Case Name: *R (on application of The Secretary of State for Health and Social Care) v Harlow District Council* [2021] EWHC 909 (Admin) (16 April 2021)

Topic: Efficacy of rates mitigation scheme based on intermittent occupation where no lease or other right of occupation had been granted to a third party for a period exceeding 6 weeks.

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Summary: One of the most commonly-found rates mitigation schemes involves the granting of valid short-term leases of premises to a third party provider or to a subsidiary of the owner, to reduce the empty rates liability of the owner (who is entitled to a 3 month exemption on the expiry of the lease, or 6 months in the case of a qualifying industrial hereditament). This case is unusual in that the ratepayer succeeded in challenging the billing authority's decision in circumstances where no leases were granted and the ratepayer relied solely on a change in the degree of use to prove (a) occupation for a period exceeding 6 weeks and (b) lack of occupation during the period of exemption of 3 months. It must be regarded as a risky strategy as the ratepayer remained entitled to occupation throughout and therefore, prima facie, not entitled to any exemption. This represents the high-water mark of intermittent occupation schemes and ratepayers would be well-advised not to test the limits in this respect.

Commentary: The ratepayer was Public Health England ("PHE"), who purchased premises in Harlow ("Premises") in 2017 for its future national headquarters. When issued with a rates demand for c.£2.5m in 2018 PHE (in line with its policy) paid the bill (which left judicial review as the only remedy available to it) and then sought mitigation advice. Having received such advice, PHE moved 30 crates of documents to the Premises (on 1 May 2018) to constitute occupation and which contained records which they may have needed to retain. Harlow DC was informed and carried out an inspection. The Premises also contained a boardroom table, chairs and facilities left behind by the previous owner to hold occasional meetings. After 6 weeks the crates were removed but the boardroom table etc remained. In response to a request for exemption Harlow DC refused to grant exemption.

In September 2018 a second period of storage commenced, this time involving 27 crates. Again, Harlow DC refused relief. So the court was required to consider the validity of two separate periods of "occupation" within the tax year 2018/19 – were they sufficient to trigger two periods of exemption of 3 months each?

The argument for the ratepayer was that occupation was limited to the two 6-week periods, after each of which the Premises were vacant and entitled to an exemption of 3 months. This was based on a novel interpretation of the 1988 Act and the 2008 Unoccupied Property Regulations, which claimed that the mere fact of occupation by the ratepayer itself (of premises previously vacant, according to the ratepayer) was sufficient to start the clock running on the 6-week period of occupation required to trigger the 3-month exemption. The court was persuaded by this argument and did not accept the council's counter-argument to the effect that if PHE was in occupation for the 6-week periods then it was equally in occupation during each of the 3-month periods when PHE claimed not to be in

occupation, as shown by its occasional use of the Premises for meetings (making use of the furniture and facilities present in the Premises at all times, even when the crates had been removed outside PHE's two "occupation" periods).

The judge also dismissed Harlow's argument that PHE had only created a semblance of occupation by storing crates in the Premises, holding that it did not set out to convey an impression different from the reality of its presence at the Premises (although the same could not be said of the position when the crates were not present and PHE argued that it did not occupy). Minimal use of property is sufficient to constitute occupation, but that could be said to apply equally to the periods when the furniture and other facilities were present in the Premises (but not the crates). The ratepayer answered that point by reliance on the fact that the furniture etc had been left behind by the previous owner, as s65(5) of the 1988 Act permits such items to be ignored (although the provision is silent as to whether such items are still left out of account if used by a ratepayer claiming that the premises are unoccupied, as in this case).

The judge also went on to set out some guidance to be applied by billing authorities to determine when premises are occupied and how to deal with disputes when they arise, and these can be read at the end of the decision. The guidance is however confined to what amounts to occupation (which was only part of the issue which arose in this case) – it does not address the conceptual difficulty in that the ratepayer itself categorised the relevant periods as occupied without having divested itself of control (e.g. by granting a lease) during those periods. The decision led to the ratepayer being able to claim an exemption which was clearly not intended to be susceptible to such "occupational engineering" and one has to ask if this will hasten the advent of legislation to severely curtail the availability of the exemption, to the detriment of commercial property owners as a whole.

That said, reliance on this decision is risky, as referred to above. One cannot be confident that if a case with similar facts were to come before the administrative court again the matter would be decided in favour of the ratepayer, when the normal and more reliable approach would have been to grant a lease to a genuine occupier, ideally not connected with the owner (to avoid the risk that at some point a court may for reasons of public policy elect to lift the corporate veil). Such public policy may well include the need to ensure continued funding of local government, for the greater good.

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