



RA/50/2004

LANDS TRIBUNAL ACT 1949

RATING – hereditament – telecommunications system consisting of ratepayer’s “own-build” sections and optical fibres belonging to other operators and contained in cables of those other operators – contractual arrangements for use by ratepayer of these fibres – whether ratepayer in occupation of fibres – whether fibres part of ratepayer’s hereditament – held ratepayer in occupation of fibres and fibres part of its hereditament

**IN THE MATTER of an APPEAL from the
BERKSHIRE VALUATION TRIBUNAL**

BETWEEN

**ALAN ROY BRADFORD
(Valuation Officer)**

Appellant

and

VTESSE NETWORKS LIMITED

Respondent

**Re: Vtesse Telecommunications Network
in Slough and England**

Before: The President

**Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 28 and 29 September 2005**

*David Holgate, QC and Timothy Morshead instructed by HMRC for the appellant.
Derek Wood QC and Robert Walton instructed by Mr A Paul by direct access for the respondent*

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The following cases are referred to in this decision:

R v Chelsea Waterworks (1833) 5 B & Ad 156
Pimlico Tramway Company v Greenwich Assessment Committee (1873) LR 9 QB 9
Lancashire and Cheshire Telephone Exchange Company v Overseers of Manchester (1884) 14 QBD 267
Holywell Union v Halkyn District Mines Drainage Company [1895] AC 117
Electric Telegraph Co v Overseers of Salford (1855) 11 Ex 181
Amalgamated Relays Ltd v Burnley County Borough Council [1950] 2 KB 183
Jackson (VO) v London Rediffusion Service Ltd (1951) 44 R & IT 439
Cory v Bristow (1877) 2 App Cas 262
Gilbert (VO) v Hickinbottom & Sons Ltd [1956] 2 QB 40
Wimborne District Council v Brayne Construction Co Ltd [1985] RA 234
Westminster City Council v Southern Railway Co Ltd [1936] AC 511

The following further cases were referred to in argument:

John Laing & Son Ltd v Kingswood Area Assessment Committee [1948] KB 116
R v Melladew [1907] 1 KB 192
Arbuckle Smith & Co Ltd v Greenock Corpn [1960] AC 813
Kennet District Council v British Telecommunications [1983] RA43
R v St Pancras Assessment Committee (1877) 2 QBD 581
LCC v Wilkins (VO) [1957] AC 362
R v East London Waterworks Co (1852) 18 QB 705

DECISION ON A PRELIMINARY ISSUE

Introduction

1. This appeal concerns a fibre optic telecommunications network operated by the respondent. It runs between Henley-on-Thames and Goswell Road in the City of London, via Marlow, Slough, Ruislip and Stoke Newington, with later spur extensions from Reading to Theale and from Acton to Brentford. The network consists of optical fibres which are in part contained in cables located in ducts belonging to Vtesse (referred to as the “own build” part of the network) and in part situated in cables and ducts belonging to third parties (the “leased fibres”). The own-build sections constitute much the smaller part of the network.

2. On 23 September 2003 the appellant valuation officer gave notice of an alteration to the rating list for Slough consisting of the insertion of the entry of a hereditament described as “Telecommunications Network” at a rateable value of £110,000 with effect from 1 April 2003. Although the Vtesse network extends into a number of rating areas, the VO entered the hereditament in the Slough rating list pursuant to regulation 6 of the Non-Domestic Rating (Miscellaneous Provisions) Regulations 1989, which enables cross-boundary property to be treated as situated in the rating area appearing to have the highest component value. The address of the hereditament was thus said to be “in Slough and England”.

3. On 27 October 2003 Vtesse made a proposal that the rateable value should be reduced to £3,095, stating that it was not in rateable occupation of the leased fibres. The appeal was heard by the Berkshire Valuation Tribunal, which on 16 July 2004 concluded that Vtesse was not in paramount occupation of the leased fibres. It accepted that Vtesse was in occupation of the own-build parts, but as these were spread over various billing authority areas, some of which were outside the VT’s area, it ordered that the entry in the list should be deleted.

4. On 31 March 2004 the VO altered the list with effect from 27 June 2003 to reflect extensions that had been made to Vtesse’s network. The alteration showed a rateable value of £125,000. On 28 July 2004 Vtesse made a proposal that the entry should be deleted since, by reason of the VT’s decision of 16 July 2004, there was no rateable hereditament. The subsequent appeal to the VT was allowed in the light of the earlier decision, and the entry was ordered to be deleted.

5. The VO appealed to this Tribunal against each of these two decisions of the VT, seeking to have the entries reinstated. The two appeals were consolidated. Vtesse’s reply to the VO’s statement of case identified two principal contentions that it sought to advance: that it was not in rateable occupation of the part of its network consisting of leased fibres and that the rateable values contended for by the VO were excessive. On the latter contention it said that it had been discriminated against by comparison with British Telecom plc (BT). On 19 January 2005 the European Commission, in response to a complaint Vtesse alleging that BT had been accorded preferential treatment under the rating system, expressed its conclusion that the method of valuation of BT’s network appeared to constitute state aid, and it opened a formal investigation. On 8 March 2005 I ordered that the question of Vtesse’s rateability in respect of

the leased fibre part of its network should be determined on a preliminary issue, leaving the second issue to be addressed as might be necessary at a later stage.

Vtesse Networks Ltd's network

6. The parties had agreed a description of Vtesse's network as it existed in June 2003, and this was supplemented by witness statements of Allan Roy Bradford, the appellant valuation officer; Aidan Paul, Chief Executive Officer and a Director of Vtesse; and Alan Robert Twite, the Chief Operating Officer and a Director of Vtesse. The VO and Mr Twite gave oral evidence, and Mr Twite explained by reference to exhibits consisting of sections of cable and a cross-section of a duct the physical components of the network. The following description takes account of all of these.

7. In June 2003 the Vtesse network was in the course of construction. Vtesse only builds network as and when it is required to fulfil arrangements made with a particular customer. The system uses optical fibre for transmission of telecommunications signals. What is transmitted is light, and the signals are binomial, consisting of a decipherable pattern of on-off transmission.

8. Individual fibres are very small, not very much greater in circumference than a human hair. They are contained in optical fibre cables. A cable comprises optical fibres consisting of finely stretched glass, each with an individual plastic coating. These are grouped within plastic sheaths and run in the form of extended spirals round a steel or plastic core. Outside them is sheathing and, in some cases, armouring. Fibres are individually identified by colouring or marking their plastic coating. Cables vary from about 6mm to 25 mm in diameter and typically contain between 12 and 296 fibres.

9. While some cables are suspended from poles, especially in the BT local access network, most are buried in the public highway or are laid alongside railway lines and canals. They can be directly buried in the ground, but this makes repair and replacement more difficult. In consequence most buried cables are installed in ducts. Ducts are pipes, nowadays plastic, with a typical outer diameter of about 114mm. It is usual to install up to four sub-ducts, each of about 40mm diameter, in the duct. This is done for a number of reasons, notably in order to facilitate the installation of new cables and the withdrawal of old cables. Use of sub-ducts increases the number of cables that can in practice be installed in a duct.

10. Ducts are laid in trenches, the size of which is determined by the number of ducts to be installed and the nature of the ground. For ducts laid in the public highway (and these constitute the vast majority) most aspects of the trench specification – its size, methods of refilling and the reinstatement of the highway surface – are prescribed in a code of practice issued by the Highways Authorities and Utilities Committee set up under the provisions of the New Roads and Street Work Act 1991. Duct routes are built with jointing chambers and access chambers. Jointing chambers accommodate the splice enclosure between cable lengths and also spare coils of cable which enable the cable ends to be pulled out of the cable for jointing and provide slack for repairs to be carried out if the cable is damaged between jointing

chambers. Access chambers are provided to allow the cable to be pulled into the duct, typically at intermediate points between chambers and in particular where the duct route changes sharply.

11. When used to extend, or interconnect with, the cables owned by another operator, Vtesse's own-build fibres are generally fusion-spliced to the other operator's fibre at a convenient jointing chamber in the street. Alternatively Vtesse may build to a "co-location centre". The jointing chamber belongs to the other operator and splicing with his cables is carried out by him.

12. Vtesse designs and implements fibre optic communications links between one or more premises of client companies. In essence the method adopted is to look for existing fibre optic cables belonging to third parties which pass reasonably close to each of the client premises, to enter into an agreement for the use of such cables and to construct a spur from the premises to the cables. The result is a network consisting mainly of spare capacity in other people's cables. Agreements for the use of cables have been entered into with Level 3 Communications Ltd, Tyco Networks (UK) Ltd, Global Crossing (UK) Telecommunications Ltd and Telewest Ltd. At the end of May 2003 the network consisted of four separate routeings: London to Henley-on-Thames (Northern Route), Henley-on-Thames to London (Southern Route), Dorking to Slough and London, and Salisbury to London and elsewhere. The total length of lit fibre as at 1 April 2003 was 147 route kilometres, of which about 4 km was own-build and 143 km was leased fibres. As at 2 May 2003 the network extended to 154.5 km.

13. The London to Henley-on-Thames (Northern Route) connection was established to connect two customer sites, one in Finsbury Square, EC1, and the other at Station Road, Henley-on-Thames. Fibres from Level 3, Telewest and Tycom were used and the connection was completed by a number of Vtesse own-build sections. The connection provided two transparent fibre paths between the two sites, one for each direction of transmission. The Henley-on-Thames to London (Southern Route) was designed to link the Finsbury Square site to another site of the customer in Henley, at Perpetual Park. Another network operator provided the connection between the two Henley sites. By June 2003 only a section of own-build from Perpetual Park to Twyford and the customer tail at Finsbury Square had been constructed.

14. The connection from Dorking to Slough and London was designed to link a customer site at Pixham End, Dorking, to another site in London. By June 2003 only the section between Dorking and Slough, using Global Crossing fibres with local own-build connections, had been constructed. The fourth part of the network, from Salisbury to London and elsewhere, was designed to connect a customer site at Castle Street, Salisbury, with several other sites of the same customer. By June 2003 only a short length of own-build cable in Salisbury had been installed.

15. The agreements under which Vtesse had the use of fibres belonging to other operators were for the use of what is referred to as "dark fibre", that is to say fibre that has not been "lit" or activated. The fibres in each of the component parts of the network are lit by Vtesse using its own (non-rateable) plant and machinery. Fibres are lit by the generation of a laser pulse

from Vtesse's own equipment so that photons, or particles of light, are pulsed through the fibres. The laser pulse operates continuously, whether data is being transmitted or not, and data is sent by changing the pattern of the laser pulse. The receiver has to be synchronised, and synchronisation is carried out by Vtesse. Vtesse's equipment was situated in co-location space or rack space in the buildings of other telecommunications operators and in customer premises. At the material dates Vtesse was not in exclusive occupation of any of the rooms within which such plant and machinery was located.

16. There was an agreed summary of faults and outages on Vtesse's network. Twelve incidents were identified, all of them after the relevant dates and all but two of them on the post-May 2003 network. Five of the outages were for a minute or less. The others were either planned outages (for instance to allow the diversion of a cable) or were due to the cable being damaged. In each case the party responsible for the cable (Telewest or Global Crossing) made the necessary reconnection. To the extent that the Vtesse network provides resilient diverse routings for customers, not all of the outages would necessarily have caused a loss of service to the end customer.

The dark fibre agreements

17. Under the agreement dated 14 January 2003 between Level 3 Communications Ltd as "Grantor" and Vtesse as "Grantee" Vtesse was granted "an exclusive right" to use a number of fibres (the "Grantee Fibres") forming part of Level 3's multi-conduit fibre optic communications system. Vtesse was given absolute freedom as to how it used the fibres, provided that it did not adversely affect the use of the system by any other person or the equipment used by such person in connection therewith. The system, as described in the agreement, was divided into segments connecting segment end points that were identified. The agreement provided that Level 3 should provide to Vtesse one fibre pair (two fibres) between particular segment end points that were set out in a table. The term of the agreement was a minimum of three years, terminable by either party on not less than 60 days' notice or after the third anniversary. The fees payable consisted of a lump sum plus periodic fees. Level 3 was required to provide its system to a specification that was set out, and Vtesse was entitled to test the system's compliance with these requirements. The connection of Vtesse's equipment to the fibres was to constitute acceptance of the fibres.

18. Level 3 had the right to relocate any portion of its system containing Grantee Fibres if required to do so by a "Relocating Authority", which was defined, or a "Force Majeure Event", in which case the relocation had to meet or exceed the agreed specifications and be subject to testing by Vtesse. On not less than 120 days notice Level 3 had the right to substitute different fibres for the Grantee Fibres at its own expense provided that the substitution met or exceeded the agreed specification, that the segment end points were not changed and that it used all reasonable good faith methods to minimise any interruption in the operation of the Grantee Fibres. Level 3 was required to maintain the Grantee Fibres, both under a programme of scheduled maintenance and to deal with faults when they occurred. Vtesse was responsible for monitoring the performance or operation of the Grantee Fibres and for notifying Level 3 of any failure.

19. In its “Dark Fiber Lease Agreement” of 4 February 2003 with Tyco Networks (UK) Ltd Vtesse was referred to as the “Lessee”. Under the agreement Tyco “leased” to Vtesse a dark “Fiber Pair” specifically identified in the agreement and “terminated at and delivered to Lessee locations” that were described. The part of Tyco’s network to which the agreement related was identified (and was referred to as the “Network”), and it was provided that Vtesse did not “own, control or revise the Network” and did not have “physical access to, the right to encumber in any manner, or other use of the Network (other than the Lessee’s Fiber Pair) except as expressly set forth herein”. Vtesse was entitled to access the fibres after the first fee payment, and Tyco were able to supervise the access. Vtesse had absolute freedom as to how it used the fibres. For its part Tyco agreed and acknowledged that it had no right to use any of the fibre that was part of the “Lessee’s Fiber Pair”. It agreed to provide “operations, administration and maintenance” on the “Lessee’s Fiber Pair” on terms that were set out, and Vtesse was entitled to provide its own maintenance if Tyco stopped providing this service. The term of the lease was three years at a quarterly “Lease Price”, and there was provision for termination in the event of default or insolvency.

20. There were two agreements with Global Crossing (UK) Telecommunications Ltd (“GC”), the principal, undated agreement, having been amended as to price by an agreement of 18 December 2003. Under the agreements GC granted Vtesse “the rights of use subject to the terms of this Agreement of a pair of optical fibres”, and the fibres so provided were to be provided exclusively for Vtesse’s use and Vtesse was to enjoy “the quiet use thereof subject to its compliance with the terms of this Agreement”. GC agreed to connect its fibres with those of Vtesse by splicing and to maintain the pair of fibres provided for Vtesse in accordance with an agreed specification. If “reasonably necessary to do so because of work on or incidents affecting the railway” (it appears that part at least of the cable route was in duct on railway land) GC had power to provide fibres on a different route or to cease to provide fibres. Other than in an emergency Vtesse had no right to access GC’s telecommunications network. The agreement was for an initial period of seven years, and Vtesse was to pay a lump sum and an annual fee.

21. It appears that the agreement between Telewest Ltd and Vtesse has not been finalised. Vtesse has taken dark fibres from Telewest and has lit them using its own equipment, and there is no suggestion that the terms of the current arrangements are materially different from those with the three other companies.

Appellant’s submissions

22. For the VO Mr David Holgate QC noted the two reasons given by the valuation tribunal for its conclusion that Vtesse was not in paramount occupation of the leased fibres. The first reason was that Vtesse could be disconnected at any time by the host company by reason of an accident to the cable, a failure of the host company’s network or if Vtesse failed to meet prescribed quality standards. The second reason was that Vtesse did not occupy a specific fibre in the cable, and its traffic could be routed through any particular fibre at the discretion of the host company. Mr Holgate submitted that neither of these reasons supported the VT’s conclusion, and indeed the second reason was factually incorrect.

23. Mr Holgate submitted that a system for conducting signals by light could be a hereditament in the same way as a system of wires for conducting electrical signals. Each of Vtesse's agreements with the fibre owners gave it: the right to use a particular pair of fibres; the right of uninterrupted use of those fibres, except in specified contingencies (eg default, the needs of the railway in GC's case and maintenance); the right to connect its own equipment to the fibres so as to enable it to use the fibres beneficially; and the right to insist that the owner of the fibres provided an agreed standard of maintenance and performance. The owner of the fibres retained no right of beneficial use or occupation of the leased fibres; it could not share the use of the fibres with Vtesse, either themselves or by granting rights in the fibres to other persons; it undertook maintenance obligations to an agreed standard; and, except in agreed circumstances, it could not terminate Vtesse's rights or substitute different fibres for those leased to Vtesse. In these circumstances, Mr Holgate submitted, Vtesse's occupation of the fibres plainly met the requirements of rateable occupation. Its use of the leased fibres was indistinguishable from its use of the lit fibres in the own-build segments of its system.

24. While it was true that the individual leased fibres were bound into cables with other fibres and the cables, and the ducts and sub-ducts in which they were run, belonged to and were operated by the leasing owner, it did not follow, Mr Holgate said, that the leased fibres were incapable of separate occupation. Indeed it was obvious that they were separable from the rest of the owner's infrastructure and that the separation was physical. The fact that the agreements limited severely the circumstances in which Vtesse could have physical access to the leased fibres was nothing to the point since Vtesse's beneficial occupation of the fibres did not depend on having physical access to the fibres along the whole of their length. It depended on the inter-connection between segments of fibres so that there was a continuous fibre pair to which Vtesse could attach its own optical equipment at each end. The occupation consisted in the light in the fibres supplied by Vtesse's equipment. Nor did it matter that Vtesse did not know where the fibres were or could not identify them if it did. It did not need to be able to identify the fibres in order to control their use through sending light signals along them. Similarly the fact that the data transmitted along the fibres was generated by Vtesse's customers was of no significance since the means of transmission was Vtesse's light, created by Vtesse's equipment installed on the premises of its customers. The situation was directly analogous to the transfer of messages by telegraph wire: the messages were the customers', but the current that conveyed them was the operator's.

Respondent's submissions

25. For the respondent Mr Derek Wood QC said that the question was essentially one of fact. It was necessary to concentrate on the substance rather than the form. Terms like "operator" and "network" did not carry any legal significance or point to any particular conclusion, and no significance attached to the terminology used in the different agreements. The decision on the issue was matter of judgment, which fell to be made on competing factors.

26. The nature of the contract in each case was that it gave Vtesse the use of a pair of fibres. The right was not exclusive, and it did not relate to a specific pair of fibres, although, once the connection was made, it was the case that the contractual right attached to the fibres that had been connected. The agreements were pure contracts and were neither leases nor licences. The arrangement in each case was analogous to the booking of a hotel room with a sea view or

a certain number of square feet in a warehouse. It was a weaker form of contract than that of the lodger (who, on the decided cases, was not in rateable occupation of his room) because the lodger's right to occupy related to a particular room.

27. The main features, said Mr Wood, were these. The optical fibres that Vtesse was permitted to use were physically integrated into and inseparable from the cables, sub-ducts and ducts belonging to and operated by the third party. They were situated within the very core of a sub-duct surrounded by protective sheathing, together with nearly 300 similar fibres. Vtesse had no access to the optical fibres of which it had the use, did not know where they were, and could not identify them if it did have access. It had no right to decide which pairs of fibres should be allocated to it rather than to other customers of the third party. It obtained from the third party nothing more than a contractual obligation to facilitate the transmission of photons through fibre. The pairs of fibres used by Vtesse's customers could be changed from time to time by the third party in cases of emergency or when maintenance was being carried out. Vtesse had no part in that decision, would not always be given notice of it, and had no right to carry out any works of maintenance itself. The data transmitted through the medium of the fibres was generated by Vtesse's customers, not Vtesse. Vtesse merely provided a service to its customers to enable them to transmit that data.

28. There was no doubt, Mr Wood said, that cables, fibres and wires were capable of forming part of a hereditament. They fell within the Valuation for Rating (Plant and Machinery) (England) Regulations 2000 Class 1 Table 1(f) and Class 3(e), but these merely provided that cables and fibres situated within a hereditament were deemed to form part of that hereditament. The rateable value of the hereditament must accordingly take account of the cables, wires and fibres. Looking at the optical fibres in the present case as a matter of practical commonsense, it was obvious that the fibres were physically and inseparably integrated into the cable that surrounded them and the cable itself was one fractional part of the sub-duct and duct in which it was situated; and all of these were under the control and management of the third party operator. If the logic of the 2000 Regulations was to be taken as a guide, the conclusion to be drawn from these facts was that the trench and all the ducts, sub-ducts, cables, wires and fibres which it contained formed a single hereditament in the rateable occupation of the third party. Vtesse's use of the fibres was not enough to constitute occupation. Its use was for the transmission of photons carrying data in optical form, and the data was generated by Vtesse's customers, not Vtesse. Photons were particles of light, and it was odd to suggest that the transmission of light constituted the occupation of land in any sense.

29. Mr Wood noted that there were a significant number of cases concerned with conducting media of various sorts: *R v Chelsea Waterworks* (1833) 5 B & Ad 156 (pipes); *Electric Telegraph Co v Overseers of Salford* (1855) 11 Ex 181 (telegraph wires suspended from posts); *Pimlico Tramway Company v Greenwich Assessment Committee* (1873) LR 9 QB 9 (tram lines); *Lancashire and Cheshire Telephone Exchange Company v Overseers of Manchester* (1884) 14 QBD 267 (overhead telephone wires); *Holywell Union v Halkyn District Mines Drainage Company* [1895] AC 117 (drain passing through a tunnel and watercourse); *Amalgamated Relays Ltd v Burnley County Borough Council* [1950] 2 KB 183 (wireless relay service); and *Jackson (VO) v London Rediffusion Service Ltd* (1951) 44 R & IT 439 (radio relay service). The common feature of all those cases was that the party who installed these different types of conducting media within what was potentially another hereditament was

nevertheless found to be in rateable occupation of the apparatus in question. Rateable occupation remained with the party who had installed it, was controlling and managing its use, and was responsible for its maintenance, upkeep, repair and, whenever necessary, replacement. Setting the facts of the present case alongside those authorities, it was obvious that the person who best fitted the profile of the rateable occupier was the third party who was in occupation of and managed and controlled the duct and all its constituent parts.

30. In the case of BT, Mr Bradford had said that all its conducting equipment was treated as comprising part of its hereditament, and when copper wire pairs were let by BT they were regarded as still being occupied by BT. Mr Wood said that this was a commonsense approach that should be followed in the present case. The hereditament should be identified vertically so that it consisted either of the trench or of the outer skin of the duct, in each case with all its contents, rather than horizontally with individual fibres being treated as part of the user's hereditament.

Discussion

31. Under section 64(1) of the Local Government Finance Act 1988 a hereditament is anything which would have been a hereditament under section 115(1) of the General Rate Act 1967; and section 115(1) defined "hereditament" to mean:

"... property which is or may become liable to a rate, being a unit of such property which is, or would fall to be, shown as a separate item in the valuation list."

As Ryde on Rating says (at para C-113) the concept of the hereditament for rating purposes is inextricably bound up with the concept of rateable occupation. The reason for this is that it was occupation that gave rise to liability to the rate, so that the definition of the unit of rateability, the hereditament, was dependent on there being a particular occupier. Property in single occupation may sometimes constitute more than one hereditament (see *Gilbert (VO) v Hickinbottom & Sons Ltd* [1956] 2 QB 40), but that is not a matter that affects the issue in the present case. Under section 45 of the 1988 Act the owner of unoccupied property is made subject to the non-domestic rate, but the hereditament falls to be identified by reference to a consideration of potential occupation since section 115(1) refers to property which "would fall to be" shown as a separate item in the valuation list.

32. The elements of rateable occupation are well-known; there must be actual, beneficial, permanent and exclusive occupation, and there is a substantial amount of law on each of these elements. It is the last of these, exclusive occupation, that requires consideration in the present case. On this the words of Lord Hatherley in *Cory v Bristow* (1877) 2 App Cas 262 at 272 are to be noted:

"The courts have not meant by the terms 'exclusively' that the interest may not be determined on certain terms and conditions, but merely that the person so occupying should have the right unattended by a simultaneous right of any other person in respect of the same subject matter."

Sometimes where two persons each enjoy the use of the same property but in different ways, it becomes necessary to determine which of them is in paramount occupation. The one that is in paramount occupation will satisfy the element of exclusivity, since his occupation will be exclusive for his own particular purposes (see *Wimborne District Council v Brayne Construction Co Ltd* [1985] RA 234 per Lloyd LJ at 243). The leading authority on paramount occupation is *Westminster City Council v Southern Railway Co Ltd* [1936] AC 511. The issue in that case was whether parts of railway premises (shops, kiosks and other premises at Victoria station and the goods yard at Beckenham Junction) were “so let out as to be capable of separate assessment” within the meaning of section 1(3) of the Railways (Valuation for Rating Act 1930; but the test of what satisfied this provision was the element of exclusive occupation since it was that that determined whether the property was capable of separate assessment – as a hereditament, therefore.

33. At 529-30 Lord Russell of Killowen identified how the question of paramount occupation was to be approached:

“Subject to special enactments, people are rated as occupiers of land, land being understood as including not only the surface of the earth but all strata above or below. The occupier, not the land, is rateable; but, the occupier is rateable in respect of the land which he occupies. 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.”

34. Lord Russell identified as the decisive matter the extent to which the owner of the hereditament retains to himself general control over the occupied parts. At 530 he said:

“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.”

Having then considered the authorities relating to the landlord control principle, Lord Russell went on (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.”

35. Section 64(4) provides that a hereditament is a relevant hereditament if it falls within any of the descriptions set out, one of which is “lands”. “Lands” has a wide meaning. It includes buildings and not only the surface of the earth but everything over or under it: see Ryde paras C301-312. It was established early on that there could be rateable occupation of the telegraph wires of a telegraph company. In *Electric Telegraph Co v Overseers of Salford* (1855) 11 Ex 181 at 186 Pollock CB said:

“Land extends upwards as well as downwards, and whether the wires and posts are fixed above or below the surface, they occupy a portion of land.”

And at 187 Alderson B said:

“There is no reasonable distinction between the electric fluid passing through pipes in the air, under water, or in the soil. All the surface upwards and downwards is land. If there is profitable occupation of the posts and wires, whether under ground or in the air, it is an actual occupation of the surface.”

36. Thus the wires constituted part of the hereditament, and there was beneficial occupation of them by reason of the transmission through them of telegraph signals. In *Amalgamated Relays Ltd v Burnley County Borough Council* [1950] 2 KB 183, which concerned the proper method of valuing a relay system consisting of wires only, there was no dispute that the system constituted a hereditament. Lynskey J referred (at 191) to the system as “a hereditament consisting of wires only”, and at 193 Sellers J said that the “wires hung and utilised” were “a species of the genus hereditament”. In *Jackson (VO) v London Rediffusion Service Ltd* (1951) 44 R & IT 439 the Lands Tribunal held that the rediffusion company was in occupation of a system of wires up to the point at which the wires reached the premises of individual customers.

37. In the *Electric Telegraph* case, under the terms of its tenancy the company could have been required to remove the posts and wires of its system to another place if the railway company, on whose land they were situated, found them inconvenient, but it was held that this made no difference to rateability. Martin B said this (at 189):

“It is true, that the railway company have the right to direct the removal of the posts and wires to a more convenient place; but that only shews that this company are strictly tenants at will of the soil occupied by them. That is no objection to the rate. In the case of *R v The East London Waterworks Company* (17 QB 512) it was argued

that the company were liable to have the position of their pipes and plugs altered; and Lord Campbell CJ says: ‘The company derive benefit from the operations of the Paving Commissioners; and though the situation of their pipes may be altered by the Commissioners, still, wherever their pipes are, the company are in lawful occupation of the soil.’ That is directly in point.”

38. The issue in the present case is whether the leased fibres that are spliced to Vtesse’s own-build fibres but are physically located within the cables and ducts of the leasing companies should be treated as forming, with the own-build parts of Vtesse’s telecommunications system, a single hereditament in the occupation of Vtesse or as constituting parts of the telecommunications hereditaments of the leasing companies. There is no dispute that neither their extremely small diameter nor the fact that they are physically bound in to the cables of the leasing companies prevents them from forming part of Vtesse’s hereditament. Whether they should be treated as doing so depends on an application of the principles established in the *Westminster* case to the facts that I have set out above. It may well be that the logical starting point is to observe that, except at either end where they are spliced to Vtesse’s own-build fibres, they are physically part of the leasing companies’ cables and then to consider (as in the *Westminster* case) whether a separate occupation has been carved out of the cables by virtue of the use of the fibres by Vtesse. The circumstances are not exactly parallel to those in the *Westminster* case because the parts of Victoria station that were there held to be separate hereditaments (the kiosks, for example) were not, as the leased fibres are, connected to property owned and occupied by the lessee or licensee. But the inquiry is essentially the same.

39. There are, in my judgment, three features of Vtesse’s use of the leased fibres that are of the greatest significance. The first is that Vtesse’s entitlement under each of the agreements is to the use of particular fibres. Reliance was at one time placed by Vtesse on the fact that under certain of the agreements (the Global Crossing one, for instance) the leasing company undertook to provide for Vtesse’s use *a pair of fibres*, without tying the obligation to any particular identified fibres. However, as Mr Wood accepted, once a pair of the company’s fibres had been spliced to Vtesse’s own-build fibres, Vtesse’s rights under the agreements related to the particular fibres that had been so spliced. The leasing company was thus not providing a service for Vtesse through the routing of signals along any fibres that it might choose to employ for this purpose but was providing specific fibres for the use of Vtesse. The second significant feature is that Vtesse’s use of the leased fibres was exclusive. No one, neither the leasing company nor another operator, could use those particular fibres. Thirdly, it was Vtesse, and Vtesse alone, that activated the fibres for the transmission of signals. It did this through the generation of a laser pulse in its own equipment, and it synchronised the receiver so that a meaningful signal could be transmitted. By this means, through its active operation of its system, Vtesse was able to provide a service for its customers. The leasing companies simply provided, and maintained, the fibres.

40. These features are, in my judgment, decisive in determining that Vtesse was in rateable occupation of the leased fibres and that its system constituted a single hereditament. The leasing companies retained no control over Vtesse’s use of the fibres. They had the right to substitute other fibres for the ones that had been spliced to Vtesse’s fibres. The nature of this right was clearly different from those of the landowners in the *East London Waterworks* and *Electric Telegraph* cases to require the relocation of the pipes and wires, since there the pipes

and wires were and remained in the ownership of the operators. But the right to substitute other fibres was limited by the agreements, and on the evidence there has been extremely little interruption of the continuous use by Vtesse of the leased fibres. The duty of the leasing companies to maintain the fibres to an agreed standard is no different from the duty of a landlord under the lease of premises. Similarly the fact that Vtesse did not know where the leased fibres were and had no right to access them physically is of little significance. It did not need to know where they were or to have physical access to them in order to enjoy their use.

41. It does not seem to me that the Plant and Machinery Order is of assistance in determining whether the leased fibres are to be treated as part of Vtesse's hereditament rather than that of the leasing company. Article 2 of the Order provides that for the purpose of determining the rateable value of a hereditament in or on which there is plant and machinery which belongs to any of the classes set out in the Order the prescribed assumption is that any such plant or machinery is part of the hereditament. The fibres fall within Class 3(e), which includes fibres which are used in connection with the transmission of communications signals and are comprised in the equipment of and are situated within a hereditament used for the processing or transmission of communications signals. The wording of this part of the Order appears to assume that such fibres would be physically contained within some larger hereditament – hence Mr Wood's contention that the "logic" of the Order meant that the fibres in the present case should be treated as part of the cables and ducts in which they were situated. However, it is no part of the purpose of the Order to prescribe the extent of the hereditament. The particular wording was presumably used by the draftsman because in the usual way such fibres would indeed be contained within some larger hereditament, but there is no requirement that they should be. The identity of the hereditament of which they form part is to be determined by reference to the principles established by the cases and not to the form of words that happen to have been employed in the Order.

42. Similarly I do not think that the robust, common-sense approach urged by Mr Wood – that these fibres physically form part of the cables and are really too small to be sensibly treated separately from the cables – is the one by which the right result is reached. It may well be, as I have said, that it is a sensible starting point to consider the ducts and the cables as potential hereditaments or components of hereditaments. But the inquiry does not stop there, and, if the facts show, as they do here, that separate occupations have been carved out of component elements of the cables, those elements, no matter how small in diameter, are properly to be treated as parts of the hereditaments with which they are occupied.

Conclusion

43. For the above reasons I conclude that the VO was correct to enter as a hereditament Vtesse's telecommunications system, including the leased fibre. A letter on costs accompanies this decision, which will only become final when the question of costs has been determined. At that stage I will give directions for the further conduct of the appeal.

23 November 2005

George Bartlett QC, President

Addendum on costs

44. I have received submissions on costs. The appellant asks for his costs. The respondent submits that the question of costs should be deferred until the appeal has been finally determined so that the Tribunal can take a broader view of the merits.

45. I can see no reason why the appellant should not have his costs of the preliminary issue. He has been successful in establishing that the whole of the respondent's system is rateable. The outstanding issues in the appeal relate to the value of the hereditament. There is nothing to suggest that the appropriateness of awarding the appellant his costs might be affected by the further proceedings related to value. Accordingly the respondent must pay the appellant's costs of the preliminary issue, such costs if not agreed to be the subject of detailed assessment by the Registrar on the standard basis.

10 January 2006

George Bartlett QC, President