Landmark CHAMBERS

Avoidance cases

Tim Morshead, QC

Recap

- Rates in origin a tax on occupation
- “Unoccupied” rates …

Recap

Exemption for the first three months

- Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008/386 (summarized in R (Makro Properties Ltd) v Nuneaton and Bedworth BC[2012] EWHC 2250 (Admin) at paragraphs 5–19)
- Main relevant points:
  - Empty rate only starts after 3 months from last occupation (6 months for industrial and warehouse hereditaments)
  - No limit to the number of 3 month “exempt” periods a property owner may claim in relation to any hereditament
  - But each 3 month “exempt” period should be separated from its predecessor by at least 6 weeks of “occupation”

In practice …

- Take as an example the case of a period of six months plus six weeks (say, for the sake of simplicity, a total of 30 weeks) counting from the date when a property becomes empty:
  - For the first 12 weeks (3 months) after last occupation, the property is empty. No rates are payable for this period, because the landlord's liability is suspended for the first three months of emptiness.
  - For the next 6 weeks, the property is occupied. Rates are payable by the occupier for this period.
  - For the 12 weeks (3 months), the property is again empty. No rates are payable for this period.
- Thus, out of a total of about 30 weeks, rates are payable only for 6 weeks.
- Contrast this with a situation in which the landlord fails to find anyone willing to occupy for six weeks: in this situation, out of a total of about 30 weeks, rates are payable for 18 weeks.
- This "cycle" can be repeated for so long as the property owner can find short-term occupiers.
- Anyone offering himself up as a short-term occupier has the potential to save the landowner substantial rates liability which the landowner, in return, is incentivised to share with the occupier.

Lines of attack:
(1) Motive
(2) Sham

- Motive of occupation may be tax avoidance, but motive is irrelevant: *Makro* para 56; and *Kenya Aid Programme v. Sheffield CC* [2014] QB 62 para 38; *Wootton* [2016] RA 49 para 40: “well established principle that an arrangement should not be treated differently because it exists for the purpose of tax avoidance.”
- Is it a “sham” ? Unlikely because acid test is whether a transaction is “genuine” in the sense of being intended by the parties to have the legal effects which it outwardly possesses. The contrast is with a transaction which is a mere pretence, where the parties are “doing one thing and saying another”. As Lord Steyn observed in *IRC v. McGuckian* [1997] 1 WLR 991, 1001, tax avoidance is the spur to executing genuine documents and entering into genuine arrangements.

Remaining lines of attack: (3) beneficial occupation

- The 6 week period of occupation will only count if it is rateable occupation; and this has led to litigation about whether the short-term occupier's use of the premises is sufficient to count as "beneficial occupation"
- Can lead to intense scrutiny of occupier's affairs
- Is such scrutiny appropriate?
- May partly depend on what is meant by "beneficial occupation"

R ota Principled Offsite Logistics Ltd v. Trafford Council [2018] EWHC 1687; [2018] RA 499

- POLL was a "professional occupier": facts more "extreme" than *Makro*, where the storage of the documents was said to serve some external regulatory record-keeping purpose. Council alleged that POLL's goods were not stored for any business purpose, beyond creating occupation to avoid rates.
- Council argued that its occupation was too exiguous to count for rates
- This was based on concept of "beneficial occupation": familiar as the third of the four *Laing* criteria of rateable occupation ("the possession must be of some value or benefit to the possessor") [1948] 1 KB 344 at 350.
- POLL argued in correspondence that "there is no requirement that the benefit be derived from the use of the property or its intended use"
- Council said "there must be some value or benefit to the possessor"
- Is the volition of the occupier to occupy sufficient?
- Or must occupation serve some additional purpose, beyond occupation itself?

Principled Logistics

- Key points from the judgment of Kerr J:
  - Court not a court of morals; reluctant to make a value judgment.
  - Occupation won't count if it is a mere semblance, such as placing a dummy in a window of a house to make it look occupied.
  - "122. In the present case, the business of the putative occupier is the business of occupation. The purpose of the occupation is not to store goods; it is, so to speak to plant the occupier's flag; to populate the premises to whatever extent is required to occupy it in law and fact. The reason why that is done – the motive if you prefer – ir rates avoidance for the landlord, but the morality of that is neither here nor there."

Principled Logistics

- “123 … Is the third [Laing] element – that possession is of some value or benefit to the possessor – present where the value or benefit is the occupancy itself? That is the question to be decided.
- 124 … I cannot see any good reason why, if ethics and morality are excluded from the discussion, the thing of value to the possessor should not be the occupancy itself. The verb ‘occupy’ and the nouns ‘occupation’, ‘occupancy’ and ‘occupier’ are, in the end, ordinary English words. Their meaning has developed in the case law to give them sensible construction, but they have not been given technical statutory definitions.
- 125 I prefer the submissions of POLL to those of Trafford because they better fit the ordinary meaning of occupation. I find no concept within the meaning of the word requiring a purpose or motive beyond that of the occupation itself. The question in each case is whether the four elements in the *Laing* case are present. <u>The third is sufficiently present where the intention is to occupy for reward, without any further commercial or other purpose.</u>”

Principled Logistics

- Broad view of “occupation” is consistent with original scope of rating, as a tax on occupation: the net is cast widely and catches most occupiers of property.
- This suits the tax authorities in a conventional rating situation.
- It only creates a difficulty because of the extension of rates to unoccupied properties, coupled with what amounts to an exception for limited periods of occupation. In this situation, the tax authorities would prefer a narrow view of occupation, to capture the larger amount of tax payable for the generally unoccupied property.
- But they shouldn’t be able to have it both ways. And, it seems, they can’t.
- They did the woodwork: they can’t complain if the bits don’t fit properly.

Remaining lines of attack: (4) pierce the corporate veil and (5) *Ramsay* doctrine

- *Rossendale BC v. Hurstwood Properties (A) Ltd & others* [2019] EWCA Civ 364
  - Leases granted by freeholder / long leaseholder to multiple SPVs, which if effective became the "owners" of empty property
  - Each SPV was then in effect wound up voluntarily under a pre-ordained programme
  - This if effective enabled each SPV to rely on the exemption for companies being wound-up voluntarily: Unoccupied Property Regulations 2008, regulation 4(k).
  - Challenged by Rossendale BC: sham, pierce the corporate veil and *Ramsay* doctrine.
  - Sham rejected at first instance: no appeal
  - Corporate veil and *Ramsay* doctrine went to Court of Appeal
  - Judgment 7th March 2019

Rossendale BC v. Hurstwood Properties

- Corporate veil: David Richards LJ key points:
  - Corporate veil can only be pierced where company's separate legal identity is being used to "evade the law or to frustrate its enforcement. It is not an abuse to cause a legal liability to be incurred by the company in the first place."
  - Rates are a tax which accrues day by day. "A person becomes subject to the liability only in respect of each day that it owns the property. It is not a future liability, such as a liability to pay interest during the currency of a loan, nor is it a continuing liability save in the sense that it continues while a person remains the owner."
  - Followed that the liability in question never accrued to the freeholder: it always belonged, and only belonged, to the SPV.
  - Therefore, no liability was "evaded", and the corporate veil could not be pierced.

Rossendale BC v. Hurstwood Properties

- *Ramsay* doctrine: Henderson LJ key points:
  - The principle: *BMBF v. Mawson* [2005] 1 AC 684 at para 32 *per* Lord Nicholls: Taxation statutes should receive a purposive interpretation, in order to determine the nature of the transaction to which it was intended to apply then then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description.
  - BUT it is a principle of interpretation
  - "One is therefore looking for words which have to be interpreted. One is not looking to a general sort of 'Parliament cannot have intended to allow this sort of thing' approach. It is a tighter approach than that": para 76, approving the trial judge
  - Approved Mann J "In my view this exposes the argument for what it is, which is not so much an attempt to construe words in the statute, but to divine a purpose behind a provision in the statute, extract that purpose and then apply a principle that a person should not be able to evade that purpose because it was Parliament's purpose."
  - In the rating context, the legislation defines liability by reference to legal concepts, not economic effects
  - *Ramsay* doctrine has limited purchase in this kind of situation

Rossendale BC v. Hurstwood Properties

- “73…. once each scheme lease was executed, the right to legal possession of the property passed from PAGL to the lessee. Accordingly, the liability to NDR … also passed to the lessee, because from the day the lease was granted it was the lessee, and not PAGL, which satisfied the ownership condition in section 45(1)(b) of the 1988 Act … regardless of the motivation of the parties in entering into it. Moreover, since the lease was not a sham, it validly conveyed a legal estate … including the right to exclusive possession. None of this can be altered by the fact that the lease may have omitted some usual provisions, or that the intention of the parties was for the lessee to divest itself of its own liability to NDR by quickly entering into members’ voluntary liquidatin. Those factors help to explain the structure and motivation of the scheme but for the purposes of section 45 the only relevant concept is whether ownership of the property has passed from the lessor to the lessee. … I cannot see any scope for giving to the concept of ownership in this context, as defined in section 65(1), anything other than its normal legal meaning. The legislation is therefore not amendable to a wider purposive construction which could allow scope for the *Ramsay* principle to operate.”

Remaining lines of attack: What's left?

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- (6) honesty??
  - re-work some of the old lines of attack but coupled with allegations of "dishonesty"??

- (7) company law/ insolvency law remedies??
  - Remember that in *SoS v. PAG Management Services Ltd* [2015] EWHC 2404, Mann J upheld the validity of a mitigation scheme, but he agreed to the SoS's petition winding-up the company which promoted those schemes, on the basis that they involved an abuse of the insolvency legislation
  - Companies can also be de-incorporated, or their incorporation quashed, on the application of the Attorney-General, if they have been formed for an illegal purpose: *R v. Companies Registrar ex p A-G* [1991] BCLC 476.

Remaining lines of attack: What's left?

- (8) General Anti Avoidance Rule: Finance Act 2013, Part 5, ss 206 to 215
  - Policy objective of these rules was "promoting fairness in the tax system by deterring taxpayers from entering into abusive schemes that might succeed under current law. The GAAR will provide that tax advantages arising from such arrangements are counteracted on a just and reasonable basis."

207 Meaning of "tax arrangements" and "abusive"

(1) Arrangements are *"tax arrangements"* if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements.

(2) Tax arrangements are *"abusive"* if they are arrangements the entering into or carrying out of which cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances including—

(a) whether the substantive results of the arrangements are consistent with any principles on which those provisions are based (whether express or implied) and the policy objectives of those provisions,

(b) whether the means of achieving those results involves one or more contrived or abnormal steps, and

(c) whether the arrangements are intended to exploit any shortcomings in those provisions.

(3) Where the tax arrangements form part of any other arrangements regard must also be had to those other arrangements.

- BUT: NDR are not listed among the taxes to which these principles apply (s206)
- This omission is perhaps a powerful reason AGAINST continuing with unreflecting attacks on mitigation schemes. The ball is in the Government's court.