Case Name: *Hurstwood Properties (A) Limited and Ors (Respondents) v Rossendale Borough Council and Anr (Appellants)* [2021] UKSC 16 (14 May 2021)

Topic: Efficacy of rates mitigation scheme based on insolvency of tenant SPV/SPV dissolution with lease vesting in the Crown as *bona vacantia*.

Full case: Click Here

Summary: This judgement (albeit in relation to an application to strike out the billing authorities' claim, without full consideration at this stage of the facts) is a significant win for the authorities, as the Supreme Court adopted a purposive interpretation of "owner" as referred to in s.65(1) Local Government Finance Act 1988. This means that leases to SPVs set up to achieve rates exemption for empty properties by immediate liquidation or dissolution of those companies will be ineffective to transfer rates liability to the SPV as the owner, in the circumstances considered by the court. The alternative ground of challenge put forward by the billing authorities, based on piercing the corporate veil, was dismissed.

Commentary: The Respondent companies (six in number) were members of the Property Alliance Group ("PAG"), a rates mitigation specialist utilising either the insolvency exemption (under para 4(k) of the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008) or the ability to fix the Crown with liability for rates (prior to the Crown's disclaimer) by dissolving a company holding a subsisting lease. The billing authorities had been unsuccessful before the Court of Appeal, which declined to adopt a purposive approach to the interpretation of the overall mitigation arrangement and stated that the Ramsay[1] principle (a tax decision, which directed that the overall result of a series of transactions is the relevant trigger of liability if the statutory provision is focused on the outcome) did not apply. The Supreme Court found that Ramsay was indeed engaged.

The Respondents were owners of various properties and sought to avoid liability by setting up SPVs with no assets or business and then granting leases to those entities. The SPVs were then immediately put into members' voluntary liquidation ("MVL") or (under an alternative PAG scheme) dissolved so as to pass liability to the Crown. In the first variant the liquidation was artificially extended to maximise the period of exemption under the 2008 Regulations and under the second type of scheme the landlord relied on the time it would take for the Crown to realise that it had become the tenant of a lease granted to a dissolved company and then disclaim the lease so as to avoid rates liability during that period (what the Supreme Court referred to, in both cases, as reliance on administrative inertia). New SPVs were ready to be slotted in should disclaimer occur, in either variant.

The MVL variant had already been judicially branded as an abuse of the insolvency scheme[2]. The Supreme Court commented that the dissolution variant was no less an abuse of legal process and may in certain circumstances also involve the commission of a criminal offence. The parties had agreed that the schemes have no business purpose save to avoid rates liability. It was also common ground that the leases were not shams, given that as a matter

[1] *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC300
[2] In *Re PAG Management Services Ltd* [2015] EWHC 2404 (CH); [2015] BCC 720

of (property) law the grant of a lease (which is not a sham) confers an entitlement to possession upon the SPVs.

The two claims (by Rossendale BC and Wigan Council respectively) were representative of 55 similar cases but the decision will have an even wider impact, as it applies judicial interpretation at the highest level to the meaning of "owner" in s.65(1) – on the face of it very clear (and previously so understood) in its reference to the (legal) person entitled to possession of a property subject to business rates.

The Ramsay principle is normally engaged in tax cases, but the court was clear that it is not confined to tax matters but is applicable in a wider context as part of the modern purposive approach to the interpretation of all legislation. Quoting from a 2003 case3, "…the controversial provisions should be read in the context of the statute as a whole", the Supreme Court went on to say "…it is not generally to be expected that Parliament intends to exempt from tax a transaction which has no purpose other than tax avoidance."

From Barclays Mercantile Business Finance Limited v Mawson [2004] UKHL 51; [2005] 1 AC 684 the court found that the line of cases involving Ramsay is authority for an application of general principles of statutory interpretation. Notably, the court also said that the two stages of interpretation and application of statutory provisions "share the need to avoid tunnel vision", by which it meant that that the charging or exempting provision in question must be construed in the context of the whole statutory scheme of which it is part. In addition, the relevant facts must be looked at in the round.

The court referred to the underlying stated purpose of imposing full liability (subject to limited exceptions) on vacant property in 2008 (which originated in 1966, but to a lesser extent), namely to encourage owners not to leave such property empty to their own advantage. The 2008 exceptions are directed towards providing relief where the owner is prevented for some reason (beyond its control) from bringing property back into occupation, including the insolvency exemption which was at play in the first of PAG's schemes considered in this case. However, was this in fact beyond the "control" of PAG? The Supreme Court held that it was not.

The court interpreted the entitlement to possession (under s.65(1)) as the ability to enjoy personal occupation of a property or to exercise a right to put another into such occupation. The facts of this case had not been fully examined (being an action to strike out the authorities' claim) so the court proceeded on the assumption that the facts as stated (including the provision of sample leases and rates demands) were correct. The key facts from the court's perspective were the setting up of the SPVs without any assets or actual or intended business and the grant of leases on terms that could be immediately terminated by the landlords. It was common ground that any rent reserved under the leases was not in fact paid and the user clause was in general terms by reference to planning use classes.

The Supreme Court found that the leases were not granted with the intention of allowing the SPVs to make any use of the property and that the SPVs were intended to go into immediate liquidation or be dissolved after a period of inactivity. The key point is that (in the court's

[3] *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687

words) "the practical ability to decide whether to continue to leave the property unoccupied remained with the … landlord." That, combined with there being no intention that the SPVs would ever pay rates, led the court to the conclusion that each scheme (whether based on liquidation or dissolution) involved, as an integral part, the misuse of a legal process and (in the case of the former at least) potential criminal liability of the SPV directors.

Applying these facts to the statutory framework, the court found that identifying "the person entitled to possession" in s.65(1) as the person with the immediate legal right to possession (under the SPV leases) would defeat the purpose of the legislation. Control remained with the landlord in each case. Parliament cannot have intended such an outcome, where the person "entitled to possession" had no real ability to exercise that entitlement and on which that legal right had been conferred for the sole purpose of rates avoidance.

This purposive interpretation of s.65(1) by the Supreme Court of itself led to the leases being held to be ineffective for the SPVs to fall within the definition of "owner" for rates purposes, despite the fact that the leases remained valid as a matter of property law. There has, therefore, been clearly identified a triable issue as to whether the respondents in the appeal remained liable for business rates throughout the duration of the leases, as claimed by the billing authorities.

As referred to above, the Supreme Court did not find favour with the authorities' alternative ground of claim, namely that the corporate veil should be pierced. This was because the evasion principle was not engaged (rates not being an existing liability but becoming due on a day by day basis following the grant of each lease) and, further, there being no evidence that the respondents were shareholders in (and controlled) the SPVs. In this respect, the Supreme Court left undisturbed the Court of Appeal's decision and the veil remained unruffled.

There can be no doubt as to the significance of this Supreme Court decision, subject only the facts being established at trial as not inconsistent with those assumed by the court (based on the authorities' particulars of claim). Billing authorities may now be expected to challenge all leases put in place to secure rates mitigation, where there is no actual occupation or real ability or intention to occupy (or to procure that others may do so). This will potentially undermine many rates mitigation schemes of a similar nature and gives increased urgency to the need for a fundamental change to the imposition of full rates liability on empty properties since 2008, with limited exceptions only.

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