Landmark CHAMBERS

Issues in Collection and Enforcement

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Introduction

A whistle stop tour of some topical liability and enforcement issues:

Liability

- ***Empty Property - Rate Mitigation Schemes - Makro and Local* Authority routes of challenge**
- ***Charitable exemption update***
- *Empty Property* - Occupation "prohibited by law" – *Pall Mall*

- **Enforcement**
  - *Demand Notices – "as soon as reasonably practicable" – Honda*
  - ***Restitution* - wrongly paid rates – *Chetnik* and *FII***

CONTEXT

1. Local authority rate retention
2. Financial pressure on local authorities and imperative to maximise income
3. Co-operative working between Local Authorities to test the boundaries of the exemptions

EMPTY PROPERTIES – MAKRO SCHEMES

The Scheme - Essential Features

- long term empty properties not in process of redevelopment
- No commercial tenant can be found
- Rating liability rests on owner
- Rate Mitigation Company takes a short (6 week) lease and "occupies"
- Effect of regulations is that the tenant is liable for rates but
- At the end of his occupation the landlord benefits from a 3/6 months fresh exemption
- Outside the terms of the lease the tenant is paid a share of the landlord's savings
- The process repeats itself

The Conventional Wisdom – and challenge to it

Since Makro and Sterling the conventional wisdom has been that these schemes work.

But Local authorities are increasingly challenging them <u>on the facts</u>

And the challenge I am about to explain is being run (in various different ways by LAs) at the moment – most recently in a MC hearing in March.

The Key Logic of the Challenge

Take a situation where the scheme ***only*** makes any commercial sense for the tenant if it is paid for its efforts out of the savings the owner achieves on its rates for non-occupation for a later period– so it has to be paid to take the **burden of occupation**

Yet to succeed, by definition, such schemes are wholly dependent on the tenant being in **beneficial occupation** for the period of its lease – the occupation itself being of benefit to tenant.

An inherent contradiction?

The Central Importance of the Facts

"the driving principle …. continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically".

If there is **one key message** in this talk is that the facts are central and that *Makro* and *Sterling* are not authority for any general proposition that these schemes work irrespective as to the detailed facts

"Beneficial Occupation"

*"Actual occupation does not amount to rateable occupation if that **occupation** is of no benefit to the occupier*" – Makro [45].

The Benefit to the Tenant in Makro – under an obligation to store the documents

The Benefit to the Tenant in Sterling - part of a roll out of a marketing business plan using Bluetooth devices to send out commercial messages for profit

But what if the facts are different…..

A tenant:

- takes a short lease for the purpose of storing boxes for 6 weeks where the boxes do not belong to the tenant and/or there is no obligation to store them. The taking of the possession of the boxes and the storage of them is of no benefit to the tenant (or the owner of the boxes);
- for that contrived purpose, the tenant agrees to pay a nominal rent ***and rates*** (a significant burden);
- is paid a nominal sum for the storage of the boxes (such that the lease and occupation inevitably generates a considerable loss – net burden)
- the tenant has to be paid to agree to enter the lease and to carry that burden by way of a share of the saving of the rates secured by the owner for a later period of non-occupation.

- In other words he knows the *occupation* will be of no benefit but a major burden and the only *benefit* comes from the agreement to share the tax benefit from a later period of non-occupation.

And crucially…

The tenant has to be paid to agree to enter the lease and to carry that burden by way of a share of the saving of the rates secured by the owner for a later period of ***non-occupation***.

- In other words he knows the *occupation* will be of no benefit to him
- He knows it will create a benefit to the landlord in respect of future non-occupation
- He gets a share of that benefit from a later period of non-occupation.

THE ARGUMENT

- If the reality is that: (1) the *occupation* provides no benefit and there is no real expectation of it doing so; and (2) that the whole benefit comes from the tenant receiving a share of the rates saving for a later period of non-occupation, the rationale in *Makro* and *Sterling* may cease to apply.
- And in those circumstances, the facts "viewed realistically" and applying an "unblinkered approach" to them may result in the opposite conclusion to *Makro* and *Sterling.*
- This argument is not dependent on the lease being a sham. It is sufficient that *on the facts* it is an artifice or a device to give the impression – the semblance - of beneficial occupation.

And if that is right…..

- Does it have knock on consequences for whether there is:
  - Actual occupation as opposed to the semblance of occupation
  - An intention to occupy as opposed to giving the impression of such intent
  - More than de minimis occupation
  - More than transient occupation

CHARITY SCHEMES

The Legislation:

ratepayer (so occupier or for empty rates owner) is a charity and

"used wholly or mainly for charitable purposes"

Principles from the Case Law to 2016

- wholly or mainly refers to the hereditament – is it being used wholly or mainly for charitable purposes
- That test may not be met when a significant proportion is not used
- The requirement is for extensive use – rather than leaving them mainly unused – an anti-avoidance approach.

South Kesteven v. Digital Pipeline (1)

The Facts:

10 days usage by a charity over 2 years for the purpose of collecting IT equipment for use in schools in developing countries.

Used 42% of a large warehouse space

BA challenged whether statutory test for 80% relief was met for those days (if it was then the empty rates relief followed)

South Kesteven (2)

- MC took into account the fact that none of the 58% was occupied for any other use in concluding that the premises was “wholly or mainly” used for charitable purposes.
- The DC held that was the wrong question:
  - Whilst the “mainly” was not a simple mathematical exercise – the 58% unused did not automatically mean that the premises were not “mainly used” but
  - The MC had failed to consider whether the main use was in fact “unused”. The absence of another use could not support the charity if on the facts, the premises were mainly unused.

Lessons for Charitable Exemption

- Providing space for charities remains an available and legitimate RMS strategy but
- The “wholly or mainly” test is a high one and LAs/Occupiers should be clear as to the physical extent of the use **and the non-use.**

RECOVERY – WRONGLY PAID RATES

The Situation

X pays rates because demanded and because not aware of and does not claim any mandatory exemption – such as empty rates relief, charitable relief etc…

X pays under an error of law

X later discovers that there was no liability in that period.

Seeks repayment.

Statutory Scheme

No statutory duty to repay – s.9 of the GRA not replicated.

Chetnik and FII

S.9 and Chetnik

Abuse of discretion in s.9 not to repay. No factors justified non repayment. S.9 became effectively a statutory form of restitution asking broadly the same questions. It extended to error of law.

Restitution and Error of Law in the tax field

Some uncertainty in case law that absent a statutory discretion, restitution applied for error of law in the tax field. That debate was always tenuous but has now been resolved in favour of repayment: *Franked Investment Group Litigation*