



RA/50/2004

RA/63/2004

LANDS TRIBUNAL ACT 1949

RATING – valuation – 2000 list – local telecommunications network – comparables – whether valuation should be based on apportionment of assessment of much larger nationwide network – whether tone of list established – whether Lands Tribunal bound by conclusion reached by European Commission – whether ratepayer’s arguments amounted to abuse of process – appeal allowed – RV determined at £110,000 and £470,000 at the two effective dates.

**IN THE MATTER OF AN APPEAL AGAINST TWO DECISIONS
OF 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: His Honour Judge Mole QC and N J Rose FRICS

**Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 13-16 May and 30 July 2008**

Christopher Vajda QC and Tim Morshead, instructed by Solicitors Office, HM Revenue and Customs for the Appellant

Derek Wood QC, Hugh Mercer QC, and Christopher Lewsley, instructed by Harbottle and Lewis LLP for the Respondent.

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The following cases are referred to in this decision:

Bradford (VO) v Vtesse Networks Ltd [2006] RA 57, [2006] RA 427, CA
Vtesse (Re The Complaint of) [2005] RVR 293
Masterfoods Ltd and HB Ice Cream Ltd (Case C -- 344/98) [2000] ECR I-11369
Iberian UK Ltd v BPB Industries PLC [1996] 2 CMLR 601
Johnson v Gore Wood & Co [2002] 2 AC 1
Gillespie (C-342/93) [1996] ECR I-475
Crehan v Inntrepreneur Pub Co [2007] 1 AC 333
Henderson v Henderson (1843) 3 Hare 99
Joan Gillespie v Northern Health and Social Services Board (1996) Case C-342/93
Delimitis [1991] ECR I-935
Pointer v Norwich Assessment Committee [1922] 2 KB 471
Lotus and Delta Ltd v Culverwell (VO)[1976] RA 141
Futures London Ltd v Stratford (VO) [2006] RA 75

The following cases were also cited by the parties:

Trouw v Mitsui [2007] UKCLR 921
Henderson v Henderson [1843] 3 Hare 100
Banks v Speight (VO) and Snowball (VO) [2007] RA 187
Barratt v Gravesend [1941] 2 KB 107
Dawkins (VO) v Ash Brothers Heaton Limited [1969] AC 266
Garton v Hunter (VO) [1969] 2 QB 37
Harrow BC v Betts (VO) (1960)31 DRA 521
Jeziarski v Osborne (VO) [2007] RA 37
K Shoe Shops Limited v Hardy (VO) [1980] RA 333, [1983] RA 26
Ladies Hosiery and Underwear Limited v West Middlesex Assessment Committee [1932] 2 KB 679
Marks v Easthaugh [1995] RA 11
Poplar Assessment Committee v Roberts [1922] 2 AC 93
Waltham Forest LBC v Andrews (VO) [1996] RA 155
Webb v Lane (VO) (1951) 22 DRA 178
Arsenal FC Ltd v Smith (VO) [1979] AC 1
Rota Corus v VOA [2002] RA 1
Berrill v Hill [2000] RA 194
Howarth v Price (1965) 11 RRC 196
Hospital Plan Insurance Services Ltd v Persaud (VO) [1998] RA 230

DECISION

Introduction

1. This is an appeal by the valuation officer, Mr Alan Roy Bradford MRICS, Dip Rating against two decisions of the Berkshire Valuation Tribunal.
2. On 19 September 2003 the VO made an entry in the 2000 rating list, bringing into assessment a telecommunications network operated by the respondent, Vtesse Networks Limited, traversing a number of billing authority areas. The effective date was 1 April 2003. On 31 March 2004 the VO made a revised entry in respect of the expanded network. The effective date for the revision was 31 March 2004.
3. Vtesse objected on the grounds that the telecommunications network referred to did not constitute a hereditament. The VT agreed and cancelled the entries. The VO appealed to the Lands Tribunal by notice dated 26th October 2004.
4. Parallel proceedings were started by a complaint made by Vtesse to the Commission of the European Communities (hereafter the EC) on 17th February 2004. This complaint was to the effect that the way the Vtesse optical fibre network was assessed for rates amounted to preferential tax treatment in favour of BT. By letter dated 19th January 2005 the EC informed the UK authorities that it had decided to conduct a formal investigation.
5. In a statement of case in the Lands Tribunal proceedings, dated 28th February 2005, the respondent set out the point that the difference in the way the VO valued Vtesse's assets and valued those of other telecommunications network operators, particularly BT, was unlawful discrimination in favour of BT and amounted to state aid, contrary to Article 87 of the EC Treaty. The respondent submitted that the Lands Tribunal would be bound by the ultimate decision of the EC, which would determine the state aid issues and the method of valuation of the hereditaments occupied by Vtesse. Proceedings in the Lands Tribunal should therefore be stayed. On 8th March 2005, the President rejected the application for a stay and ordered that the following issue should be determined at a preliminary hearing:

“Whether, under domestic law and without regard to any considerations relating to European Community Law, the Vtesse telecommunications network the subject of the original list entry and its revision, or any part of that network (and, if so, what part), should be entered as a hereditament in the rating list.”
6. In his decision the President upheld the appeal ([2006] RA/57). He recorded (at paragraph 5) that the second issue (the State aid point) had been left "to be addressed as might be necessary at a later stage." Vtesse appealed to the Court of Appeal. Its appeal was dismissed on 19th October 2006 ([2006] RA/427).

7. On 12th October 2006 the EC published its decision [2005] RVR 293. Its conclusions (paragraphs 174 to 176) were that there was no evidence that the different methods employed to value BT and Kingston on the one hand and their competitors, including Vtesse, on the other, were not justified by the differences between those organisations and the evidence available to the VOA. Nor was there evidence that the application of a different method had resulted in an advantage to BT and Kingston. It followed that the UK non-domestic rate system had not provided state aid to BT or Kingston during the relevant period.

8. Vtesse are currently seeking to challenge that decision by an application for review to the Court of First Instance.

9. The appeal now returns to the Lands Tribunal for a determination of the rateable value of the hereditament at each of the relevant dates.

10. A detailed description of the hereditament is contained in the President's decision on the preliminary issue. Briefly, it consists of a fibre optic telecommunications network in England, located between Henley-on-Thames and Goswell Road in the City of London. It comprises a pair of strands of optical fibre. Each fibre, which is made from drawn glass, is no thicker than a human hair.

11. The pair of fibres is located in underground cables, adjacent to numerous other fibres in the same cable not occupied or used by Vtesse. The cables themselves are located in sub-ducts and ducts in underground trenches. A minor part of the network is located in apparatus installed by and belonging to Vtesse. Most of the fibres belong to third parties who installed and maintained the cables, sub-ducts and ducts. The fibres transmit data between various workplaces of Vtesse's commercial customers.

12. The length of the network at 1 April 2003 was 147 fibre pair km. At 31 March 2004 it was 625.9125 fibre pair km.

13. Vtesse's case was that the unit of valuation to be attributed to each kilometre traversed by the network should be £19 at both 1 April 2003 (RV £2,800) and 31 March 2004 (RV £11,900). The VO argued for a value at each date of £750 per km, rising to £900 for sections within the London Metropolitan area. This produced RVs of £110,000 and £470,000 on 1 April 2003 and 31 March 2004 respectively.

14. Mr Christopher Vajda QC and Mr Timothy Morshead of counsel appeared for the appellant VO, Mr Vajda only in connection with the European implications of the appeal. They called the appellant to give expert evidence. Mr Bradford is currently the team leader of the Valuation Office Agency Telecommunications Team at the Chief Executive's office. He is a former chairman of the RICS Rating Diploma Holders Section.

15. Mr Derek Wood QC, Mr Hugh Mercer QC (European Law) and Mr Christopher Lewsley of counsel appeared for Vtesse. They called, as witness of fact, Mr A R Paul, a director and chief executive of the appellant. They also called, as expert witness, Mr C N Partridge TD, BSc (Est Man), FRICS, IRRV, a director of Lambert Smith Hampton, a past president of the Rating Surveyor's Association and a former chairman of the RICS Rating and Local Taxation Panel.

The Evidence of Mr Paul

16. Mr Aidan Paul's first witness statement dealt with the nature of Vtesse's business designing and implementing fibre optic communications links between the premises of client companies. The method is to find existing unlit fibre optic cables that provide a suitable route, enter into agreements to use them and construct a spur from the client's premises to the network Vtesse puts together. Mr Paul's first witness statement was almost entirely directed to the issue of the rateability of optic fibres. (The facts relating to that issue were recorded in detail by the President in paragraphs 7 to 21 of his decision referred to above.)

17. In his evidence to this Tribunal Mr Paul's point was that the rating system worked unfairly as between BT on the one hand and Vtesse and other operators on the other. To make that good Mr Paul turned to a detailed history of the telecommunications market and the development of the optical fibre market. In the course of his description of the optical fibre market he sought to assess its size in terms of thousands of fibre pair kilometres which, he concluded, demonstrated the very large share of the total in the hands of BT. This dominant position, he said, not only enabled BT to shrug off the pressures on fibre operators following the bursting of the "dot com" boom, it also gave BT the power to set the price against which others, like Vtesse, competed. He drew attention to the investigation by Ofcom in 2003 of BT's dominance and the consequences of that study. He relied upon that study in support of his thesis that the notional rent applied to BT per kilometre pair of fibre was substantially below the rent assumed to apply to other operators under the tone.

18. A further theme that Mr Paul developed in his evidence was his opinion that several, or perhaps even most, of the assessments relied upon by Mr Bradford for his tone were settled by companies who were under pressure of one sort or another and for whom it was more important to reach a rapid conclusion than to enter into a lengthy argument with the VO about the extent of their rating liability. He suggested that, for the reasons he gave, those negotiating rental agreements between 1995 and 2001 did not anticipate that a rates burden would fall upon them. When it did, those companies had to settle that liability against a background of insolvency or threatened insolvency and they would have been most unwilling to risk the costs of a dispute with the VO. That made their settlements an unreliable basis for Mr Bradford's tone.

19. Mr Paul agreed that the reason he had appointed Mr Partridge to act as his expert, a rating surveyor with no prior telecoms experience, was because he could not find any of the others who would act for him. They declined to act because, he was told, others had settled. He was asked about the material that he had provided to Mr Partridge, particularly the account

that he had provided of the telecommunications market and the extent to which he had made Mr Partridge aware of the Commission Decision of the 12th October 2006. It emerged that there was a difference of recollection between Mr Partridge and Mr Paul as to whether Mr Partridge had received the whole decision or only parts of it.

The opposing valuation contentions

20. Mr Bradford said that he had valued the Vtesse network in line with the 2000 list tone. He considered such tone to have been established following agreements reached in respect of 36 fibre optic network assessments. There were two limbs to this tone, covering respectively networks above and below 3,000 fibre km in total length. Vtesse's network fell into the latter category. For such hereditaments an RV of £667 per route km was applied to sections with one fibre in use (or 'lit'). This figure doubled to £1,333 for routes with four lit fibres and nearly trebled (to £1,800) where eight fibres had been lit. Thereafter, each additional lit fibre attracted a modest incremental value, varying between £78 and £28 until, with 48 fibres lit, the applicable value was £3,889 per route km. No additional value was attributed where the number of lit fibres exceeded 48.

21. A somewhat higher tone of values was applied to networks within the London Metropolitan area. It ranged from £800 per km with one lit fibre to £5,000 for 48. Since Vtesse's network comprised two lit fibres, the appropriate tone rates were £1,200 and £1,000 respectively for routes inside and outside the Metropolitan area.

22. An oversupply deduction of 25% was applied to all assessments effective on or after 1 April 2002 to reflect new networks coming on line.

23. Mr Partridge considered that the tone upon which Mr Bradford relied was flawed, because it took no account of the assessment of the British Telecommunications (BT) hereditament, which had been agreed after the valuation arguments had been fully explored both before and in front of the VT and various experts reports had been submitted in connection with the appeal to the Lands Tribunal. The BT hereditament included 85.8% of the optical fibre network in the United Kingdom. Once this assessment had been agreed, said Mr Partridge, it was no longer open to the VO to rely on the rents of other similar properties, while ignoring the evidence of a tone of value provide by the BT settlement. In Mr Partridge's view, a proper devaluation of that assessment would have shown that it would be grossly unfair to rely on market evidence to value what was only a small segment of the total fibre optic market.

24. Mr Partridge's devaluation of the BT assessment changed during the course of the proceedings. In its final form it produced a value of £14.06 per fibre km, as follows:

BT's estimated RV for the UK incl NI		£552,679,899
Less Telereal rent adjusted to AVD		
£176,092,000 @ 90%	£158,482,800	
29m copper loops @ £12.00	<u>£348,000,000</u>	<u>£506,482,800</u>
		£ 46,197,099
Add back additional competition or over supply		
25% of £46,197,099		<u>£ 15,399,033</u>
Sub total		£ 61,596,132
VO quantum 25% add back		<u>£ 20,532,044</u>
Adjusted RV in terms of linear assets		£ 82,128,176
Note No allowance for value of 130,000 telephone boxes, or BT Tower		
Value for advertising of BT between £50-£100 per box		
Fibre km in use 7,300,000 @ 80% = 5,840,000		
RV = £14.06 per fibre km		

25. Mr Partridge used this devaluation to arrive at a value for the Vtesse network of £19.00 per fibre pair km, as follows:

BT value per fibre km	£14.06
Less 25% for oversupply	<u>£ 3.52</u>
Comparable value of single fibre km Vtesse	£10.54
Less 10% for "obsolescence" or the inefficiency of the actual route	<u>£ 1.05</u>
	£ 9.49
Value per fibre km	say £ 9.50

or £19.00 per fibre pair km

26. Mr Partridge provided the following explanations to clarify this analysis. The reference to the Telereal rent related to a sale and leaseback transaction effected by BT in 2001 with Telereal, a joint venture company between Land Securities and William Pears. The properties transferred included the BT Tower and approximately 130,000 telephone boxes. The value of these boxes for advertising was taken from the VO Rating Manual. The figure for the value of copper loops was taken from evidence given by the UK Government to the European Commission (EC). Telereal had advised that the figure of 7.3 km of optical fibre was a measure of single fibre strands, not fibre pairs and related to all fibre deployed, whether used or not.

27. Apart from its failure to take account of the BT settlement, Mr Partridge criticised Mr Bradford's tone on several grounds. Firstly, he said that he had been given the opportunity to examine the VO's files on a confidential basis. His conclusion from this examination was that Mr Bradford did not have "a library of rental evidence on which to base or justify his assessments." He had spoken to two of the agents who had agreed 11 of the 36 hereditaments on the VO's schedule. In one case the surveyor had prepared both a contractor's test and a receipts and expenditure valuation. He had not approached the valuation on a price per kilometre basis. The other surveyor had told him that the ultimate American owner of his

client company had been in “Chapter 11” protection and that agreeing the assessment with its consequential rate refund was “a matter of business necessity, and not a valuation based decision.”

28. Mr Partridge added

“My conclusion is that the VO initially persuaded an agent or agents to accept his proposed basis of assessment. I have no idea why they agreed to settle at a particular value. There is no evidence to support any particular level of value in the VO’s files. It may be that some telecommunication companies were in financial difficulty following the ‘dotcom’ debacle, and they may not have had either the time or resources to contest their assessment. They may have decided that any saving however small should be accepted as cash ‘in hand’ which was vital to their survival. I do not know, and the VO tells me that he cannot remember, the order in which the 36 assessments were settled. It would appear however that once the VO had reached agreement with one or two telecommunication operators the others fell into line.”

29. Mr Bradford said that he was aware of the BT assessment; indeed he had been involved, with others, in work leading to the eventual agreement with BT. He had, however, never attempted to analyse BT’s RV in the way Mr Partridge had done. In his view such an analysis could only ever be an apportionment based on significant assumptions as to the extent and value of component parts. BT’s assessment included millions of local access copper loops, several thousand telephone exchanges, over 100,000 public telephone kiosks, hundreds of mast sites, two satellite earth stations as well as an extensive national fibre optic trunk network. Vtesse, on the other hand, only occupied limited trunk fibres in their network; they did not have any of the other BT type of rateable network assets. Vtesse’s trunk network of 625 route km was a minute proportion of BT’s trunk fibre optic network. The difference in scale alone prevented any meaningful comparison. A devaluation of the component parts could not be accurate, as all parts of BT’s network interacted with each other and affected the value of the whole.

30. In summary, Mr Bradford’s view was that

“no useful analysis can be made of BT’s agreed assessment when looking at the rental value of fibre optic networks. The networks are significantly different in scale, age and diversity. BT’s assessment is clearly not a direct or even an indirect comparable and any attempt at comparison is spurious in my opinion.”

31. Mr Bradford disagreed with the suggestion that the RVs on which he had relied for his tone represented purely commercial deals by companies, many of which were seriously insolvent, who were interested in settling their rates liabilities rather than seeking to arrive at a proper valuation.

32. Mr Bradford also denied that his tone was unsupported by rental evidence. Most of the evidence used to establish the 2000 list had been provided by operators on a voluntary and confidential basis and not on statutory forms of return. Nevertheless, this information had all been made available to Mr Partridge on a confidential basis. Mr Bradford did not suggest that all this evidence had equally informed his scale of RVs or the tone of the list based on his scale which had resulted from his agreements with many rating surveyors. But he strongly rebutted any suggestion that that scale had been arrived at without regard to rental evidence. He did not rely on actual rents to support his valuation. He relied on the tone of the list, which had evolved through the consistency of agreements reached with other surveyors at RVs which matched his scale.

State Aid - Submissions

33. The appellant VO acknowledged that the Tribunal and the EC had a concurrent jurisdiction to determine whether a state measure constitutes state aid within the meaning of Article 87 (1) of the EC treaty. But it was a basic principle of EC law that the national courts should avoid giving decisions which run counter to a decision of the Commission. (See *Masterfoods Ltd and HB Ice Cream Ltd* (Case C -- 344/98) [2000] ECR I-11369, particularly paragraphs 45 to 52.)

34. The decision of the EC on Vtesse's application was clear and determinative of the issue, just as Vtesse had previously argued that it would be. Vtesse had chosen to argue its case before the EC and that was a highly appropriate forum to determine such a point. It is clear from the decision that the Commission considered the issue whether BT's competitors were overvalued, as well as whether BT and Kingston were undervalued.

35. The VO drew attention to the ability of the Commission to take evidence from a wide-ranging number of sources including BT, Ofcom, and other telecommunications operators. Vtesse was the instigator of the complaint and had taken the opportunity to provide both comment and information on the numerous occasions listed in the decision. The UK authorities had set out the position of the VO. The VO submitted that in any event the argument was irrelevant to the issue of Vtesse's rateable hereditament because the proper remedy if Vtesse were to succeed was not the reduction of the value of that hereditament but the requirement that BT repay state aid. There were inevitable differences between the procedures of the Commission and the Tribunal, just as there were between the procedures of the Commission and the Irish courts in the *Masterfoods* case, but they could make no difference to the application of the fundamental principle that a national court could not take decisions running counter to that of the Commission. If such matters were a reason why the Commission decision should not be followed, it would be unusual for any EC decision to be followed in UK National proceedings. The appellant relied upon the judgment of Laddie J in *Iberian UK Ltd v BPB Industries PLC* [1996] 2 CMLR 601, particularly at paragraphs [69] to [78] and [85]. It would be an abuse of process for Vtesse to seek to re-litigate the state aid issue before this Tribunal, see *Johnson v Gore Wood & Co* [2002] 2 AC 1, especially Lord Bingham at page 31 A-F.

36. Finally, it was submitted, the basis of the state aid argument rests on discrimination. Discrimination in EC law was defined in *Gillespie* [1996] ECR I-475 at para 16. The same analysis applies to the state aid challenge. The respondent must prove that although the networks of BT and the Vtesse are in a comparable position BT has been given an unjustified advantage. For the reasons set out by the VO the networks of BT and Vtesse cannot usefully be compared (as the EC concluded). If the Tribunal so finds as a matter of fact there can be no question of unlawful state aid under EC law.

37. The respondent's argument was that in the determination of the tone rate by reference to which the rate to be applied to Vtesse's optical fibres was judged, the VO had not taken into account the much lower rate applied to the optical fibres of BT. BT dominates the market, is the major competitor for other telecommunications providers, such as Vtesse and yet carries a significantly and disproportionately lower burden of tax on its optical fibres. This amounts to unlawful discrimination by the granting of a selective advantage through fiscal measures to BT, relative to its competitors, such as Vtesse. It is also contrary to the more specific EC regulatory framework, particularly Dir 2002/7 and Art 2(1) which, in seeking to achieve an internal market for electronic communications systems in Europe, applies the general principle of non-discrimination and prohibits the granting or maintaining in place of "special rights" for the provision of electronic communications services to particular operators.

38. The respondent said that this is relevant to the Lands Tribunal's consideration because it has a concurrent jurisdiction with the EC and European Courts and an obligation to apply and act in accordance with European law. This encompasses the ability to determine whether the VO's treatment of the valuation of BT's hereditaments amounts to unlawful state aid, contrary to Article 87, and to unlawful discrimination. Contrary to what was previously argued, the Lands Tribunal was not precluded by the decision in *Masterfoods Ltd and HB Ice Cream Ltd* (above), from considering the matter *de novo*. In support of that submission the respondent relied on the decision of the House of Lords in *Crehan v Inntrepreneur Pub Co* [2007] 1 AC 333 for the proposition that the duty to avoid conflicting decisions of the Commission and national courts does not apply with the same force when the legal and factual context of the case examined by the Commission was not completely identical. In this case, the respondent argued, the legal and factual context was not identical. The EC was dealing with a different issue in that it focused on whether the method of valuation chosen for BT advantaged it and whether that valuation was correct, whereas in these proceedings it was accepted that BT was correctly valued. The challenge now was to the failure to put any weight on BT's assessment in valuing other hereditaments, such as those of Vtesse. Furthermore there were substantial differences in procedure and in the parties and between the inquisitorial and wide ranging processes of the EC and the "*inter-partes*" procedures of this Tribunal. Because of those differences there could be no question of an estoppel or abuse of process argument based upon *Henderson v Henderson* (1843) 3 Hare 99 and *Johnson v Gore Wood & Co* [2002] 2 AC 1. Nor was the case of *Iberian UK Ltd v BPB Industries PLC* (above) of assistance.

State Aid - the law and discussion

39. It is a matter of agreement between the parties that the Lands Tribunal has a concurrent jurisdiction with the EC and European Court and an obligation to give full effect to European law arising under the Treaties. (Section 2, European Communities Act 1972; Article 10, C 321 E/47) This includes the principles of state aid law arising under article 87 of the EEC treaty, which reads:

“1. Save as otherwise provided in this The treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.”

40. As was recorded in the Commission Decision of 12 October 2006 (C 4/2005),

“(120) Therefore, any measure constitutes State aid within the meaning of Article 87(1) EC if it fulfils the following four criteria:

- it confers a selective advantage on the recipient(s)
- it is granted by the State through State resources
- it distorts or threatens to distort competition
- it is likely to affect trade between Member States.

(121) In order to determine whether the application of the property tax to BT and Kingston has resulted in an economic advantage to these two firms, the Commission's analysis must be two-fold:

- it must first determine whether the rules concerning the property tax have been correctly applied to BT and Kingston and in particular whether the application of the R&E method was justified and properly applied.
- it must also consider whether the application of the R&E method to BT and Kingston confers an advantage on those firms in comparison with their competitors that are valued under the rental method."

41. Conferring a selective advantage, or discriminating, was defined in the case of *Joan Gillespie v Northern Health and Social Services Board* (1996) Case C-342/93, at paragraph 16, in this way-

“It is well settled that discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations.”

42. It is useful to record in a little detail the Commission's consideration of Vtesse's complaint that BT received preferential tax treatment in the application of business rates. The Commission noted the nature of business rates as a property tax. It recorded the methods of valuation open to the VOA and in particular what it called the "rental method", which included reference to the "tone of the list", and the receipt and expenditure method (R&E). It noted that for the relevant period the VOA applied the R&E method to BT but the "tone of the list" method to Vtesse. (Paragraphs 11 to 26.)

43. In section III of its decision the Commission set out the comments they had received from interested parties starting (at paragraph 34) with the submissions of Vtesse. Those submissions appeared to be centred on the propositions that BT's hereditament was undervalued. (See paragraphs 35 to 42.) BT and Kingston also commented. In section IV the UK authorities offered a full account of the rating system, the methods of valuation and their application to both BT and Vtesse. It was submitted that a selective advantage could be demonstrated either

“by showing that an R&E valuation of telecommunications operators other than BT and the Kingston would have yielded a lower rateable value than the rental method or

by showing that using correct and relevant comparisons other telecommunications operators had a disproportionately high rateable value when compared with BT and Kingston.” (paragraph 103)

44. Developing their submissions, the UK authorities argued that

“it also appears that even when the rental evidence derived from other telecommunication operators exists, for instance on optic fibres, the differences between the use of optic fibres by those operators and the use that is made of them by BT and Kingston means that this rental evidence is not fully relevant to value the latter undertakings' hereditaments.” (Paragraph 125.)

The conclusion of the VOA was that the rental method could not be applied to BT and Kingston. The Commission noted (at paragraph 127) that there was no probative evidence showing the contrary and consequently it concluded that the application of the R&E method was justified.

45. The next question was whether that method had been correctly applied. The Commission concluded that it had. (Paragraph 139.)

46. Next the Commission turned to consider whether the application of that method conferred an advantage on BT and Kingston in comparison with their competitors. It concluded (paragraph 140) that the existence of an advantage could be demonstrated in the following ways:

- “(a) by showing that the application of the rental method to BT and Kingston would be possible and result in a higher rateable value than the R&E method, or
- (b) by showing the application of the R&E method to the other telecommunication operators would be possible and would systematically result in a lower rateable value than that derived from the rental method, or
- (c) by showing that, using other correct and relevant comparisons, telecommunication operators that are assessed under the rental method are taxed more heavily as compared with BT and Kingston.”

47. Demonstrating (a) or (b) was not possible, for the reasons given in paragraphs 141 and 142. The Commission focussed on point (c) in paragraphs 144 to 161. A number of points advanced by Vtesse were examined and dismissed. At paragraph 153 the Commission observed that “BT's and Kingston's optic fibre networks are of a different nature from, and not comparable with, those of other operators. It is therefore not possible to apply rental evidence derived from other operators' optic fibre networks to BT or Kingston.”

48. The Commission said (at paragraph 161) there was no clear evidence that the R&E method would generally result in a lower rateable value than the rental method (that is, for other operators, such as Vtesse) or that the application of the R&E method to BT and Kingston undervalued the rateable value of their hereditaments. After considering the question whether the R&E method conferred an advantage at the margin, and concluding that it did not, the Commission set out its overall conclusions thus:

“(174) In conclusion, it should be recalled that business rates are a tax on the value of the property concerned. They are not a tax on profits or revenues. They are normally applied on all non-domestic properties, and consequently are applied to all telecommunications networks. According to British case law, all telecommunications networks are valued as a whole. There are several methods for valuing such property. When all methods can be applied, they should result in the same valuation. The use of a specific valuation method depends on the circumstances of the case.

(175) It now appears that the VOA has applied to BT and Kingston the general rules concerning business rates as laid down in the legislation and case law. It is clear that the valuation of BT's and Kingston's hereditaments as well as the revisions of these rateable values, are carried out on the basis of a different method than in the case of their competitors. However, the Commission can conclude that there is no evidence that the use of this different method is not justified by the objective differences between those firms and their competitors and by the extent of the evidence available to the VOA.

(176) There is no evidence that the application of a different valuation method to BT and to Kingston has resulted in an advantage to these firms in comparison with their competitors. Since there is no evidence of an advantage, the Commission can conclude that the non-domestic rates system has not provided State aid to BT and/or Kingston within the meaning of Article 87 (1) EC during the period considered by the Commission i.e. 1995 - 2005.”

49. To what extent do those conclusions bind this Tribunal in this case? We were referred to the decision in *Masterfoods v HB Ice Cream* (above), which concerned a dispute over the provision of ice cream cabinets on condition that they were used exclusively for HB ice cream. There were parallel proceedings in the Irish courts and before the Commission. HB succeeded before the Irish High Court and obtained an injunction but lost before the Commission, which found that the exclusivity provision constituted an infringement of Article 85 (1) of the Treaty. The Irish Supreme Court referred to the Court of Justice the questions whether the obligation of sincere cooperation required the Supreme Court to stay the Irish proceedings and whether a decision of the Commission addressed to an individual party prevented such a party from seeking to uphold a contrary judgement of the National Court in that party's favour on the same or similar issues. The Court of Justice found:

“48. ... the Commission cannot be bound by a decision given by a national court in application of Articles 85 (1) and 86 of the Treaty. The Commission is therefore entitled to adopt at any time individual decisions under Articles 85 and 86 of the Treaty, even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision.

49. It is also clear from the case-law of the Court that the Member States' duty under Article 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from Community law and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts ...

50. Under the fourth paragraph of Article 189 of the Treaty, a decision adopted by the Commission implementing Articles 85 (1), 85(3) or 86 of the Treaty is to be binding in its entirety upon those to whom it is addressed.

51. The court has held, in paragraph 47 of *Delimitis*, that in order not to breach the general principle of legal certainty, a national court must, when ruling on agreements or practices which may subsequently be the subject of a decision by the Commission, avoid giving decisions which would conflict with a decision contemplated by the Commission in the implementation of Articles 85 (1) and 86 and Article 85 (3) of the Treaty.

52. It is even more important that when national courts rule on agreements or practices which are already the subject of a Commission decision they cannot take decisions running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance.”

50. We find paragraph 52 to be a clear statement of a basic principle. The Commission has ruled and we cannot take a decision that conflicts with that decision. However, a number of points were advanced on behalf of Vtesse in support of their submission that this Tribunal was not bound to follow the Commission decision.

51. It was submitted that the that the decision of the House of Lord's in *Crehan v Innpreneur Pub Co* (above), was authority for the proposition that there could be no risk of conflict "where the legal and factual context of the case being determined by the Commission is not completely identical to that before the national courts." Counsel for the respondent put forward a number of ways in which the legal and factual context of the case before the Commission and the case before this Tribunal was said to be less than completely identical.

52. In the *Crehan* case Lord Hoffman considered the *Masterfoods* case. He said:

48 The matter was taken further by the decision of the Court of Justice in *Masterfoods Ltd v HB Ice Cream Ltd*. (op cit). Masterfoods Ltd, a subsidiary of Mars Inc, brought proceedings in Ireland against HB Ice Cream Ltd, a subsidiary of Unilever, for a declaration that its agreements to provide retailers with freezer cabinets on terms that they stocked only HB ice cream contravened articles 81 and 82. On 28 May 1992 the High Court dismissed the action and, on HB's counterclaim, granted an injunction to restrain Masterfoods from inducing retailers to break their agreements by stocking Masterfoods ice cream. On 18 September 1991 Masterfoods made a complaint to the commission under article 3 of Regulation 17/62 and on 4 September 1992 it gave notice of appeal to the Supreme Court. In the course of discussions with the commission, HB offered to make some changes in its agreements and the commission issued a notice saying that it proposed to grant exemption under article 81(3). However, as in this case, the commission changed its mind and on 11 March 1998 issued a decision (98/531) stating that HB's agreements infringed articles 81 and 82. HB immediately applied to the Court of First Instance to annul the decision of the commission. That was the state of affairs when the appeal came before the Supreme Court in June 1998. The court made a reference to the Court of Justice seeking guidance as to how it should proceed. It asked whether it should stay the Irish proceedings pending the decision of the Court of First Instance and whether the decision of the commission on the HB agreements prevented HB from seeking to uphold the contrary decision of the national court.

49 Advocate General Cosmas, starting from the proposition that it was necessary to avoid conflict between the decisions of Community institutions and national courts, discussed the question of what counted as a conflict, at para 16. There could be no risk of conflict, he said, "where the legal and factual context of the case being examined by the commission is not completely identical to that before the national courts".

50 Significantly for the situation in the present case, he gave as an example of such lack of identity a case in which:

“the national courts are examining the legality of an exclusivity agreement in respect of the use of ice cream freezer cabinets between a particular company and retailers 1, 2 and 3 in Ireland, whilst the commission is monitoring a similar agreement in respect of the same products in the same market between another company and retailers 4, 5 and 6.”

51 In such a case, said the Advocate General:

“The commission's decision may provide important indications as to the appropriate way to interpret articles 85(1) and 86, but in this case there is no risk, from a purely legal point of view, of the adoption of conflicting decisions.”

52 A risk of conflict:

“only arises when the binding authority which the decision of the national court has or will have conflicts with the grounds and operative part of the commission's decision. Consequently the limits of the binding authority of the decision of the national court and the content of the commission's decision must be examined every time.”

53 In *Masterfoods*, the High Court had examined the agreements and the Irish ice cream market as they stood before its decision in 1992, whereas the commission had examined the amended agreements and the market as it stood in 1996. It followed that the decisions of the High Court and the commission were not necessarily in conflict. Conflict would arise only if the High Court's injunction continued to apply after the commission had ruled that the agreements were unlawful. But that was exactly what HB were asking the Supreme Court to do. The appeal therefore presented an imminent risk of conflict.

54 The Court of Justice accepted the Advocate General's analysis that the risk of conflict arose out of the possibility of the Supreme Court continuing an injunction to enforce agreements which the commission had held to be unlawful, at para 59:

“In this case it appears from the order for reference that the maintenance in force of the permanent injunction granted by the High Court restraining Masterfoods from inducing retailers to store its products in freezers belonging to HB depends on the validity of Decision 98/531.”

55 The ruling of the Court of Justice was that the Irish courts had to give priority to the decisions of the European institutions on the validity of the agreements which they were being asked to enforce. The Supreme Court could suspend the proceedings until the outcome of the application to the Court of First Instance for annulment was known. Or it could make a reference to the Court of Justice for a preliminary ruling on the validity of Decision 98/531. What it could not do was dismiss the appeal and enforce the injunction while the commission's decision remained in effect.

56 It is clear that the duty to avoid conflicting decisions, as stated by the Court of Justice in the two leading cases of *Delimitis* [1991] ECR I-935 and *Masterfoods*, has no application to the present case. There is no possibility of conflict, in the sense discussed in those cases, between a decision of the commission that the Whitbread agreements infringed article 81 and a decision of the national court that the Inntrepreneur agreements did not. The case rather resembles Advocate General Cosmas's example of the two ice cream manufacturers operating in the same market.

53. Attention was drawn to the formulation of the issues before the Commission. It was argued that they were not the same as those put before this Tribunal. While there is something in the argument that the issues were not all expressed or developed in exactly the same way as they have been before this Tribunal, the central points at issue seem to us to have been essentially the same. Emphasis was then placed upon the differences in parties and procedures between the Commission and the Lands Tribunal. Differences there certainly are. The Commission's proceedings are investigatory and draw evidence from a wide range of sources; for example, as Counsel for the VO stressed, BT are not a party to this Tribunal hearing, although the decision has the potential to affect them. But they were able to make full submissions to the Commission in pursuit of a decision that was favourable to their position.

54. The proceedings of the Lands Tribunal are, it seems to us, as different from the proceedings of the Commission as the proceedings of the Irish High Court were. If the difference in proceedings matters, it is difficult to see how the principles set out in paragraph 52 of the *Masterfoods* decision could ever bind a UK national court. So far as the parties are concerned, it is true that the addressee of the Commission decision is the United Kingdom but the complainant was Vtesse. Vtesse took a major and a very active part in arguing the matter and is in the process, we were told, of bringing an action for annulment of that decision. The reality, as it appears to us, is that Vtesse was as much a party to the Commission proceedings as it is to these proceedings. To borrow the words of Laddie J. in *Iberian UK Ltd* [1996] 2 CMLR, paragraph [78] Vtesse were 'directly and fully involved' in the European proceedings. At paragraph [86] of his judgment Laddie J. said

“... in view of the special position of the Commission, CFI and ECJ in relation to competition law and the authorities cited earlier in this judgment, there are strong public policy reasons for preventing the addressee of a Commission decision from challenging it before the national courts.”

55. We find those words persuasive. In the current case the Lands Tribunal is to be regarded as an organ of the addressee and as such those same strong public policy reasons seem to us to mean that we should not permit a party to Lands Tribunal proceedings who was also directly involved in the Commission proceedings to make such a challenge, even if that party was not actually the addressee.

56. As for the *Crehan* decision, read in context, it is clear to us that Advocate General Cosmas was not saying - and Lord Hoffmann did not think he was saying - that if the legal and factual context was not completely identical in every particular then there could be no instance

of conflict. The Advocate General illustrated by way of example a situation in which the legal and factual context was far from completely identical and which made his point clear. He instanced a case where the parties on either side were completely different: that is not the case before this tribunal. Lord Hoffmann explained that in the *Masterfoods* case there was a real risk of conflict and the Irish court had to give priority to the Commission decision. It cannot be supposed that Lord Hoffman was unaware of the manifest differences between the legal and factual context of the Irish courts and the Commission. He went on to say that, on the facts of the *Crehan* case, on the other hand, there was no real risk of conflict.

State Aid - conclusions

57. We would therefore conclude, were it necessary to do so, that this Tribunal could not take a decision that runs counter to the Commission's conclusion that the different valuation methods applied to Vtesse and BT and the VO's unwillingness to compare the valuation of the former's fibre optic hereditament with that of the latter does not amount to the conferring of an advantage on BT or the unlawful provision of state aid.

58. It seems to us that it is not necessary to do so, however, because we accept, as a matter of fact and judgement and for the reasons recorded in paragraphs 29 and 30 above, the view of Mr Bradford that BT's assessment is simply not usefully comparable with that of Vtesse. We agree with the submission of counsel for the VO that in those circumstances it is impossible to say that BT has been given any unfair advantage or more favourable treatment contrary to the broad principles of Article 87 or to the more specific regulatory framework in the EU telecoms directives. Our decision on the facts does not conflict with that of the Commission.

59. It is also unnecessary to reach a concluded view on whether Vtesse's maintenance of the state aid argument amounts to an abuse of the process of the Tribunal, although we see force in the submissions based on the speech of Lord Bingham in the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1, at page 31 A – F, that a broad merits-based judgement, taking account of the public and private interests involved and all the circumstances of this case might well conclude that the pursuit of the state argument before this Tribunal does indeed amount to an abuse.

The Tone of the List - Law

60. There is little or nothing between the parties about the principles of law relevant to the determination of the relevant value of the hereditament. The Local Government Finance Act 1988 requires the valuation officer to compile and maintain a local non-domestic rating list showing the rateable value of every non-domestic hereditament. That rateable value is to be determined in accordance with schedule 6 of the Act. Paragraph 2 (1) provides, so far as relevant, that

“the rateable value of a non-domestic hereditament shall be taken to be an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to let from year to year.”

That is the fundamental rating hypothesis. It is the task of the valuation officer to estimate that hypothetical rent taking into account the real hereditament with all its particular advantages and disadvantages. It may be that there is an actual rent of the hereditament that is sufficiently close to the circumstances of the hypothetical tenancy to be useful. It may be that there is rental evidence from comparable hereditaments. In the absence of reliable evidence from such sources, assessments of the rateable value in the list of comparable properties may be helpful. In *Pointer v Norwich Assessment Committee* [1922] 2 KB 471 at 477 Atkin LJ said:

“In my opinion evidence of the rateable value (of other premises) must be admissible, and for two reasons. In the first place in cases in which both premises are in the same union, it is evidence against the assessment committee in the nature of an admission. And secondly, it may be the only way in which you can get at the rent at which the appellant's premises are worth to let by the year.”

61. The case of *Pointer* was considered by Mr J H Emlyn Jones FRICS in *Lotus and Delta Ltd v Culverwell (VO)* [1976] RA 141. After a review of the authorities he concluded that the following propositions were established:

“Where the hereditament which is the subject of consideration is actually let that rent should be taken as a starting point. The more closely the circumstances under which the rent is agreed both as to time, subject matter and conditions relating to the statutory requirements contained in the definition of gross value in (the Act) the more weight should be attached to it. Where rents of similar properties are available they too are properly to be looked at through the eye of the valuer in order to confirm or otherwise the level of value indicated by the actual rent of the subject hereditament. Assessments of other comparable properties are also relevant. When a valuation list is prepared these assessments are to be taken as indicating comparative values as estimated by the valuation officer. In subsequent proceedings on that list therefore they can properly be referred to as giving some indication of that opinion.”

62. How valuable an indication assessments provide will depend upon all the circumstances. Assessments agreed by professional advisers, experienced in dealing with the type of hereditament in question will carry more weight than assessments that are the result of acquiescence by those who have not chosen to take professional advice. The more assessments there are, and the more consistent they are, the more valuable they are likely to be as evidence. A stage may be reached when the assessments can be said to have settled into a pattern that establishes "the tone of the list" so far as that type of hereditament is concerned. That is what the valuation officer argues in this case.

63. The position has been well summarised by Mr P. H. Clarke FRICS in a passage that appears in more than one of his cases but was most recently set out in *Futures London Ltd v Stratford (VO)* [2006] RA 75, at page 82, paragraph 25, thus:

“There are three stages leading to the establishment of tone of the list. At first, when a new rating list is put on deposit, assessments will carry relatively little weight: they are opinions of value by the valuation officer, as yet unchallenged and untested by negotiation. Over time assessments will be challenged and agreed or determined by a Valuation Tribunal or this Tribunal or accepted by lack of challenge. Finally, a stage will be reached when enough assessments have been agreed or determined or are unchallenged to establish a pattern of values, a tone of the list. The list is then said to have settled: rents will be largely subsumed into assessments. At this stage rating surveyors will have little regard to rents and pay considerable attention to assessments. The position at any time regarding the tone of the list is a question of fact. When an assessment is challenged before a tribunal the correct time before deciding whether the tone of the list has been established is immediately before the hearing. The weight to be given to comparable assessments as evidence of value will depend on the circumstances in each case. These may indicate that little or no weight should be given to comparable assessments, e.g. where acceptance of value is more acceptance of rate liability or where a body of settlement evidence rests on a single agreed assessment.”

64. In this case, as we have recorded, the dispute is not about the principles of law but about whether there is indeed an established tone of the list, as Mr Bradford maintains. That has involved consideration of the nature of the evidence upon which that tone is said to be based, the degree of rental evidence, and the circumstances in which the assessments that are said to support the tone were reached.

Conclusions

65. Mr Bradford has agreed the 2000 list assessments of 36 fibre optic networks with twelve well known firms of rating surveyors, some of whom had also been involved in similar negotiations for the 1995 list. It is apparent from Mr Paul’s evidence that not one of the twelve firms has been prepared to act for his company in connection with this appeal. Mr Partridge has not previously dealt with the valuation of a telecommunications hereditament, but he dismissed the 36 settlements on the grounds that they were based on commercial rather than valuation considerations.

66. We are unable to accept the suggestion that the agreed assessments did not represent agreed valuations. No direct evidence was produced from any of the 12 surveyors or their clients to support it. Mr Bradford pointed out that, far from pressing for early agreements to be reached, many companies had in fact delayed providing him with information in order to put off the day when he could increase their assessments, since any material changes would only take effect in the rate year during which the VO’s notice was served. Moreover, as Mr Morshead observed, the agreed RVs gave rise to rates bills of, in many cases, millions of £s per annum. If Mr Partridge’s approach were correct, the true rates bills would have been tiny

fractions of those based on the RVs which were actually agreed. It is in our view unrealistic to suppose that any sensible ratepayer would have passed up a reasonable chance of paying a hugely reduced tax bill, merely because of a fear about costs. In any event, in the course of cross examination Mr Partridge accepted that, whilst the rental and other evidence which had been made available to the VO was inconsistent, Mr Bradford's valuations represented the best that could be done with the available information.

67. By the end of the hearing, therefore, Mr Partridge's case boiled down to the suggestion that the 36 agreed assessments were:

“not just out of line with the agreed BT assessment, but are so substantially out of line as to be both grossly inequitable and unsustainable in the light of the agreement reached in respect of the BT 2000 list assessment.”

68. In cross-examination Mr Partridge said that he had initially been uncertain whether the valuation approach adopted by the VO was in fact unfair. He continued

“I know, and as we have seen this morning, how passionately Mr Paul believed that they were wrong, but candidly I was sceptical. I thought that when I investigated this I would find ... differences in the valuation but I expected them to be of a magnitude that could be explained by normal valuation adjustments...”

When I had completed the first stage of my investigation ... I found that his concerns ... although I would express them differently, were in fact justified on rating valuation grounds.”

69. Because Mr Partridge had not been operating in the telecommunications market on 1 April 1998 or 1 April 2003, he said that he had had to rely on Mr Paul for a description of the optical fibre market on those dates. Mr Paul said that he had provided Mr Partridge with a copy of the decision of the European Commission dated 12 October 2006. As previously mentioned, in para 176 of its decision the EC concluded that

“... BT's and Kingston's optic fibre networks are of a different nature from, and not comparable with, those of other operators. It is therefore not possible to apply rental evidence derived from other operators' optic fibre networks to BT and Kingston.”

The reference to “Kingston” related to Kingston Communications Plc, the owner of the only local access network in the region of Hull.

70. In the course of cross-examination Mr Partridge was asked whether he had considered the decision of the European Commission as part of his investigation. He replied:

“Only post my first report. I think Mr Paul’s recollection is slightly faulty in that I did a de novo English report. I did not look at the European report and I heard your cross-examination this morning and I thought to myself, ‘well, is that right?’ My recollection of it is that I did not see this ... that document until post my first report.”

71. In our judgment, Mr Partridge’s failure to address the implications of the EC’s conclusion in para 176 once it came to his attention – whether that was before or after his first report – detracts from the credibility of his evidence as an independent expert.

72. It is clear that Mr Paul provided Mr Bradford with inaccurate information. He told Mr Partridge, wrongly, that the UK had advised the EC that BT’s 29m copper loops had been valued at £12 each. In cross-examination Mr Partridge accepted that he was unable to offer any opinion about the rateable value of the loops.

73. Mr Partridge’s decision to use the Telereal sale and leaseback when devaluing BT’s assessment was also based on Mr Paul’s suggestion, despite his own view that such transactions were “a poor indicator of actual rental value”. In cross-examination, Mr Partridge referred to the use of sale and leasebacks as follows:

“I would love to have something better but ... I can only use the tools that I have got.”

74. Mr Partridge’s reservations are entirely understandable. Apart from the general difficulties which make the use of sale and leaseback rents questionable in principle, Telereal undertook responsibility for providing accommodation and estate management services to BT. The transaction also afforded BT the ability to vacate approximately 35% by rental value of its estate at no extra cost, and to transfer 350 of its employees to Land Securities Trillium. In our judgment, the Telereal transaction is of no assistance when trying to apportion the BT assessment between its component parts.

75. Another deficiency of Mr Partridge’s devaluation of the BT assessment is his assumption that 80% of the fibres were lit. He accepted in cross-examination that he had no personal knowledge of what proportion of the total fibres was in use.

76. Mr Bradford pointed out that Vtesse’s RV (which he suggested should be £110,000) was less than 0.025% of BT’s England RV (£443.5m) as at 1 April 2002 and that the BT network was infinitely larger and more diverse than Vtesse’s. Both he and Mr Partridge agreed that Mr Partridge’s attempted deconstruction of BT’s assessment was unprecedented in rating history. We have no hesitation in concluding that the exercise which Mr Partridge has undertaken is wholly unreliable. We obtain no assistance from it.

77. We are satisfied that a tone for the valuation of fibre optic telecommunications networks in the 2000 rating list has been established and that Mr Bradford's valuations are consistent with that tone. The appeal is allowed. We direct that the assessment of the hereditament in the 2000 list be altered to £110,000 with effect from 1 April 2003 and £470,000 with effect from 31 March 2004. A letter on costs accompanies this decision, which will take effect when the question of costs is decided.

Dated 7 November 2008

His Honour Judge Mole QC

N J Rose FRICS