**December 2018 – ATM rating decision**

**Andrew Hetherton summarises the position following the ATM case decision**

The Court of Appeal has recently issued its decision in *Sainsburys and Others v Sykes (VO) & Others* and, over the coming weeks, there will no doubt be much debate about it. This article may prove “provocative” to one or other of the parties, but that is not hard given the numbers on the team sheets for appearances firstly at the Valuation Tribunal, then at the Upper Tribunal (Lands Chamber) and, most recently, before the Court of Appeal.

The case concerns the rateability of the site on which ATMs sit. It will be clear to many experienced rating professionals that the ATM machines themselves are not rateable and, in broad terms, there were two types of ATM locations to be considered:

* machines sited within retail stores
* “hole in the wall” machines situated at a retail site, for example, in a supermarket facing onto a car park.

It is interesting to note that not all ATMs were considered in this litigation. For example, ATM machines situated in free standing “kiosks” in wholly separate structures outside the curtilage of the host store, or ATMs located within stores where the bank operates a concession and has control of a separate area which, in many cases, will satisfy the criteria of being a hereditament.

The ATM machines involved in the litigation were owned and operated by banks, including Sainsburys Bank, Tesco Bank and Co-Op Bank. The fourth retailer involved in the case was Cardtronics, which operates machines at various convenience stores and shops.

Each of the banks carried out the provision of services via the ATMs, including the provision of cash, changing PINs, checking balances, ordering statements and, in some instances, topping up mobile phone balances. These are all similar services to those you may find if you were to visit one of the few remaining branches of your banking provider. One area the ATMs tend not to deal with concerns deposits of cash and or cheques, which you normally need to do at your local bank branch.

The Valuation Office Agency (VOA) started to investigate the circumstances behind the operation of these ATM sites in 2009/10 in part, probably as a consequence of litigation in Scotland1.  That, of course, is not to say that other reasons may have prompted a review of the circumstances and, looking back through the course of time, a number of events are relevant. It is, of course, not the first time that such matters have become before the Courts and Tribunals - one such case being *Stringer (VO) v J Sainsbury Plc* [1992] RA 16, considered by the Lands Tribunal. Even prior to that, the situation concerning the assessment of kiosks and barrows was considered in *Westminster Council v Southern Railway Company Ltd* [1936] AC 511. Of course, much has changed over time.

The outcome of the VOA’s investigations, and protracted enquiries of a number of operators into the “squadron agreements” (the collective name), led them to conclude that the ATM sites were capable of being individually assessed as separate hereditaments. This issue was the subject of litigation in the 1960s and related to the assessment of a milk vending machine in *NH Platts & Sons v Hanstock (VO) (1963) (3 R & VR 344).* It was determined they were not only sites capable of being separate hereditaments, but that they were in the occupation of the store operator.

As a consequence of the VOA’s investigations, rating lists were altered up and down the country to separately assess the sites of ATM machines and bring them into the rating list. This was bad news for the banks and the host retail stores, who had not had assessments in such circumstances before and now had an additional liability. Further bad news compounded the issue for the retail operator, as the separate assessment of the ATM site generally did not lead to a reduction in the host store assessment. This left a contractual problem for the banks and the supermarkets to work out who was to pay. In some instances, local authorities sought to chase who, in their view, was the “occupier” for the amounts owing, creating a number of challenges for those named on the rates demand.

This wholesale change in approach understandably created significant concerns on the part of the ratepayers affected and proposals were submitted which, in turn, became appeals transmitted in the normal way to the Valuation Tribunal for England (VTE).

As the subject of these appeals was both controversial and complex, the matter was subject to special directions from the VTE and the matter proceeded to a hearing on 11th February 2016 before the VTE Vice President, Alf Clark. In rather unusual circumstances, the appeals were heard by the VTE at the Rolls Building in London, with no less than 27 people representing the interests of the appellants and an entourage of VOA representatives. All parties had leading QCs, junior counsel, instructing solicitors and surveyors. It is no wonder that larger premises were required for the conduct of the hearing. The decision of the VTE was given on 4th March 2016.

The VTE had to consider the definition and nature of a hereditament. taking account of Section 64(1) of the 1988 Act, which defines a hereditament as anything which would before the passing of the Act have been a hereditament for the purposes of section 115(1) of the General Rate Act 1967.  That being **“such a unit of property which is or would fall to be shown as a separate item in the valuation list”** the statutory definition therefore provides only limited assistance and whether a unit of property is a hereditament is to be determined by applying principles developed by the courts since the seventeenth century.

It was argued by the supermarkets that none of the ATM sites were physically self-contained units of property (as they can only be found within the host’s stores) and, as the ATMs were a non-rateable piece of plant and machinery, their presence within the hereditament cannot be relied on in order to identify the appeal hereditament.  In other words, when you remove the non-rateable plant and machinery from the site, there is nothing left to identify it.

However, the VTE identified a flaw in this argument. Namely, if the host’s store is self-contained, then the ATM cannot possibly be so as it is included within the self-contained store.  Access to it will be through an enclosed area of the store.  The Tribunal pointed out that many enclosed shopping centres are only accessed through areas belonging to someone else but that does not mean that they are not self-contained.

The Tribunal took the view that the supermarkets fell into a trap of automatically focusing on the host’s store and its relationship with the ATM site and not on identifying the hereditament in dispute and then determining who is in occupation.  What is being rated is the site of the ATM - a piece of land clearly defined and on which the operator stores its money and machinery.  This was likened to the decision in *Vtesse Networks Ltd v Bradford [2006] EWCA Civ 1339* where it was found that Vtesse were in occupation of the entire network of cables and ducts which constituted a hereditament, even though they only owned around a small proportion of the total.

It was identified that whilst it is possible to carve a hereditament out of the site of an ATM, that is not the end of the matter.  The court then needed to go on and to consider the test set out in *John Laing & Son Ltd. v Kingswood Assessment Committee [1949] 1 K.B. 344.*  The supermarkets pointed out that in none of the contractual arrangements regarding the ATMs were the operators granted a lease over the particular site.  Ownership of the land remained with the host’s site.  In some circumstances the host was granted a right of access or, in others, required the operator to have restricted access.

However, the VTE took the view that none of the contractual arrangements interfered with the enjoyment by the ATM operators of the premises in their possession for the purposes of which they enjoyed them.  An analogy was drawn with a shopkeeper who has restrictions placed on him by the owner of the surrounding land as to when deliveries or repairs can be undertaken.  Equally, where a landlord may provide services such as repairs, insurance, replenishing supplies to the premises or even cleaning, but these do not result in the tenant no longer being in occupation.

The Tribunal accepted that a tenancy did not exist in relation to any of the sites, but that did not change the fact that the site owners “interfered” with the operator’s enjoyment of the ATM site.  All these factors were within the spirit of *Westminster Council v Southern Railway Company Ltd [1936] A.C. 511),* where the occupiers of stalls, kiosks and hairdressing salons were held to be in rateable occupation.  The Tribunal found that the four ingredients of rateable occupation are met by the operator of each ATM site and they were, therefore, in occupation of each ATM site.

The Tribunal therefore dismissed appeals relating solely to the deletion or merger of separate entries in the rating list for the sites of the ATMs.

The matter then proceeded on appeal by way of a *de novo* hearing to the Upper Tribunal (Lands Chamber) and a hearing before Martin Rodger QC, Deputy Chamber President and Valuer Member Andrew Trott FRICS over three days in January 2017.

The UTLC determined that the sites of ATMs were capable of being separate hereditaments, but the sites of in-store ATMs were in the rateable occupation of the store operator and therefore formed part of the store hereditament. Insofar as the sites of the outward-facing “hole in the wall” ATMs were concerned, these were in the occupation of the banks and not the store and therefore they should be assessed as separate hereditaments.

It was hardly surprising that the matter would progress further as neither party got from the judgement of the UTLC a decision that they were satisfied with.

The Court of Appeal, comprising three Lord Justices of Appeal including a former President of the UTLC, Lord Justice Lindblom, heard the case over two days in May 2018. As before, the parties were represented by a large number of leading and junior barristers, along with an army of supporters. The Court handed down its judgement on Friday 9th November 2018 and sought to address the following issues:

* did the Tribunal err in its approach to the identification of a hereditament?
* did the Tribunal err in its approach to the rateable occupation of the ATM sites?

The Court held that externally located ATMs (e.g. those on the outward-facing walls of premises) were not separate hereditaments for rating purposes. Therefore, they did not give rise to a separate business rates liability.

In its judgment, the Court of Appeal considered the correct way to identify a hereditament for rating purposes, and the meaning of rateable occupation of a hereditament, to be as follows:

* whilst an ATM itself is non-rateable machinery, it could be taken into account when determining whether a separate hereditament exists. It was not necessary for the site to be specifically adapted for the ATM in order to create a separate hereditament
* applying the principle of "general control" (from the *Westminster* case), it considered that the involvement of the store in the operations room retained sufficient control of the ATM site (in contractual, physical and functional terms) that it (i.e. the store) should be treated as being in rateable occupation as the paramount occupier, not the bank.

The VOA sought leave to appeal to the Supreme Court against the judgement of the Court of Appeal. However, the Court of Appeal both refused permission to appeal or grant a stay in proceedings. The court ordered the rating lists to be amended to give effect to its decision. The VOA therefore has to take the necessary action to implement the Court’s decision or, within 28 days of the decision, to petition the Supreme Court for permission to appeal.

At the time of writing this note, it is not known whether the VOA will petition the Supreme Court for permission to appeal.

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*1. Assessor for Central Scotland Joint Valuation Board v Bank of Ireland* [2011] RA 195

2. *Assessor for Lanarkshire Valuation Joint Board v Clydesdale Bank Plc [2005]* RA 1