Case Name: *Isle Investments Limited v Leeds City Council* [2021] EWHC 345 (Admin) (19 February 2021)

Topic: Appeal by case stated – efficacy of rates mitigation scheme where permitted use was a snail farm (among other uses)

Full case: Click Here

Summary: A rates mitigation scheme involving the granting of valid short-term leases of office premises to various subsidiaries of a provider of such schemes (to avoid empty rates liability of the owner) was held to be ineffective on the grounds that they were sham leases. The "sham" was found to have arisen as the owner was aware at the time of granting the initial leases that the only permitted use in the leases was as a snail farm, which was a practical impossibility. Although subsequent leases (to different SPVs of the same mitigation scheme provider) omitted the offending user provision (and referred instead to property management/marketing and use by persons authorised by the tenant) they were equally found to be sham on account of the owner's knowledge of the impracticality of the snail farm use and willingness to grant further leases to SPVs owned by the same provider. This case demonstrates an extension of the doctrine of sham through a conflation of the owner's mitigation scheme (the grant of valid leases) with the scheme provider's subsequent mitigation (an attempt to utilise the agricultural exemption, so far as the original leases were concerned).

Commentary: This case shows the limits of the commonly-used mitigation scheme under which leases are granted to SPVs owned by an independent provider so as to pass the liability for empty premises to the tenant. The substitution of the tenant as "owner" under s65(1) of the 1988 Act is generally beyond challenge, where the lease is granted on arm's length terms (as in this case). The normal "periodic occupation" mitigation scheme involves the recurring grant of leases for terms of not less than six weeks, followed by a claim for three months' relief (or six months in the case of industrial or warehouse premises), where the landlord has a more hands-on role – in this case the initial leases were granted for terms of 21 weeks, albeit containing a landlord's break right in case a commercial tenant were to be found, and referred specifically to the use designed to achieve exemption (with no alternative use specified).

The magistrates' court had found on the facts that the leases were shams, on account of the impracticality of the permitted use of the earlier leases and the landlord's apparent reckless disregard of whether there would be any intention on the part of the tenant to occupy the premises (although following lease grant various crates containing snails were in fact delivered to some, at least, of the premises). The case stated was phrased in such terms that the High Court was not persuaded to refer the matter back to the magistrates' court for a re-hearing and instead adopted the facts as found by the inferior court. This demonstrates the limitations of the case stated procedure, where the High Court's decision is final.

The question may be asked whether the High Court is the best forum to determine disputes of this nature, where a basic and accepted tenet of rating law (as to the liability of a tenant as "owner" under a valid lease) was held to be inapplicable on the grounds of sham. A court or tribunal more familiar with the underlying statutory framework and case law may have come to a different conclusion, as previous case law clearly demonstrates.

This decision shows the importance, if such a mitigation scheme is used, of ensuring not only that the leases are valid on their face (being for a specified term, validly executed and granted at arm's length on terms which are not clearly artificial) but also that the premises are capable of being used for the permitted purpose. If any of these tests are not met, there will now be an increased risk that billing authorities will seek to challenge the mitigation scheme, on the grounds that the owner had a reckless disregard of the use of the premises after lease grant and that the leases were, therefore, shams.

The question which emerges is whether the balance between billing authorities and users of such mitigation schemes needs to be reset, although these schemes are but one manifestation of the adverse reaction by property owners to the imposition in 2008 of full liability for rates even where premises are empty (and cannot be let). That is, however, a question for government to consider and to address, if considered necessary. It remains to be seen if the (oft-postponed) Fundamental Review of Business Rates results in a reduction in empty rates liability (say to 50% of the amount payable in respect of occupied property) or an increase in the minimum period of a "third party lease" (triggering exemption for three/six months on its expiry) from 6 weeks to, say, 6 months. The Scottish Parliament extended the qualifying period to 6 months with effect from 1 April 2020.

What is clear is that the attempt to utilise an agricultural exemption where office premises are involved is a bridge too far for the High Court and that billing authorities have a new incentive to challenge any such schemes which are still in operation.

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