# COLLECTION AND ENFORCEMENT

David Forsdick 26th April 2017

## INTRODUCTION

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

**Liability**

i. *Empty Property - Rate Mitigation Schemes - Makro* and *Bluetooth* Billing Authority challenges
ii. *Other permissible routes*
iii. *Charitable exemption update*
iv. *Empty Property* - Occupation "prohibited by law" – *Pall Mall*

**Enforcement**

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

## CONTEXT

2. Local authorities having much more incentive to rigorously enforce liability and challenge avoidance because of rate retention.

3. Some local authorities seeing the potential for significant income and testing the boundaries of existing case law.

## LIABILITY

4. Issues normally arise in respect of empty properties or with disputes as to who is in actual occupation. I am focussing on the former.

### *(1)Empty Property – Makro type schemes*

5. The classic situation – large empty building. Owner liable for rates. Cannot find a commercial tenant. Rate Mitigation Company ("the tenant") takes a short lease (6 weeks) and "occupies" taking rating liability. At the end of that lease a new 3/6 month's exemption from empty rates liability is triggered for the owner. The owner shares the rate saving with the tenant. The process repeats itself.

6. Conventional wisdom is that these schemes work. But is that conventional wisdom correct?

7. 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**.

8. 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 X.

9. The potential *factual* contradiction inherent in the schemes in such circumstances is obvious. How it may play out in *law* is yet to be seen.

10. I will consider two main varieties of schemes with which this note is concerned: (1) a small number of boxes being stored in the hereditament by the tenant (*Makro);* and (2) Bluetooth schemes where the tenant puts a Bluetooth device in the hereditament for the transmission of commercial messages (as in *Stirling*).

11. The case law has, so far, been seen as giving a blank cheque to such schemes causing considerable disquiet amongst billing authorities.

12. I am going to show you how the prevailing orthodoxy that these schemes work can (and is) being questioned on the facts with a focus on two issues:
    a. whether the occupation can properly be described as "beneficial"; and
    b. whether it is actual occupation or just the semblance of occupation; an intention to occupy or just the semblance of such an intention.

13. My emphasis on the facts is fundamental: Barclays Mercantile Business Finance Limited v. Mawson [2004] UKHL 51 endorsing Collector of Stamp Revenue v. Arrowtown Assets Limited [2003] HKCFA 46:

> "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".

14. Mere recitation of the results in *Makro* and *Sterling* are no substitute for a careful examination of the facts of the case – and it is important to note that the Magistrates (and the HC in PAG) undertook a detailed examination of the facts. The High Court was not the place to question the factual findings.

15. So the argument goes an unblinkered approach by the Magistrates to the facts of Makro type schemes may demonstrate that there is no beneficial occupation, only the semblance of occupation rather than actual occupation, a concocted "intention" to occupy and that any occupation is trifling when "viewed realistically".

16. With the possible result that on the facts beneficial occupation is not established and the owner remains liable for the rates during the life of the lease and the new exemption period is not triggered thereafter.

*The "benefit"*

17. "*Actual occupation does not amount to rateable occupation if that* ***occupation*** *is of no benefit to the occupier*" – Makro [45]. It is the occupation itself which has to be of value.

18. The short point is that the benefit has to be from the occupation and not from a factor divorced from the occupation.

19. Take the storage schemes. In *Makro,* the benefit of occupation consisted of the actual storage of the 16 crates of papers where there was an obligation on the tenant to store

them. It is (just) possible to see why in those circumstances the Magistrates found the occupation to be beneficial and not de minimis.

20. But what happens if a tenant:
    a. 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 and/or they were previously perfectly well stored elsewhere. 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);
    b. for that contrived purpose, the tenant agrees to pay a nominal rent *and rates* (a significant burden);
    c. is paid a nominal sum for the storage of the boxes (such that the lease and occupation inevitably generates a considerable loss – net burden); and
    d. 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.

21. 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.

22. Take the Bluetooth schemes. When they started (around 2010) the business plan was that the devices would become part of national networks transmitting commercial messages to the public. That potential marketing business was the benefit of occupation.

23. In *Sunderland v. Sterling* [2013] that approach was accepted. The fact that there was "user…which was commercial and *at least potentially beneficial* to [the occupier]" [20] was sufficient to constitute beneficial occupation.

24. The judge concluded that although the rent paid was minimal, the outgoings in terms of liability for rates during the 6 weeks was not and that "[the outgoings] reflects the value or potential value to them of the lease and their occupation of the premises." NB: No consideration there of any later payment by the owner to the tenant of the share of the future rates saving.

25. The finding of a benefit in *Sterling* was not a surprising result for an occupier in a start-up phase. In the start up phase, potential future benefit as demonstrated by a business plan is obviously relevant. The benefit was the ability to further the business plan and the roll out of the novel marketing concept.

26. However, we are now around 7 years down the line from the start of these schemes. Does the case that the *occupation* is of value to the tenant stack up in current circumstances? Of course it is of value to the owner - but the whole purpose is to ensure he is not occupying but what is the *value of the occupation to the tenant*.

27. What happens if a tenant:

a. takes a lease for the purpose of the Bluetooth device for 6 weeks where he has no national roll out programme, no commercial customers and no income stream from the occupation;
b. he agrees to pay a nominal rent *and rates* (a significant burden);
c. earns no income from the occupation at all (the occupation is thus a significant burden and by definition loss making;
d. the only way the occupation makes any economic sense is for him to be paid to carry that burden by way of a share of the saving of rates secured by the owner.

What is the benefit *of the occupation*?

28. Rhetorically, why on a realistic and unblinkered assessment of the facts is the *occupation* in both cases the opposite of beneficial and in fact a burden? So the argument runs, the taking of the lease and the occupation is a burden and the only benefit to the tenant comes not from occupation but from the separate, later tax advantage to the owner which the owners shares with the tenant. That is not a benefit *of or from* occupation.

29. The putative occupation is merely a device to secure the tax advantage.

30. Testing the "benefit" on the facts:

*In a storage case*

a. was the tenant under an obligation to store and does the taking of the lease and the offer to store commercially real (PAG [38];
b. was the agreement to take a lease and store boxes a commercial undertaking or did the occupation create a burden;
c. what was it that made it economic for the tenant to enter into the lease for the purpose of storing a few boxes?

*In a Bluetooth Case:*

d. are any commercial messages in fact transmitted for profit?
e. What income is received from the *occupation* - *h*as any historic business plan delivered a profit *from occupation*

31. 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.

32. 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.*

33. This argument is not dependent on the lease being a sham[1]. It is sufficient that *on the facts* it is an artifice or a device to give the impression – the semblance - of beneficial occupation

[1] As explained in *Secretary of State for Business Innovation and Skills v. PAG Management Services* [2015] EWHC 2404 (ch).

when the reality properly understood is the reverse. It is relevant to note that in PAG a similar arrangement was conceded to lack any commercial reality and to be an artifice.

*Actual Occupation/Intention to occupy/De Minimis*

34. Those facts would also be directly relevant to the other issues the court would have to consider: namely whether:
    a. there was genuine actual occupation rather than a scheme to give the semblance of occupation – given that the lease itself is not conclusive as to actual occupation;
    b. an intention to occupy rather than to give the impression of such an intent through entering into a lease;
    c. the occupation was de minimis or trifling;
    d. the occupation was in fact transient – just for a moment at the start and a moment at the end. Storage was not the purpose and was of no benefit; the operation of the Bluetooth was not the purpose and was of no benefit.

35. Of course the use of a small part of a hereditament constitutes occupation of it.

36. But in a situation where some boxes are stored for a third party for no reason and for an inevitably loss making fee, the costs of moving them in and out fall on the tenant who makes a significant loss, why is that "actual" occupation by the tenant and not a semblance of occupation. Why is it not an artifice or device which is intended to give the impression of occupation. If a Bluetooth device is installed on day 1, left in place, does nothing of value during the six weeks, why is that, on the facts "actual" occupation of anything.

37. Further take a situation (common in practice if rarely recorded in the leases) the owner can take back possession if a substantial tenant wishes to take the space. Doesn't that add to the picture on the facts critically analysed that there was no real intent to occupy but just to give the impression of such an intent?

38. And take a position where the boxes or the device occupy a tiny proportion of the overall space but the tenant takes the rating liability for the whole. Why does that combined with all the other facts above not demonstrate the occupation is trifling and contrived?

39. Given the increased interest of billing authorities in recovery, we can expect to see these arguments being run in appropriate cases in the near future (and indeed are already being run).

**(2) Permissible routes to empty rates exemption?**

40. Plainly in an appropriate case on the facts, the above analysis does not prevent short term leases being granted as long as:
    a. there is actual and not just the semblance of occupation;
    b. beneficial occupation rather than occupation which on a correct analysis imposes a burden;
    c. an intention to occupy rather than an attempt to give a semblance of such intent;
    d. more than de minimis occupation.

41. *Stirling* and *Makro* themselves might survive the critical analysis of the facts to which I have referred. But the assumption that they work irrespective as to the precise facts is wrong.

42. Further the device in PAG can be taken to be closed. There PAG incorporated a SPV to whom a lease was granted by clients of PAG who were the owners of an empty property. As soon as the lease was granted the SPV was placed in voluntary liquidation in an attempt to trigger reg 4(k) and (l). The SPV is thus exempt from rates. The owner declines to forfeit (for obvious reasons) and a liquidator of the SPV was not appointed promptly and then did not act appropriately to disclaim. The intended effect was that the SPV would continue in existence and continue to benefit from the exemption unless and until a new (proper) tenant was found. PAG was wound up by the Court because the arrangements an abuse of the insolvency legislation and the lack of commercial probity. (Note the possible read across from that case to *Sterling/Makro* situations).

43. Of course the obvious answer to empty rates liability is to let the premises for beneficial occupation. But not at all costs.

44. There have been a number of recent scams by tenants which have landed landlords desperate for tenants so as to avoid empty rates in very significant problems. In one case the problems were so severe that the landlord had to forfeit to avoid further harm/damage so he became liable for rates again and had to cover the remediation costs!

***(3)Charity Exemption and Empty Rates***

45. Charities receive favourable treatment in respect of rates. They secure an 80% relief on days of occupation (s.43(6)(a)), and by virtue of s.45A(2) complete exemption from empty rates if they are the owner. The effect is that if they are in occupation within s.43(6)(a) they will secure the rate protection potentially creating a major benefit to the landlord on lettings to charities.

46. The two conditions for the favourable treatment are that the ratepayer (occupier) is a charity and the hereditament is used wholly or mainly for charitable purposes.

47. The most recent in the line of cases is *South Kesteven District Council v. Digital Pipeline Limited* [2016] EWHC 101 (Admin). The charity occupied the premises under a lease. The premises were used for "appeal days" and left vacant between appeal days. On the appeal days the charity used a part of the building for the purposes of collecting donations of IT equipment for the use of schools. It did not use substantial parts of the building (58%) and the building was not ideal. The district judge held that "whilst less than 50% was used, nothing else happened in the remainder. It was not a case where 40% was used by the charity and the remainder by a commercial organisation. On appeal days the only thing happening was the appeals.

48. The Divisional Court recited the established principles from e.g. *English Speaking Union* and *Kenya Aid:*

    a. The question is not whether the activity is wholly or mainly charitable but whether the premises are being used wholly or mainly for charitable purposes;
    b. A building is not wholly or mainly so used when a significant proportion of it is not so used. 1 of 7 floors in *English Speaking Union* did not satisfy the test; and in *Public Safety Charitable Trust,* the requirement was for extensive use of the premises for charitable purposes rather than leaving them "mainly unused";
    c. If the premises are so used, it matters not that they could be more efficiently used requiring less space;
    d. the fact that the charity was paid a share of the rates saved during its occupation (not a later period of non-occupation – and therefore a different question from *Makro* and *Sterling*) was not relevant.

49. The Appellant councils contended that the approach of the judge misunderstood "mainly" - less than 50% was occupied; he left out of account that the premises were mainly unused; and made other errors.

50. The Divisional court rejected the 50% point – it was not only a mathematical exercise.

51. However the claim succeeded on the failure to take into account the fact that the building could be "mainly unused". By referring to the lack of other uses, he failed to consider whether the main use was in fact unused.

52. Two central lessons: first, providing space to charities remains an available rate mitigation exercise and lawful; second, the "wholly or mainly" test is a high one (partly to avoid abuse)

and whilst not a mathematical exercise it has to be contrasted with the other uses including no use.

***(4) Empty Property: Occupation Prohibited by Law***

53. Under reg 4 (c) of the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008 there is no liability for empty property where the owner is "prohibited by law from occupying it or allowing it to be occupied". This phrase is to be strictly construed (*Pall Mall).*

54. What are the limits of this rule? Consider three scenarios:
    a. the statutory scheme itself expressly prohibits occupation until a particular step is taken – such as the provision of a fire escape as in *Tower Hamlets v. St Katherine by the Tower Limited* [1982] RA 261. **The focus is on the words of the statutory scheme – do they meet the reg 4(c) formulation.** The exemption applies even though the owner could easily take the step to overcome the obstacle to occupation;
    b. the statutory scheme enables prohibition notices to be imposed which have the inevitable effect of preventing occupation until they are complied with as in *Regent Lion Properties v. Westminster* [1990] RA 121. **The focus is on the statutory role of the prohibition notice and its inevitable effect.**
    c. The occupation of the premises could in certain circumstances result in the commission of offences. This was the position in the rejected cross appeal in *Regent Lion* and in *Pall Mall v. Gloucester City Council* [2014] EWHC 2247. This was not sufficient to trigger thee exemption because the occupation was not prohibited *per se* but in some circumstances once in occupation the occupier could be in breach of the criminal (or civil) law. That was not sufficient.

55. How is this line to be drawn and what implications does it have for rating surveyors? In short the prohibition must be on the occupation and nothing less will suffice.

56. First and obviously, where the statute prohibits occupation until X that satisfies the reg 4(c) test.

57. Second, prohibition notices may prevent *certain works* (refit works) until certain remedial works are carried out (e.g. to remove asbestos). The prohibition notice and the statutory scheme under which it was made did not expressly refer to occupation. However, because the asbestos works *had to be carried out* before any of the refit works could be lawfully started and because the refit works were necessary for any occupation, the inevitable effect of the prohibition notice was that it prevented any occupation. That satisfies reg 4(c) but it is a very narrow category.

58. Third, the absence of planning permission does not constitute such a prohibition on occupation. The use of a property in breach of planning law does not constitute a criminal offence. In some circumstances an enforcement notice can be issued and breach of that can be a criminal offence but the planning legislation does not prohibit occupation. Of course an enforcement notice (or an injunction under s.187B) may.

59. Fourth, where occupation may (not inevitably will) render the person in breach of the criminal law that will not trigger the exemption. Thus in *Pall Mall* the building was in such a state that an employer occupying the building may be in breach of his obligations under the HSAWA but that did not prevent occupation. Occupation did not constitute the criminal offence – putting employees at risk did. This is perfectly explicable in its own terms but is also a justified interpretation to avoid abuse – for example taking out sanitary fittings to make a building unusable under the HSAWA.

**Collection**

***(5) Wrongly paid rates***

60. Where rates are wrongly paid under a mistake it has been well understood that there is a restitutionary claim for their return. When is that principle in play?

61. In *Chetnik* [1988] 2 WLR 654, under a building construction consent, two new warehouses were not permitted to be occupied until consent to the proposed user had been obtained. No consent was received but rates were nonetheless paid. That was a mistake because the occupation was prohibited by law. There was no liability. The Council in the exercise of its then discretion (s.9(1) of the GRA 1967) refused to repay for a wide range of reasons. The Court held that the refusal to repay was an abuse of the discretion and unlawful. The purpose of s.9 was to remedy injustice which would normally occur if rates were paid for which there was no liability and absent any special reasons the decision not to repay was quashed. That clear approach in principle was based on the then statutory scheme. That statutory scheme has not been replicated in the 1988 Act.

62. However it is now clear that the same approach applies under the law of restitution: see *The Test Claimants in the Franked Investment Group Litigation v. Commissioners for HMRC* [2016] EWCA Civ 1180 (24th November 2016). There the way taxes were charged was a breach of EU law. As a matter of *domestic law* the money was repayable on the basis that it had not been due (a classic *Woolwich* type case) but also on the basis that it was paid in the mistaken belief that it was due (error of law restitutionary claim – *Deutsche Morgan Grenville.* This had the effect of extending the limitation period. The total claim was close to £5bn. Even if that situation the HMRC could not establish a change of position defence. There does not appear to be any reason why the logic of that case would not also apply to rates.

63. The historic position that rates paid under a mistake of law could not be recovered therefore now appears to be wrong.

**(6) Service of Demand Notices – "As soon as practicable". Does delay causing prejudice remove liability?**

62. It is appropriate to just recap where the case law on this issue has got to because this issue is often wrongly raised.

63. In the *Encon* case, it was held that a breach of the "as soon as practicable" requirement in the C&E Regs meant that the sums were not due irrespective as to any prejudice. That surprising result was reversed in a string of cases including *North Somerset v. Graham* in

2010. The correct position is that a person who has suffered substantial prejudice as a result of the failure to comply with the rules in circumstances where that prejudice is not outweighed by the public interest will be able to defeat recovery.

64. However: (1) the prejudice has to directly arise from the delay – the delay itself will not be prejudice unless it causes some consequence; (2) it has to be so significant as to outweigh the harm to the public interest in non-recovery. Given that everyone knows that rates are normally due, that all list entries are available on the web and that the absence a rate bill would therefore normally be attributable to a mistake (rather than to actually lead to prejudice). It is therefore difficult to see what remaining scope for such claims is.

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