Case Name: *Rossendale Borough Council v Hurstwood Properties (A) Limited and Wigan Council v Property Alliance Group Limited* [2017] EWHC 3641 (Ch) (30 November 2017)

Topic: Rates mitigation (insolvency)

Full case: click here

Summary: Where a ratepayer grants a temporary lease to a special purpose vehicle (SPV) for the purpose of avoiding liability for empty rates, achieved by the subsequent insolvency of the SPA, there is an arguable case that the ratepayer remains liable for payment of rates. The point has yet to be decided by the Court of Appeal.

Commentary: This decision of the High Court (dealing with a strike out application by the defendants in response to the claims by the billing authorities) has been appealed to the Court of Appeal and judgment is awaited. The underlying purpose of the grant of the leases by the defendants was to take advantage of the exemption from empty rates of a company which is either subject to a winding up order or is being wound up voluntarily under the Insolvency Act 1986. Following the grant of the leases to the SPV, in the variant of the mitigation scheme adopted in relation to Property Alliance Group (PAG) the SPV was placed in members' voluntary liquidation (MVL) and in the Hurstwood variant (following MVL) the SPV was subsequently struck off the register under the Companies Act 2006. In the latter case, the premises demised under the lease vested in the Crown (or Duchy of Lancaster/Cornwall depending on location) as *bona vacantia* and, pending disclaimer, liability for rates rests with the Crown/Duchy. Only on disclaimer of the lease would the liability revert to the original ratepayer.

The leases granted by the ratepayers were not on commercial terms, in that they reserved only a notional rent, they were terminable by the landlord at short notice and they did not contain the usual forfeiture provision in the event of the tenant's insolvency. However, the court found that the leases were not a sham, although they were clearly artificial and put in place to avoid rates liability.

Having ruled that the leases were genuine, the court went on to consider if the principles in *Ramsay* v *IRC* [1982] AC 300 should be applied to ascertain the overall legal nature of the transaction, disregarding individual steps which had no impact on the outcome. The analysis of Mr Justice Lewison in *Bury* v *Revenue and Customs Commissioners* [2011] UKUT 81 (TCC) was referred to by way of clarification of the *Ramsay* principles but the court found that the principles did not apply to the facts as pleaded in this case – on the grant of the (genuine) leases the entitlement to possession and, therefore, the liability for empty rates, clearly passed to the SPV.

The court also considered if the corporate veil could be pierced, enabling it to look behind the SPV to fix liability for rates on PAG/Hurstwood notwithstanding the grant of the leases. It referred to the landmark case of *Gilford Motor Company Limited* v *Horne* [1933] Ch 935 and the statements made there by Lord Sumption. The key statement was that two conditions must be satisfied if the corporate veil is to be pierced: (1) there exists a legal obligation against the controller of the relevant company, independent of the company's involvement

and (2) that the controller deliberately evades or frustrates that obligation by interposing a company under his control.

This approach was adopted and further developed by the Supreme Court in *Prest* v *Petrodel Resources Limited* [2013] UKSC 34. In that case it was stated that the legal obligation being evaded by the intervention of the SPV in question must be pre-existing at the relevant date, before the corporate veil could be pierced. Although the ratepayers' counsel argued in *Rossendale* that rates accrue from day to day and cannot, therefore, be said to pre-exist the lease grant, this was not accepted by the court as there remained (after the grant) a continuing obligation to pay business rates for the premises.

The High Court concluded that there was an arguable case that the relevant SPV should be disregarded as a matter of law and that PAG/Hurstwood should continue to be treated as liable for business rates in respect of the relevant properties. It is a matter for the Court of Appeal to decide whether the developing jurisprudence on the piercing of the corporate veil should be extended to include circumstances where the insolvency regime is being used to avoid liability for empty rates.

In the earlier case of *Secretary of State for Business Innovation and Skills* v *PAG Management Services Limited* [2015] EWHC 2404 (Ch), which was in the context of a public interest winding-up of the PAG entity, the judge had been highly critical of the same mitigation scheme involving the use by PAG of an SPV to avoid empty rates, which he regarded as a misuse of the insolvency legislation. This decision was not followed in *Rossendale* as the question before the court was different, namely whether the schemes were effective to avoid the liability for rates. It does, however, indicate the direction of travel of the jurisprudence and the Court of Appeal may feel able to rule in favour of the billing authorities after full consideration of the facts and legal precedent.