



Neutral Citation Number: [2010] EWCA Civ 16

Case Nos: C3/2009/0506 and 0513

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE LANDS TRIBUNAL
HIS HONOUR JUDGE MOLE Q.C. AND MR N J ROSE FRICS
Cases RA/50/2004 and RA/63/2004
ON APPEAL FROM THE BERKSHIRE VALUATION TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 January 2010

Before:

LORD JUSTICE SEDLEY
LORD JUSTICE LLOYD
and
LORD JUSTICE SULLIVAN

Between:

ALAN ROY BRADFORD (Valuation Officer)

Appellant
(0506)
Respondent
(0513)

- and -

VTESSE NETWORKS LTD

Respondent
(0506)
Appellant
(0513)

Christopher Vajda Q.C., Timothy Morshead and Alan Bates (instructed by
the **Solicitor for HM Revenue and Customs**) for the **Valuation Officer**
Nicholas Green Q.C., Hugh Mercer Q.C. and Tony Singla (in appeal 0513) and
Christopher Lewsley (in appeal 0506) (instructed by **Harbottle & Lewis LLP**)
for **Vtesse Networks Ltd**

Hearing dates: 15-17 December 2009

Approved Judgment

Lord Justice Lloyd:

1. This judgment is given in relation to two appeals from an order of the Lands Tribunal made on 12 February 2009, which was itself given on two appeals from decisions of the Berkshire Valuation Tribunal dated 16 July 2004 and 15 October 2004. It is a sequel to a previous decision of this court on 19 October 2006, [2006] EWCA Civ 1339, which was given on an appeal from a decision of the Lands Tribunal on a preliminary point in the same appeals. It concerns the liability of Vtesse Networks Ltd, which I will call Vtesse, for National Non-Domestic Rates in respect of a fibre-optic cable network.
2. The question at the earlier stage was whether the network as a whole was rateable at all. The Valuation Tribunal had held that it was not. The Lands Tribunal allowed the appeal of the Valuation Officer (VO), and this court dismissed Vtesse's appeal against that decision.
3. Now the question is as to valuation: what entries should be made in the rating valuation list for the five year period from 1 April 2000 in respect of the network, and with effect from what dates? The cases were not remitted to the Valuation Tribunal for further decision but proceeded in the Lands Tribunal as regards the valuation issues. The Lands Tribunal held that the assessment of the network in the 2000 list should be altered to £110,000 with effect from 1 April 2003 and to £470,000 with effect from a later date. Initially, in their judgment handed down on 7 November 2008, they said that this should take effect from 31 March 2004, but their decision was not binding at that stage, because they had not decided the issues of costs. Vtesse then made further submissions, to which the VO responded, as a result of which the Lands Tribunal's order was that the alteration to £470,000 should take effect from 7 November 2008.
4. By appeal number 0506, the VO challenges the order as regards dates, and also for its omission to provide for an intermediate entry of £125,000 as of 27 June 2003; the latter point is accepted on behalf of Vtesse, subject to the other appeal. He seeks an effective date of either 31 March 2004 or 15 October 2004 for the £470,000 entry. On this appeal the VO was represented by Mr Morshead and Vtesse by Mr Lewsley. The appeal turns on the application to the facts of some provisions in the Non-Domestic Rating (Alteration of Lists and Appeals) Regulations 1993. If the VO were successful in this appeal, then, depending on the basis of that success, the court might need to remit the case to the Lands Tribunal for further consideration.
5. By appeal number 0513, Vtesse challenges the figures, arguing that the basis of the valuation in each respect is flawed because of the failure of the Lands Tribunal to take into account the rateable value of the comparable and competing fibre-optic network of BT. This argument was put partly as a matter of national rating law, but also in the context of European Union law of competition. For this reason, the teams deployed on this appeal were different and larger: Mr Green Q.C., Mr Mercer Q.C. and Mr Singla for Vtesse, and Mr Vajda Q.C., Mr Morshead and Mr Bates for the VO. Though there was talk about a possible reference to the European Court of Justice, this appeal came down in the end to being a reasons challenge, reinforced, according to Mr Green, by European law but otherwise capable of being determined entirely as a matter of English domestic law. In practice, if Vtesse were successful on this appeal, it would lead to a remission to the Lands Tribunal.

6. In order to address each appeal it is necessary to set out the facts as regards both the rateable hereditament and the course of events. I proceed to that task next, before dealing separately with the judgment of the Lands Tribunal and then the relevant law and the issues in each appeal. Later I will mention facts which are relevant only to one or other of the two appeals.

The hereditament

7. In his decision on the preliminary issue in the Lands Tribunal, [2006] RA 57, Mr Bartlett Q.C., President, gave a clear and full description of the network from which I take the following, omitting material which I will deal with elsewhere or which is of less relevance for present purposes:

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

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

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

10. Ducts are laid in trenches, the size of which is determined by the number of ducts to be installed and the nature of the ground. For ducts laid in the public highway (and these constitute the vast majority) most aspects of the trench specification – its size, methods of refilling and the reinstatement of the highway surface – are prescribed in a code of practice issued by the Highways Authorities and Utilities Committee set up under the provisions of the New Roads and Street Work Act 1991. Duct routes are built with jointing chambers and access chambers. Jointing chambers accommodate the splice

enclosure between cable lengths and also spare coils of cable which enable the cable ends to be pulled out of the cable for jointing and provide slack for repairs to be carried out if the cable is damaged between jointing chambers. Access chambers are provided to allow the cable to be pulled into the duct, typically at intermediate points between chambers and in particular where the duct route changes sharply.

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

12. Vtesse designs and implements fibre optic communications links between one or more premises of client companies. In essence the method adopted is to look for existing fibre optic cables belonging to third parties which pass reasonably close to each of the client premises, to enter into an agreement for the use of such cables and to construct a spur from the premises to the cables. The result is a network consisting mainly of spare capacity in other people's cables.
...

15. The agreements under which Vtesse had the use of fibres belonging to other operators were for the use of what is referred to as "dark fibre", that is to say fibre that has not been "lit" or activated. The fibres in each of the component parts of the network are lit by Vtesse using its own (non-rateable) plant and machinery. Fibres are lit by the generation of a laser pulse from Vtesse's own equipment so that photons, or particles of light, are pulsed through the fibres. The laser pulse operates continuously, whether data is being transmitted or not, and data is sent by changing the pattern of the laser pulse. The receiver has to be synchronised, and synchronisation is carried out by Vtesse. ..."

8. According to a Statement of Agreed Facts, prepared and agreed in September 2005 for the purposes of the appeal to the Lands Tribunal, the network was located between Henley-on-Thames and Goswell Road in London, via Marlow, Slough, Ruislip and Stoke Newington, with two spur extensions added by 2 May 2003. The network consisted in part (a minor part) of optical fibres contained in cables located in ducts which were referred to as "own build" but the majority of the fibres constituting the network were situated in cables and ducts belonging to third parties. As at 1 April 2003 the total length of "lit" fibre was 147.027 route km, of which 4.127 km was own build and the rest was leased. The extensions added by 2 May 2003 amounted to an additional 7 km or so of lit fibre.
9. A Supplementary Statement of Agreed Facts was signed in April 2008, before the further hearing in the Lands Tribunal, by which time Vtesse was advised by a valuation expert with rating experience, Mr Partridge, who signed the Statement on behalf of Vtesse. The description of the network in this document recorded that by 31

March 2004 significant network extensions had been added, including a section in Tonbridge and Malling, which was at that time separately assessed, and was also subject to appeal to the Valuation Tribunal. The effect of that was that, as at 31 March 2004, the Statement recorded that the extent of the lit network was 625.912 km, which was agreed, for the purposes of the appeal, to be contiguous.

10. This particular form of rateable hereditament is most unusual in that it cannot be inspected physically by the VO, or indeed, in practical terms, by anyone at all in ordinary circumstances. The VO is entirely dependent on information from Vtesse for his knowledge of (a) what length of fibre Vtesse may from time to time own or have leased and (b) how much of that fibre has been lit at any given time. The VO takes a point in his appeal on the basis that he did not know, in 2004 or 2005, that the whole network was contiguous, including the length in Kent. I will come to that later.

Entries in the list

11. The case is concerned with the 2000 rating list, that is to say the list which prevailed for the period from 1 April 2000 until 31 March 2005, for which hereditaments already in existence were valued as at 1 April 1998. The entries in the list in respect of Vtesse's network were made by way of alteration to the list.
12. On 19 September 2003 the VO made an entry in the list for Slough in respect of Vtesse's telecommunications network with a rateable value of £110,000, with effect from 1 April 2003. This was based on information provided by Vtesse. On 27 October 2003 Vtesse made a proposal that the rateable value should be reduced to £3,095, attributable to the "own build" element of the network, on the basis that it was not in rateable occupation of the leased fibres. Vtesse appealed to the Valuation Tribunal. Before that appeal was heard, the VO revised the entry in the list on 31 March 2004, increasing the rateable value to £125,000, to take account of extensions to the network, with effect from 27 June 2003.
13. On 16 July 2004 the Berkshire Valuation Tribunal upheld Vtesse's appeal, holding that it was only in rateable occupation of the own build fibres. Since not all of these were in the Berkshire area, it ordered that the whole entry be deleted. That related to the £110,000 figure. On 28 July 2004 Vtesse made a proposal that the £125,000 figure be deleted, on the same basis. That appeal was allowed on 15 October 2004, and that entry was therefore deleted. (The date of 18 October 2004 is given in some of the papers before us as the date of this decision. However, the notice given by the Valuation Tribunal of its decision shows that the decision was made on 15 October and was notified to the parties on 18 October 2004.)
14. As already mentioned, the VO's appeals against those two decisions of the Valuation Tribunal were allowed by the Lands Tribunal (on 23 November 2005), which decision was upheld by this court on 20 October 2006. The remitted hearing in the Lands Tribunal took place in May 2008. By then the extent of the network as it stood on 1 April 2003, 2 May 2003 and 31 March 2004 was agreed, as already described. The primary dispute between the parties was as to the appropriate rate of valuation for the network, on a unit basis per kilometre. A dispute as to the effective date did not emerge until late in the day.

15. The rival valuations did not differentiate between any of the relevant dates. Vtesse proposed a unit value of £19; the VO proposed £750 outside, and £900 within, the London Metropolitan area. These competing contentions produced overall figures of £2,800 and £110,000 respectively on 1 April 2003, and £11,900 and £470,000 at 31 March 2004. The VO's intermediate figure of £125,000 as from 27 June 2003 would have had a correspondingly small equivalent from Vtesse. As can be seen from this, the Lands Tribunal accepted the VO's figures, though overlooking the £125,000 figure as from 27 June 2003.

The hearing before the Lands Tribunal as to valuation

16. On behalf of the VO, he himself was the only witness, giving expert valuation evidence in accordance with reports dated 31 August 2007, 22 February 2008 and 13 May 2008. He was cross-examined on these reports.
17. For Vtesse factual evidence was given by Mr Aidan Paul, a director and chief executive of Vtesse, who is by profession an accountant, and expert evidence by Mr Charles Partridge, who had provided reports dated 6 September 2007 and 25 February 2008 and a clarificatory statement to the latter in April 2008. Both witnesses were cross-examined.
18. The main part of the hearing was held from 13 to 16 May 2008. Written submissions were lodged on 4 July 2008. A further short hearing took place on 30 July 2008, which we are told was mainly concerned with issues of EU law. As already mentioned, the Tribunal published its written decision on 7 November 2008, upholding the VO's contentions as to value and as to date (except for the £125,000 figure which was overlooked). This did not deal with costs, and was therefore not yet effective. On 24 November 2008 Vtesse's solicitors wrote to the Lands Tribunal contending that the effective date for the £470,000 entry could not be earlier than the date of the Lands Tribunal's own decision, and asking that the decision be reviewed in this respect. The VO put in written submissions to the contrary and Vtesse put in written submissions in reply. On 12 February 2009 the Lands Tribunal published an addendum to their decision, accepting the argument about backdating, and holding that the £470,000 entry only had effect from 7 November 2008. They also dealt with costs.

The European Commission investigation

19. A central element of Vtesse's objection to the treatment of its network for rating purposes has always been based on what is said to be the disparity of treatment, in this context, between itself (and other small operators in the same market) and BT which is said to have something in the region of 80% of the market for fibre-optic telecommunications of this kind in the UK. BT's network is vast and complex, including many elements altogether foreign to that of Vtesse, such as millions of local access copper loops, over 100,000 telephone kiosks, mast sites and two satellite earth stations in addition to its extensive national fibre optic trunk network. A central issue on valuation is whether any meaningful comparison can be made between Vtesse's network and that of BT, given their different size and character. As part of that issue, it is relevant to consider whether the BT network can relevantly be disaggregated, in order to identify a figure attributable to the component part which is the fibre optic

network, or more specifically to that part of such network which is used to provide services of the kind which Vtesse provides.

20. On 17 February 2004 Vtesse complained to the European Commission alleging preferential tax treatment in favour of BT. In early 2005 the Commission decided to initiate a formal investigation procedure under article 88(2) of the then relevant treaty. It received comments from the UK Government, from BT, from Vtesse and from 17 other bodies active or interested in this sector of the market and, at the request of the Commission, from Ofcom as the UK regulator of this sector. It made its decision on 12 October 2006. Its conclusion is expressed in paragraphs 174 to 176 of the recitals, the procedure, the comments and the Commission's assessment of the position having previously been described, summarised and set out. The conclusion is as follows:

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

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

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

The references to Kingston Telecommunications plc arise because that body, rather than BT, provides the local access telecommunications service in and around Kingston-on-Hull.

21. The decision itself was as follows:

“Article 1

The application by the United Kingdom of the tax on non-domestic property to BT plc and Kingston Communications plc from 1995 until

the end of 2005 does not constitute aid within the meaning of article 87(1) of the Treaty.

Article 2

This decision is addressed to the United Kingdom of Great Britain and Northern Ireland.”

22. Vtesse has brought an application to annul that decision in the Court of First Instance. That proceeding is pending. It seems that Vtesse’s standing to make such an application is itself in dispute.
23. The relevance of the Commission decision for present purposes is disputed between the parties.

The issues on the appeals

24. On the VO’s appeal, Mr Morshead argued that the Lands Tribunal were not limited to giving effect to the £470,000 valuation as at the date of their decision but could, at the least, make it effective as of the date of the Valuation Tribunal’s decision under appeal. He argued that it ought to take effect as of 31 March 2004, relying on two propositions. A provision of the relevant regulations appears to be inconsistent with that, but he argued, first, that Vtesse had waived, by agreement, their ability to contend that the valuation should not be back-dated to 31 March 2004. Alternatively, he argued that Vtesse ought not to be able to rely on the regulation because they would thereby obtain an advantage by reason of wrongful conduct, having misled the VO by non-disclosure of the extent of the network. It is on this point that, if it be relevant as a matter of law, there would have to be a remission to the Lands Tribunal for the case to be decided on the facts. Mr Lewsley argued that it was not open to the Lands Tribunal to backdate the effect of their decision at all. He also said that there was no scope in the regulations for either of Mr Morshead’s other arguments. I mention for the record that the VO sought to appeal on other issues as well, but did not pursue these other points, and that Vtesse served a Respondent’s Notice, which does not require separate consideration.
25. On Vtesse’s appeal Mr Green’s submissions came down, in the end, to saying that the Lands Tribunal had not given any or proper reasons for rejecting or ignoring a factor which was of central importance, namely a report by Ofcom called “Business Connectivity Market Review” published in January 2008 by way of a consultation paper, which includes as Annex 12 a high level comparison of the price charged by BT for its wholesale Ethernet services with the cost of delivering those services. That required Ofcom to express some views as to the right devaluation, or disaggregation, of BT’s costs overall, in order to identify the contribution to those costs made by, for example, the fibre-optic network itself. As originally formulated, Vtesse’s grounds of appeal (ignoring one which was not pursued) were three. The Tribunal was said to have erred in holding that the VO was entitled not to take account of BT’s assessment when deciding Vtesse’s rateable value, because of European law which requires Member States to ensure effective competition between operators in telecommunications markets. Its second error was said to be in considering that it was bound to reject Vtesse’s argument based on Commission Directive 2002/77 on competition in the market for electronic communication networks and services

because of the existence of the Commission's decision. The third error was said to have been to assume that the burden of proving the rateable value of BT's fibre optic network lay on Vtesse. The Lands Tribunal did not refer to the Ofcom 2008 report in its judgment. Ultimately the failure of the Tribunal to mention this report, and to explain (if they thought so) why it was not relevant, became the principal focus for Mr Green's submissions.

26. Mr Vajda's argument for the VO centred on the proposition that the dispute before the Lands Tribunal was one of valuation, that the Tribunal had considered the valuation evidence placed before it, and had come to, and properly expressed, their conclusions as to why they preferred Mr Bradford's evidence on valuation to that put forward by Mr Partridge, in which the Ofcom 2008 report featured only by way of passing mention, and was not the basis for any of the valuation figures that he put forward. The VO served a Respondent's Notice but this does not call for separate consideration.

The decision of the Lands Tribunal: valuation

27. In the original and main part of its decision, the Lands Tribunal dealt with the valuation dispute. They recorded the history, including reference (which Mr Green criticised, as I will mention later) to the Commission investigation, and described the hereditament. They referred to the evidence, first of Mr Paul and then of the valuation experts, setting out the calculation by which Mr Partridge reached the figure which he said represented market value, namely £19 per fibre pair km. They summarised his position at paragraph 23 as follows:

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

28. As regards Mr Bradford's opinion, as expressed in his evidence, they said this at paragraphs 29-30:

“29. Mr Bradford said that he was aware of the BT assessment; indeed he had been involved, with others, in work leading to the eventual agreement with BT. He had, however, never attempted to analyse BT's RV in the way Mr Partridge had done. In his view such an analysis could only ever be an apportionment based on significant assumptions as to the extent and value of component parts. BT's assessment included millions of local access copper loops, several

thousand telephone exchanges, over 100,000 public telephone kiosks, hundreds of mast sites, two satellite earth stations as well as an extensive national fibre optic trunk network. Vtesse, on the other hand, only occupied limited trunk fibres in their network; they did not have any of the other BT type of rateable network assets. Vtesse's trunk network of 625 route km was a minute proportion of BT's trunk fibre optic network. The difference in scale alone prevented any meaningful comparison. A devaluation of the component parts could not be accurate, as all parts of BT's network interacted with each other and affected the value of the whole.

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

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

29. Then the Tribunal discussed the State aid issue, describing the decision of the Commission and dealing with the question whether it bound the Tribunal. In so doing, they referred to Vtesse's part in the investigation, saying at paragraph 54:

“Vtesse took a major and a very active part in arguing the matter and is in the process, we were told, of bringing an action for annulment of that decision. The reality, as it appears to us, is that Vtesse was as much a party to the Commission proceedings as it is to these proceedings.”

30. Mr Green submitted that this showed a fundamental misunderstanding of the nature and effect of the Commission's investigation. He also argued that the Tribunal held, in effect, that it was bound by the Commission decision, but that it was wrong to do so. As to that, the Tribunal said this at paragraphs 57 and 58, which appears to me to show that, although they may have considered that they were bound by the decision, they did not base their own decision on this proposition:

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

58. It seems to us that it is not necessary to do so, however, because we accept, as a matter of fact and judgement and for the reasons recorded in paragraphs 29 and 30 above, the view of Mr Bradford that BT's assessment is simply not usefully comparable with that of Vtesse. We agree with the submission of counsel for the VO

that in those circumstances it is impossible to say that BT has been given any unfair advantage or more favourable treatment contrary to the broad principles of Article 87 or to the more specific regulatory framework in the EU telecoms directives. Our decision on the facts does not conflict with that of the Commission.”

31. They then went on to discuss the evidence as regards the tone of the list and the VO’s reliance on it. I need not refer to the detail of this, as it was not challenged as such on appeal. Their conclusion was expressed at paragraphs 76 and 77:

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

77. We are satisfied that a tone for the valuation of fibre optic telecommunications networks in the 2000 rating list has been established and that Mr Bradford’s valuations are consistent with that tone. The appeal is allowed. We direct that the assessment of the hereditament in the 2000 list be altered to £110,000 with effect from 1 April 2003 and £470,000 with effect from 31 March 2004.”

Discussion: valuation

32. The aim of the valuation exercise is to determine the rateable value of every relevant hereditament. This is defined by statute (paragraph 1 of Schedule 6 to the Local Government Finance Act 1988):

“The rent at which it is estimated the hereditament might reasonably be expected to be let from year to year if the tenant undertook to pay all usual tenant’s rates and taxes and to bear the cost of the repairs and insurance and the other expenses (if any) necessary to maintain the hereditament in a state to command that rent.”

33. It is common ground that four methods are available to be used to assess the rateable value of a given hereditament.
- i) The rental method uses direct and actual evidence of the rent of the actual hereditament. It is not available in the present case because the hereditament cannot be let as a whole.
 - ii) The tone of the list uses a comparison with the rateable value of other comparable hereditaments in order to derive a unit cost which is consistent with that of other hereditaments. This is the method which the VO used as regards Vtesse’s network.

- iii) The receipts and expenditure method estimates the future receipts of a putative tenant and deducts its future costs and the return it would require, thereby leaving the maximum rent which it would be prepared to pay. This is the method which the VO has generally applied in respect of BT and Kingston.
 - iv) The contractor's method is based on the replacement cost of a business property, on the basis that a putative tenant would not be willing to pay more in annual rent for the hereditament than it would cost in terms of annual interest on the capital sum needed to build a similar hereditament.
34. It is agreed that, whichever method is used, the object is the same, namely to identify the hypothetical market rental figure for the given hereditament.
35. The tone of the list method was explained helpfully by Mr Clarke in the Lands Tribunal in *O'Brien v Harwood* [2003] RA 244 at paragraphs 40-41:

“40. The concept of tone of the list has been explained by this Tribunal on many occasions (see eg *K Shoe Shops Limited v Hardy (VO)* [1983] RA 145 at 154; *Burroughs Machines Limited v Mooney (VO)* [1977] RA 45 at 55; *Marks v Eastaugh (VO)* [1993] RA 11 at 20-23; *Jafton Properties Limited v Prisk (VO)* [1997] RA 137 at 166-7). It is concerned with the weight to be given to assessments in the rating list. It is settled law that assessments of comparable hereditaments are admissible as evidence of value (*Pointer v Norfolk Assessment Committee* [1922] 2 KB 471). Tone of the list may be explained as follows. Rateable value is based on market rents. These usually vary, sometimes considerably, and it is often difficult to find a general pattern. When preparing a rating list the valuation officer is required to value each property individually and to have regard to the underlying principle of uniformity and equality. Although rents may vary greatly assessments must show a uniform pattern. This has led to assessment by the use of common unit figures for classes of hereditament and location with individual adjustments to reflect the characteristics of each property. Advertising rights are usually valued by reference to a figure per 48-sheet poster. This figure will be based on an analysis of the rental evidence.

41. 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 an LVT 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. When 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 question in this appeal is therefore whether a tone of the list has become established for advertising rights comparable to the appeal hereditament?"

36. Equality of rating is a fundamental principle of rating law: see for example *Poplar Assessment Committee v Roberts* [1922] 2 AC 93, Lord Atkinson at page 108 and Lord Parmoor at page 119. Accordingly it does not seem to me that Vtesse's contentions gain any additional force from reliance on European Union law. In the end Mr Green relied on European law for the proposition that the burden was on the Government to ensure, and where relevant to demonstrate, that there was equality between ratepayers. This case is altogether unlike those he cited as examples of unequal treatment, where the inequality, whether obvious or not, was built into the system in one way or another. Here the whole basis of English domestic law is exactly that which European law requires it to be, namely that like cases are to be treated alike.
37. Mr Green submitted that the decision of the Lands Tribunal could not be regarded as dealing properly with the issues in circumstances in which, first, a central question was whether disaggregation of BT's assessment as a whole, to identify a unit value figure for the fibre optic cable element in the network, was meaningful or useful in the context of valuation of such networks for rating purposes, secondly the Ofcom 2008 report showed that such disaggregation was feasible and, thirdly, although the Ofcom report was referred to in the evidence and was used in cross-examination, the Tribunal did not even mention it, let alone explain what account they took of it and why (if that was their opinion) they regarded it as irrelevant.
38. In order to assess the weight of this argument, it is necessary to refer to the course of the evidence before the Tribunal.
39. In Mr Bradford's first valuation report dated 31 August 2007 he identified the following issues in dispute (in addition to one point of detail, no longer relevant):
 - i) The unit rent to be applied to the agreed Vtesse network fibre lengths.
 - ii) Whether the 2000 central rating list valuation of BT is relevant as a comparable.
 - iii) Whether it is possible to analyse BT's 2000 central list assessment and apply it to Vtesse's network assessment.
 - iv) The weight to be given to the comparable fibre optic networks which he had agreed with other smaller operators.
40. In 2005 he had provided 12 comparables based on agreements. By the date of this report he had agreed 24 more assessments, with twelve prominent rating surveyors acting for the rateable occupiers as his counterparties. On the basis of the figures so agreed he expressed the opinion that the tone of the list was well established. He then explained why he disagreed with Mr Partridge, whose principal contention seemed to be that an analysis of BT's agreed assessment would be more reliable. He set out his opinions, which the Lands Tribunal summarised in their paragraph 29 and quoted from in their paragraph 30, both quoted at paragraph [28] above.

41. Mr Partridge's first report is dated 6 September 2007. He described his extensive experience in rating valuation, though this was the first time he had been concerned with the valuation of a telecommunications network. He identified the issues in the same way as Mr Bradford had done. On the major question, as to the relevance of the BT agreed valuation, he said that a proper analysis of this was crucial to the tone of the rating list, since it represented 70 to 80% of the optical fibre network in the UK. He expressed the view that the assessments placed on Vtesse's network by the VO were so substantially out of line with the agreed BT assessment as to be grossly inequitable and unsustainable. He referred to the need for devaluation, or disaggregation, in order to make one valuation sensibly comparable with another. After some further discursive passages, he came at section 12 of his report to the subject of the initial devaluation of the BT assessment. Based on information available from public sources, he described the elements making up the hereditament as a whole, consisting of buildings, linear assets (ducts, poles cables etc) and other assorted assets such as call boxes and satellite dishes. He referred to the sale and leaseback of BT's property assets in 2001 to a company called Telereal. In the course of his analysis based on this material he came to a maximum figure of £48 per route km for the fibre optic cable element in BT's assessment, as compared with the VO's figure of upwards of £1,000 for Vtesse. He contended that, once an assessment had been agreed with BT, it was no longer open to the VO simply to rely on the actual rents of similar properties, while ignoring the evidence as to a tone of value provided by the BT assessment. He said that in his opinion the BT figure could be analysed and the VO should not dismiss out of hand the evidence which it represented. At the least the VO should have prepared his own devaluation of the BT figure. Mr Partridge then went on to discuss a number of other factors, and came to a figure of £9.75 per route km as the right figure for Vtesse, comparable to that which he said was the fibre optic cable element in the BT assessment. This was his first formulation of the exercise which the Lands Tribunal set out in its final form in their paragraphs 24 and 25.
42. Mr Bradford responded with a further report dated 22 February 2008. He identified the question whether BT's network assessment can sensibly be compared with that of Vtesse as being a main issue in the case, and focussed first on that question. He criticised Mr Partridge's attempt to make the comparison as being both strained and rife with errors, and as incompatible with any reasonable approach to valuation. He pointed out a number of respects in which Mr Partridge's calculations were either erroneous or ambiguous and unclear. As a general comment he said that in his opinion it was not possible, practical or sensible to attempt to isolate the value of component parts in BT's valuation. Notwithstanding that, he set out a number of detailed criticisms of Mr Partridge's process of reasoning and his figures. It was in the last part of this report that he set out revisions to his previously expressed opinion, in consequence of having become aware that Vtesse's network had been much longer on 31 March 2004 than he had thought on the basis of the figures previously disclosed.
43. Mr Partridge put forward a report by way of rebuttal dated 25 February 2008. It is apparent from that report that he did not advocate using any other valuation method than the tone of the list. At paragraph 4.2.1 of this report he restated his disagreement with Mr Bradford as to whether a useful analysis can be made of BT's agreed

assessment when looking at the rental value of fibre optic networks, and said that his first report had showed how it might be achieved. He went on to say this:

“I was interested to see that in a consultation document published by Ofcom on 17th January 2008 entitled “Business Connectivity Market Review” it carried out a very similar exercise. This was for a different purpose but shows that it is possible to financially analyse BT’s network.”

In cross-examination he said that he had seen extracts from the Ofcom report, provided to him by Mr Paul, rather than the whole report.

44. He then made a comment on a figure from the Ofcom report of 26p per metre by way of the ongoing operating cost of BT’s fibre as at 30 September 2006, which he said was two thirds of the liability for rates alone on the basis of the VO’s figure for Vtesse. He said this showed how far the VO’s basis of valuation was divorced from reality. He went on to revise his own valuation based on his analysis of the BT agreement. The Ofcom report played no part in that analysis. He made one further reference to the Ofcom report, at paragraph 5.4 where he contrasted the 36 comparables on which the VO relied, which he said were not supported by valuation evidence nor adequately explained, as compared with the BT assessment which, though agreed, was arrived at “after the arguments were fully explored both before and in front of the VT”. In response to the VO’s stated belief that an analysis of BT’s assessment could not be achieved, he referred again to the Ofcom report and said that if the costs can be analysed in detail for Ofcom’s purposes, “I do not see why the rating assessment should not also be capable of analysis”.
45. Shortly before the hearing in the Lands Tribunal Mr Partridge made a brief further report clarifying and revising his earlier reports in minor respects, dated 22 April 2008. Mr Bradford also made a short further report dated 13 May 2008 dealing with some additional information and a statement dated 14 May 2008 explaining some additional documentation which had been prepared for use at the hearing. That was how the valuation evidence stood at the time of the hearing before the Lands Tribunal. The Ofcom report was referred to as showing that an analysis of BT’s overall costs to identify a particular type of cost was possible. It was not put forward as the basis on which a disaggregation of BT’s rating assessment should be undertaken in order to identify a comparable figure for the hypothetical market rental of BT’s fibre optic cable network, or of the part of that network which was used to provide comparable services to those provided by Vtesse.
46. Mr Paul, the managing director of Vtesse, also made a second witness statement after the date of the Ofcom report, on 25 February 2008. We were shown part of this witness statement. He too referred to the Ofcom report and identified the 26p per metre figure. He put forward various comments in relation to that figure and made suggestions as to how one might arrive at the notional rent and rates figures comprised within that overall cost figure. As a matter of calculation, those comments may be valid. The underlying basis for some elements was described but not disclosed, and the relevance of the process for valuation purposes was, as it seems to me, a question for the valuation expert, not for a factual witness, however well informed as to the nature of Vtesse’s business.

47. Counsel sensibly refrained from taking up any significant amount of time at the hearing of the appeal by referring to passages in the transcript of the hearing before the Lands Tribunal, but Mr Green put before us a note describing the part played by the issue as to disaggregation in the hearing below, including reference to the cross-examination of Mr Bradford by Mr Derek Wood Q.C., who led for Vtesse at that hearing, and some cross-examination of Mr Paul by Mr Morshead for the VO. I have taken the opportunity, since the hearing, to read the passages referred to in Mr Bradford's cross-examination and the whole of the transcript of the evidence of Mr Paul and Mr Partridge. Mr Wood did spend some time cross-examining Mr Bradford by reference to the Ofcom 2008 report, but when he cross-examined Mr Bradford as to the actual basis of valuation he did so by reference not to the Ofcom report but (correctly and inevitably) to the approach adopted by Mr Partridge in his expert reports.
48. Thus, the Ofcom 2008 report was referred to before the Lands Tribunal as showing that disaggregation of the BT rateable value was possible, and it was the submission on behalf of Vtesse that the fact that it had been done (to the extent shown from the Ofcom report) was useful and helpful in relation to the exercise of establishing the rateable value of hereditaments occupied by competitors of BT. It was not used directly to show what that rateable value ought to be: for that purpose Vtesse relied on the evidence of Mr Partridge, who put forward his own disaggregation of BT's assessment, on a different basis, and without relying on what Ofcom had said or done other than as generalised support.
49. The European Commission's decision was referred to extensively in the course of the hearing below. I have quoted the Lands Tribunal's conclusion at their paragraphs 57 and 58. Mr Green submitted to us that the Lands Tribunal had misunderstood the nature of the Commission's investigation, and had come to the wrong conclusion as to whether it was binding on them. He made a fair comment that the description of the complaint in paragraph 4 of the decision as having been "to the effect that the way Vtesse optical fibre network was assessed for rates amounted to preferential tax treatment in favour of BT" is incorrect. The reference to Vtesse in that passage should be a reference to BT. Nevertheless, the essence of the complaint lay in the comparison between the treatment of BT and that of Vtesse, so the passage, while incorrect, is not altogether misleading.
50. Mr Green criticised the Lands Tribunal for its conclusion that Vtesse was "as much a party to the Commission proceedings as it is to these proceedings" (paragraph 54) and that because the Lands Tribunal itself is an organ of the UK, the addressee of the decision, it should not permit a party to the Lands Tribunal proceedings which was also directly involved in the Commission proceedings to take a stance inconsistent with the Commission's decision (paragraph 55).
51. He showed us a number of passages in support of the first proposition, in particular from *Crehan v Inntrepreneur Pub Co* [2006] UKHL 38. An important factor in relation to any such question is to identify exactly what is the subject matter of the Commission's decision. In the present situation it is necessary to bear in mind, for that purpose, the difference between the complaint to the Commission, which was that BT's rateable valuation was too low, so as to represent State aid, and the present case which proceeds on the basis that BT's rateable valuation is correct (that was Mr Partridge's express assumption) and that this shows that Vtesse's is too high. Both

for this reason and, well arguably, because Vtesse was not a party to the Commission's proceedings, I am inclined to the view that the Commission's decision is not binding on Vtesse at all, and is not binding on anyone in relation to the different issue which is raised in these proceedings.

52. It would follow that the second point, mentioned in paragraph 55 of the Lands Tribunal's decision, does not arise. If it did arise, it would give rise to an interesting question. The addressee of the decision was the United Kingdom, that is to say the Member State personified, in effect, by the Government. It is true that courts and tribunals, including the Lands Tribunal, are organs of the State and that organs of the State may be bound to give effect to obligations binding on the State under European Community law (see *Marshall v Southampton Health Authority* Case 152/84 [1986] QB 410, to take just one example). However, courts and tribunals are also bound to apply the law correctly as between parties before them. If Vtesse is not itself bound by the Commission's decision, not being an addressee of it, its rights and liabilities ought to be determined accordingly, in any dispute before a court or tribunal. If the court or tribunal were required to give effect to the decision because the decision is binding on the court, though only on one, not both, of the litigants before it, that would seem to give an excessive indirect effect to the decision. We do not have to decide the point, but it seems to me right to express a note of caution as to whether, if the point did arise, the Tribunal's approach would be correct.
53. Mr Vajda submitted that it was not necessary for the Lands Tribunal, or for this court, to decide whether the decision is binding (though he said that, if the point did have to be decided, he would argue that it was binding). He submitted that the Lands Tribunal's treatment of the decision was in substance entirely apposite, and consistent with observations of Lord Hoffmann in *Crehan* at paragraph 69:
- “The correct position is that, when there is no question of a conflict of decisions in the sense which I have discussed, the decision of the Commission is simply evidence properly admissible before the English court which, given the expertise of the Commission, may well be regarded by that court as highly persuasive. As a matter of law, however, it is only part of the evidence which the court will take into account.”
54. For the reasons advanced by Mr Green, I see considerable force in the proposition that the Lands Tribunal was wrong to suppose that they were bound by the Commission's decision, as they indicated at their paragraph 57. But it does not seem to me that this matters, because, as already observed, they did not decide the case on that basis. They decided it on the footing of the evidence before them, rejecting the valuation case advanced on behalf of Vtesse. In that respect, as it seems to me, they acted in proper accord with the guidance given by Lord Hoffmann in the passage quoted. In those circumstances I would reject the ground of appeal on behalf of Vtesse which asserts an error of law as regards the effect of the Commission's decision. The Lands Tribunal did not base their own decision on that of the Commission having binding effect. It is unnecessary to decide, and I do not, whether the Commission's decision did have the binding effect which the Tribunal described in paragraph 57 of their decision.

55. The real issue in Vtesse's appeal, therefore, is whether the Lands Tribunal's decision can be shown to have been wrong in law in rejecting the valuation case made on behalf of Vtesse. Mr Green submitted that the Tribunal explained in paragraph 58 the basis of their decision as to why it was not necessary or relevant to have regard to the BT assessment when considering what assessment should be made in respect of Vtesse's hereditament. They said that they accepted, as a matter of fact and judgment, Mr Bradford's view that it was not usefully comparable with that of Vtesse. They also said that they did so for the reasons recorded in paragraphs 29 and 30, quoted at paragraph [28] above. The reasons appearing from those paragraphs are, first, that an analysis of BT's assessment so as to identify the elements comparable with that of Vtesse "could only ever be an apportionment based on significant assumptions as to the extent and value of component parts", secondly the very different nature of the BT hereditament from that of Vtesse, in terms of the many and various heterogeneous component elements of the former as compared with the limited and homogeneous latter, thirdly the difference in scale, and fourthly the fact that all parts of the BT network interacted with each other and affected the value of the whole. Paragraph 30 adds a reference to difference in age to those of scale and diversity already mentioned.
56. Mr Green's argument was that this explanation of the Lands Tribunal's reasons for rejecting Vtesse's argument, as presented in Mr Partridge's evidence (summarised at paragraph 23 of their decision, quoted at paragraph [27] above) gives no indication that the Tribunal had any regard to the Ofcom 2008 report, nor of why, if they did take it into account, they did not treat it as relevant and supportive of Vtesse's case. That is therefore a reasons challenge: the decision might have been correct, but it is wrong in law because it does not deal with a point of major importance.
57. The grounds of appeal relied on by Vtesse are set out in a document running to 12 pages which consists of 37 paragraphs of introductory matter, leading up to one which asserts that the Tribunal committed four errors of law, which are then set out in four reasonably succinct subparagraphs. Those four appear to be the grounds of appeal relied on. Lack of reasons is not one of them. However, the Ofcom report is mentioned in the preliminary passages and the point is made, in the last sentence of paragraph 32, that "notwithstanding the relevance of the OFCOM Report, the Tribunal failed even to refer to it in its judgment". Because of that sentence, albeit apparently a passing remark which is not expressed to identify any error of law, it would not be right to preclude Vtesse from relying on this argument.
58. The resolution of this issue depends on how important a factor the Ofcom report was, not on the importance of the issue of disaggregation. The latter was undoubtedly at the heart of the case, as put forward by Mr Partridge. The Lands Tribunal was under no illusion or misunderstanding as to the significance of that issue as such, and they addressed it. The point is as to the relevance of the Ofcom report in relation to the issue as a whole. As I have said, that report did feature in the evidence before the Lands Tribunal, but Mr Partridge did not use it as any part of the analysis which he presented by way of his expert opinion as to valuation of the hereditament. In substance, he used it only to provide general support for the possibility of disaggregation of BT's costs as a whole, albeit in a different statutory context and for a different purpose. Mr Paul made greater reference to it, but his evidence was of fact, not by way of expert valuation evidence. He was able to put before the Tribunal

matters of fact which might be relevant to the valuation exercise, but his evidence did not form part of the contrasting expert opinions as to valuation which provided the basic material for the Lands Tribunal's decision.

59. The essential task of the Lands Tribunal was to decide between the two different approaches to valuation that were put before them, justifying either the VO's proposal or the rateable occupier's alternative proposal, by way of their assessment of the factual and expert evidence adduced. The VO's position was clear, and was vouched for in accordance with his reports. The position advanced on behalf of Vtesse was not altogether clear, but it did at any rate proceed on the basis that it was possible, relevant and appropriate to disaggregate the BT assessment in order to identify the component attributable to the fibre optic element of the network and ascertain the unit of valuation of that element which went towards the overall assessment, and to take that as a proper comparison for the unit of valuation applicable to Vtesse. Moreover, Mr Partridge put forward a specific devaluation on that basis. Although this underwent a degree of modification in the course of the proceedings, from the time when he put forward his expert evidence the case made on behalf of Vtesse was identifiable, both as to the possibility and utility of disaggregation, and as to how this was to be done. The Ofcom 2008 report was used to support, in a general way, the first proposition. It formed no part of the second aspect of the case made.
60. In those circumstances it seems to me that it is not correct to assert that the Ofcom report was a vital, a central or a significant element of the case, such that the Lands Tribunal was obliged to deal with it in the course of its decision. It seems to me that greater significance has been attributed to it in the course of the appeal, with hindsight, than it ever had before the Lands Tribunal. This view is consistent with the lack of prominence given to the point in the formulation of the grounds of appeal. The fact that it prompted no more than a passing mention in the preparatory text, laying the ground for the identified grounds of appeal, seems to me to confirm the lack of significance of the point itself, which is clearly apparent from the course of the proceedings in the Lands Tribunal.
61. I would therefore reject this ground of appeal, on which in the end Mr Green primarily relied.
62. That leaves two points from the original four grounds: the relevance of the obligation of a Member State to ensure that there is effective competition between operators in telecommunications markets, and therefore for the VO to compare the position of other operators in the market with that of the incumbent operator, whatever the differences between their respective networks, and the suggestion that the Tribunal erred in treating Vtesse as under a burden of proof as to the rateable value of BT's fibre optic network.
63. The first of these points is based on both the general principle of equal treatment under EC law and on Commission Directive 2002/77 of 16 September 2002 on competition in the market for electronic communication networks and services, of which article 2 prohibits exclusive or special rights in relation to the establishment or provision of such networks or services. However, since, as already noted, the fundamental basis of rating law in the UK is one of equality as between hereditaments, these particular features of EC law add nothing to the general domestic law. This ground of appeal therefore adds nothing to the other points taken. I do not

accept that the VO is placed under an obligation to make a comparison between BT's assessment and that of, for example, Vtesse. Whether such a comparison can usefully be made is an issue which can legitimately be raised before the Tribunal, as it was. It is a question of valuation judgment, on the basis of relevant material. Given that the respective valuers disagreed as to whether disaggregation of BT's assessment was of any use in relation to the determination of the rateable value of Vtesse's hereditament, it fell to the Tribunal to consider the evidence adduced and to decide whether it was a useful process and, if it was, what was the effect of making that comparison as regards the valuation of Vtesse's hereditament. That is exactly what was done in the present case. The fact that the Tribunal did not accept the case made on behalf of Vtesse is not, in itself, an error of law.

64. Correspondingly, the point about onus of proof gets nowhere. Each party advanced before the Tribunal the evidence that it sought to rely on. Mr Partridge put forward, as a matter of his expert opinion, a particular basis of valuation by way of disaggregation of the BT assessment. Mr Bradford expressed the opinion that this was irrelevant and useless. Each was cross-examined accordingly. The Tribunal decided the issue of valuation on the basis of this evidence, not on the basis that any burden of proof lay on Vtesse. If Mr Partridge had considered it to be relevant in some specific way, he might have used the Ofcom 2008 report to support his valuation approach in detail, rather than in the general way that he did. If he had done so, then the issue to be decided by the Tribunal would have been addressed differently, by reference to the evidence as given and tested in cross-examination. I see no reason why it should be regarded as incumbent on the VO in a case such as this to adduce additional evidence as to the basis of the BT assessment. Certainly the European Court of Justice's decision in *Germany v Isis Multimedia Net GmbH* Joined Cases C-327/03 and C-328/03 [2005] ECR I-8877, cited by Mr Green in this context, does not seem to me to provide any support for that proposition.
65. For those reasons, I would dismiss Vtesse's appeal, and hold that, subject to the issue of dates, the Lands Tribunal's decision was correct.
66. I do not see that any point of European Community law needs to be decided in order that these proceedings can be determined, and I would therefore not refer any question to the European Court of Justice under article 267 of the Treaty on the Functioning of the European Union (following the EU Treaty amendments introduced by the Lisbon Treaty, the equivalent of the former article 234 EC).

The effective dates: the legislation

67. It follows that the VO's entry of £110,000 in respect of Vtesse's hereditament as from 1 April 2003 stands in accordance with the Lands Tribunal's decision, and also that the 2000 list should be amended by the entry of £125,000 with effect from 27 June 2003, as noted at paragraph [4] above. What remains in dispute on the VO's appeal is the date as at which the further entry of £470,000 should be made. The Lands Tribunal decided that it should be 7 November 2008. The VO contends that it should be either 31 March 2004 or 15 October 2004. Vtesse supports the Lands Tribunal's eventual decision.
68. This issue requires a consideration of regulations as then in force: the Non-Domestic Rating (Alteration of Lists and Appeals) Regulations 1993. (They have since been

further amended and then repealed, but I will refer to them as if they were still in force in the relevant form.) These are elaborate and complex, but Counsel assisted our task by agreeing which were the only provisions that we need to consider. The relevant regulations relate to a situation in which an alteration is made to the rating list, either as a result of a proposal or in one of a number of other circumstances. Because rates are payable on a daily basis by reference to the value of the hereditament as shown in the list on the given day, it is necessary to determine the date on which an alteration made to the list has effect. Alterations may be made with retrospective effect, but there are some provisions which protect the ratepayer from retrospective increases.

69. Alterations to the list are made by the VO. If the ratepayer objects to the value shown in a list (whether an original figure or one inserted by way of an alteration), it may make a proposal to the VO for the alteration of the value. The VO may agree to the proposal, or all persons affected may agree on an alteration of the list. If the proposal is not agreed to, and no other agreement is reached, the disagreement is to be referred to the Valuation Tribunal by way of an appeal on the part of the proposer against the VO's refusal to alter the list: regulation 12. The Valuation Tribunal may order the VO to alter a list so as to give effect to the decision: regulation 44(1). Further appeals lie to the Lands Tribunal under regulation 47 and thence on a point of law to this court. Appeals to the Lands Tribunal may well take some time to be determined, though the time required in the present case, in the circumstances which I have described, was presumably unusually long.
70. Regulation 13A governs the time when an alteration is to have effect as regards the 2000 list. The alteration which is at issue (namely to £470,000) was not made by the VO in the first place, because it is based on information which he did not have until well into the course of the proceedings. Moreover, regulation 13A(14A) prevents him from making an alteration with retrospective effect after 31 March 2006, unless it is in pursuance of a proposal, and it was not until well after that date that he became aware of the correct length of Vtesse's network.
71. If the alteration in question, being one which reflected a material change in circumstances rendering the previous entry in the list inaccurate, had been made directly by the VO, the general rule would have been that the alteration would take effect from the later of (a) the date on which the list became inaccurate (here, the date of the extension to the network) and (b) the first day of the financial year in which the alteration is made: regulation 13A(5)(b). If the VO had once altered the list but needed to correct the alteration, the general rule is that the correction takes effect from the later of (a) the date of the first alteration and (b) the first day of the financial year in which the correcting alteration is made: regulation 13A(13)(b). Both of those are subject to an exception in regulation 13A(14) which itself contains an exception. First, if the alteration increases the value shown in the list, the alteration only takes effect from the day on which it is made. However, if the inaccuracy in the list "has arisen by reason of an error or default on the part of a ratepayer" then the exception is disapplied in favour of the general rule.
72. However, none of that applies directly in the present case, since the VO did not and could not make the alteration to insert an entry of £470,000 of his own initiative. The alteration to that effect can only be made as a result of an order of the Valuation Tribunal, the Lands Tribunal or the court. In that case, the general rule is that the

alteration takes effect from the date on which the list became inaccurate: regulation 13A(12). However where (as here) the alteration increases the rateable value above the amount in the list at the date of the ratepayer's proposal, the increase takes effect from the date of the decision: regulation 44(4).

73. So far as the powers of the Lands Tribunal are concerned on an appeal from the Valuation Tribunal, regulation 47 sets out the position. Regulation 47(5) is as follows:

“(5) The Lands Tribunal may confirm, vary, set aside, revoke or remit the decision or order of the tribunal, and may make any order the tribunal could have made.”

74. The references to “the tribunal” are to the Valuation Tribunal.

75. In turn, the powers of this court are governed by CPR Part 52.10(1):

“In relation to an appeal the appeal court has all the powers of the lower court.”

76. The lower court, in the present context, means the Lands Tribunal. Since that tribunal had power to make any order that the Valuation Tribunal could have made, it follows that the Court of Appeal also has those powers in disposing of appeals before it.

The Lands Tribunal's decision: the effective dates

77. This point was covered in the addendum to the Lands Tribunal's decision, issued on 12 February 2009. Previously, in paragraph 77 of their decision, they had said that the alteration to £470,000 would take effect from 31 March 2004. That accorded with the position stated in the Supplementary Statement of Agreed Facts signed on behalf of the parties in April 2008 (by Mr Bradford and Mr Partridge). Following further written submissions, the Tribunal held that regulation 44(4) did apply to the alteration to £470,000, subject to an argument which it rejected, and is not now pursued for the VO, based on regulation 44(5). They also rejected an argument that the point could not be taken because it was too late. They did not in terms address the question whether the “day on which the decision is given”, in regulation 44(4) should, in the particular circumstances, be taken as the day of the Valuation Tribunal's decision, rather than that of their own decision, although the point had been taken by the VO and addressed in reply on behalf of Vtesse.

Discussion: effective dates

78. Leaving aside his argument based on regulation 47(5), in favour of backdating to 15 October 2004, Mr Morshead relies on two different arguments to override the effect of regulation 44(4) and to backdate the alteration to 31 March 2004. The first is that Vtesse is precluded from objecting to this backdating, having agreed that this is the appropriate date. This depends on the argument that because regulation 44(4) exists for the protection of the ratepayer, it can be waived by the ratepayer, and that in fact it was so waived by the agreement set out in the Supplementary Statement of Agreed Facts. The second is that regulation 44(4) is subject to an overriding principle that it may not be used by a ratepayer to secure a wrongful gain resulting from its having

misled the VO as to the relevant facts. On the first of these points the facts are clear and undisputed, and it is open to us to decide the point either way. On the second, if the point is arguable, the facts would have to be investigated and resolved. It is therefore open to us only to consider whether the point can be run; if it can, we would have to remit the case to the Lands Tribunal for decision.

79. A preliminary point arises at this stage, namely that the VO put in an additional witness statement, made on 30 April 2009, in support of his appeal at the stage of the application for permission to appeal, but did not apply for permission to use it in support of the appeal, as he should have done. Vtesse objected to this, and eventually issued its own application to have the statement excluded. Parts of the statement did no more than reiterate, in what was thought to be a convenient form, matters already in evidence before the Lands Tribunal. Other parts related to points on which, in the end, the VO did not pursue his appeal. In relation to some more paragraphs the VO did not seek to rely on them in any event. Three paragraphs remained, numbers 30, 33 and 45, which were, on the one hand, relied on as being relevant to the points which are still pursued and, on the other, not confined to matters which were already in evidence or common ground. The factual matters referred to in these passages had not been explored before the Lands Tribunal because, first, they were not relevant to the matters primarily in issue, which were covered by the main part of the decision in November 2008, secondly (it might be said) because there did not appear to be an issue on this because of the terms of the Supplementary Statement of Agreed Facts and, thirdly, because when backdating did become relevant there was no further oral hearing before the Lands Tribunal. It is also a fair comment that neither of the points now under consideration was taken on behalf of the VO in written submissions to the Lands Tribunal at this stage, though points about Vtesse having misled the VO had already been made in the VO's evidence. Mr Morshead explained that there were two reasons for putting in the witness statement. One was to put facts before this court in a convenient format. The other was so that he could resist any argument to the effect that either point could not be run because there was no evidence relevant to it. It became clear in the course of argument on this question that, if there were any substance in the point about wrongful gain, it could not be decided by this court and would have to be remitted to the Lands Tribunal. In the light of that, the dispute about the witness statement was resolved by the court treating it as an aide memoire, so far as it was common ground and still relied on and, as regards the parts of paragraphs 30, 33 and 45 which were objected to, taking those as no more than a record of the VO's position on issues of fact which, if relevant as a matter of law, would require remission. At a late stage Vtesse put forward a witness statement of its own, made by Mr Twite. It was unnecessary for the court to consider this. It could not sensibly have been admitted in any event. At best it showed that there were issues of fact which, if relevant, would have to be determined elsewhere.

Waiver or agreement

80. For the legal principle on his first point Mr Morshead relied above all on *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850. In that case tenants of business premises had served a notice requesting a new tenancy, the landlord served a counter-notice stating that they would oppose an application to the court for a new tenancy, and the tenants then applied to the court for a new tenancy. The legislation provided for the tenant to make such an application not less than two

nor more than four months after the making of the tenant's request. The tenant's proceedings were brought after only one month from their request. The landlord filed an answer in which it did not take the point that the proceedings were premature, but shortly after the four months had expired the landlord's solicitors took the point and argued that the proceedings could not be entertained because they were premature. By a majority of four to one, the House of Lords held that the requirements as to time were only procedural, and were for the sole benefit of the landlord, and that the landlord could waive the defect by agreement or by conduct. By a majority of three to two they held that the landlord had not waived the defect. On the topic of waiver Lord Diplock said this at page 883:

“The second type of waiver which debars a person from raising a particular defence to a claim against him, arises when he either agrees with the claimant not to raise that particular defence or so conducts himself as to be estopped from raising it. This is the type of waiver which constitutes the exception to a prohibition such as that imposed by section 29 (3) of the Landlord and Tenant Act, 1954, and other statutes of limitation. The ordinary principles of estoppel apply to it.”

81. Like the other judges in the majority, Lord Diplock was unable to find in the landlord's conduct anything which satisfied those principles.

82. In the present case, as regards the facts, the VO relied on express agreement. A first Statement of Agreed Facts had been formulated on 20 September 2005, at the time of the first Lands Tribunal hearing. It recorded that the effective date, if the hereditament was rateable, was 1 April 2003 and that the effective date for revision (as regards the added 7 km) was 2 May 2003. The Supplementary Statement of Agreed Facts gave the same effective date of 1 April 2003, but instead of 2 May 2003 it stated “Effective date for revision is 31 March 2004” and “Material date for revision is 31 March 2004”. Among the agreed facts were these:

“33. Total lit fibre as at 1 April 2003 = 147.027 Route km consisting of 4.127 Route km of own build and 142.9 km of leased fibres.

34. 2 fibres were lit by Vtesse on the total Route km of 147.027 km as at 1 April 2003 and have been agreed for the purposes of this appeal only to be contiguous.

35. 2 fibres were lit by Vtesse on the total extended Route km of 625.912 km as at 31 March 2004 and have been agreed for the purposes of this appeal only to be contiguous.”

83. This text differed from the original statement in two respects: in paragraph 34 the reference to it being agreed to be contiguous was added, and in paragraph 35 the original text referred to 154.504 km and did not include the reference to contiguity.

84. Mr Morshead invited us to consider this agreed statement in the light of the evidence which had preceded it. In paragraphs 6.1 to 6.4 of Mr Bradford's report dated 31 August 2007, he said that he had valued both the 147 km route length and the 154 km length on the basis that they were contiguous, but said that a diagram supplied by

Vtesse suggested that they might not be. He complained of Vtesse not having supplied a proper network diagram and a description of the network in a timely manner despite numerous requests. He also said that he understood that the network had been extended significantly further since May 2003 but that he had not been provided with information about this, despite a statutory form of return being served on Vtesse. In his report dated 6 September 2007 Mr Partridge said at paragraph 5.1 that he relied entirely, as did the VO, on the statement of agreed facts, but he also said at paragraph 5.2 that the network had been extended by 27 June 2003 to 166.4 route km.

85. Mr Bradford and Mr Partridge had continuing discussions about the issues in the case and the relevant facts. On 22 January 2008 Mr Partridge sent an email to Mr Bradford on the subject of the fibre lengths in use at the two material days. He referred to their having expressed concern on this subject in a recent telephone conversation. He had asked Vtesse to look into the point, and he sent a table showing the result. The figure as at 1 April 2003 was confirmed as 147.027 km. As regards the position on 31 March 2004 he said this:

“The length of lit optical fibres in use as at 31 March 2004 (the second Material Day) is 625.912. This is a far longer length than that which you and I have been using. It transpires that this length includes the “Tonbridge” route. You will be aware that you have separately assessed this route from 1 April 2004”.

86. He gave details of the listing, which he said stood at £20,000, and proposed that the whole network of 625.912 km should be valued together as it existed on 31 March 2004.
87. By the time that Mr Bradford put in his supplementary report dated 22 February 2008, therefore, he had this further information as to the length of the network. He said at paragraph 107 that the material date for the list alteration was 31 March 2004, the date of the alteration to the list, and that the physical extent of Vtesse’s network as at that date should be valued, effective from the date of the last material change in circumstances or from 1 April of the rate year in which the alteration was made, if that were later. He also put forward changes which he contended should be made to the Statement of Agreed Facts, including the changes noted above as regards the effective date and the material date for the alteration, and the increased length of the network which came to be recorded in paragraph 35, with the statement that this was “as at 31 March 2004, the Material Date for the revised assessment”.
88. In paragraph 116 he complained of the factual details as to the extended network not having been provided by Vtesse until after the time had run out for making alterations to the 2000 list, except to give effect to outstanding appeals. He said that he thought the lack of response was an error or omission on the part of Vtesse for the purposes of reg 13A(14) referred to above (the phrase used should have been “error or default”), and that Vtesse had misled the VO into under-assessing its hereditament. He said that Vtesse “should not benefit from their complete lack of response and inaction to my justified and numerous requests for information”. He noted that the ability of the Lands Tribunal to order a backdated increase in the assessment would be subject to legal submissions.

89. In his submission in rebuttal dated 25 February 2008 Mr Partridge recorded at paragraph 4.1.1 that the lit fibre length on the second “Material Day” was considerably longer than had previously been agreed, namely 625.912 km, partly because of extensions and also because a section of fibre which had been treated separately ought to have been taken as contiguous and part of the whole. At paragraph 4.1.4 he said:

“Since the last material change in circumstances occurred on 31st March 2004, this should be the effective day for the second alteration of the list which occurred on that day.”

90. Those are the facts on which Mr Morshead relied to show that the agreement of Vtesse, through Mr Partridge, to the Supplementary Statement of Agreed Facts amounted to an agreement that, if an alteration was to be made to the list to take account of the increased length of the network as it stood by 31 March 2004, it should be made with effect from that date. He argued that the VO had drawn attention in February 2008 to the effective date for the change and to the fact that the Lands Tribunal proceedings were the right forum for any decision on this point, that Mr Partridge on behalf of Vtesse had had the opportunity to challenge the VO’s analysis but did not do so and instead, aware of the fact that there might be argument about backdating, he signed the amended statement of agreed facts. He submitted that by agreeing to the effective date as being 31 March 2004, Vtesse avoided the risk that the argument based on non-disclosure might be run successfully, with adverse findings being made about the conduct of Vtesse.

91. In response, Mr Lewsley contended that the agreed statement was effective only as regards facts, such as the length of the network and the amount of lit fibre at given dates. It included an agreement as to the length of the network on 31 March 2004 but, he said, not also an agreement that any alteration in the list attributable to that extended length should take effect as at that same date.

92. For my part I would accept Mr Morshead’s first proposition that a ratepayer could agree that an increased entry on the list should be made retrospectively in circumstances in which regulation 44(4) would otherwise operate to protect the ratepayer against that increase. The point of the regulation is to protect the ratepayer against some retrospective increases. It may not be easy to see why a ratepayer should be willing to agree not to invoke the protection of this provision, but I do not see why he should not do so if he wishes. Although this is not a point about procedure, so it is not on a par with the point at issue in *Kammins Ballrooms*, it is nevertheless clearly one which is solely for the protection of the particular ratepayer who is or would be affected by the increase, depending on when it is to take effect. I consider that Vtesse could have agreed not to take the point, and that if it had done so, then the alteration to the list would have had effect without the impediment posed by regulation 44(4).

93. Mr Lewsley drew to our attention the decision of the Court of Appeal in *Marks & Spencer plc v Fernley (VO)* [1999] RA 409, a case concerned with the transitional arrangements effective as the 1990 list came into operation, though he did not make any specific submission based on it. The VO had first made three separate entries in the 1990 list, at given values. The ratepayer had made proposals against each entry and had also proposed that all three hereditaments should be covered by a single

entry. The VO did not agree, so appeals were referred to the Valuation Tribunal. Later the VO did alter the list with effect from 1 April 1991, inserting a single entry in place of the three separate entries. The ratepayer made a proposal against that, challenging among other things both the value and the effective date which it was said should be 1 October 1991. That proposal too, not being accepted by the VO, was referred to the Valuation Tribunal by way of appeal. Eventually the ratepayer withdrew its appeals arising from its first four proposals, leaving only the issue of the actual entry in respect of the single hereditament, its value and its effective date. On the latter point, at the appeal hearing before the Valuation Tribunal the VO contended for 1 April 1990 and the ratepayer for 1 April 1991. The ratepayer might therefore be said to have abandoned its appeal against the effective date proposed by the VO, but this did not result in agreement between the parties on that point. The Valuation Tribunal decided in favour of 1 April 1990, and fixed a lower valuation than that fixed by the VO. The ratepayer then appealed to the Lands Tribunal. At that stage the parties agreed that the valuation should be even lower, but they did not agree as to the effective date, the ratepayer arguing for the later date of 1 April 1991. The Lands Tribunal did not accept this and ruled that 1 April 1990 was correct. On appeal to this court the ratepayer sought to argue that it had not been open to the Valuation Tribunal (or, therefore, the Lands Tribunal) to decide in favour of any other date than 1 April 1991. That had been the alteration made by the VO and although the ratepayer had challenged it by a proposal, this had, in that respect, been withdrawn by the time of the hearing before the Valuation Tribunal, so there was no issue outstanding for the Valuation Tribunal to decide as to that.

94. Rejecting this argument, Peter Gibson LJ said this at page 416:

“The valuation tribunal, in my judgment, is not bound by the agreement or the late abandonment of points by an appellant. The valuation tribunal must decide the issues before it in accordance with the law, and in doing so, it will no doubt consider that its decision may affect persons other than the parties before it. The powers of a valuation tribunal setting an effective date are not the same as those of a valuation officer altering the list. The effective date will be governed by how the regulations apply to the particular circumstances of the case. Thus if the rateable value which is found by the valuation tribunal is in excess of that in the list at the date of the proposal and in excess of the amount contended for in the proposal, the list would have had to have been altered with effect from the day on which the decision is given.”

95. I do not regard those observations as inconsistent with the proposition contended for by Mr Morshead on this point. In that case there was no agreement before the tribunal as to the correct disposition of the appeal as regards the effective date, and no question arose as to whether the ratepayer was protected by regulation 44(4). The point was very different from that which would arise if, in particular circumstances, a ratepayer did agree that, if an alteration of the list by way of increase was appropriate, it should take effect on an earlier date than that of the decision, notwithstanding regulation 44(4).

96. On the other hand, I would hold that Vtesse did not in fact agree not to invoke the regulation, nor did it agree that the regulation should not be applied in the particular

circumstances. It seems to me that the Supplementary Statement of Agreed Facts was a binding agreement as to the facts which it set out, such as the length of the lit network on given dates. I do not consider that it was a binding agreement as to other matters such as the effective date for any backdating of any alteration of the list that might result from the appeal. An agreement that, if there was to be an altered and increased entry in the list to reflect the extended length of the lit network, it should have effect as from 31 March 2004 notwithstanding regulation 44(4) would be a quite different kind of agreement from one which recorded that the length of the network on 31 March 2004 was so many km. It seems to me that the statement of the effective and material dates as regards the extension was a matter of forensic convenience, recording the then position of the respective parties. It did not go further and preclude Vtesse from arguing that regulation 44(4) did in fact prevent backdating the increase as far as 31 March 2004. Accordingly I would not accept this part of Mr Morshead's argument in favour of an alteration as of 31 March 2004.

Wrongful gain

97. Mr Morshead's submission in this respect is that a ratepayer should not be allowed to obtain a benefit by his own wrong; more specifically, a ratepayer should not have the protection of regulation 44(4) against the backdating of an alteration by way of increase where the fact that the alteration has had to be made retrospectively is due to the ratepayer having misled the VO as to the relevant circumstances of the hereditament at the time - here as to the extent of the network.
98. So far as the fact of the misleading statements by Vtesse are concerned, he pointed first to the fact that the length of the network is now agreed to have been over 625 km on 31 March 2004, whereas in the first Statement of Agreed facts in 2005 the length was agreed at 154 km as at that date, and to the undoubted fact that the VO is entirely dependent on information from Vtesse as to (a) the length of the network, and (b) how much of it has been lit, at any given time. Thus the first agreed statement of facts was necessarily based on a statement by Vtesse which, it can now be seen, was seriously inaccurate at the time of the agreement.
99. As has been mentioned, at least the major part of the inaccuracy lay in the fact that what had been treated as a separate network in Kent was separately listed and separately assessed, whereas it now turns out that it was contiguous and therefore part of the same network at all material times.
100. Mr Lewsley denied that there had been any misrepresentation as to the status of the network in Kent. He relied on a letter from Vtesse to the VO dated 25 February 2005 in which it was said: "The fibre from Maidstone barracks to Tonbridge is contiguous with our network as it forms part of the ring round the south of London, as described" in an earlier letter. It had not been included in the Slough assessment because that was based on a letter in February 2003 describing services in use by March 2003. The southern ring was said to have been lit in August 2003.
101. Schedule 9 to the Local Government Finance Act 1988 includes powers for a VO to serve a notice on the owner or occupier of a hereditament requesting information relevant to a liability to rates, at paragraph 5. If in responding to such a notice a statement is made which is known to be false in a material particular, or a statement is recklessly made which is false in a material particular, a criminal sanction applies

under paragraph 5(4). If, on the other hand, there is no response within the due time, the person in question is liable to a penalty of £100. In that case the VO can serve a penalty notice. Non-compliance with that notice within 21 days gives rise to a further penalty of £100 and of £20 per day after the end of that period until compliance. There is a right of appeal against such penalties, the possible grounds being that there was a reasonable excuse for non-compliance with the penalty notice or that the information requested was not in his possession or control.

102. In exercise of this power, on 7 March 2006 the VO required Vtesse to supply information as to its network in Kent. Vtesse refused to comply with this requirement, stating that the notice was served for an unlawful purpose. The VO then served a penalty notice, against which Vtesse's appeal to the Kent Valuation Tribunal was dismissed on 16 August 2006. Mr Morshead submitted that the civil penalty imposed in this way could not be regarded as the only possible consequence of failure to comply, if the effect of the failure to supply the information was that the ratepayer would escape what would otherwise be its liability to pay rates by reference to an increased assessment appropriate to the circumstances as they existed, known to the ratepayer but not to the VO.
103. So far as the legal point is concerned, Mr Morshead started with the proposition that fundamental to rating law is the principle of fairness and uniformity as between ratepayers. He cited *Arsenal Football Club v Smith* [1979] AC 1 which, directly, was concerned with the question who might be a "person aggrieved" entitled to complain about the under-valuation of a hereditament in the same area. Holding that a person liable to pay rates in the same area was entitled to challenge the valuation of another hereditament even if he could not show any financial or other loss to himself, Lord Wilberforce at page 17 said that "Uniformity and fairness have always been proclaimed and judicially approved as standards by which to judge the validity of rates". Others in the House of Lords said much the same.
104. Taking the point to a less general level, Mr Morshead showed us a number of cases in which what appears to be an absolute statutory provision has been held to be subject to an implied qualification such that a person may not obtain a benefit from his own wrong. By way of an author's comment he relied on Cross on Statutory Interpretation, 3rd ed, at 166, discussing presumptions in general, including this passage:

"The principle that no one shall be allowed to gain an advantage from his own wrong is of general application for it undoubtedly applies so as to qualify the effects of statutory words which are wholly unambiguous. But it is somewhat easily rebutted by the statutory context."
105. The example given in support of the first of those sentences is of the Social Security Act 1975, under which a woman who has been widowed "shall be entitled to a widow's allowance", but this was held in *R v Chief National Insurance Commissioner ex parte Connor* [1981] QB 758 not to apply to a woman who had become a widow on killing her husband, for which she was convicted of manslaughter.
106. Mr Morshead cited a variety of other cases on this point. In *F C Shepherd & Co Ltd v Jerrom* [1987] QB 301, concerned not with statutory interpretation but with the

application of employment protection legislation to the facts, Mustill LJ said this at page 325:

“On the facts of the present case, if the man in the street were to be asked whether, for the purposes of claiming compensation from his employers, the applicant should be better off because his actual and prospective absence from work was caused by his having committed a criminal act and being punished for it, than if it was due to an event not of his own making, he would not pause long to reply. In my judgment he would be right, for such a result would be an affront to common sense; an infringement of what Diplock L.J. described in *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26, 66, as “the fundamental legal and moral rule that a man should not be allowed to take advantage of his own wrong.”

107. Another case, closer to the point because it is concerned with statutory interpretation, is *R v Registrar-General ex parte Smith* [1991] 2 QB 393. The facts and the particular point at issue are remote from the present case. Discussing the proposition that the courts will not allow a party to benefit from his own crime, in the context of enforcing statutory provisions, Staughton LJ said this at page 401-2:

“In the case of statutory duties the rule is, in my opinion, based upon interpretation of the meaning intended by Parliament. It is not a rule imposed ab extra as in the case of contracts. That is apparent from the passage of the judgment of Donaldson LJ which I have just quoted. To hold otherwise would come perilously close to infringing constitutional doctrine of major importance. Our courts have no power to dispense with the laws enacted by Parliament or (as it is now called) to displace them, subject to the law of the European Community. So the rule is that we must interpret Acts of Parliament as not requiring performance of duties, even when they are in terms absolute, if to do so would enable someone to benefit from his own serious crime.”

108. On the basis of the principle exemplified in different ways by these citations, that legislation is not generally to be construed as allowing a person to gain an advantage from his own wrongful act, Mr Morshead submitted that a ratepayer should be held not to be entitled to the protection against retrospective increases afforded by regulation 44(4) if the reason why the increase has to be made retrospectively is that the ratepayer has misled the VO as to relevant circumstances, at any rate where the VO could not otherwise ascertain the facts and was dependent on the ratepayer for up to date and accurate information.
109. He argued that regulation 13A(14), with its exception to comparable protection against retrospective increases in the case of error or default by the ratepayer, is relevant by way of analogy. Mr Lewsley also relied on that provision, but made the opposite point, namely that the existence of this express provision in the one case to which it applies must be seen as showing that the legislator has dealt with the question in one context, and has deliberately decided to do so only in that case, and not in the present instance. Moreover, he argued that the consequences of failure to comply with a statutory requirement to supply information are prescribed and there is no scope for implying some other consequence not mentioned in the regulations.

110. For my part, attractively as Mr Morshead put his arguments, I am not persuaded that he is right. The regulations provide an elaborate regime dealing with many different contingencies. There is an express provision as regards the consequences of error or default by the ratepayer in one context, namely regulation 13A(14). Likewise the consequences of failure to comply with a statutory request for information are prescribed. It does not seem to me that it would be proper to read into the regulations another provision, more or less equivalent to the exception in regulation 13A(14), whereby the protective effect of regulation 44(4) against a retrospective increase is qualified in a similar way. This is a case such as is mentioned in the second sentence in the quotation from Cross at paragraph [104] above where the principle gives way to contrary indications in the legislation. It seems to me that if a different result is to be achieved, an amendment to the legislation is required.
111. I would therefore also reject this argument in favour of backdating the increase to £470,000 as far as 31 March 2004.

Backdating on appeal

112. Mr Morshead's third proposition is that, in any event, the Lands Tribunal, allowing an appeal from the Valuation Tribunal, ought to have ordered that the increase to £470,000 should have effect as from the date of the Valuation Tribunal's decision, namely 15 October 2004. The effect of the Lands Tribunal's decision, leaving aside the backdating point, is that the Valuation Tribunal ought to have held that Vtesse's network ought to have been shown in the list with a value of £470,000. Of course, some of the facts on which that conclusion was based were not known to both parties at the time of the Valuation Tribunal decision, but that does not affect the principle. If the alteration has effect from 15 October 2004, then Vtesse is liable to rates for the period from that date until 31 March 2005 by reference to the higher value. The result of the Lands Tribunal's decision as to the effective date is that the alteration of the list has no effect on Vtesse's liability to rates for any part of the period covered by the 2000 list.
113. Mr Morshead submitted that it was open to the Lands Tribunal to make an order that the alteration should have effect as of the date of the Valuation Tribunal's decision, by virtue of regulation 47(5). The Lands Tribunal may make any order that the Valuation Tribunal could have made. That must include an order as to the date on which the alteration to the list has effect. If the Valuation Tribunal had known in October 2004 the facts which were known by the time of the second Lands Tribunal decision, it has to be assumed that (leaving aside any question of itself backdating the increase) it would have ordered that the increase should have effect as of the day on which it decided the case, under regulation 44.
114. The VO's submissions to the Lands Tribunal on backdating included this point, though it was subsidiary to the arguments about further backdating to 31 March 2004. Correspondingly, Vtesse submitted to the Lands Tribunal, as Mr Lewsley did before us, that even backdating to 15 October 2004 is precluded by regulation 44(4). The Lands Tribunal did not expressly deal with this point in their additional reasons given in February 2009.
115. Mr Lewsley's argument is that regulation 44(4) applies directly to the Lands Tribunal when, as here, the decision in favour of an alteration to the list by way of increase

arises on an appeal from the Valuation Tribunal. He argues that in a case such as this “the day on which the decision is given”, in regulation 44(4), means the day on which the decision is given on the appeal.

116. He drew our attention to a decision of this court in *Ellerby v March (VO)* [1954] 2 QB 357 about the powers of the Lands Tribunal on an appeal from the local valuation court under the then relevant legislation, the Local Government Act 1948, which provided for the Tribunal to have power to “give any directions which the local valuation court might have given”. The local valuation court had fixed the value of a hereditament at a figure less than that entered in the list by the VO but higher than that proposed by the ratepayer. The ratepayer appealed to the Lands Tribunal; the VO did not. However, before the Lands Tribunal the VO argued that the Tribunal could decide that the correct valuation was the higher figure originally entered in the list, even though he had not appealed. The Lands Tribunal rejected that argument and the Court of Appeal dismissed the VO’s appeal.
117. That seems to be an altogether different kind of point, and the Court of Appeal’s decision was at least in part based on the then rules as to the scope of an appeal to the Lands Tribunal. I do not find the case to be of assistance.
118. In any event, I cannot accept Mr Lewsley’s argument. The Lands Tribunal has power to make any order that the Valuation Tribunal could have made. It has decided that the Valuation Tribunal’s decision was wrong, and that the Valuation Tribunal ought to have held (a) that the whole network was rateable as being in the occupation of Vtesse, and (b) that the correct valuation figure as of 31 March 2004 was £470,000. If the Valuation Tribunal had come to that decision, it must have ordered that the increased figure should have effect from no later than the date of its own decision. That is the decision which the Lands Tribunal itself can make.
119. The protection against retrospective increases which is built into regulation 44(4) does not, in my judgment, extend to the period of any appeal from a decision of the Valuation Tribunal, whether to the Lands Tribunal or on to this court or higher. Otherwise there would be an inbuilt incentive in favour of delay. By the time of the decision of the Valuation Tribunal, issue has been joined as to the correct valuation figure, at least in principle and in most cases as regards the actual figures. I can see no reason why, if the ratepayer wins before the Valuation Tribunal on a basis which, it has to be assumed, was wrong, it should be protected against the retrospective effect, back to the date of the Valuation Tribunal’s decision at least, of a successful appeal by the VO.
120. The use of the word “may” in regulation 47(5) shows that the Lands Tribunal has a variety of courses open to it on allowing an appeal. In a given case an exercise of discretion may be called for in order to decide what would be the appropriate order to be made to give effect to the success of the appeal, as it sometimes is in the Court of Appeal. However, the Lands Tribunal did not in the present case address the issue, and therefore did not approach it as a matter of discretion. In any event on the material before us, and on the submissions made to us, I find it difficult to see on what other basis they could properly have exercised any discretion they had other than by ordering that the increase should have effect as of the day of the Valuation Tribunal’s own decision. Mr Morshead showed us that Mr Rose had made just such an order in *Re Reeds (VO)* [2009] RA 90. Mr Lewsley pointed out that there was no legal

member of the Lands Tribunal in that case, that the ratepayer was not present or represented and there is no indication that this point was taken. The case is not authority, but it conforms with common sense in the circumstances. In my judgment it is a course which was open to Mr Rose in that case, and also to the Lands Tribunal in the present case.

Disposition

121. For the reasons given above, I would dismiss Vtesse's appeal and would not refer any question to the European Court of Justice. I would allow the VO's appeal, but only to the extent of ordering that (1) the list be altered by the insertion of a figure of £125,000 with effect from 27 June 2003 and (2) the alteration of the list to insert the figure of £470,000 should have effect as of the day of the decision by the Valuation Tribunal on 15 October 2004.

Lord Justice Sullivan

122. I am in complete agreement with the judgment of Lord Justice Lloyd. Whether disaggregation of BT's assessment was a useful exercise for the purpose of determining the rateable value of Vtesse's hereditament was a question of valuation judgment for the Tribunal. The Tribunal had to form that judgment on the basis of the evidence placed before it. Given the very limited extent to which Mr Partridge relied on the 2008 Ofcom Report the lack of any reference to it in the Tribunal's decision did not amount to an error of law on its part.

Lord Justice Sedley

123. I adopt with gratitude the careful and comprehensive account of the case set out in the judgment of Lord Justice Lloyd. I part company with him on one issue only, but it is the critical issue before us.
124. It is now evident, despite the oblique and partial approach adopted at earlier stages, that Vtesse has a tenable argument that, contrary to the VO's case and BT's claims, the 2008 Ofcom report shows that it is possible not only to disaggregate BT's rateable holdings but to assign a hypothetical rental value to their fibre-optic cables. If that can be done, there is arguably a gross disparity in BT's favour between the rateable value of its and Vtesse's cables.
125. As Lord Justice Lloyd accepts, the issue was and is – albeit only just – legitimately on the agenda. For my part I accept that the way it has been developed up to now has fallen markedly short of what was required to give it its full potential effect. But unless to do so would produce an irremediable injustice, the right course in this situation is in my respectful judgment to remit the appeal to the Lands Tribunal for argument and determination on a point which, though potentially crucial, has so far gone almost unaddressed.
126. The additional burden thrown on to the VO by this course would be adequately remedied by depriving Vtesse of its costs of this appeal, or even by requiring it to pay the VO's costs, as well as by making it liable for the additional costs to be incurred below. By contrast, the injustice of allowing the continuance of what may be a radical inequity in the rating system will go unredressed by the proposed disposal.

127. For my part, therefore, I would have allowed Vtesse's appeal to the extent and on the terms which I have indicated.