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THE VALUATION TRIBUNAL FOR ENGLAND

Summary of Decision: *Non-Domestic Rating Appeal; Fibre communications network; whether unlawful State aid affects assessment of rateable value; comparability of larger network for valuation purposes; whether disaggregation of larger network possible or necessary; appeal dismissed.*

Re: Telecommunications Fibre Optic Network & Premises,
Vtesse Telecommunications Network in England
(incl. Kennet) near Marlborough SN8 5TS

APPEAL NO: 394017376068/537N10

BETWEEN: Interoute Vtesse Ltd (formerly "Vtesse Networks Ltd") — Appellant

and

Alison Gidman (Valuation Officer) — Respondent

BEFORE: Mr Martin Young (Vice-President)

SITTING AT: The Tribunal Offices, 2nd Floor, 120 Leman Street, London E1 8EU

ON: 20 and 21 March 2018

APPEARANCES:

For the Appellant: Mr Aidan Paul, agent

For the Respondent: Mr Dan Kolinsky QC, counsel

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1. The appeal is dismissed for the reasons set out below.

Introduction

2. A proposal was made on 6 September 2010 on behalf of the appellant ratepayer ("Vtesse") seeking a reduction in rateable value to £1 with effect from 1 April 2010.

Stating that: ‘The present assessment is incorrect, excessive and wrong in law” the proposal was a challenge to the Valuation Officer Notice of 13 July 2010.

3. The rateable value in the Rating List at the date of the proposal was £2,020,000. According to the proposal there was a rent on the appeal hereditament of £1,731,000. The entries in the 2010 rating list for the appeal hereditament are:

Effective Date	RV
01 April 2010	**£2,020,000**
01 June 2010	**£2,110,000**
01 September 2011	**£2,000,000**
01 October 2011	**£2,030,000**
01 June 2012	**£1,950,000**
01 April 2015	**£1,900,000**
01 December 2015	**£1,770,000**
03 August 2016	**£1,910,000**

4. In summary, the appeal hereditament is a wholly contiguous fibre optic telecommunication network. It comprises three main elements:
    a. Fibre network;
    b. Network buildings; and
    c. Rateable Plant and Machinery.

5. It was agreed that as at 1 April 2010 the actual lit network in England and Wales covered a route distance of 7,567.16 km. The network is operated by lighting, with the transmission of data, a single pair of fibres on its entire route length. The fibre network also extended into Scotland covering 530 km (although not part of the subject hereditament).

6. The network is almost entirely established by Vtesse leasing dark (unlit) fibre from third party providers in the open market for a term of years at an annual rent, with small sections being built by Vtesse itself to connect to customer premises. On the ‘Request for Information’ document completed by Vtesse on 7 May 2008 it declared 7,276 km was leased from 12 providers including significant amounts (3,875 km) from Virgin Media (Telewest/NTL).

7. There are five network operational buildings. All are physically connected to the network. Two of these can be classed as major buildings. The Hertford building was the Vtesse company headquarters and comprised offices with a switch room on the ground floor totalling 1,741.05 m^2. This building was held under a lease for a term of years at an annual rental. The building is in the Foxholes Business Park in Hertford, the other units on the estate being in separate assessment and valued on a comparative rental basis.

8. The Hoddesdon building is used as a data centre. A data centre is a dedicated space where operators can keep and use most of the Information and Communications Technology ("ICT") infrastructure that supports their business. This includes the servers and storage equipment that run application software to process and store data. Upon acquisition in 2008 Vtesse stripped this building down to a shell and then fitted out the building in stages. As at 1 April 2010, 522.51 m^2 was in rateable occupation and in assessment. This building is held under a lease for a term of years at an annual rent and is in the Geddings Road industrial area in Hoddesdon, the neighbouring units being in separate assessment and valued on a comparative rentals basis.

9. The three remaining buildings are small cabins or containers in Dorchester, Leicester and Peterborough.

10. Named items of plant and machinery under the Valuation for Rating (Plant and Machinery) (England) Regulations 2000 SI 2000/540 are included in the valuation. The major items are electrical plant and include generators, transformers, uninterrupted power supply and batteries.

11. The Appellant's network directly connected individual sites of banks, government departments and other large commercial organisations using the Ethernet computer protocol directly over fibre rented or constructed for the purpose. This allowed Vtesse' customers the ability to treat different sites as if they were located on the same campus. The network architecture was distinct from, and bore no resemblance to, the older voice based telecommunications networks. At its peak, there were some 350 directly connected sites, using around 7,500 route kilometres of optical fibre.

Issues raised by this appeal.

12. The Appellant expressed these issues, which concern the assessment of RV of the fibre components of the network only, as follows:

> *"In a nutshell, Vtesse is rated at levels far above the class of companies with which it competes or competed in the period covered by the AVD and 2010 list, and in particular, BT Group plc ("BT") whose effective rateable value can be shown to be around £20 per kilometre. This has been proven under a full judicial process in the Competition and Markets Authority ("CMA") which concluded at paragraph 4.77 "We therefore conclude that TalkTalk has demonstrated that there is a material differential between OCPs' NDRs and the attribution of BT's NDRs in respect of the significant majority of circuits."*

“Vtesse’s fundamental point is that EU law applies and governs the way in which the Valuation Office Agency should implement rating policy. To do otherwise would be unlawful. The telecommunications sector is the most highly regulated sector in the world, and is the only market where ex-anteregulation is imposed in most developed markets in the world on the incumbent operator, including the UK on BT. Ex-ante regulation presupposes that in the absence of imposed competition remedies, there will be monopoly abuse in breach of competition law principles.

The valuation of Vtesse is also incorrect under, and inconsistent with, the general principles of rating”

13. I shall refer to the first limb of the Appellant’s case as “the unlawful State aid point” and the second as “the rating valuation point”. On either basis the ultimate contention for the Appellant before me was that the RV should be reduced to £20 per km for the network: the proposal that it should be £1 was not pursued.

14. The Respondent maintained that there was a settled tone of the list for comparable fibre networks underpinned by directly comparable rental evidence which provided the figure of £250 per km on which the RV of £2,020,000 in the list was arrived at.

15. In his skeleton argument dated 12 March 2018, Mr Paul for the Appellant suggested that there were grounds for debarring the respondent from taking part in the proceedings because the Respondent had failed to disclose the substance of negotiations leading to an agreement between the VO and another fibre network operator, CityFibre, on 8 March 2018. I did not take up that suggestion as a preliminary issue because I preferred to see how an argument based on that agreement might impact on the appeal after considering all the evidence to be given.

The statutory basis for assessment of a rateable value,

16. The appeal hereditament must be valued for the purpose of non-domestic rating on the basis of the rent at which it might reasonably be expected to let from year to year on a number of assumptions: paragraph 2(1) of Schedule 6 of the Local Government Finance Act 1988. The date of the hypothetical rent was 1 April 2008 (“AVD”).

17. Matters that affect the physical state or enjoyment of the property or the locality were to be taken as at 1 April 2010 (“the Material Day”) for this appeal.

18. Valuers can adopt a number of methods to value for rating purposes a hereditament. In this instance the Respondent relies on what is contended to be directly comparable rental evidence supported by the settled tone of the 2010 list for long distance fibre networks.

19. The decision of the Lands Tribunal in *O’Brien v Harwood (VO)* [2003] RA 244 provides authoritative guidance on the application of the tone of the list in this context and this was relied on by Mr Kolinsky QC. At paragraph 41 Mr P.H. Clarke FRICS held that:

> "There are three stages leading to the establishment of tone of the list. At first, when a new rating list is put on deposit, entries 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 is reached where 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 that stage rating surveyors will have little regard to rents and pay considerable attention to assessments. The position regarding tone of the list at any particular time is a question of fact. Where an assessment is challenged before a Tribunal the correct time for deciding whether a tone of the list has been established is immediately before the hearing."

The unlawful State aid point

20. Mr Paul, who has many years' experience running a business in the sector, provided a copy of the Final Determination of the Competition & Markets Authority on a reference under section 193 of the Communications Act 2003 in Case 1259/3/3/16 brought by TalkTalk Telecom Group plc ("TalkTalk") against the Office of Communications ("Ofcom"). Those proceedings were to determine whether measures taken by Ofcom to deal with an operator with significant market power, in this instance BT plc, provided sufficient regulatory remedy so as to maintain healthy competition in the sector in compliance with the 2003 Act implementing the EU Common Regulatory Framework. The Final Determination was also made in an appeal by CityFibre Infrastructure Holdings plc in Case 1261/3/316. The CMA permitted interventions by a number of interested parties, including BT plc who also appealed.

21. The appeal by TalkTalk raised a question related to the assumption made by Ofcom regarding non-domestic rates in the calculation of the price charged for dark fibre access by BT plc which TalkTalk contended gave rise to a difference between the cost attribution of BT plc NDR to leased networks and the level of other communication providers' NDR costs for comparable services (paragraphs 4.2, 4.4 and 4.5 of the Final Determination).

In order to address this question the CMA considered the NDR regime for the networks in issue and observed that the person in rateable occupation is the provider who lights the fibre: this was decided by the Court of Appeal in *Vtesse Networks Ltd v Bradford (VO)* [2006] EWCA Civ 1330. The CMA recorded the fact that most networks are assessed under the rentals method while three, including BT plc, are assessed under the receipts and expenditure method. This means there is no RV for an individual circuit forming part of the BT plc network: the VOA did not consider disaggregation from the 'cumulo' rating assessment was possible and that was agreed between expert witnesses for BT plc and TalkTalk (paragraphs 4.29 to 4.31 of the Final Determination). TalkTalk relied on the resultant differential of between 11 and 35 times the amount of NDR paid by it as against the attribution of BT plc NDR on its circuits (paragraph 4.47). The CMA found at paragraph 4.77, for its statutory purposes, that there was a material difference between the NDR paid by other communication providers and that attributed to the significant majority of the BT plc circuits. Mr Paul submitted that should not be ignored for the purposes of this appeal.

22. That submission for the Appellant was developed by reference to Article 107 which prohibits State aid by fiscal measures which discriminate between taxpayers in a similar factual and legal situation: a summary of decisions in support of the appellant's case in this regard was put before me (C-105/14, C-6/12,.C-106/09 and C-107/09, C-78/08 to C-80/08, C-387/92, C-156/98 and 730/79). Mr Paul submitted that BT Global Services Ltd gains a reduction in rates by being part of the BT plc group: if that were not the case its network would be assessed in the same way as the Appellant's.

23. The Appellant had obtained an advice by e-mail of 18 March 2018 from leading counsel specialising in EU and competition law, Mr Aidan O'Neill QC (Scot) QC, which I received as a supplementary skeleton argument. Reasoning on the basis that:

    24.1 Article 8(5) and Article 2(g) of the Framework Directive 2002/21/EC and authorities from the CJEU as recent as Case C-64/16 on 27 February 2018,
    24.2 Case C-672/16 as to fiscal neutrality in the taxation of traders,
    24.3 Case C-187/15 as to the requirement to "level up" when providing a remedy for a party disadvantaged by unequal treatment in a tax regime
    24.4 the right to equal treatment under the common law as explained by Lord Sumption in *R (Rotherham MBC and others) v Secretary of State for BIS* [2015] UKSC 6 at [26]

    Mr O'Neill QC concluded, in effect, that the principle of non-discrimination applies to the VOA in assessment of RV as between undertakings providing the networks in issue. I was reminded that where a question as to the validity and interpretation of EU is raised before a tribunal of a member state, that tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice of the EU to give a ruling on it. Where any such question is raised in a case pending before a tribunal of a member state against whose decisions there is no judicial remedy under national law, the tribunal must bring the matter before the Court of Justice of the EU. I understood that this Tribunal cannot give a judgment contrary to the law of the EU and the Respondent did not argue to the contrary.

24. Referring to *European Law of State Aid* by Kelyn Bacon QC (3rd ed. 2017) at paragraph 2.02 Mr Kolinsky QC submitted that to be unlawful State aid the Appellant had to prove all of the following:

(a) aid exists in the sense of an economic advantage;
(b) the measure must favour certain undertakings;
(c) the advantage is gained directly or indirectly through State resources and must be imputable to the State;
(d) the measure must be liable to distort competition and affect trade between member states.

25. Mr Paul did not make any contrary submission and I accept the foregoing at paragraph 25 as an accurate summary of the law. Two points were then made by Mr Kolinsky QC, before considering the point at 24(b) above, which he submitted were against the case for the Appellant.

26. The first is that the Appellant was claiming, in essence, that it was subject to a charge, or disadvantage, which should be removed, rather than BT benefitting from State aid which should be paid back. Having regard to the CJEU Case C-187/15 *Pöpperi v Land Nordrhein-Westfalen* [2017] CMLR 21 at paragraph 46, cited by Mr O'Neill QC as authority for the proposition that proper remedy for breach of the obligation of equal treatment is not to level down but to level up, I do not accept that, as submitted by the Respondent, this highlights the fact that this is not a State aid case. Paragraph 46 of the judgment in *Pöpperi* states:

> "Where national law, in breach of EU law, provides that a number of groups of persons are to be treated differently, the members of that group placed at a disadvantage must be treated in the same way and made subject to the same arrangements as the other persons concerned. The arrangements applicable to members of the group placed at an advantage remain, for want of the correct application of EU law, the only valid point of reference".

27. The second point is more persuasive, not least because it is based on consideration by the Commission of the EC in its decision dated 12 October 2006 on a complaint by this appellant that BT plc was receiving, in the assessment of its NDR RV for lists prior to 2010, preferential tax treatment as against the Appellant amounting to unlawful State aid. The issue, then as now, depended on whether the outcome of the receipts and expenditure method used for the BT plc network conferred unlawful State aid on BT plc as against other operators such as the Appellant who were assessed on the rentals method. The Commission decided that it was not, setting out in recital (125) (and omitting the reference to Kingston Communications plc which provides local access telecommunications services in and around Kingston-upon-Hull):

> "It also appears that even when rental evidence derived from other telecommunication operators exists, for instance on optic fibres, the differences between the use of optic fibres and the use that is made of them by BT … means that this rental evidence is not fully relevant to value the latter undertakings' hereditaments. The fibre rent quoted by Vtesse is based on market evidence for fibre trunk networks serving a small number of high value, high volume customers. BT's…networks are mainly local access networks serving millions of individuals…The role of their optic fibre network is mainly that of a backbone which interconnects their local loops. Their networks are this reason unique and cannot be compared with any other in the United Kingdom, including large networks such as that of Cable & Wireless. It is true that parts of BT's network may be used by BT to provide services that compete with Vtesse, but they remain physical and functionally incapable of being disaggregated from BT's whole network. Therefore, on the whole, the two types of network do not fulfil the same function, and are unlikely to have the same rental value.

This view is confirmed by Ofcom in particular, which pointed out that the average value of a route kilometre of a fibre network can be very different according to the characteristics of the networks to which it belongs and that BT;'s core network topology is likely to be very different to that a backbone operator catering for the corporate market".

28. Having rejected the approach of the Appellant at recital (153), the Commission concluded at (176):

> "There is no evidence that the application of a different valuation method to BT has resulted in an advantage to those 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…during the period considered by the Commission i.e. 1995 -2005".

29. Mr Paul referred me to the DG Competition Working Paper on State Aid and Tax Rulings prepared for the High Level Forum of 3 June 2016 which gave an account of major State aid investigations by the EU Commission in recent years but I was unable to discern from that any basis on which the decision of 2006 is affected with respect to NDR in the UK in this sector.

30. I accept that the decision of the CMA in Case 1259/3/3/16 is an important development as regards the regulation of prices for dark fibre access since the decision of the EC Commission in 2006. I can understand why the Appellant fastens on to key findings of the CMA with respect to the NDA differential between BT plc and other communication providers in this sector, such as at 4.212:

> "It seems to be broadly accepted that the NDR Differential can be expected to be significant for the foreseeable future, unless the Government changes the rating rules".

31. However that was significant for the statutory purposes of the CMA in deciding the appeal before it so as to provide a remedy for the error on the part of Ofcom in deciding that, "in the absence of a change to the rating rules by the Government, the NDR costs to be deducted from the price of the reference active products in deriving the price for (direct fibre access) should be based on an attribution of BT's rates costs to the fibre (rather than some other appropriate measure)".

32. Further, I accept the submissions for the Respondent that the CMA decision is not of assistance in determination of the RV for the appeal hereditament because:

    33.1 it was not concerned with legality of the rating assessment as State aid: as much was held by the Hon. Mr Justice Snowdon sitting as the CAT on 29 September 2016 (see paragraph 11) in refusing the appellant permission to intervene;

    33.2 the matters set out at paragraph 31 above;

    33.3 the CMA was aware, as appears from paragraph 4.37, that there is a body of direct rental evidence applicable to fibre optic networks and that there was a different, receipts and expenditure, basis of valuation in the case of the BT plc cumulo assessment (paragraphs 4.39 to 4.30). That was

common ground for the parties to the reference to the CMA, although I bear in mind that the appellant was not one of those parties having been refused permission to intervene.

33. I do need to consider, in the absence of those supporting arguments based on the CMA decision relied on by the Appellant, whether there is still unlawful State aid by which BT plc has received a favourable assessment to RV. I am satisfied that this is not the case because I accept the Respondent's submission that there is not a measure here which favours some undertakings by comparison with others in a comparable legal and factual situation. This is because I accept the evidence of Mr Cains and Mr Johnson, the expert witnesses for the Respondent, on this point for the reasons set out in the following paragraphs.

34. Mr Cains RICS has 29 years' professional experience, the last 27 with the VOA. He has worked in the Telecommunications Team for the last 11 years, with 6 months in that team in 2003. At paragraph 4.0 he adopts the reasons of Mr Johnson for the opinion that the BT plc network is not comparable to that of the Appellant.

35. Mr Johnson MRICS also has 27 years professional experience all at the VOA where he has been Head of the Telecommunications Team since 2014. His expert evidence was addressed, in particular, to the questions of whether the Appellant's network is comparable to that of BT plc, whether the BT plc valuation could be disaggregated and of so whether that assisted in the valuation of the Appellant's network. He described the BT plc network as primarily a local access network that connects to the majority of UK households (with the exception of Kingston-upon-Hull, that exception not being material to the issues before me). The BT cumulo valuation is for the whole of the UK but it is then apportioned between the central list for England and Wales and the lists for Scotland and Northern Ireland. He tabulated the differences in size between the BT plc network, first pointing out that, unlike the Appellant, BT plc was subject to a universal service obligation as to the provision of basic telephone services at regulated prices.

It had about 25.5M residential connections, primarily using copper wires, while the Appellant had none. As to the fibre networks: the Appellant had 8,097 km fibre pair nationally while BT plc had 18M km fibre paid. BT plc had about 6,000 buildings while the Appellant has 5. Mr Johnson was of the opinion that this difference in physical extent and diversity, coupled with greater regulation, made the BT plc network unique. It was entirely owner-occupied and had to be valued using the receipts and expenditure method. This was a complex exercise because BT plc provided numerous different services to different classes of customers but all integrated in to the network and its ducts, fibre, copper wires and exchanges. The valuation for the 2010 list also had to deal with physical material changes in circumstances arising from local loop unbundling, required by The Non-Domestic Rating (Communications Hereditaments) (Valuation, Alteration of Lists and Appeals and Material Day) (England) Regulations 2008 SI 2008/2333 from 1 October 2008 and the development since the AVD of "Next Generation Access" or "NGA" local access fibres.

36. The Appellant had argued that the BT plc valuation in the 2000 list should be disaggregated so as to provide a basis of comparison with its much smaller network and this was the subject of earlier appeals as far as the Court of Appeal in *Bradford (VO) v Vtesse Networks Ltd* [2010] EWCA Civ 16. The Court of Appeal (Lloyd and Sullivan LLJ, Sedley LJ dissenting) held that the Lands Tribunal had not erred in law in deciding that it was not possible, relevant and appropriate to disaggregate the BT plc assessment for the purposes of comparison with the Appellant's network (per Lloyd LJ at [59] to [61]. Permission to appeal to the Supreme Court was refused on 17 June 2010. An application by the Appellant to re-open the appeal to the Court of Appeal, based on non-disclosure of the material preparatory to the making of SI 2008/2333 said to be relevant to the case for disaggregation, was dismissed on 4 April 2017 (Henderson LJ).

37. The Appellant sought to rebut the expert evidence for the Respondent in a document prepared for that purpose but without calling expert evidence of its own. That is not to say that Mr Paul has not built up considerable knowledge and experience through working in the sector and involvement in the litigation about the RV of the Appellant's hereditament.

38. He did call Mr Czeslaw Ziemniak, a director of the Appellant, who had been Director of Policy, Planning and Performance for BT plc for two years from September 1991. In that capacity he had responsibility for the budget for rates within a budget of £2B.

Mr Ziemniak went on to state that where possible all central costs were broken down to be apportioned to an "owner" or service in the business structure and this was done for many reasons including regulatory requirements and ensuring product line profitability. Mr Ziemniak could see no reason why BT plc could not have calculated its rates burden on specific fibre circuits that competed with the Appellant. He believed BT plc did not do that because it was not in its commercial interests to do so. In cross-examination Mr Ziemniak accepted he

had not been involved in the assessment of RV for BT plc, which he recalled was probably on the basis of a formula since the company was established on privatisation. In the light of that, I am not able to give any weight to Mr Ziemniak's opinion as against that of the expert witnesses for the Respondent.

39. Mr Paul also produced a note of a telephone conversation he had with Mr Alisdair MacTaggart FRICS, a senior valuer at the Renfrewshire Valuation Joint Board on 11 May 2017. As noted by Mr Paul, Mr MacTaggart expressed the opinion that it was possible to disaggregate the BT plc network down to a single line, giving the treatment of the NGA lines as the best example. Mr Paul then established from the BT plc regulatory financial accounts that, on the basis of profit weighted net replacement costs ("PWNRC"), BT plc had been able to apportion the NGA components separately to the non-NGA components from 2012-2013 and this had been agreed with the VO as a basis of assessment. Mr Johnson dealt with this at paragraphs 8.12. to 8.15 of his report: the model agreed with BT plc for the 2010 assessment of RV contemplated the addition of the new NGA components, then at an early stage. As further explained in section 9 of Mr Johnson's report, addition in of those components is dealt with as a material change of circumstances and this does not support the concept of disaggregation of the BT plc network. I accept that expert explanation and factual account. Mr MacTaggart did not give evidence so as to be cross-examined as to that explanation. His beliefs as expressed to Mr Paul and as summarised above were put to Mr Johnson in cross-examination and he maintained his explanation with clarity.

40. With respect to the question of local loop unbundling as demonstrating that the BT plc network could be disaggregated because that had to happen as a result of the statutorily designated material change of circumstances imposed by SI 2008/2333, I have no reason not to accept the account given by Mr Johnson at paragraphs 8.6 to 8.11: there is no deduction of a price per loop so unbundled and the charged recovered from such a loop let or licensed by BT plc is not a rent matching the rating hypothesis as it includes return on capital, maintenance, testing and sales some of which relate to non-rateable equipment and services.

Revised valuations of the BT plc hereditament are carried out by running the receipts and expenditure valuation model for that whole hereditament.

41. It was pointed out in the Appellant's rebuttal of the Respondent's expert evidence that the entity in direct competition with the Appellant, successfully bidding against the Appellant on renewal of its major contract with Lloyds Bank plc, was BT Global Services Ltd. It was then contended that a BT Global Services Ltd (network) had been disaggregated from the BT plc network and this should found the basis of comparison with the Appellant's network. However the Appellant did not provide a valuation for the alleged BT Global Services Ltd network. When asked about that in his evidence in chief Mr Johnson stated that BT Global Services Ltd was not in separate occupation of a telecommunications hereditament to BT plc and what was paid by BT Global Services Ltd was reflected in the revenue of BT plc. He maintained that position in cross-examination and I have not been able to identify any evidence to the contrary.

42. I therefore find that networks of BT plc and the Appellant are not in a comparable legal and factual situation, whether as the effect of their respective assessments to RV stand or as might be possible by disaggregation of the larger network so as to enable the unlawful State aid point to be considered further. The position in the latter regard is somewhat analogous to the decision of the CJEU in Case C-518/13 where licensed taxis in London were held to be in a different factual and legal position to minicabs so the former were not given unlawful State aid by being permitted to drive in bus lanes, an advantage denied to the latter.

43. The position was different in *R v Customs and Excise Commissioners ex parte Lunn Poly Ltd and anr.* [1999] 1 CMLR 1357 [1999] STC 350 relied on by the Appellant. In that case the unlawful State aid consisted of a differential rate for travel insurance under statutory provision. This is not the same as the application of different bases of valuation for NDR purposes applied of necessity, as I find, to the much larger BT plc network.

44. The Appellant's rebuttal of the Respondent's expert witnesses was based first on the proposition that neither Mr Cains or Mr Johnson had taken account of competition law, European or domestic but had restricted their expert evidence to rating. That proposition begs the question as to whether there has been unlawful State aid to BT plc which impacts on the statutory valuation of the Appellant's network. For the reasons set out above I have found against the Appellant on that question. The rebuttal of the Respondent's expert witnesses also raises issues with respect to the rating valuation point, to which I now turn. Criticism based on technical knowledge of fibre networks and their components was not relevant to the issues before me.

The rating valuation point.

45. As I do not accept the Appellant's case that I am obliged to use its calculation of RV of the BT plc network to prevent unlawful State aid being upheld by the 2010 RV of the Appellant's network, the next issue is whether the Appellant proves that RV is incorrect as a matter of valuation. The case for the Respondent is straightforward: factors have been taken into account as required by the 1988 Act which I agree has the statutory purpose of establishing a tax on the occupation of premises and not the success of the business occupying those premises.

46. The Respondent sought to establish her case primarily on the basis of a settled tone of the 2010 list which in turn was based on 2 withdrawn appeals and 20 settlements, all of which were long distance (above 1,000 km) networks. Mr Cains set out what Mr Kolinsky QC described as a healthy body of evidence at Appendix 7 of his report: 14 rents with devaluations excluding any capital payment of between £89/km and £640/km. One of those was the lease from Geo to the Appellant of 5 years with an effective date of 30 January 2008, close to AVD, of a 2 fibre network of 1,463,21 km for a devalued amount of £250/km. I agree with Mr Kolinsky QC that there was no serious challenge to this evidence.

47. Instead Mr Paul first maintained his challenge to the 2010 list valuation on the rating valuation point by contending that the BT plc network was the appropriate comparator on a disaggregated basis. This was rejected by the Lands Tribunal for the purposes of the 2000 list in *Bradford (VO) v Vtesse Networks Ltd* [2008] EWLands RA/50/2004 [2009] RA 105, not disturbed on appeal or, in my judgment, the submissions from Mr Paul that Mr Bradford gave false evidence to the Lands Tribunal which I understood was the subject of a second application to the Court of Appeal under CPR 52.30 yet to be decided. I accept that there have been two developments since that decision: development of the NGA network by BT plc and the requirement for local loop unbundling. However, as explained above, I do not see how this deploys to support the comparison sought to be made by the Appellant.

48. I am unable to accept the case for the Appellant that disaggregation of the BT plc network is possible for the purposes of a valid attack on the valuation by the respondent in issue. Utilisation of PWNRC for the regulation of pricing is for a different purpose. There is no support for the Appellant's case in this regard from the CMA decision which was for a different statutory purpose and using a different methodology.

49. The same applies to the announcement by CityFibre of a "New Fibre Tax system for City Fibre" on 8 March 2018 which gave rise to the contention by the Appellant that the Respondent was in breach of case management directions as to disclosure because her expert witnesses had not referred to negotiations with the rating surveyors leading to that agreement. As set out at paragraph 2.1 of that agreement it concerned "metro" dark fibre circuits, making CityFibre the party in rateable occupation and charging £100 per fibre or pair irrespective of

distance. It has no application to the long distance network circuits in issue in this appeal.

50. Mr Paul argued that the existence of separate assessments for mobile telephone masts showed that it was possible to disaggregate the BT plc network. It was accepted for the Respondent that these hereditaments were not in the Central List. However the fact that these sites are rated separately does not cause me to doubt the case that it is not possible, for rating purposes, to disaggregate the very large BT plc network into fibre components for meaningful comparison with the Appellant's network, as found by the Lands Tribunal and the Court of Appeal and was the Respondent's case before me. The analogy which Mr Paul sought to draw between the valuation of large and small warehouses and large and smaller fibre networks was not of assistance because those hereditaments are of a completely different nature to the fibre networks in issue here and the scale of difference between the BT plc network and the Appellant's network is of no comparison to the warehouse examples referred to.

51. The position is the same with regard to the authorities on the rating of utilities historically leading to *R v Central VO and anr. ex parte Edison First Power Ltd* [2003] UKHL 20 which explained the development of rating law leading to the establishment of the central list under section 52 of the 1988 Act.

Conclusion

52. The Respondent VO was correct to enter the RV of £2,020,000 for 1 April 2010 as at the date of the proposal. The tone of the list was established and that value is consistent with that tone.

M.F. Young
Vice-President 21 May 2018