

# ***THE UNIT OF ASSESSMENT FOR RATING PURPOSES***

## ***THE HEREDITAMENT***

The unit of assessment for rating purposes is of course a hereditament so what is a hereditament?

Article 37(1) of the 77 Order directs that properties of the description specified in Schedule 10 shall, except insofar as they are required by virtue of Paragraph (2) not to be treated as hereditaments, be hereditaments for the purpose of the Order. Paragraph (2) then goes on to list the various exclusions ie those mentioned in Schedule 11.

All of the above then defines what a hereditament is or is not but one further question remains and that is the seaward extent of a hereditament ie where a hereditament adjoins the coast to which point does the boundary of the hereditament extend?

The answer to the question is that in Northern Ireland rates can only be levied on hereditaments “in the district” ie within a local government district boundary. These boundaries are established under the powers contained in the Local Government (Boundaries) Order (Northern Ireland) 1992 (the 92 Order). In this Order the boundary of each district is stated to be:

“the area designated on the map..... and demarcated by a red line thereon.”

There is a common law presumption that the land between the high and low water marks is not within a district boundary. This presumption can be displaced by Statute and in Northern Ireland whether or not it has been displaced depends on the boundaries as set out in the 92 Order. On checking the various maps and after consultation with the Ordnance Survey I have confirmed that generally the district boundary as it adjoins the coast is taken to be the high water mark of medium tides. The exception to this would be structures, such as marinas, which extend below the high water mark and in these cases the boundary has also universally been extended to include such property.

## ***LEGISLATION***

The unit of assessment then is the hereditament and in the previous chapter consideration has been given to what is or is not a hereditament. The 77 Order then goes further than this and although stating that every hereditament shall be separately valued allows in certain circumstances hereditaments to be aggregated or disaggregated for valuation purposes:

- “38(2) Subject to any regulation under Article 37(4), to paragraph (3) and to any other statutory provision, every hereditament shall be separately valued.
- 38(3) Notwithstanding anything contained in paragraph (2), the Commissioner, or the District Valuer, with the approval of the Commissioner, may, if he thinks it proper to do so having regard to the circumstances of the case:-
- (a) value contiguous hereditaments in the occupation of one and the same occupier as a single hereditament, notwithstanding that they are held under different titles;
  - (b) where a hereditament comprises 2 or more parts capable of separate occupation, although in the same occupation, value the several parts as separate hereditaments and where hereditaments or parts of a hereditament are valued as mentioned in sub paragraph (a) or (b) they shall be treated as a single hereditament, or, as the case may require, as separate hereditaments, for all the other purposes of this Order.”

### ***CASE LAW***

We now know, at least in general terms what the unit of valuation is ie the hereditament and that a hereditament comprises for example land.

We also know that legislation allows the aggregation or disaggregation of hereditaments in certain circumstances. Case law adds a more precise definition and in this jurisdiction the leading case is to “Switzer” case.

#### ***Switzer v Commissioner***

Switzer and Co Ltd v The Commissioner of Valuation (1902) 2 IR 275 was heard by the King’s Bench Division by way of an appeal against a decision by the Recorder of Dublin. It held that premises had to be valued having regard to the leases on which they were held and that there had to be separate entries in the Valuation List for each hereditament held on a separate lease.

The details of the case are that Switzer and Co held a number of premises in Grafton Street and Wicklow Street under 9 different leases, and prior to and in 1900 they were valued as 9 separate hereditaments in the Valuation List although structurally they communicated with each other and formed one business establishment.

In or about the year 1897 Switzer's purchased a leasehold interest in premises at 1 to 5 Clarendon Street which lay behind and abutted their Grafton Street premises. These Clarendon Street premises were held under 5 separate leases. After the purchase Switzer's pulled down the Clarendon Street houses and erected on the site a large building facing Clarendon Street. A portion of the wall between the Grafton Street premises and the Clarendon Street premises was removed to leave essentially one single large shop.

When all had been completed the Town Clerk requested the Commissioner of Valuation to revise the valuation of the Clarendon Street premises. What he in effect did was to strike out of the Valuation List the 9 separate entries for the Grafton Street premises and value as one rateable hereditament the whole block which comprises the Grafton Street, Wicklow Street and Clarendon Street properties - now one shop unit which he valued at £1,900. This decision was appealed to the Dublin Recorder who affirmed the decision of the Commissioner leading to the further appeal to the Kings Bench Division. In allowing the appeal Palles CB said:

“Two questions were argued before the Recorder and were argued here. The first is whether the revised valuation is bad, upon the grounds that premises held under separate immediate lessors and under separate leases, should be separately valued. The second is whether there was any jurisdiction to revise the valuation of any of the premises except those included in the Town Clerk's list of premises requiring revision - namely the Clarendon Street premises. I shall take first the question of what is the unit of valuation. The unit of valuation of premises in the occupation of tenants is such hereditaments of the description in S12 of the Act of 1852 as are in the occupation of the same occupiers, holding from the same immediate lessor under the same lease or contract of tenancy. In this definition the expression ‘occupier’ and immediate lessor’ may, of course, include a plurality of persons being joint occupiers or joint immediate lessors, who, between them, may constitute one occupier or one immediate lessor. But premises in the occupation of several distinct occupiers, or secondly, premises which, although in the occupation of the same person, are held under separate immediate lessors, or thirdly, premises which, although in the occupation of the same person, and held under the same lessor, are so held under several distinct leases or contracts of tenancy - each of these premises is a separate rateable hereditament; and more than one of them cannot be included in any one single valuation. In other words, the characteristic of a tenement to be separately valued is a tenement all of which is in the occupation of the same occupier, under the same immediate lessor, held under one contract of tenancy.”

The decision of the King's Bench Division was affirmed by the Court of Appeal so in Ireland as from 1902 there was a clear definition of exactly what constituted a hereditament, ie the unit of assessment for valuation purposes.

In practical terms the decision in Switzer caused difficulties - one premises valued as several hereditaments, and Parliament provided a way around the decision in certain circumstances by enacting at Section 8 of the Valuation Acts Amendment Act (Northern Ireland) 1932 as follows:

“Notwithstanding anything contained in the Irish Valuation Acts, contiguous hereditaments in the occupation of one and the same occupier may, if the Commissioner of Valuation thinks proper having regard to the circumstances in any case, be valued for the purpose of those Acts as one rateable hereditament although held under two or more immediate lessors under different contracts of tenancy.

This section then provided for, as it were, a statutory fusion of what according to Switzer would have been a series of different hereditaments. Sub paragraph 38(3)(a) of the 77 Order re-enacted Section 8 of the 32 Act with the modification that it refers to contiguous hereditaments “held under different titles” instead of the 1932 wording noted above ie “held under two or more immediate lessors under different contracts of tenancy”. The change was intended to cover the case where part of a site is freehold and part is leasehold.

### ***BELFAST COLLAR COMPANY v COMMISSIONER***

The second case is the Belfast Collar Company Ltd v the Commissioner of Valuation (1959) NI LR 198. This related to premises in Shaftesbury Street, Belfast occupied by the Belfast Collar Company Ltd, which also occupied other premises in the same street but on the opposite side. The Company was an industrial concern and the use of the two premises were inter-related. The premises were held under separate leases from the same lessor but were physically divided by Shaftesbury Street. It was agreed that they were not contiguous.

Before the Belfast Recorder it was held that the premises were so essential in use, the one to the other, that they should be treated as one hereditament and in so doing the Recorder followed the decision of the Court of Appeal in England in Gilbert v Hickinbatton and Sons Ltd (1956) 2QB 40. This approach was rejected by the Court of Appeal. Lord MacDermott LCJ in his judgement said as follows:

“It is important to read, in connection with Section 4, the definition of “hereditament” contained in Section 8 of the same Act: ‘Hereditament’ means a rateable hereditament as defined in Section twelve of the Valuation (Ireland) Act, 1852, and includes any “tenement requiring to be valued under the Irish Valuation Acts, ....” That definition serves to emphasize the difference between the law relating to valuation in this country and that in England where there is not the same statutory background and where the question of what constitutes a single rateable hereditament is much more at large. The definition contained in Section 12 of the 1852 Act and referred to in Section 8 of the 1923 Act is in very wide terms, but in the well known case of **Switzer and Co v Commissioner of Valuation** (1902) 2 IR 275 it was held by a divisional court of the King’s Bench Division (Palles CB, Johnson and Gibson JJ), and affirmed by the Court of Appeal (Lord Ashbourne L.C., Fitzgibbon and Holmes L.J.J.), that premises had to be entered and valued having regard to the leases on which they were held, and that there had to be separate entries for each hereditament held on a separate lease. That decision was founded on a consideration of the provisions of the Irish Valuation Code, and has ever since been a basic part of the valuation law of this country.

It is true that by Section 8 of the Valuation Acts Amendment Act (Northern Ireland), 1932, Parliament provided a way around the decision in **Switzer's** case in certain circumstances by enacting as follows: "Notwithstanding anything contained in the Irish Valuation Acts, contiguous hereditaments in the occupation of one and the same occupier may, if the Commissioner of Valuation thinks proper having regard to the circumstances in any case, be valued for the purposes of those Acts as one rateable hereditament although held under two or more immediate lessors under different contracts of tenancy." That section provided for, as it were, a statutory fusion of that according to **Switzer's** case would have been a series of different hereditaments. But it applied only to contiguous premises and so does not avoid the impact of **Switzer's** case in the present instance."

### ***LEADER v COMMISSIONER***

The third case to note, as it also led to a change in legislation is *Leader v The Commissioner* (1936) NI 57. It was again heard in the King's Bench Division although this time in Belfast and the facts were that the respondent held premises consisting of a dwelling house, offices and lands, the lands constituting the more important part of the single hereditament. The premises were all held under one title.

The respondent appealed from the decision of the Commissioner, who had valued all of the premises as a single hereditament, to the County Court Judge. He asked in his Notice of Appeal that the valuation of £60.00 placed on the dwelling house should be put and shown as a separate unit on a separate line in the Valuation List. It was found as a fact that the dwelling house was vacant.

The Court Judge held that the valuation of £60.00 placed on the dwelling house should be distinguished in the Valuation List as a separate unit of valuation, but stated a case for the opinion of the King's Bench Division.

It was held by the King's Bench Division that the principle underlying the decision of the Court in "*Switzer*" applied as the premises included in the valuation under appeal were held by the respondents under one title and that the hereditaments could not be separately valued.

Sub paragraph 38(3)(b) of the 77 Order was enacted to deal with the difficulty created by "*Leader*" in that it allows a separate valuation of parts in the same occupation but only if the various parts are capable of separate occupation. It does not apply where the parts of the hereditament are not capable of separate occupation, eg where the occupier elects not to use part of a premises in his occupation because he has no need temporarily of their use. The rationale here of course is that to allow otherwise would defeat the cardinal principle of rating law that occupation of part is occupation of the whole.

### ***LECKPATRICK DAIRIES v COMMISSIONER***

The fourth and last case for present purposes is *Leckpatrick Dairies v Commissioner of Valuation VR/22/1990 - VR/23/1990* two related appeals heard together. There were two main issues. Firstly whether or not premises which were not contiguous were so functionally interrelated that they should be considered to be a single hereditament and secondly that a weighbridge situated on the opposite side of a public road from a Mill but connected to it by virtue of an electrical cable under the road could be considered to be contiguous and therefore a single hereditament.

The first issue was essentially a re-run of the *Belfast Collar Company* case and the Tribunal rejected the appellants arguments holding that the decision in *Switzer* remains an integral part of rating law in Northern Ireland. As regards the second argument the Tribunal considered that the decision in *Burton on Trent CBC v Ind Coope Ltd and Thomas (VO) (1961) 8RRC 149 (1061) RVR 310* was decision and found that the weighbridge was not contiguous with the mill complex by virtue of the electric cable under the road. This reinforced the point that “contiguous” in a rating sense in Northern Ireland means “touching”. The following extracts from the decision are relevant:

“Mr Copeland had argued that the definition of hereditament in Article 2 was now on all fours with that in the General Rates Act 1967 at present in force in England, and differed from the definition of “hereditament” then in force at the time of the **Belfast Collar Company** Case. When pressed upon the point by the Tribunal he conceded that there was nothing remotely similar to Article 38(3) in the English 1967 Act. He could give no reason why Article 38(3) was required if the decision in **Switzer and Company v Commissioner of Valuation** (1902) 2 IR 275 had been swept away. The Tribunal simply cannot agree with Mr Copeland’s analysis of the effect of the definition of “hereditament” in the 1977 Order and is of the view that Article 38(3)(a) is directly aimed at the difficulties which ensued both in Ireland (and later in Northern Ireland) as a result of the **Switzer** decision. Article 38(3)(a) re-enacts Section 8 of the 1932 Act with one amendment, which refers to contiguous hereditaments “held under different titles” instead of “held under two or more immediate lessors under different contracts of tenancy”. The decision in **Switzer** has not been swept away. It remains an integral part of rating law in Northern Ireland .....

“So too with the weighbridge for a public road separates it from the Mill and it cannot be considered to be within the same curtilage. Nor, following the **Burton on Trent** Case, can it be considered to be contiguous by virtue of the electric cable under the road.”

### ***PRESCRIPTION***

There is another way for the unit of assessment to be determined and that is by prescription ie the extent of the hereditament is prescribed by legislation.

In the case of public utility undertakings - see the definition in Article 2 of the 77 Order, still valued by prescription it is normal practice to specify the extent of the hereditament as well as the method of calculating or recalculating NAV. As an example The Railways (Rateable Value) Order (Northern Ireland) 1997 specifies that the order applies to any property which is, or which may become liable to a rate

and which is occupied by the company - the Northern Ireland Railway Company Ltd, for the purpose of its undertaking but which is not:

- (a) an hotel, refreshment room, dwelling house, residence, town office or town receiving depot;
- (b) used and occupied for the purpose of subsidiary services (other than those connected with the local collection and delivery of parcels, goods or merchandise conveyed or to be conveyed by rail) carried on by that company for the purpose of road, sea or other transport;
- (c) a store, building or other premises let by that company or, if unused, capable of being so let.

There are however cases where former utilities, such as BT are valued “conventionally” but where the extent of the hereditament is prescribed. The enabling legislation which permits this is Article 37(4) of the 1977 Order which reads as follows:

“(4) Regulations may provide that in prescribed cases:

- a. anything which would (apart from the regulation) be one hereditament shall be treated as more than one hereditament;
- b. anything which would (apart from the regulations) be more than one hereditament shall be treated as one hereditament.”

An example of an Order made under the powers contained in Article 37(4) is the Valuation (Telecommunication) Regulations (Northern Ireland) 1997 in which the extent of properties occupied respectively by British Telecommunications Plc; Mercury Communications Ltd, and Cabletel (Northern Ireland) Ltd which would be regarded as a single hereditament was specified.

In addition to the above in the case of caravan sites in certain circumstances the extent of the hereditament is prescribed. The Rates Amendment (NI) Order 1982 added a further provision to Schedule 12 of the 77 Order relating to caravan sites. Where in a caravan site pitches for leisure caravans are separately occupied by persons other than the site operator so that each caravan and pitch could be regarded as a separate hereditament, the District Valuer may value all or any of the pitches as a single hereditament together with other parts of the site, if any, in the occupation of the site operator. In essence the entire site can be valued as a single hereditament.

Provision is however made for individual caravan owners not wishing to be included in the single hereditament. They may make application to the District Valuer to be excluded from the single composite hereditament and instead be valued as a single hereditament.

## ***HEREDITAMENTS CAPABLE OF SEPARATE OCCUPATION***

The rules found in “Switzer” ie that premises had to be valued having regard to the lease on which they were held and that there had to be separate entries in the Valuation List for each hereditament held on a separate lease allows us to understand the situation of say an office building the various floors of which are capable of being separately let. If separately let they may constitute several hereditaments but if let to one occupier only one hereditament. The fact that the various floors are capable of separate occupation does not necessarily involve separation into different hereditaments when all are occupied together.

A difficulty arises however as to when the Commissioner should use the discretion given to him by Article 38(3)(b) of the 1977 Order ie

“Where a hereditament comprises two or more parts capable of separate occupation, although in the same occupation, value the several parts as separate hereditaments.”

In the above example the office building may be all held by one occupier but one floor may be vacant. Article 38(3)(b) would allow the Commissioner to value the vacant floor as a separate hereditament and thereby in Northern Ireland avoid any rate liability for that floor while it remains vacant. What factors should he take into account in making his decision? There are a number of factors which can be considered:

### ***Purpose of the Legislation***

As a starting point it should be recalled that this power was introduced into rating law in Ireland following the “Leader” case to specifically allow a separate valuation of parts in the same occupation if the various parts were capable of separate occupation. In “Leader” although wishing to do so the courts were unable to value a vacant dwelling house as a separate hereditament because it was held with other property under one head of title.

### ***Discretion***

The power appears to be discretionary. The legislation uses the term “may” rather than “shall” although of course discretion must be exercised reasonably or face a challenge possibly by way of Judicial Review. It is also interesting to note that in the Leckpatrick Dairies case (VR/22/1990) the Tribunal made the following statement:

“It seems clear that in the present appeal the Commissioner of Valuation exercised the discretion given to him by Article 38(3)(b) of the 1977 Order to value the store and the weighbridge as separate hereditaments rather than as a single hereditament for they were held under one fee simple title in Folio 33409 County Tyrone.”

### ***Structured Severance***

The necessity of structural severance before separate occupation can be considered is still on occasion argued but this is incorrect as case law makes clear.

In *Allchurch v Hendon Union Assessment Committee* (1891) 2QB436. Lord Esler MR said:

“The phrase ‘structural severance’ is not a phrase which has anything to do with occupation at all. It was a phrase invented by the judges at a time when in the Statute of Elizabeth and in the Franchise Acts they were labouring to determine what was to be an occupation which in one case would give liability to be rated, and in the other the right to the franchise. It was in use for a long time, and it had so far got into use that the legislature was obliged to deal with it, and the legislature has dealt with it, and has, in fact, done away with it and has determined that when dealing with occupation as the foundation either for a right or for a liability, you must look to the occupation and see what it is that is occupied ..... I say distinctly this whole matter of structural separation is an exploded phrase, and an exploded doctrine for all purposes whatever.”

On the other hand it may nevertheless be possible to identify a sufficient degree of structural separation to justify separate entries. The presence or absence of an internal communication between two houses or premises forming part of the same building is a consideration to be taken into account. Where there is some form of internal communication the two may form a single hereditament but where there is none the premises should be separately valued. Where the only means of access to one building is through another it would be difficult although not impossible to maintain that the two were not a single hereditament.

### *Separate Lettability*

The structural position can then be considered but is not decisive. What does seem to be essential however is the possibility of separate lettability. In *Gilbert (VO) v Hickinbottom and Sons Ltd* (1956) 2QB 40 (1956) 2A11 ER 101, 1RRC 46 the necessity of separate lettability ie that occupation by a separate occupier can be contemplated was stated to be an essential requirement. In a similar vein the test formulated by Lord Kyllachy in *Bank of Scotland v Assessor for Edinburgh* (1891) 18 R 936 was:

“Whether the houses in question are capable, not merely physically, but, all conditions being considered of being separately let, and having a separate rent or value being attached to them.”

### *Used for a wholly different purpose*

Another consideration may be use of part of a hereditament for a wholly different purpose.

Premises in one occupation may form two or more hereditaments if parts of the premises are used for wholly different purposes. In *North Eastern Ry Co v York Union* (1900) IQB 733 the railway company were rated for the whole of the York Station (including the railway hotel and refreshment rooms, a number of engine sheds, carriage and wagon shops, a pumping station, coal yards and warehouses) together with running lines and sidings. At the hearing it was admitted that the hotel and refreshment rooms should have been rated separately but it was denied that any further subdivision was necessary. It was found as a fact that various parts might be occupied separately from the railway but that, as at present laid out, they were only adapted for use by the railway company themselves. On these facts it was found that no further subdivision was necessary.

### ***Where only part is used***

In certain circumstances the hereditament may be more extensive than the area actually in use. In *Moffatt v Venus Packaging Ltd* (1977) 20 RRC 335 premises which were formerly used as a whole for manufacturing purposes and entered in the Valuation List as one hereditament, were partially redeveloped. The manufacture was moved into a new part, and the old part left unused. The two parts were separated by a wall with one interconnecting door. The Lands Tribunal held that the premises should be in the List as two hereditaments.

There were however slightly different circumstances in the case of *Carmel Teague v Commissioner* (VR/29/88). Miss Teague held first and second floor premises under a 3 year lease. The first floor was used as a hairdressing salon but the second floor was in poor repair and not in use although it did contain toilet facilities. The second floor had been "blocked off" by placing a cabinet across the stairs leading to the second floor. In refusing to treat the second floor as a separate hereditament the Tribunal noted that:

- i. the two floors were let by one landlord to one tenant under one lease or contract of tenancy;
- ii. the only WC included in that lease was on the second floor and the arrangement that had been made by the appellant to share the WC on the first floor did not change the assumption that the second floor was used at least in part as an entity with the first floor; and
- iii. the effort made to divide off the second floor by putting a cabinet across the stairs was a purely temporary measure which could be changed at any time.

### ***Action and Intention of the Ratepayer***

There may be cases where one part of a single hereditament could be regarded as either separate from or part of the other part with almost equal plausibility.

In such cases it is necessary to have regard to the whole facts and circumstances including the actions of the ratepayers and their intentions. In the case of Assessor for

Fife v Royal Insurance Company Ltd (1969) RA 454 the hereditament was a single building. It had been so planned that two areas on the upper floors could be leased by the ratepayers as separate offices. These two areas, although accessible only through an entrance, vestibule and stairs provided for the joint use of all the occupiers of the building, were secured by locked doors, and were not intended to be used and had not in fact been used by the ratepayers as their business offices. The areas were thus capable of being separately let, but the degree of geographical separation was slight. Steps had however been taken to find a tenant or tenants for these areas and "to let" boards were displayed but no tenants had been found. It was held that it was proper to have regard to the elements of planning and intention that had been carried into effect by positive action, including the steps to put the areas on the letting market and to keep them vacant for that purpose.

Note however that while the ratepayers intention may be relevant and indeed a decisive consideration there are limits to this approach. In the Royal Insurance case it was noted that premises cannot be converted into two or more separate hereditaments merely by locking up certain rooms or ceasing to make use of certain parts of the premises.

In the Royal Case there was an intention and plan in pursuance of which active and positive steps had been taken, and a degree of physical separation which was, if not conclusive, at least not negligible.

### ***Resume***

All of the above can be summarised as follows:

When determining if there are any compelling reasons to value what would otherwise be a single hereditament as two or more hereditaments ie should the Commissioner 's discretion to separate under Article 31(3)(b) be exercised regard should be had to:-

- Whether or not the property is clearly lettable in its existing physical state as a separate hereditament?
- In determining separate lettable regard can be had to whether or not part is vacant or is clearly used for some other purpose.
- Physical separation is not essential but a degree of physical separation is suggestive of separate occupation.
- If the tests mentioned above are inconclusive the intention of the ratepayer can be considered ie is there a clear intention to treat part as a separate hereditament and what positive steps have been taken in pursuit of that intention?

### ***INDUSTRIAL HEREDITAMENTS***

A unique feature of rating in Northern Ireland is that industrial derating is retained. Paragraphs 4 and 4B of Schedule 7 to the 77 Order direct that these parts of a hereditament distinguished in the valuation list as industrial shall have 100% relief.

For purposes of industrial derating what constitutes the unit of occupation ie the extent of a single hereditament is extended. Paragraph 3 of Schedule 2 to the 77 Order notes that:

“Where two or more properties within the same curtilage, or contiguous to one another are in the same occupation and, though treated for any reason as two or more hereditaments for the purpose of valuation and rating, are used as parts of a single mine, quarry or factory, then for the purpose of determining whether the several hereditaments are industrial hereditaments, they shall be treated as if they formed parts of a single hereditament comprising all those hereditaments”.

It should be noted that this is not a power of amalgamation such as is found in Article 38(3) of the 77 Order but rather a provision which permits two separate hereditaments to be treated as if they were one industrial hereditament.

When considering this provision we know that “contiguous” means touching so what has to be dealt with is the meaning of “within the same curtilage”. Lord MacDermott LCJ dealt with the question in the Belfast Collar Company case as follows:

“As respects section 4(3), Mr Harrison concedes that the premises are not contiguous, but he contends that nevertheless they are within the same curtilage, and if he is right in that the case must be dealt with under that subsection. The definition of “curtilage” contained in the Shorter Oxford English Dictionary is - ‘A small court, yard, or piece of ground attached to a dwelling-house and forming one enclosure with it’. The word ‘enclosure’ ie, perhaps, the key word, signifying a close or enclosure containing one, or even more than one, tenement. I cannot find, however, that these two hereditaments are within the same curtilage, divided as they are by a public highway. There is no authority to indicate that one can have a curtilage bisected in that way by a public highway. Accordingly, that being my view, and it being conceded that the premises are not contiguous, I am of opinion that section 4(3) cannot apply”.

Another case which dealt with the topic was *Geddis Enterprises Ltd v Commissioner of Valuation VR/13/1990*. In this case the appellant had leases three properties in the one sheet - Young Street, two of which were contiguous but the third was some 100 metres away.

The appellants were attempting to argue that the works “within the same curtilage” had been given too narrow an interpretation in the past and that it should be enlarged to take account of what they saw as “commercial realities”. The Tribunal disagreed and the following passages taken from the judgement are relevant:

“This at once raises the question of what is meant by “within the same curtilage”. The essence of the Appellants case was an attempt to enlarge the word “curtilage” beyond the meaning of “enclosure”, as commented upon by Lord MacDermott in the Belfast Collar Company Case and to which reference has been made earlier. Put in another way the Appellant sought to include in the word “enclosure” all properties in

a continuous strip of land which were used for similar commercial/industrial purposes. .... While not finding that all the buildings at No 8A to 8J inclusive are within the same curtilage, for the Lands tribunal is not required to do so, No 2 Young Street, cannot in any way be said to be within the same curtilage as Nos 8F and H. This is highlighted by the fact that as in the Belfast Collar Company Case, that in order to go from No 2 Young Street to Nos 8F and H one must traverse a length of the public highway”.

“Curtilage” then retains the narrow meaning of “enclosure”.

### ***THE POSITION IN ENGLAND AND WALES***

The position in England and Wales can be summarised in the judgements given in the Court of Appeal in *Gilbert v Hickinbottom and Sons Ltd*. The question at issue there was whether or not two premises in one occupation but separated by a public highway should be treated as one or two hereditaments but in his judgement Denning LJ dealt with wider issues:

“Denning LJ: The ratepayers are the owners and occupiers of two properties in Wednesbury. These properties are separated by a public road called Albert Street, which is 36 feet wide. On one side of the road the ratepayers run a large bakery which is fully equipped with machinery for making and packing bread. On the other side they have a repair depot which they use principally for the repair and maintenance of their seventy two vehicles, but which they also use for repairing the plant and machinery in the bakery. In this respect the repair depot is essential to the efficient working of the bakery itself.

The question for determination is whether the bakery and the repair depot are separate hereditaments for rating purposes or only one hereditament. The answer is very material, because, if they are one, the whole will be entitled to the benefit of industrial derating; whereas, if they are two, the bakery will be so entitled but the repair depot may not.

The case therefore raises the important question:

What is a separate hereditament for rating purposes.

The statutes contain no definition, but the practice which has prevailed for many years past warrants the following general rules:

- (1) Where two or more properties are within the same curtilage or contiguous to one another, and are in the same occupation, they are, as a general rule, to be treated for rating purposes as if they formed parts of a single hereditament. There are exceptional cases, however, where for some special reason they may be treated as two or more hereditaments. That may happen, for instance, when they are situate in different rating areas, or because they were valued at different times (see s 3(3) of the Rating and Valuation (Apportionment) Act, 1928); or because they were at one time in different occupations (see *Spillers Ltd v Pritchard*<sup>1</sup> (1931), 13 R and LT 251 : 2 DRA 83, per Avory, J): or

because one part is used for an entirely different purpose (see *North Eastern Railway Co v York Union* (1900) 1 QB 733).

- (2) Where the two properties are in the same occupation but are not with the same curtilage nor contiguous to one another, each of the properties must as a general rule be treated as a separate hereditament for rating purposes: and this is the case even though they are used by the occupier for the purposes of his one whole business. That was the position in the first four of the five rating cases considered in 1931 (*Spillers Ltd v Pritchard and other cases*). The two properties of the occupier were separated by the property of someone else, such as a dwelling house, a canal or railway. No one doubted that they should be treated as two separated hereditaments unless they could be said to be 'contiguous' to one another, which the court held not to be the case.
- (3) Where two properties are separated by a public highway, the surface of which is vested in the highway authority and the soil is vested in the occupier of the two properties, the position in general seems to me to be the same as if the two properties were separated by a canal, a railway or a dwelling house occupied by somebody else. They are normally to be treated as two separate hereditaments for rating purposes. This was certainly assumed to be so to the five rating cases. It was assumed that the properties on either side of the road should be separately rated unless they could be held to be 'contiguous' within s 3(3) of the 1928 Act; and, on this point of 'contiguous or not', despite the admission made by council for the revenue officer, the court clearly indicated its view that in the ordinary way houses on opposite sides of the road were not contiguous. I agree with that view. The fact that the one occupier, owns the subsoil of the road does not make them contiguous any more than if he owned the minerals underneath. It has nothing to do with the occupation.

Our present case comes within the third general rule. The two properties ought, therefore, *prime facie*, to be rated as two separate hereditaments. But this third rule is not inflexible. There are exceptional cases where two properties, separated by a road, may be treated as one single hereditament for rating purposes. That may happen when a nobleman's park, or a farm (when agricultural land was rated), or a golf course, is bisected by a public road. In such cases the two properties on either side of the road are so essentially one whole - by which I mean, so essential in use the one to another - that they should be regarded as one single hereditament".

In the same case Parker LJ said:

"Parker LJ: The question of law raised in this appeal by way of case stated is whether the Lands Tribunal misdirected itself in holding that the functional connection for the purposes of the ratepayers' business between the use of the repair depot and the use of the bakery was a relevant and decisive consideration in arriving at the conclusion that the said premises should be treated as one hereditament. Unless it can be said that functional connection was in law irrelevant, or if relevant could not be decisive, the tribunal's decision, I think, must stand.

Whether or not premises in one occupation fall to be entered in the valuation list as one or more hereditaments depends on several considerations. Without attempting an exhaustive list, the following can be mentioned:

- (1) Whether the premises are in more than one rating area. If so, they must be divided into at least the same number of hereditaments as the rating areas in which the premises are situated.
- (2) Whether two or more parts of the premises are capable of being separately let. If not, then the premises must be entered as a single hereditament.
- (3) Whether the premises form a single geographical unit.
- (4) Whether, though forming a single geographical unit, the premises by their structure and layout consist of two or more separate parts.
- (5) Whether the occupier finds it necessary or convenient to use the premises as a whole for one purpose or whether he uses different parts of the premises for different purposes.

Whereas a consideration of questions (1) and (2) will in certain events conclude the matter one way or the other, I think the same does not result from a consideration of any one of the other questions alone. The conclusion, where the considerations of (1) and (2) are not decisive, must depend on the weight to be attached to the facts of each case to the other considerations.

In relation to the functional connection issue it is worth noting that the Lands Tribunal in *Harris Graphics Ltd v M R Williams (VO)* 1988 were satisfied that in law it was possible to find that two premises that were geographically separated were in fact one hereditament.

### ***COMMENTARY ON POSITION IN NORTHERN IRELAND V POSITION IN ENGLAND AND WALES***

The main differences between the two jurisdictions arise from the fact that the NI Courts did not follow the judgement in *Gilbert v Hickinbottom*. The Belfast Collar Co Case has already been referred to and in it the Northern Ireland Court of Appeal followed *Switzer and Co v Commissioner* rather than *Gilbert*. The general rule in Ireland thus is not that suggested by Lord Justices Denning or Parker but rather the “Switzer” rule that premises have to be entered in the list and valued having regard to the leases on which they are held.

There is no concept of a “functional connection” in Northern Ireland to deal with the situation where premises are separated by say a public road. Interestingly as per *Switzer* the two could be valued as one hereditament if both were held under one title from one landlord thus in “*Harris Graphics*” the two units could have been held to be a single hereditament if held under one lease. Except in these circumstances however properties in Northern Ireland can only be valued as a single hereditament if they are contiguous, or within the same curtilage for industrial derating purposes.

There are however circumstances in which the judgement of the English Courts would be considered in Northern Ireland and these relate to the Commissioners discretion to value parts of what would otherwise be a single hereditament separately using the powers conferred by Article 38(3)(b) of the 77 Order. One of the main principles which underpin Administrative Law is that all public actions taken should have an impecable legal mandate and action taken within the legal mandate should be conducted within a framework of recognised rules and principles which restrict discretionary power. In other words the Commissioner must act reasonably when exercising his discretion. One way of ensuring that action taken are reasonable is to have regard to the rules established in case law, for example the rules laid down by Parker L J in the “Gilbert” case. As noted previously then the Commissioner can look at such matters as: Severance; separate lettability; use for a different purpose; the action and intention of the ratepayer etc and by so doing show that he has acted reasonably in making his decision.

### ***TABLE OF CASES***

- Switzer and Co Ltd v the Commissioner of valuation (1902) 2IR 275.
- Leader v the Commissioner of Valuation (1936) NI 57.
- Belfast Collar Company Ltd v the Commissioner of Valuation (1959) NILR 198.
- Leckpatrick Dairies v the Commissioner of Valuation - Lands Tribunal VR/22/1990 and VR.23/1990.
- Burton on Trent CBC v Ind Coupe Ltd and Thomas (VO) (1961) 8RRC 149 (1061) RVR 310.
- Costal Container Holdings Ltd v the Commissioner of Valuation Lands Tribunal VR/9/1986.
- John Laing and Sons Ltd v Kingswood Assessment Committee (1949) 1 All ER224.
- Westminster Council v Southern Railway Company (1936) AC 511.
- Allchurch v Hendonj Unia Assessment Committee (1871) 2 QB 436.
- Gilbert (VO) v Hickinbottom and Sons Ltd (1956) 2QB 40 (1956) 2All ER 101; IRRC 46.

- Bank of Scotland v Assessor for Edinburgh (1891) 18R 936.
- North Eastern Rly Co v York Union (1900) IQB 733.
- Moffatt v Venus Packaging Ltd (1977) 20 RRC 335.
- Carmel Teague v Commissioner of Valuation Lands Tribunal VR/29/88/
- Assessor for Fife v Royal Insurance Company Ltd (1969) RA 454.
- Geddis Enterprises Ltd v Commissioner of Valuation Lands Tribunal VR/13/1990.
- Spillers Ltd v Pritchard (1931) R&IT 251.
- Harris Graphics ltd v M R Williams (VO) 1988.

C'AVON.AH.2855.GW/BC ***THE UNIT OF ASSESSMENT FOR RATING  
PURPOSES***

***THE HEREDITAMENT***

The unit of assessment for rating purposes is of course a hereditament so what is a hereditament?

Article 37(1) of the 77 Order directs that properties of the description specified in Schedule 10 shall, except insofar as they are required by virtue of Paragraph (2) not to be treated as hereditaments, be hereditaments for the purpose of the Order. Paragraph (2) then goes on to list the various exclusions ie those mentioned in Schedule 11.

All of the above then defines what a hereditament is or is not but one further question remains and that is the seaward extent of a hereditament ie where a hereditament adjoins the coast to which point does the boundary of the hereditament extend?

The answer to the question is that in Northern Ireland rates can only be levied on hereditaments “in the district” ie within a local government district boundary. These boundaries are established under the powers contained in the Local Government

(Boundaries) Order (Northern Ireland) 1992 (the 92 Order). In this Order the boundary of each district is stated to be:

“the area designated on the map..... and demarcated by a red line thereon.”

There is a common law presumption that the land between the high and low water marks is not within a district boundary. This presumption can be displaced by Statute and in Northern Ireland whether or not it has been displaced depends on the boundaries as set out in the 92 Order. On checking the various maps and after consultation with the Ordnance Survey I have confirmed that generally the district boundary as it adjoins the coast is taken to be the high water mark of medium tides. The exception to this would be structures, such as marinas, which extend below the high water mark and in these cases the boundary has also universally been extended to include such property.

## ***LEGISLATION***

The unit of assessment then is the hereditament and in the previous chapter consideration has been given to what is or is not a hereditament. The 77 Order then goes further than this and although stating that every hereditament shall be separately valued allows in certain circumstances hereditaments to be aggregated or disaggregated for valuation purposes:

“38(2) Subject to any regulation under Article 37(4), to paragraph (3) and to any other statutory provision, every hereditament shall be separately valued.

38(3) Notwithstanding anything contained in paragraph (2), the Commissioner, or the District Valuer, with the approval of the Commissioner, may, if he thinks it proper to do so having regard to the circumstances of the case:-

(a) value contiguous hereditaments in the occupation of one and the same occupier as a single hereditament, notwithstanding that they are held under different titles;

(b) where a hereditament comprises 2 or more parts capable of separate occupation, although in the same occupation, value the

several parts as separate hereditaments and where hereditaments or parts of a hereditament are valued as mentioned in sub paragraph (a) or (b) they shall be treated as a single hereditament, or, as the case may require, as separate hereditaments, for all the other purposes of this Order.”

## ***CASE LAW***

We now know, at least in general terms what the unit of valuation is ie the hereditament and that a hereditament comprises for example land.

We also know that legislation allows the aggregation or disaggregation of hereditaments in certain circumstances. Case law adds a more precise definition and in this jurisdiction the leading case is to “Switzer” case.

### ***Switzer v Commissioner***

Switzer and Co Ltd v The Commissioner of Valuation (1902) 2 IR 275 was heard by the King’s Bench Division by way of an appeal against a decision by the Recorder of Dublin. It held that premises had to be valued having regard to the leases on which they were held and that there had to be separate entries in the Valuation List for each hereditament held on a separate lease.

The details of the case are that Switzer and Co held a number of premises in Grafton Street and Wicklow Street under 9 different leases, and prior to and in 1900 they were valued as 9 separate hereditaments in the Valuation List although structurally they communicated with each other and formed one business establishment.

In or about the year 1897 Switzer’s purchased a leasehold interest in premises at 1 to 5 Clarendon Street which lay behind and abutted their Grafton Street premises. These Clarendon Street premises were held under 5 separate leases. After the purchase Switzer’s pulled down the Clarendon Street houses and erected on the site a large building facing Clarendon Street. A portion of the wall between the Grafton Street premises and the Clarendon Street premises was removed to leave essentially one single large shop.

When all had been completed the Town Clerk requested the Commissioner of Valuation to revise the valuation of the Clarendon Street premises. What he in effect did was to strike out of the Valuation List the 9 separate entries for the Grafton Street premises and value as one rateable hereditament the whole block which comprises the Grafton Street, Wicklow Street and Clarendon Street properties - now one shop unit which he valued at £1,900. This decision was appealed to the Dublin Recorder who affirmed the decision of the Commissioner leading to the further appeal to the Kings Bench Division. In allowing the appeal Palles CB said:

“Two questions were argued before the Recorder and were argued here. The first is whether the revised valuation is bad, upon the grounds that premises held under separate immediate lessors and under separate leases, should be separately valued.

The second is whether there was any jurisdiction to revise the valuation of any of the premises except those included in the Town Clerk's list of premises requiring revision - namely the Clarendon Street premises. I shall take first the question of what is the unit of valuation. The unit of valuation of premises in the occupation of tenants is such hereditaments of the description in S12 of the Act of 1852 as are in the occupation of the same occupiers, holding from the same immediate lessor under the same lease or contract of tenancy. In this definition the expression 'occupier' and immediate lessor' may, of course, include a plurality of persons being joint occupiers or joint immediate lessors, who, between them, may constitute one occupier or one immediate lessor. But premises in the occupation of several distinct occupiers, or secondly, premises which, although in the occupation of the same person, are held under separate immediate lessors, or thirdly, premises which, although in the occupation of the same person, and held under the same lessor, are so held under several distinct leases or contracts of tenancy - each of these premises is a separate rateable hereditament; and more than one of them cannot be included in any one single valuation. In other words, the characteristic of a tenement to be separately valued is a tenement all of which is in the occupation of the same occupier, under the same immediate lessor, held under one contract of tenancy."

The decision of the King's Bench Division was affirmed by the Court of Appeal so in Ireland as from 1902 there was a clear definition of exactly what constituted a hereditament, ie the unit of assessment for valuation purposes.

In practical terms the decision in *Switzer* caused difficulties - one premises valued as several hereditaments, and Parliament provided a way around the decision in certain circumstances by enacting at Section 8 of the Valuation Acts Amendment Act (Northern Ireland) 1932 as follows:

"Notwithstanding anything contained in the Irish Valuation Acts, contiguous hereditaments in the occupation of one and the same occupier may, if the Commissioner of Valuation thinks proper having regard to the circumstances in any case, be valued for the purpose of those Acts as one rateable hereditament although held under two or more immediate lessors under different contracts of tenancy.

This section then provided for, as it were, a statutory fusion of what according to *Switzer* would have been a series of different hereditaments. Sub paragraph 38(3)(a) of the 77 Order re-enacted Section 8 of the 32 Act with the modification that it refers to contiguous hereditaments "held under different titles" instead of the 1932 wording noted above ie "held under two or more immediate lessors under different contracts of tenancy". The change was intended to cover the case where part of a site is freehold and part is leasehold.

### ***BELFAST COLLAR COMPANY v COMMISSIONER***

The second case is the *Belfast Collar Company Ltd v the Commissioner of Valuation* (1959) NI LR 198. This related to premises in Shaftesbury Street, Belfast occupied by the Belfast Collar Company Ltd, which also occupied other premises in the same street but on the opposite side. The Company was an industrial concern and the use

of the two premises were inter-related. The premises were held under separate leases from the same lessor but were physically divided by Shaftesbury Street. It was agreed that they were not contiguous.

Before the Belfast Recorder it was held that the premises were so essential in use, the one to the other, that they should be treated as one hereditament and in so doing the Recorder followed the decision of the Court of Appeal in England in *Gilbert v Hickinbatton and Sons Ltd* (1956) 2QB 40. This approach was rejected by the Court of Appeal. Lord MacDermott LCJ in his judgement said as follows:

“It is important to read, in connection with Section 4, the definition of “hereditament” contained in Section 8 of the same Act: ‘Hereditament’ means a rateable hereditament as defined in Section twelve of the Valuation (Ireland) Act, 1852, and includes any “tenement requiring to be valued under the Irish Valuation Acts, ....” That definition serves to emphasize the difference between the law relating to valuation in this country and that in England where there is not the same statutory background and where the question of what constitutes a single rateable hereditament is much more at large. The definition contained in Section 12 of the 1852 Act and referred to in Section 8 of the 1923 Act is in very wide terms, but in the well known case of **Switzer and Co v Commissioner of Valuation** (1902) 2 IR 275 it was held by a divisional court of the King’s Bench Division (Palles CB, Johnson and Gibson JJ), and affirmed by the Court of Appeal (Lord Ashbourne L.C., Fitzgibbon and Holmes L.J.J.), that premises had to be entered and valued having regard to the leases on which they were held, and that there had to be separate entries for each hereditament held on a separate lease. That decision was founded on a consideration of the provisions of the Irish Valuation Code, and has ever since been a basic part of the valuation law of this country.

It is true that by Section 8 of the Valuation Acts Amendment Act (Northern Ireland), 1932, Parliament provided a way around the decision in **Switzer's** case in certain circumstances by enacting as follows: "Notwithstanding anything contained in the Irish Valuation Acts, contiguous hereditaments in the occupation of one and the same occupier may, if the Commissioner of Valuation thinks proper having regard to the circumstances in any case, be valued for the purposes of those Acts as one rateable hereditament although held under two or more immediate lessors under different contracts of tenancy." That section provided for, as it were, a statutory fusion of that according to **Switzer's** case would have been a series of different hereditaments. But it applied only to contiguous premises and so does not avoid the impact of **Switzer's** case in the present instance.”

### ***LEADER v COMMISSIONER***

The third case to note, as it also led to a change in legislation is *Leader v The Commissioner* (1936) NI 57. It was again heard in the King’s Bench Division although this time in Belfast and the facts were that the respondent held premises consisting of a dwelling house, offices and lands, the lands constituting the more important part of the single hereditament. The premises were all held under one title.

The respondent appealed from the decision of the Commissioner, who had valued all of the premises as a single hereditament, to the County Court Judge. He asked in his Notice of Appeal that the valuation of £60.00 placed on the dwelling house should be put and shown as a separate unit on a separate line in the Valuation List. It was found as a fact that the dwelling house was vacant.

The Court Judge held that the valuation of £60.00 placed on the dwelling house should be distinguished in the Valuation List as a separate unit of valuation, but stated a case for the opinion of the King's Bench Division.

It was held by the King's Bench Division that the principle underlying the decision of the Court in "Switzer" applied as the premises included in the valuation under appeal were held by the respondents under one title and that the hereditaments could not be separately valued.

Sub paragraph 38(3)(b) of the 77 Order was enacted to deal with the difficulty created by "Leader" in that it allows a separate valuation of parts in the same occupation but only if the various parts are capable of separate occupation. It does not apply where the parts of the hereditament are not capable of separate occupation, eg where the occupier elects not to use part of a premises in his occupation because he has no need temporarily of their use. The rationale here of course is that to allow otherwise would defeat the cardinal principle of rating law that occupation of part is occupation of the whole.

### ***LECKPATRICK DAIRIES v COMMISSIONER***

The fourth and last case for present purposes is Leckpatrick Dairies v Commissioner of Valuation VR/22/1990 - VR/23/1990 two related appeals heard together. There were two main issues. Firstly whether or not premises which were not contiguous were so functionally interrelated that they should be considered to be a single hereditament and secondly that a weighbridge situated on the opposite side of a public road from a Mill but connected to it by virtue of an electrical cable under the road could be considered to be contiguous and therefore a single hereditament.

The first issue was essentially a re-run of the Belfast Collar Company case and the Tribunal rejected the appellants arguments holding that the decision in Switzer remains an integral part of rating law in Northern Ireland. As regards the second argument the Tribunal considered that the decision in Burton on Trent CBC v Ind Coope Ltd and Thomas (VO) (1961) 8RRC 149 (1061) RVR 310 was decision and found that the weighbridge was not contiguous with the mill complex by virtue of the electric cable under the road. This reinforced the point that "contiguous" in a rating sense in Northern Ireland means "touching". The following extracts from the decision are relevant:

"Mr Copeland had argued that the definition of hereditament in Article 2 was now on all fours with that in the General Rates Act 1967 at present in force in England, and differed from the definition of "hereditament" then in force at the time of the **Belfast Collar Company** Case. When pressed upon the point by the Tribunal he conceded that there was nothing remotely similar to Article 38(3) in the English 1967 Act. He

could give no reason why Article 38(3) was required if the decision in **Switzer and Company v Commissioner of Valuation** (1902) 2 IR 275 had been swept away. The Tribunal simply cannot agree with Mr Copeland's analysis of the effect of the definition of "hereditament" in the 1977 Order and is of the view that Article 38(3)(a) is directly aimed at the difficulties which ensued both in Ireland (and later in Northern Ireland) as a result of the **Switzer** decision. Article 38(3)(a) re-enacts Section 8 of the 1932 Act with one amendment, which refers to contiguous hereditaments "held under different titles" instead of "held under two or more immediate lessors under different contracts of tenancy". The decision in **Switzer** has not been swept away. It remains an integral part of rating law in Northern Ireland .....

"So too with the weighbridge for a public road separates it from the Mill and it cannot be considered to be within the same curtilage. Nor, following the **Burton on Trent** Case, can it be considered to be contiguous by virtue of the electric cable under the road."

### ***PRESCRIPTION***

There is another way for the unit of assessment to be determined and that is by prescription ie the extent of the hereditament is prescribed by legislation.

In the case of public utility undertakings - see the definition in Article 2 of the 77 Order, still valued by prescription it is normal practice to specify the extent of the hereditament as well as the method of calculating or recalculating NAV. As an example The Railways (Rateable Value) Order (Northern Ireland) 1997 specifies that the order applies to any property which is, or which may become liable to a rate and which is occupied by the company - the Northern Ireland Railway Company Ltd, for the purpose of its undertaking but which is not:

- (a) an hotel, refreshment room, dwelling house, residence, town office or town receiving depot;
- (b) used and occupied for the purpose of subsidiary services (other than those connected with the local collection and delivery of parcels, goods or merchandise conveyed or to be conveyed by rail) carried on by that company for the purpose of road, sea or other transport;
- (c) a store, building or other premises let by that company or, if unused, capable of being so let.

There are however cases where former utilities, such as BT are valued "conventionally" but where the extent of the hereditament is prescribed. The enabling legislation which permits this is Article 37(4) of the 1977 Order which reads as follows:

"(4) Regulations may provide that in prescribed cases:

- a. anything which would (apart from the regulation) be one hereditament shall be treated as more than one hereditament;
- b. anything which would (apart from the regulations) be more than one hereditament shall be treated as one hereditament.”

An example of an Order made under the powers contained in Article 37(4) is the Valuation (Telecommunication) Regulations (Northern Ireland) 1997 in which the extent of properties occupied respectively by British Telecommunications Plc; Mercury Communications Ltd, and Cabletel (Northern Ireland) Ltd which would be regarded as a single hereditament was specified.

In addition to the above in the case of caravan sites in certain circumstances the extent of the hereditament is prescribed. The Rates Amendment (NI) Order 1982 added a further provision to Schedule 12 of the 77 Order relating to caravan sites. Where in a caravan site pitches for leisure caravans are separately occupied by persons other than the site operator so that each caravan and pitch could be regarded as a separate hereditament, the District Valuer may value all or any of the pitches as a single hereditament together with other parts of the site, if any, in the occupation of the site operator. In essence the entire site can be valued as a single hereditament.

Provision is however made for individual caravan owners not wishing to be included in the single hereditament. They may make application to the District Valuer to be excluded from the single composite hereditament and instead be valued as a single hereditament.

### ***HEREDITAMENTS CAPABLE OF SEPARATE OCCUPATION***

The rules found in “Switzer” ie that premises had to be valued having regard to the lease on which they were held and that there had to be separate entries in the Valuation List for each hereditament held on a separate lease allows us to understand the situation of say an office building the various floors of which are capable of being separately let. If separately let they may constitute several hereditaments but if let to one occupier only one hereditament. The fact that the various floors are capable of separate occupation does not necessarily involve separation into different hereditaments when all are occupied together.

A difficulty arises however as to when the Commissioner should use the discretion given to him by Article 38(3)(b) of the 1977 Order ie

“Where a hereditament comprises two or more parts capable of separate occupation, although in the same occupation, value the several parts as separate hereditaments.”

In the above example the office building may be all held by one occupier but one floor may be vacant. Article 38(3)(b) would allow the Commissioner to value the vacant floor as a separate hereditament and thereby in Northern Ireland avoid any rate liability for that floor while it remains vacant. What factors should he take into account in making his decision? There are a number of factors which can be considered:

### ***Purpose of the Legislation***

As a starting point it should be recalled that this power was introduced into rating law in Ireland following the “Leader” case to specifically allow a separate valuation of parts in the same occupation if the various parts were capable of separate occupation. In “Leader” although wishing to do so the courts were unable to value a vacant dwelling house as a separate hereditament because it was held with other property under one head of title.

### ***Discretion***

The power appears to be discretionary. The legislation uses the term “may” rather than “shall” although of course discretion must be exercised reasonably or face a challenge possibly by way of Judicial Review. It is also interesting to note that in the Leckpatrick Dairies case (VR/22/1990) the Tribunal made the following statement:

“It seems clear that in the present appeal the Commissioner of Valuation exercised the discretion given to him by Article 38(3)(b) of the 1977 Order to value the store and the weighbridge as separate hereditaments rather than as a single hereditament for they were held under one fee simple title in Folio 33409 County Tyrone.”

### ***Structured Severance***

The necessity of structural severance before separate occupation can be considered is still on occasion argued but this is incorrect as case law makes clear.

In *Allchurch v Hendon Union Assessment Committee* (1891) 2QB436. Lord Esler MR said:

“The phrase ‘structural severance’ is not a phrase which has anything to do with occupation at all. It was a phrase invented by the judges at a time when in the Statute of Elizabeth and in the Franchise Acts they were labouring to determine what was to be an occupation which in one case would give liability to be rated, and in the other the right to the franchise. It was in use for a long time, and it had so far got into use that the legislature was obliged to deal with it, and the legislature has dealt with it, and has, in fact, done away with it and has determined that when dealing with occupation as the foundation either for a right or for a liability, you must look to the occupation and see what it is that is occupied ..... I say distinctly this whole matter of structural separation is an exploded phrase, and an exploded doctrine for all purposes whatever.”

On the other hand it may nevertheless be possible to identify a sufficient degree of structural separation to justify separate entries. The presence or absence of an internal communication between two houses or premises forming part of the same building is a consideration to be taken into account. Where there is some form of internal communication the two may form a single hereditament but where there is none the

premises should be separately valued. Where the only means of access to one building is through another it would be difficult although not impossible to maintain that the two were not a single hereditament.

### ***Separate Lettability***

The structural position can then be considered but is not decisive. What does seem to be essential however is the possibility of separate lettability. In *Gilbert (VO) v Hickinbottom and Sons Ltd* (1956) 2QB 40 (1956) 2A11 ER 101, 1RRC 46 the necessity of separate lettability ie that occupation by a separate occupier can be contemplated was stated to be an essential requirement. In a similar vein the test formulated by Lord Kyllachy in *Bank of Scotland v Assessor for Edinburgh* (1891) 18 R 936 was:

“Whether the houses in question are capable, not merely physically, but, all conditions being considered of being separately let, and having a separate rent or value being attached to them.”

### ***Used for a wholly different purpose***

Another consideration may be use of part of a hereditament for a wholly different purpose.

Premises in one occupation may form two or more hereditaments if parts of the premises are used for wholly different purposes. In *North Eastern Rly Co v York Union* (1900) IQB 733 the railway company were rated for the whole of the York Station (including the railway hotel and refreshment rooms, a number of engine sheds, carriage and wagon shops, a pumping station, coal yards and warehouses) together with running lines and sidings. At the hearing it was admitted that the hotel and refreshment rooms should have been rated separately but it was denied that any further subdivision was necessary. It was found as a fact that various parts might be occupied separately from the railway but that, as at present laid out, they were only adapted for use by the railway company themselves. On these facts it was found that no further subdivision was necessary.

### ***Where only part is used***

In certain circumstances the hereditament may be more extensive than the area actually in use. In *Moffatt v Venus Packaging Ltd* (1977) 20 RRC 335 premises which were formerly used as a whole for manufacturing purposes and entered in the Valuation List as one hereditament, were partially redeveloped. The manufacture was moved into a new part, and the old part left unused. The two parts were separated by a wall with one interconnecting door. The Lands Tribunal held that the premises should be in the List as two hereditaments.

There were however slightly different circumstances in the case of *Carmel Teague v Commissioner* (VR/29/88). Miss Teague held first and second floor premises under a

3 year lease. The first floor was used as a hairdressing salon but the second floor was in poor repair and not in use although it did contain toilet facilities. The second floor had been “blocked off” by placing a cabinet across the stairs leading to the second floor. In refusing to treat the second floor as a separate hereditament the Tribunal noted that:

- i. the two floors were let by one landlord to one tenant under one lease or contract of tenancy;
- ii. the only WC included in that lease was on the second floor and the arrangement that had been made by the appellant to share the WC on the first floor did not change the assumption that the second floor was used at least in part as an entity with the first floor; and
- iii. the effort made to divide off the second floor by putting a cabinet across the stairs was a purely temporary measure which could be changed at any time.

### ***Action and Intention of the Ratepayer***

There may be cases where one part of a single hereditament could be regarded as either separate from or part of the other part with almost equal plausibility.

In such cases it is necessary to have regard to the whole facts and circumstances including the actions of the ratepayers and their intentions. In the case of *Assessor for Fife v Royal Insurance Company Ltd (1969) RA 454* the hereditament was a single building. It had been so planned that two areas on the upper floors could be leased by the ratepayers as separate offices. These two areas, although accessible only through an entrance, vestibule and stairs provided for the joint use of all the occupiers of the building, were secured by locked doors, and were not intended to be used and had not in fact been used by the ratepayers as their business offices. The areas were thus capable of being separately let, but the degree of geographical separation was slight. Steps had however been taken to find a tenant or tenants for these areas and “to let” boards were displayed but no tenants had been found. It was held that it was proper to have regard to the elements of planning and intention that had been carried into effect by positive action, including the steps to put the areas on the letting market and to keep them vacant for that purpose.

Note however that while the ratepayers intention may be relevant and indeed a decisive consideration there are limits to this approach. In the *Royal Insurance* case it was noted that premises cannot be converted into two or more separate hereditaments merely by locking up certain rooms or ceasing to make use of certain parts of the premises.

In the *Royal Case* there was an intention and plan in pursuance of which active and positive steps had been taken, and a degree of physical separation which was, if not conclusive, at least not negligible.

### ***Resume***

All of the above can be summarised as follows:

When determining if there are any compelling reasons to value what would otherwise be a single hereditament as two or more hereditaments ie should the Commissioner 's discretion to separate under Article 31(3)(b) be exercised regard should be had to:-

- Whether or not the property is clearly lettable in its existing physical state as a separate hereditament?
- In determining separate lettable regard can be had to whether or not part is vacant or is clearly used for some other purpose.
- Physical separation is not essential but a degree of physical separation is suggestive of separate occupation.
- If the tests mentioned above are inconclusive the intention of the ratepayer can be considered ie is there a clear intention to treat part as a separate hereditament and what positive steps have been taken in pursuit of that intention?

### ***INDUSTRIAL HEREDITAMENTS***

A unique feature of rating in Northern Ireland is that industrial derating is retained. Paragraphs 4 and 4B of Schedule 7 to the 77 Order direct that these parts of a hereditament distinguished in the valuation list as industrial shall have 100% relief.

For purposes of industrial derating what constitutes the unit of occupation ie the extent of a single hereditament is extended. Paragraph 3 of Schedule 2 to the 77 Order notes that:

“Where two or more properties within the same curtilage, or contiguous to one another are in the same occupation and, though treated for any reason as two or more hereditaments for the purpose of valuation and rating, are used as parts of a single mine, quarry or factory, then for the purpose of determining whether the several hereditaments are industrial hereditaments, they shall be treated as if they formed parts of a single hereditament comprising all those hereditaments”.

It should be noted that this is not a power of amalgamation such as is found in Article 38(3) of the 77 Order but rather a provision which permits two separate hereditaments to be treated as if they were one industrial hereditament.

When considering this provision we know that “contiguous” means touching so what has to be dealt with is the meaning of “within the same curtilage”. Lord MacDermott LCJ dealt with the question in the Belfast Collar Company case as follows:

“As respects section 4(3), Mr Harrison concedes that the premises are not contiguous, but he contends that nevertheless they are within the same curtilage, and if he is right

in that the case must be dealt with under that subsection. The definition of “curtilage” contained in the Shorter Oxford English Dictionary is - ‘A small court, yard, or piece of ground attached to a dwelling-house and forming one enclosure with it’. The word ‘enclosure’ ie, perhaps, the key word, signifying a close or enclosure containing one, or even more than one, tenement. I cannot find, however, that these two hereditaments are within the same curtilage, divided as they are by a public highway. There is no authority to indicate that one can have a curtilage bisected in that way by a public highway. Accordingly, that being my view, and it being conceded that the premises are not contiguous, I am of opinion that section 4(3) cannot apply”.

Another case which dealt with the topic was *Geddis Enterprises Ltd v Commissioner of Valuation VR/13/1990*. In this case the appellant had leases three properties in the one sheet - Young Street, two of which were contiguous but the third was some 100 metres away.

The appellants were attempting to argue that the works “within the same curtilage” had been given too narrow an interpretation in the past and that it should be enlarged to take account of what they saw as “commercial realities”. The Tribunal disagreed and the following passages taken from the judgement are relevant:

“This at once raises the question of what is meant by “within the same curtilage”. The essence of the Appellants case was an attempt to enlarge the word “curtilage” beyond the meaning of “enclosure”, as commented upon by Lord MacDermott in the Belfast Collar Company Case and to which reference has been made earlier. Put in another way the Appellant sought to include in the word “enclosure” all properties in a continuous strip of land which were used for similar commercial/industrial purposes. .... While not finding that all the buildings at No 8A to 8J inclusive are within the same curtilage, for the Lands tribunal is not required to do so, No 2 Young Street, cannot in any way be said to be within the same curtilage as Nos 8F and H. This is highlighted by the fact that as in the Belfast Collar Company Case, that in order to go from No 2 Young Street to Nos 8F and H one must traverse a length of the public highway”.

“Curtilage” then retains the narrow meaning of “enclosure”.

### ***THE POSITION IN ENGLAND AND WALES***

The position in England and Wales can be summarised in the judgements given in the Court of Appeal in *Gilbert v Hickinbottom and Sons Ltd*. The question at issue there was whether or not two premises in one occupation but separated by a public highway should be treated as one or two hereditaments but in his judgement Denning LJ dealt with wider issues:

“Denning LJ: The ratepayers are the owners and occupiers of two properties in Wednesbury. These properties are separated by a public road called Albert Street, which is 36 feet wide. On one side of the road the ratepayers run a large bakery which is fully equipped with machinery for making and packing bread. On the other side they have a repair depot which they use principally for the repair and maintenance of their seventy two vehicles, but which they also use for

repairing the plant and machinery in the bakery. In this respect the repair depot is essential to the efficient working of the bakery itself.

The question for determination is whether the bakery and the repair depot are separate hereditaments for rating purposes or only one hereditament. The answer is very material, because, if they are one, the whole will be entitled to the benefit of industrial derating; whereas, if they are two, the bakery will be so entitled but the repair depot may not.

The case therefore raises the important question:

What is a separate hereditament for rating purposes.

The statutes contain no definition, but the practice which has prevailed for many years past warrants the following general rules:

- (1) Where two or more properties are within the same curtilage or contiguous to one another, and are in the same occupation, they are, as a general rule, to be treated for rating purposes as if they formed parts of a single hereditament. There are exceptional cases, however, where for some special reason they may be treated as two or more hereditaments. That may happen, for instance, when they are situate in different rating areas, or because they were valued at different times (see s 3(3) of the Rating and Valuation (Apportionment) Act, 1928); or because they were at one time in different occupations (see *Spillers Ltd v Pritchard*<sup>1</sup> (1931), 13 R and LT 251 : 2 DRA 83, per Avory, J); or because one part is used for an entirely different purpose (see *North Eastern Railway Co v York Union* (1900) 1 QB 733).
- (2) Where the two properties are in the same occupation but are not with the same curtilage nor contiguous to one another, each of the properties must as a general rule be treated as a separate hereditament for rating purposes: and this is the case even though they are used by the occupier for the purposes of his one whole business. That was the position in the first four of the five rating case considered in 1931 (*Spillers Ltd v Pritchard* and other cases). The two properties of the occupier were separated by the property of someone else, such as a dwelling house, a canal or railway. No one doubted that they should be treated as two separated hereditaments unless they could be said to be 'contiguous' to one another, which the court held not to be the case.
- (3) Where two properties are separated by a public highway, the surface of which is vested in the highway authority and the soil is vested in the occupier of the two properties, the position in general seems to me to be the same as if the two properties were separated by a canal, a railway or a dwelling house occupied by somebody else. They are normally to be treated as two separate hereditaments for rating purposes. This was certainly assumed to be so to the five rating case. It was assumed that the properties on either side of the road should be separately rated unless they could be held to be 'contiguous' within s 3(3) of the 1928 Act; and, on this point of 'contiguous or not', despite the admission made by council for the revenue officer, the court clearly indicated its view that in the ordinary way houses on opposite sides of the road were not

contiguous. I agree with that view. The fact that the one occupier, owns the subsoil of the road does not make them contiguous any more than if he owned the minerals underneath. It has nothing to do with the occupation.

Our present case comes within the third general rule. The two properties ought, therefore, *prime facie*, to be rated as two separate hereditaments. But this third rule is not inflexible. There are exceptional cases where two properties, separated by a road, may be treated as one single hereditament for rating purposes. That may happen when a nobleman's park, or a farm (when agricultural land was rated), or a golf course, is bisected by a public road. In such cases the two properties on either side of the road are so essentially one whole - by which I mean, so essential in use the one to another - that they should be regarded as one single hereditament".

In the same case Parker LJ said:

"Parker LJ: The question of law raises in this appeal by way of case stated is whether the Lands Tribunal misdirected itself in holding that the functional connection for the purposes of the ratepayers' business between the use of the repair depot and the use of the bakery was a relevant and decisive consideration in arriving at the conclusion that the said premises should be treated as one hereditament. Unless it can be said that functional connection was in law irrelevant, or if relevant could not be decisive, the tribunal's decision, I think, must stand.

Whether or not premises in one occupation fall to be entered in the valuation list as one or more hereditaments depends on several considerations. Without attempting an exhaustive list, the following can be mentioned:

- (1) Whether the premises are in more than one rating area. If so, they must be divided into at least the same number of hereditaments as the rating areas in which the premises are situated.
- (2) Whether two or more parts of the premises are capable of being separately let. If not, then the premises must be entered as a single hereditament.
- (3) Whether the premises form a single geographical unit.
- (4) Whether, though forming a single geographical unit, the premises by their structure and lay out consist of two or more separate parts.
- (5) Whether the occupier finds it necessary or convenient to use the premises as a whole for one purpose or whether he uses different parts of the premises for different purposes.

Whereas a consideration of questions (1) and (2) will in certain events conclude the matter one way or the other, I think the same does not result from a consideration of any one of the other questions alone. The conclusion, where the considerations of (1) and (2) are not decisive, must depend on the weight to be attached to the facts of each case to the other considerations.

In relation to the functional connection issue it is worth noting that the Lands Tribunal in *Harris Graphics Ltd v M R Williams (VO)* 1988 were satisfied that in law it was possible to find that two premises that were geographically separated were in fact one hereditament.

### ***COMMENTARY ON POSITION IN NORTHERN IRELAND V POSITION IN ENGLAND AND WALES***

The main differences between the two jurisdictions arise from the fact that the NI Courts did not follow the judgement in *Gilbert v Hickinbottom*. The Belfast Collar Co Case has already been referred to and in it the Northern Ireland Court of Appeal followed *Switzer and Co v Commissioner* rather than *Gilbert*. The general rule in Ireland thus is not that suggested by Lord Justices Denning or Parker but rather the “Switzer” rule that premises have to be entered in the list and valued having regard to the leases on which they are held.

There is no concept of a “functional connection” in Northern Ireland to deal with the situation where premises are separated by say a public road. Interestingly as per *Switzer* the two could be valued as one hereditament if both were held under one title from one landlord thus in “*Harris Graphics*” the two units could have been held to be a single hereditament if held under one lease. Except in these circumstances however properties in Northern Ireland can only be valued as a single hereditament if they are contiguous, or within the same curtilage for industrial derating purposes.

There are however circumstances in which the judgement of the English Courts would be considered in Northern Ireland and these relate to the Commissioners discretion to value parts of what would otherwise be a single hereditament separately using the powers conferred by Article 38(3)(b) of the 77 Order. One of the main principles which underpin Administrative Law is that all public actions taken should have an impeccable legal mandate and action taken within the legal mandate should be conducted within a framework of recognised rules and principles which restrict discretionary power. In other words the Commissioner must act reasonably when exercising his discretion. One way of ensuring that action taken are reasonable is to have regard to the rules established in case law, for example the rules laid down by Parker L J in the “*Gilbert*” case. As noted previously then the Commissioner can look at such matters as: Severance; separate lettability: use for a different purpose; the action and intention of the ratepayer etc and by so doing show that he has acted reasonably in making his decision.

### ***TABLE OF CASES***

- *Switzer and Co Ltd v the Commissioner of valuation* (1902) 2IR 275.

- *Leader v the Commissioner of Valuation* (1936) NI 57.
- *Belfast Collar Company Ltd v the Commissioner of Valuation* (1959) NILR 198.
- *Leckpatrick Dairies v the Commissioner of Valuation - Lands Tribunal* VR/22/1990 and VR.23/1990.
- *Burton on Trent CBC v Ind Coupe Ltd and Thomas (VO)* (1961) 8RRC 149 (1061) RVR 310.
- *Costal Container Holdings Ltd v the Commissioner of Valuation Lands Tribunal* VR/9/1986.
- *John Laing and Sons Ltd v Kingswood Assessment Committee* (1949) 1 All ER224.
- *Westminster Council v Southern Railway Company* (1936) AC 511.
- *Allchurch v Hendonj Unia Assessment Committee* (1871) 2 QB 436.
- *Gilbert (VO) v Hickinbottom and Sons Ltd* (1956) 2QB 40 (1956) 2All ER 101; IRRC 46.
- *Bank of Scotland v Assessor for Edinburgh* (1891) 18R 936.
- *North Eastern Rly Co v York Union* (1900) IQB 733.
- *Moffatt v Venus Packaging Ltd* (1977) 20 RRC 335.
- *Carmel Teague v Commissioner of Valuation Lands Tribunal* VR/29/88/
- *Assessor for Fife v Royal Insurance Company Ltd* (1969) RA 454.
- *Geddis Enterprises Ltd v Commissioner of Valuation Lands Tribunal* VR/13/1990.
- *Spillers Ltd v Pritchard* (1931) R&IT 251.
- *Harris Graphics ltd v M R Williams (VO)* 1988.

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