Rating

Schroder Exempt Property Unit Trust and others v Birmingham City Council

Administrative Court

10 July 2014

Hickinbottom J

[2014] EWHC 2207 (Admin)

[2014] EGILR 43

**Rating – Non-domestic rates – Unoccupied hereditament – Local Government Finance Act 1988 – Insolvency Act 1986 – Lease of business premises – Tenant company going into liquidation – Liquidators disclaiming lease under section 178 of 1986 Act – Tenant's guarantor nonetheless continuing to pay rent and landlords not taking physical possession of premises – Sections 45(1) and 65(1) of 1988 Act – Whether landlords liable for rates on premises as "owner" of unoccupied hereditament – Effect of disclaimer of lease – Whether landlords entitled to immediate possession of whole property during relevant period**

The appellants owned the freehold of commercial premises in Witton, Birmingham, which they had let on a 10-year lease in 2006. The original tenant had since assigned the lease to another company but continued to guarantee the obligations of the assignee by way of an authorised guarantee agreement. The assignee went into liquidation and ceased to pay the rent, which amounted to a "default" entitling the appellants to re-enter the property under the terms of the lease. In April 2011, the liquidators disclaimed all interest in the premises pursuant to the Insolvency Act 1986. However, the original tenant continued to pay rent that the appellants demanded from it pursuant to its ongoing guarantee liability and the appellants did not take physical possession of the property.

The respondent local authority issued demands for non-domestic rates against the appellants in respect of the unoccupied premises for the period after the disclaimer. When these went unpaid, they obtained a liability order for approximately £590,000 for the period April 2011 to March 2013. The appellants appealed by way of case stated; the issue was whether the appellants were the "owner of the hereditament" so as to be liable for unoccupied rates under section 45(1) of the Local Government Finance Act 1988, which turned on whether they were "the person entitled to possession" of the hereditament so as to come within the definition of "owner" in section 65(1). The appellants contended that they were not entitled to possession since the disclaimer, while ending the liabilities of the tenant, did not put an end to the lease itself; they submitted that the lease continued for certain purposes, including the original tenant's guarantee liability, such that they had no immediate right to possession unless and until they exercised their right of re-entry.

**Held: The appeal was dismissed. A disclaimer under section 178 of the 1986 Act determines a lease for all purposes. After a disclaimer, the lease ceases to exist as a matter of property law and the reversion accelerates. With the lease go all the rights and obligations under it, such as the lessee's obligation to pay rent. Although the deeming provision in section 178(4)(b) ensures that the rights and obligations of third parties, including guarantors, remain in force as though the determined lease had continued, the rights and liabilities of guarantors thereby preserved are not property rights but contractual rights under the guarantee; section 178(4)(b) is necessary precisely to prevent the surety from arguing that, once the rights that it was guaranteeing have gone, there is nothing left for the guarantee to support. Once the lease was disclaimed, the assignee had ceased to have the right to immediate possession as tenant and that right instead lay with the appellant landlords, as the freehold owners without the burden of any leasehold interests. The appellants' right of re-entry under the lease had disappeared with the rest of the lease; instead, the appellants had an immediate right to possession which had arisen on the acceleration of the reversion at the time of disclaimer. It followed that the appellants were the "owner" of the hereditament liable for rates by reason of their immediate entitlement to possession.**

This was an appeal by way of case stated by the first appellant, Schroder Exempt Property Unit Trust, and the second appellants, British Overseas Bank Nominees Ltd and WGTC Nominees Ltd (as trustees for Schroder UK Property Fund), from a decision of District Judge Mottram, sitting in Birmingham Magistrates Court, granting a liability order to the respondents, Birmingham City Council, in respect of unpaid rates on unoccupied commercial premises.

Reuben Taylor QC (instructed by Wragge Lawrence Graham & Co LLP) appeared for the appellants; Judith Jackson QC (instructed by the legal department of Birmingham City Council) represented the respondents.

Giving judgment **Hickinbottom J** said:

1. This is an appeal by way of case stated against a liability order made on 28 August 2013 against the First Appellant and in favour of the Respondent Council by District Judge Mottram in Birmingham Magistrates' Court, for non-domestic rates for the period 20 April 2011 to 31 March 2013 in respect of Unit 2, Zenith Deykin Avenue, Witton, Birmingham ("the property"). The Council seeks to uphold the order, and has served a Respondent's Notice which relies upon additional grounds to those of the District Judge.
2. The First Appellant transferred its interest in the Property to the Second Appellants at some stage between April 2011 and March 2013, a point only very recently disclosed. However, the Second Appellants have agreed to be added as a party to this appeal and have undertaken to honour any liability for rates found under the liability order; and no point in respect of corporate personality is taken. In this judgment, I shall refer to the First Appellant and the Second Appellants collectively as simply "the appellants".
3. The background facts can be shortly put. They are uncontroversial, and were the subject of an agreed statement before the District Judge, no witnesses being called.
4. The appellants are the freehold owners of the property. On 5 June 2006, they granted a 10 year lease of the property to Woodward Foodservice Limited ("WFL"), the tenant's obligations being guaranteed by W F Group Holdings Limited. The lease required the tenant to pay all outgoings, including rent (clause 6.2) and rates (clause 6.3). Clause 10.1 of the lease gave the appellants as landlords a right of re-entry in the event of default, defined to include a failure to pay rent (clause 10.2(a)) or entering administration or receivership (clause 10.2(d)).
5. On 23 July 2008, with the appellants' consent, WFL assigned the lease to W F Group Limited, but it guaranteed the new tenant's obligations to the appellants under the lease by way of an authorised guarantee agreement, in these terms:

"1.1 [WFL] guarantees to the Landlord that [W F Group Limited] shall pay the rents reserved by the Lease… and observe and perform the tenant covenants of the Lease and that if [W F Group Limited] fails to pay any of those rents or to observe or perform any of those tenant covenants, [WFL] shall pay or observe and perform them.

1.2 [WFL] covenants with the Landlord as a separate and independent primary obligation to indemnify the Landlord against any failure to pay any of the rents reserved by the Lease or any failure to observe or perform any of the tenant covenants of the Lease."

The liability of WFL is expressly stated not to be affected by any disclaimer of the liability of W F Foods Limited under the lease (paragraph 2.1.9).

1. W F Group Holdings Limited and W F Group Limited went into liquidation, and were wound up on 20 April 2011. The liquidator disclaimed all interest in the property that day, under section 178 of the Insolvency Act 1986 ("the 1986 Act").
2. It was common ground that the appellants had continued to call on WFL as guarantor under the terms of the authorised guarantee agreement to make good the default of W F Group Limited in paying the rent, and that WFL had made payments of the sums demanded. The appellants have not exercised any right to go into physical possession of the property.
3. The Council made rate demands of the appellants for the period after the disclaimer. These were not honoured; and therefore the Council sought a liability order, which resulted in the order in the sum of approximately £590,000 now challenged in this appeal.
4. Under section 178(4) of the 1986 Act:

"A disclaimer under this section –

(a) operates so as to determine, as from the date of the disclaimer, the rights, interests and liabilities of the company in or in respect of the property disclaimed; but

(b) does not, except so far as is necessary for the purpose of releasing the company from any liability, affect the rights or liabilities of any other person."

1. Thus, from the date of disclaimer, by virtue of section 178(4)(a), the tenant (ie W F Group Limited) ceased to have any right to occupy the property, and indeed ceased to be in occupation. It is common ground that, for the whole of the relevant period, the property had no actual occupier.
2. Historically, in general local rates were levied on an occupier for occupied premises. Occupiers are still liable for rates (section 43(1) of the Local Government Finance Act 1988 ("the 1988 Act")); but, where there are no actual occupiers, non-occupiers may also now be liable. Under section 45(1) of the 1988 Act:

"A person (the ratepayer) shall as regards a hereditament be subject to a non-domestic rate of a chargeable financial year if the following conditions are fulfilled in respect of any day in the year –

(a) on the day none of the hereditament is occupied,

(b) on the day the ratepayer is the owner of the whole of the hereditament,

(c) the hereditament is shown for the day in a local non-domestic rating list in force for the year, and

(d) on the day the hereditament falls within a class prescribed by the Secretary of State by regulations."

In this case, it is common ground that none of the property was actually occupied during the relevant period; and that conditions (a), (c) and (d) were fulfilled. This appeal concerns condition (b).

1. For the purposes of the 1988 Act, "owner of a hereditament" is defined in section 65(1), as follows:

"The owner of a hereditament or land is the person entitled to possession of it."

1. Given those statutory provisions, it is common ground between the parties that whether the appellants are liable for the rates during the relevant period turns on whether it was entitled to immediate possession of the whole property during that period. The question posed for this court by the District Judge correctly identifies this determinative issue: "Was I correct to find that the [appellant] was the owner within the meaning of sections 45(1)(b) and 65(1) of the Local Government Finance Act 1988?".
2. Mr Reuben Taylor QC for the appellants submitted that the appellants were not entitled to immediate possession. He submitted that the effect of section 178(4) is as follows:

i) A disclaimer has the effect of ending the liabilities of a tenant such as W F Group Limited, but not ending the lease for all purposes. It continues for certain purposes related to the third parties including guarantors such as WFL in this case.

ii) As section 178(4)(b) provides, the disclaimer does not affect the rights and obligations between a landlord and guarantor. WFL as guarantor therefore continues to be liable to pay the rent until the earlier of: (a) expiry of the term of the lease; or (b) the appellants physically re-entering the property in accordance with clause 10.1 of the lease, there having been an "event of default" notably W F Group Limited’s default on the rent and entry into administration/liquidation. Therefore, the appellants have a right to possession of the property prior to the expiry of the term, but only if and when they have exercised their right under clause 10.1 physically to re-enter the property. They did not have – and still do not currently have – a right to immediate possession. In this regard, Mr Taylor relies on *Brown* v *City of London Corporation* [1996] 1 WLR 1070[[1]](#endnote-1) at page 1082H-1083A per Arden J (as she then was), where she says:

"[A] person is entitled to possession for the purposes of section 65(1) of the Act of 1988 only is he is immediately entitled to possession. It is not enough that a person has a right which if exercised would result in his having possession".

iii) The appellants therefore have the choice to re-enter and forfeit the lease as against WFL thereby losing entitlement to rent from that company for the remainder of the term, or not to re-enter and continue receiving rent from that company; and it has, to date, chosen the latter course. The appellants are only entitled to immediate possession as and when it exercises its right to physical possession.

iv) That submission, Mr Taylor says, receives support from section 17 of the Landlord and Tenant (Covenants) Act 1995 ("the 1995 Act"). Under that Act, if the requisite notices are served, a landlord in the position of the appellants is entitled to rent from the guarantor. In this case, the appellants served the relevant notices and WFL has paid the rent throughout. Rent can only be payable if and for so long as the landlord does not have a right to immediate possession. The fact that rent is being paid therefore confirms the proposition that the landlord is not entitled to immediate possession.

v) Mr Taylor also seeks support from section 19 of that same Act, which gives a guarantor who makes payments of amounts required to be paid under section 17 an entitlement to an "overriding lease", ie "a tenancy of the reversion expectant on the relevant tenancy". He submits that, if a guarantor exercises that right, he then has a right to possession. Therefore, a landlord and guarantor are in essentially the same position. Neither is entitled to immediate possession of the property, but only so entitled if and when it has exercises a right which gives it that entitlement. After a disclaimer, until one or other exercises its particular right, no one has the right to immediate possession of the property.

1. The starting point is *Hindcastle Ltd* v *Barbara Attenborough Ltd* [1997] AC 70[[2]](#endnote-2) a House of Lords case rightly described by Mr Taylor as the leading authority on the effect of section 178(4). At page 87E-89D, Lord Nicholls of Birkenhead (with whom the rest of their Lordships' House agreed) said this:

"*Disclaimer: (1) where only a landlord and tenant are involved*

The simplest case is of a landlord and an insolvent tenant. No third parties are involved. Disclaimer operates to determine all the tenant's obligations under the tenant's covenants, and all his rights under the landlord's covenants. In order to determine these rights and obligations it is necessary, in the nature of things, that the landlord's obligations and rights, which are the reverse side of the tenant's rights and obligations, must also be determined. If he tenant's liabilities are to be extinguished, of necessity so also must be the landlord's rights against the tenant. The one cannot be achieved without the other.

Disclaimer also operates to determine the tenant's interest in the property, namely the lease. Determination of a leasehold estate has the effect of accelerating the reversion expectant upon the determination of that estate. The leasehold estate ceases to exist. I can see no reason to question that this is the effect of disclaimer when the only parties involved are the landlord and tenant.

*Disclaimer: (2) where others have liabilities in respect of the lease*

Thus far I have addressed the case where, apart from the insolvent tenant, the only person involved is the landlord. In such a case there is no scope for any rights or liabilities to be preserved by paragraph *(b)* of section 178(4). In order to achieve the statutory objective of releasing the insolvent from liability, it is necessary to determine all the rights of the landlord.

The matter stands differently where the landlord has the benefit of covenants from a guarantor. In this situation the liabilities of the insolvent tenant to the landlord are ended, but not so as to affect the obligations of the guarantor to the landlord. That is the effect of paragraph *(b)* of section 178(4). Similarly, where the insolvent tenant is an assignee and the landlord has the benefit of the covenants of the original tenant: the original tenant's obligations to the landlord are not affected.

Also ended is the obligation of the insolvent tenant to indemnify the guarantor but, here again, not so as to affect the mutual rights and obligations of the landlord and the guarantor. Termination of the liabilities of the insolvent does not carry with it any legal necessity to determine the guarantor's obligations to the landlord. The right of recourse of the guarantor against the insolvent can be effectually determined without, at the same time, releasing the guarantor from his liability to the landlord. His liability to the landlord can survive extinguishment of his right of recourse. Similar considerations apply to the liabilities of the original tenant where the insolvent tenant is an assignee.

… But there is a recondite point which must be faced and resolved here as part of the process of interpreting the sections as a whole. It concerns what happens to the lease in this tripartite situation. The point may be stated shortly. A lease either exists, or it does not. If disclaimer has the effect of ending the lease, no further rent can become due, and so the guarantor and original tenant cannot be called upon. It is a contradiction in terms for rent to accrue for a period after the lease has ended. If, however, disclaimer does not end the lease, so that rent continues to accrue, what happens to the lease, bearing in mind that the insolvent's interest in the property has been ended? Possibilities are that the lease vests in the Crown as bona vacantia, or that it remains in being but without an owner, or that it remains vested in the tenant but in an emasculated form. Each of these possibilities raises its own problems.

The starting point for attempting to solve this puzzling conundrum is to note that the Act clearly envisages that a person may be liable to perform the tenant's covenants even after the lease has been disclaimed. A vesting order may be made in favour of such a person: see section 182(3), and see also section 181(2)*(b)*.The proper legal analysis has to be able to accommodate this conclusion. The search, therefore, is for an interpretation of the legislation which will enable this to be achieved as well as fulfilling the primary purpose of freeing the insolvent from all liability while, overall, doing the minimum violence to accepted property law principles.

If the problem is approached in this way, the best answer seems to be that the statute takes effect as a deeming provision so far as other persons' preserved rights and obligations are concerned. A deeming provision is a commonplace statutory technique. The statute provides that a disclaimer operates to determine the interest of the tenant in the disclaimed property but not so as to affect the rights or liabilities of any other person. Thus when the lease is disclaimed it is determined and the reversion accelerated but the rights and liabilities of others, such as guarantors and original tenants, are to remain *as* *though* the lease had continued and not been determined. In this way the determination of the lease is not permitted to affect the rights or liabilities of other persons. Statute has so provided.

The vesting order provisions do not run counter to this analysis. If a vesting order is made, the court order operates by virtue of the statute to vest the lease in the person named on the terms fixed by the court. That the lease may have ceased to exist meanwhile is neither here nor there. If necessary, there will be a statutory recreation.

If no vesting order is made and the landlord takes possession, the liabilities of other persons to pay the rent and perform the tenant's covenants will come to an end as far as the future is concerned. If the landlord acts in this way, he is no longer merely the involuntary recipient of a disclaimed lease. By his own act of taking possession he has demonstrated that he regards the lease as ended for all purposes. His conduct is inconsistent with there being a continuing liability on others to perform the tenant covenants in the lease. He cannot have possession of the property and, at the same time, claim rent for the property from others.

The result is not without artificiality. Unless a vesting order is made, after disclaimer there will be no subsisting lease, and the property will be vacant and empty. But if the landlord enters upon his own property, he will thereby end all future claims against the original tenant and any guarantor, not just claims in respect of the shortfall between the lease rent and the current rental value of the property. It must be recognised, however, that awkwardness is inherent in the statutory operation: extinguishing ('determining') the lease so far as the bankrupt is concerned, but leaving others' rights and liabilities in respect of the same lease affected no more than necessary to achieve the primary purpose."

1. That is a lengthy quotation; but worthwhile, because in my view it answers Mr Taylor's submissions, comprehensively and conclusively. Valiantly as those submissions were made, they cannot stand in the light of *Hindcastle*, for the following reasons.
2. Whilst, with respect, Lord Nicholls' reference to the landlord demonstrating that he regards "the lease as ended for all purposes" by physically taking possession may have been more felicitously put, it is clear from the passage from *Hindcastle* I have quoted that a disclaimer determines a lease for all purposes. As Lord Nicholls emphasises, a lease either exists or it does not: and, after a disclaimer, he clearly holds that, as a matter of property law, it ceases to exist. It does not maintain some sort of shadowy existence. The lease falls in, and the reversion accelerates. Indeed, it is precisely because it has ceased to exist that a deeming provision is necessary, section 178(4)(b) being to the effect that the rights and obligations of others such as guarantors remain *as* *though* the (determined) lease had continued.
3. With the lease, go all of the rights and obligations under the lease, such as the lessee's obligation to pay rent (see *Christopher Moran Holdings Ltd* v *Bairstow* [1999] UKHL 2; [2000] 2 AC 172[[3]](#endnote-3) at page 183E per Lord Millett), and the landlord's right to rent and the right to re-enter (*ibid* at page 184D-E and 186D). Mr Taylor's submission based upon the appellants' right to re-enter the property under clause 10.1 of the lease after disclaimer is misconceived: after disclaimer, there was no such right.
4. Prior to disclaimer, the tenant will of course have the right to immediate possession. After disclaimer, the former tenant has no such right; and, in the usual way, the landlord (as freehold owner, without the burden of any leasehold interests) will himself have the right to immediate possession. That is confirmed, in terms, by Lord Millett in *Christopher* *Moran* at page 183D-E:

"It has long been recognised that the effect of the disclaimer of a lease is to extinguish the lease as between the landlord and the tenant. Where (as in the present case) these are the only parties involved, the disclaimer operates to determine the lease altogether with the result that the landlord's reversion is accelerated: see [Hindcastle]. This is because the subsection expressly provides that the tenant's rights and liabilities in respect of the leasehold property are determined. These include its right to possession and its liability to pay rent. *Once these are determined, the landlord is entitled to immediate possession and has no right to any further payment of rent.* In [Hindcastle] your Lordships explained that the disclaimer has the same effect even where third parties such as sureties are involved. When the lease is disclaimed it is determined and the reversion accelerated, but the effect of subsection (4)*(b)* is to preserve the rights and liabilities of others, such as guarantors and original tenants, as though the lease continued…" (emphasis added).

1. I was unimpressed by Mr Taylor's submission that Lord Millett was only dealing with a case which concerned the landlord's right to rent, rather than his right to possession; because, although Lord Millett's comments about the landlord's entitlement to immediate possession might perhaps technically be *obiter dicta*, they are not only comments from the highest court, they are clear and, in context, entitlement to possession is in principle indistinguishable from the landlord's loss of the right to rent which was at the heart of that case.
2. As Lord Millett indicates, section 178(4)(b) clearly preserves the rights and liabilities of guarantors. But Mr Taylor's submissions mis-categorise such rights. They are not property rights. They are contractual rights under the guarantee. The deeming provision is necessary, because, without it, a surety's contractual obligation to guarantee the rent etc in the event of the tenant's failure to make such payments and subsequent disclaimer of the lease will or might be empty, the surety having the argument that, the rights that he is guaranteeing having gone, there is nothing left for his guarantee to support. The reasons for why the deeming provision of section 178(4) is needed are made clear in the speech of Lord Nicholls in *Hindcastle* which I have quoted above.
3. Thus, if and when the landlord takes actual possession of the property, he does not change the position with regard to property rights (including the entitlement to possession, which he already has): he simply brings to an end the guarantor's contractual obligation to make payments under the guarantee, as well as all future claims against the former tenant. Any apparent legal artificiality or awkwardness in that (as Lord Nicholls noted in *Hindcastle*) derives from the statutory scheme.
4. Therefore, as Miss Jackson QC submitted, the effect of the disclaimer operates to terminate the lease entirely; but a surety is not thereby released from his contractual liability to make good the defaults of the former tenant, because section 178(4)(b) operates on the basis of a fiction that the lease in fact continues for the limited purpose of ensuring that substance in the guarantor's covenant is maintained. But for that fiction, the third party’s liability too would or may end with the termination of the lease. Thus post-*Hindcastle*, in *Shaw* v *Doleman* [2009] EWCA Civ 279[[4]](#endnote-4) at para 60, Elias LJ said:

"The effect of Hindcastle is that the lease is deemed to continue and the obligations of the assignee are deemed to remain in place. This fiction permeates the whole of the agreement."

This was confirmed, in its proper historical context, by Chadwick LJ in *Basch* v *Stekel* [2000] EWCA Civ 3033; [2001] L&TR 1 at para 20 and following. At para 22 he said:

"[T]he tenancy, itself, does cease to exist as an estate in the land demised by the lease. The relationship of landlord and tenant is preserved *notionally* for the purposes *only* of giving rise to an obligation on the surety or other third parties." (emphasis added)

1. These principles are, in my view, well-established and have been consistently recognised and applied in the authorities. Applying them to this case, I agree with Miss Jackson's submissions. After the assignment of the lease and prior to the disclaimer, W F Group Limited was the tenant and the person entitled to immediate possession. After the disclaimer, the lease ceased to exist and the appellants' reversion accelerated. Consequently, the appellants as freehold owners became entitled to immediate possession. WFL, however, remained liable to make good the defaults of the former tenant, not because the lease continued in any shape or form, but because section 178(4) operates to ensure that the guarantor's covenant in the event of the tenant's default is given continued substance and the third party guarantor remains contractually liable. Therefore, the guarantor must continue to make good the former tenant's default in paying rent under the determined lease until the landlord exercises his right to immediate possession by physically taking possession.
2. Therefore, contrary to Mr Taylor's submissions:
3. WFL does not "pay rent under the terms of the lease" – the lease has gone – but rather it makes payments under its contractual covenants to make good the former tenant's default (as bound to do under the guarantee) for which unique purpose the lease is deemed to continue.

ii) The appellants' right of re-entry under the lease disappears with the rest of the lease, once disclaimed.

iii) If the appellants re-take physical possession, that does not give rise to a right to immediate possession: it is rather the exercise of an existing right to immediate possession which arises on the acceleration of the reversion at the time of disclaimer.

iv) The appellants and WFL are not in the same position. The appellant has an immediate right to possession, which they may choose to exercise or not. WFL does not have an immediate right to possession; although, if it exercises its statutory right under section 19 of the 1995 Act to call for a lease, then that lease would give it an immediate right to possession, at the expense of the appellants' right to such.

1. Mr Taylor sought to obtain assistance from *Brown*; but, when the proper effect of that case is considered, he finds no support there. The case concerned the question of whether receivers appointed by banks who held a debenture over a borrower's property which included the freeholds of two buildings were liable for rates from the date upon which a lease on two properties expired. By the terms of their appointment, the receivers were agents of the borrower companies; but there was a question of whether they had exercised a power under the debentures to take possession of the properties on their own behalf. Arden J distinguished entitlement to physical possession from actual physical possession. After the leases expired, she held that the borrower companies were, as freeholders, entitled to physical possession; the only question then being whether that entitlement later vested in the receivers personally.
2. As I have indicated, Mr Taylor relied upon a passage from Arden J's judgment in *Brown*, which in full context reads as follows (at page 1082H-1083A):

"As there cannot in general at least be two persons in different capacities in possession at the same time…, it must follow… that a person is entitled to possession for the purposes of section 65(1) of the Act of 1988 only is he is immediately entitled to possession. *It is not enough that a person has a right which if exercised would result in his having possession.* Accordingly the fact that the receivers could have displaced the possession of the company, or exercised their power [under the debentures to take possession on their own behalf] is not enough to make them 'owners' for the purposes of section 65(1) of the Act of 1988." (emphasis added).

1. However, it is clear that, throughout this passage (including in the emphasised part, upon which Mr Taylor particularly relied), Arden J was speaking of the right to possession not actual possession. Therefore (she said) it is not sufficient if a person does not have a right which if exercised would result in him having a right to immediate physical possession. The borrowing companies in that case were therefore in a similar position to the appellants in this case: they each had a right to immediate possession of the relevant property. The receivers in that case were in a similar position to WFL in this case: neither had a right to immediate possession, but they could obtain such a right (and defeat the another's right to immediate possession) by exercising some other right, in WFL's case the right under section 19 to call for a lease.
2. For those reasons, when properly construed, Brown does not support the appellants' case. It is entirely consistent with the later case of *Hindcastle*, and the Respondent Council's case in this appeal.
3. Mr Taylor also relied upon the 1995 Act; but that too offers him no substantive support. Section 17 of the 1995 Act does not help him: under that provision, a landlord in the position of the appellants is not entitled to rent, but only to any sum payable under its covenant.
4. Nor is section 19 of any better assistance. It is noteworthy that the section refers, not to "rent" paid under section 17, but to "payment of an amount which he has duly been required to pay in accordance with section 17". In any event, as I have described, section 19 enables a guarantor of an obligation of a tenant, having been called upon to make good that tenant's default in paying rent, to demand an overriding lease. Miss Jackson submitted that it may be a moot point whether a guarantor has a right to call for a reversionary lease under section 19 where the relevant lease has been disclaimed. The guarantor may be left only with a right to call for a vesting order under section 181 of the 1986 Act. I do not need to decide this point; and certainly if there is such a right, the nature of the lease obtained is moot. It seems to me that, on the basis of the analysis of the authorities to which I have referred, despite the use of the term "reversion expectant", the overriding lease once granted is something different from the former lease that the tenant had before disclaimer. In any event, WFL has not sought such a lease, and, therefore, its nature is not in issue here. Section 19 does not support the contention that, prior to the vesting of any interest in the property in the guarantor, the landlord as freeholder has anything short of an immediate and exercisable entitlement to possession.
5. Consequently, in my firm view, the appellants did have the right to immediate possession once the lease in respect of the property had been disclaimed; and, although for reasons somewhat different from those of the District Judge – which largely reflect the additional reasons relied on in the Respondent’s Notice – I therefore consider the answer to the question she posed for this court to be, "Yes": she was correct to find that the first appellant was the owner within the meaning of sections 45(1)(b) and 65(1) of the 1988 Act, and thus liable for non-occupied rates for the property.
6. The liability order was therefore properly made; and I dismiss this appeal.

*Appeal dismissed*

1. Editor's note: also reported at [1996] 1 EGLR 139 [↑](#endnote-ref-1)
2. Editor's note: also reported at [1996] 1 EGLR 94 [↑](#endnote-ref-2)
3. Editor's note: also reported at [1999] 1 EGLR 1 [↑](#endnote-ref-3)
4. Editor's note: [2009] 2 EGLR 35 [↑](#endnote-ref-4)