The Supreme Court and empty rates mitigation:

some possible implications of recent developments for Makro occupations and other empty rates mitigation schemes

Tim Morshead, QC

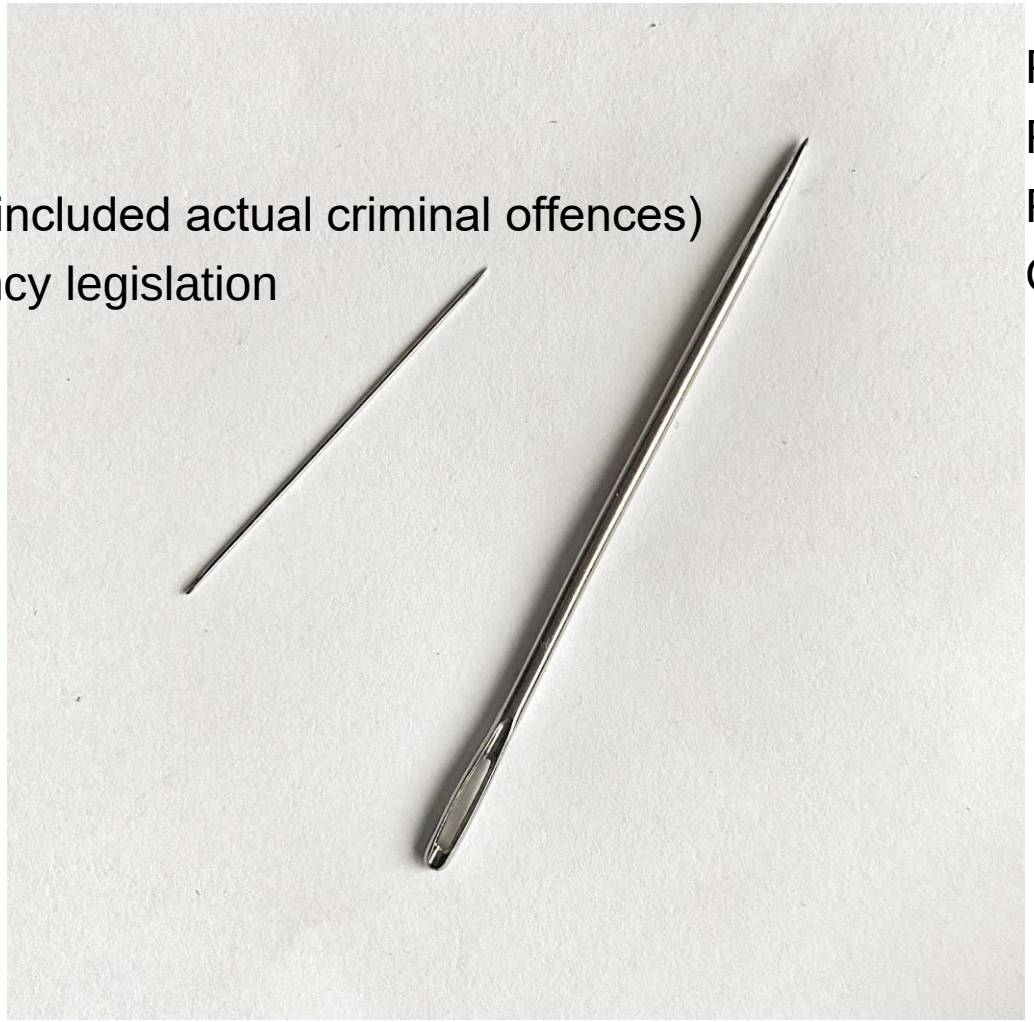
Rossendale: narrow or broad?

Statutory interpretation

“Possession” in s65(1)

Extreme facts (Scheme “A” included actual criminal offences)

Abuse of company/ insolvency legislation



Purposive approach

Rating is just a tax like others

Facts merely exemplify the problem

Chain of inquiry about substance

Rossendale as a judicial catalyst

Interpretation of s65(1) “possession” <<>> How to think about rating/ exemptions

The other judicial ingredient

- S Franses Ltd v. Cavendish Hotel (London) Ltd [2019] AC 249

“Intention” v “conditional intention”

The Makro-type scheme

- Makro Properties Ltd v. Nuneaton and Bedworth BC [2012] EWHC 2250

6 weeks occupation sufficient to reset the clock for attracting the 3 month/ 6 month exemption.

Motive not relevant but intention to occupy might be relevant as an ingredient of rateable occupation:

"43. The proper approach to be drawn from the authorities in my judgment is to consider both use and intention. If there is clear evidence or inference of an intention to occupy, such an intention taken together with the user, albeit slight, may be sufficient to amount to occupation as determined in Melladew. Slight user without such evidence of intention may not be sufficient. In my judgment Wirral is an example of the latter."

The problem in a nutshell

1) If having an “intention to occupy” is relevant to whether or not a person is in rateable occupation, then is it sufficient to have a “conditional intention to occupy”: apart from the exemption, would the person intend to occupy?

2) AND: If having an “intention to occupy” is not relevant (and perhaps even if it is) then does the empty rates regime expose a previously unasked aspect of the Laing criteria: “apart from the exemption, would there be occupation?”

In other words, possibly the power (risk or advantage depending on which side of the fence you sit) of Frances combined with the purposive approach in Rossendale, is that it can be generalised:

Perhaps this formulation is arguable: occupation counts for rates if you satisfy the Laing criteria despite rates, but not if you only satisfy them because of a rating exemption. On this basis: if the correct inference from the facts is that, apart from the exemption, there would be no occupation – then there is no rateable occupation even if the Laing criteria are otherwise satisfied.

Endorsements of Makro in the High Court

- R ota Principled Logistics v. Trafford Council [2018] EWHC 1687 (6th July 2018)

[Frances in the Supreme Court: 5th December 2018]

… not cited in:

R ota SHSC v. Harlow DC [2021] 4 WLR 65 (16th April 2021)

[Rossendale in the Supreme Court: 14th May 2021]

And variants?

Examples of other schemes where the language and concepts evolved in the conventional sphere of rating (“occupation”/ “beneficial occupation”) has made it hard to question the effectiveness of avoidance schemes (a) in the sphere of unoccupied rating and (b) even in the conventional sphere:

- The charities variant
- The “Bluetooth” variant
- “Snail farms”
- Multiple small company occupiers to attract small business rate relief

What is at stake?

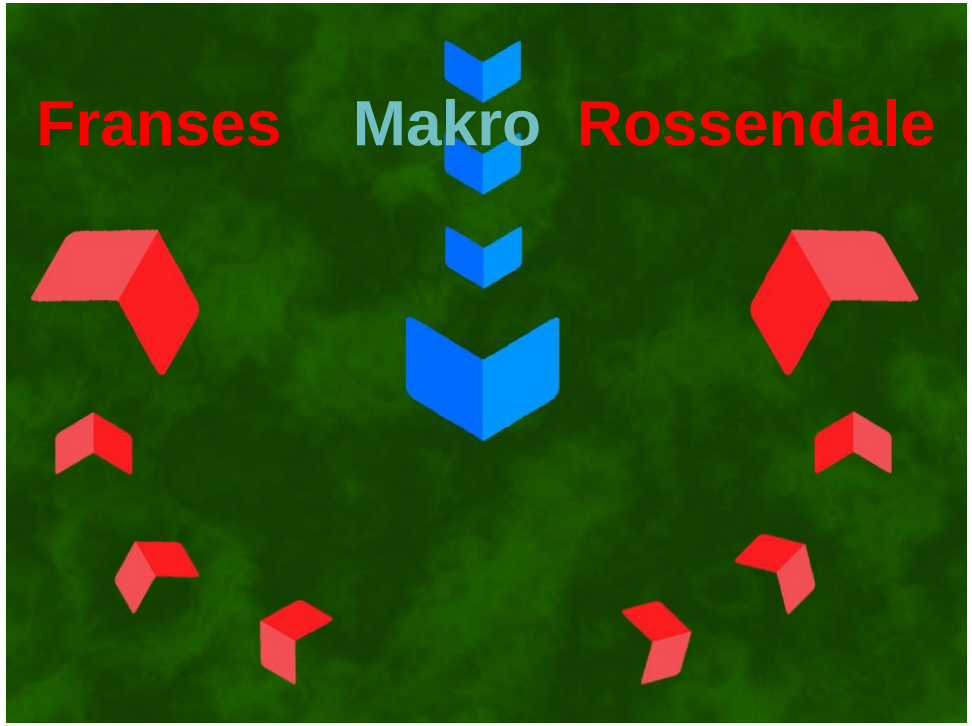
- Local Government Association survey, results published in July 2019:

"Business rates avoidance survey of local authorities"

- Estimated "cost" of avoidance schemes: £250m, or 1% of total payable
- Rossendale-type schemes: 26% of respondents
- Cases where occupation may be the critical factor: eg

❖ Makro-type schemes (periods of short occupation to attract 3 month exemption): 37% of respondents
❖ Charity schemes: 36% of respondents
❖ "Bluetooth" minimal occupation schemes: 30% of respondents
❖ "Snail farms": 17% of respondents

A judicial Pinzer?



A walk in the park?

- Concepts evolved in Franses and Rossendale are not self-deploying
- Cannot assume that “purposive” interpretation gives *carte blanche* to ignoring mitigation measures
- Cannot assume that concept of “conditional” intention/ “conditional” occupation defeats (eg) use of the 6 week “reset button” to attract successive periods of 3/6 months exemption

… for example, the “reset button” and other controls intrinsic to the rating regime (including empty rates) have their own purposes, which the Courts must be astute not to jeopardise.

So …

- One size might not fit all
- Case-by-case approach likely to be needed for foreseeable future
- Supreme Court recognised this in Rossendale:

The test:

"61… section 65(1) is speaking of an entitlement to possession which vests in the person concerned a real and practical ability either to occupy the property or to put someone else into occupation of it, is a purposive interpretation which achieves some coherence between the language of the statute and its purpose in identifying the owner of an unoccupied non-domestic property as the person who is liable for business rates.

"… It may be that other factual situations may demonstrate that this test needs some further adjustment."

Thank you for listening

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