

Case Name: *Rossendale Borough Council v Hurstwood Properties (A) Limited and Others AND Wigan Council v Property Alliance Group Limited* [2019] EWCA Civ 364 (7 March 2019)

Topic: Rates mitigation (use of insolvency exemption)

Full case: [click here](#)

Summary: Where a ratepayer grants a temporary lease to a special purpose vehicle (SPV) to avoid liability for empty rates (achieved by the subsequent voluntary winding-up of the SPV), the court may not look behind the lease to fix rates liability on the landlord as if the lease had never been granted.

Commentary: The Court of Appeal has over-ruled the High Court's decision of 30 November 2017 not to strike out an application from billing authorities to disregard leases granted by a ratepayer to an SPV (controlled by the ratepayer) for the sole purpose of avoiding rates liability on the SPV's subsequent insolvency, thereby restoring the landlord's liability for rates. These appeals comprised two test cases out of 55 similar proceedings.

Exemption from rates liability is triggered when a company is subject to a winding-up order under the Insolvency Act 1986 or is being wound-up voluntarily under the same Act. Following the grant of SPV leases by the relevant companies, in the variant of the mitigation scheme adopted by 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.

The leases were not on commercial terms (being at notional rent, terminable by the landlord at short notice and with no forfeiture provision on tenant's insolvency) but the billing authorities had accepted that these factors did not prejudice the transfer of rates liability from the landlord to the tenant from the date of grant, unless the leases or the SPVs themselves must be disregarded as a matter of law.

The two issues raised by the appeals were (1) is it arguable that the doctrine of piercing the corporate veil is applicable to the SPVs (enabling the billing authorities to look behind those SPVs and issue demands to the landlords under the leases) and (2) could it be argued that the leases fall to be disregarded under the principles established in *Ramsay v Inland Revenue Commissioners* [1982] AC 300 and later cases (again, enabling the issue of demands to the putative landlords)? The High Court had held that it may be possible to pierce the corporate veil in these circumstances, but the *Ramsay* principles were inapplicable.

On a technical point, as the appeals related to applications to strike out the particulars of claim (on the grounds that they disclosed no reasonable grounds for bringing the claims) the court's focus was on the cases pleaded by the billing authorities, assuming that the pleaded facts were correct. The cases did not go to trial, so for example it was not open for Hurstwood Properties or PAG to argue that the schemes served any bona fide commercial purpose beyond avoiding liability for non-domestic rates – this remains an open question which may be determined in due course by Parliament, in the context that the use of schemes taking advantage of the insolvency exemption from rates could be said to be contrary to the public interest.

Piercing the corporate veil

This aspect of the judgement was dealt with by D Richards LJ. The billing authorities argued that the corporate veil of the SPVs should be pierced on the grounds that the SPVs were interposed for the sole purpose of avoiding an existing or imminent rates liability. The High Court had held that there was an arguable case for piercing the corporate veil, as that area of jurisprudence was in the course of development and the dicta of Lord Sumption in *Prest v Petrodel Resources Ltd* [2013] UKSC 34 should not be regarded as exhaustive as to the circumstances where the principle (as to piercing the corporate veil) could apply. The Court of Appeal referred to Lord Sumption's conclusions that it is only where an existing liability is being evaded by the use of a corporate legal personality that the corporate veil can be pierced.

D Richards LJ did not accept that the evasion principle applied in the cases under consideration, as liability for non-domestic rates accrues on a day to day basis (under sections 43 and 45 Local Government Finance Act 1988). This means that it is neither a future nor a continuing liability, therefore it cannot be said to constitute an "existing liability" as referred to by Lord Sumption in *Prest*. The position would have been different had the leases been shams (as the liability of the original ratepayer would have continued) but that point had been determined in favour of the ratepayers in the High Court proceedings. It follows that liability for payment of rates for each day of the term of each lease rests with the relevant SPV.

The Court of Appeal acknowledged that it may be possible that following a trial a court might develop the principle of piercing the corporate veil so as to apply to the present cases, but it made clear that any extension beyond the evasion test would be in very rare and novel cases. The creation of a separate legal person through registration under the Companies Acts is of such importance that the possibility of piercing the corporate veil needs to be "highly circumscribed".

The Ramsay Principles

Henderson LJ dealt with this aspect of the judgement. The principles in *Ramsay* (and later cases) have been developed to assist in the interpretation of tax statutes, disregarding individual steps of no commercial purpose which have no impact on the outcome. The principle is one of general application and could therefore apply in the context of non-domestic rates (being a tax on property). Put simply, *Ramsay* directs that the overall result of a series of transactions is the relevant trigger of liability if the statutory provision is focused on the outcome.

Applied to the facts of these cases, Henderson LJ noted that the relevant statute (Local Government Finance Act 1988) was clear that the owner of an unoccupied property is the entity entitled to possession and, therefore, liable for payment of non-domestic rates. Equally clear is the fact that where a lease is granted the tenant becomes entitled to possession, and therefore liable for payment of rates. In these cases it had been accepted by the billing authorities that the leases were not shams and, therefore, liability passed to the SPVs. The final step was to note that the exemption from liability conferred on companies in

members' voluntary liquidation (Regulation 4(k) of the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008) is also clear in its terms.

The conclusion reached by Henderson LJ was that the legislation was not amenable to a wider, purposive construction which could allow scope for the *Ramsay* principles to operate.

The Court of Appeal accordingly struck out the proceedings in their entirety, having dismissed the appeals from the billing authorities. It remains to be seen if Parliament will now legislate to prevent or restrict the use of similar schemes in the future.