Neutral Citation Number: [2018] EWHC 1687 (Admin)

Case No: CO/5086/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Hearing at Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Judgment handed down at:
Royal Courts of Justice,
Strand, London WC2A 2LL

Date: 06/07/2018

Before:

THE HON MR JUSTICE KERR

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Between :

THE QUEEN ON THE APPLICATION OF PRINCIPLED OFFSITE LOGISTICS LIMITED	**Claimant**
- and –	
TRAFFORD COUNCIL	**Defendant**
- and –	
(1) (1) LANCASTER CITY COUNCIL **(2) BASILDON BOROUGH COUNCIL**	**Interested Parties**

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TIMOTHY MORSHEAD QC and LUKE WILCOX (instructed by **Eversheds Sutherland International LLP**) for the **Claimant**

RICHARD GLOVER QC and KELLY PENNIFER (instructed by **Greenhalgh Kerr LLP**) for the **Defendant**

The **First and Second Interested Parties** did not appear and were not represented

Hearing dates: 1st and 2nd May 2018

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Approved Judgment

The Hon Mr Justice Kerr:

Introduction

1. This case is about what constitutes occupation of premises for the purposes of national non-domestic rating law. To the uninitiated, this might seem like a dry enough question but in certain circles it arouses high passions and stimulates serial litigation.

2. The main business of the claimant (POLL) is occupying premises for reward on behalf of landlord commercial property owners, to the exclusion of the owner landlord and for the avowed purpose of minimising the landlord's liability to pay national non-domestic rates (NNDR). The defendant (Trafford) is the billing authority for rating within its area.

3. The applicable legislation normally charges NNDR to the person entitled to possession of commercial premises, whether or not that person is in actual occupation. If the person entitled to possession is not the landlord and becomes the occupier of the property, the landlord, neither in occupation nor entitled to possession, is not liable for NNDR, subject to fulfilling certain temporal conditions.

4. Instead, the liability falls on the tenant occupier, which may charge the owner a fee based on the amount of rates saved, which the owner would otherwise have had to pay. It is therefore important for POLL, Trafford and others to know in what circumstances a person such as POLL will be considered to be in occupation of a commercial property.

5. POLL says the touchstone of occupation is *volition*: the exercise of the will to occupy the premises. Trafford submits, on the contrary, that occupation for its own sake, without any separate purpose than to occupy, is not occupation in law and fact. There must be some *additional purpose* to use the premises for something.

6. The case arises from the advent of an apparently new growth industry. Businesses that might be called "professional occupiers" agree with landlords to lease premises from landlords but charge what could be called "reverse rent", so that the tenant is paid to occupy instead of paying to occupy.

7. This is a rolled up hearing of POLL's application for permission to bring a judicial review challenge to Trafford's decision to issue a particular summons seeking a rates liability order from a magistrates' court, combined with the substantive hearing if permission is granted. POLL also seeks declaratory relief arising from Trafford's "general approach" to its billing functions.

8. The main point arising is whether the arrangements between POLL and its landlord customers amount to occupation by POLL of the landlord's premises within the applicable legislation. Does there have to be an independent business purpose, such as storage of goods for onward sale, to establish occupation?

9. That question divides the parties and has spawned the present ongoing dispute which has become untidy and occasionally ill-tempered. Rates liability issues are usually litigated in a magistrates' court and, on appeal, by case stated to this court. A number of such cases in various magistrates' courts are stayed to await the outcome of this case.

10. The two interested parties (Lancaster and Basildon) are parties in some of those cases. Other billing authorities and businesses at one time wished to be joined. Only Lancaster and Basildon remain in the litigation, but they have not taken any part in the argument before me.

11. Trafford agreed to stays of certain magistrates' court proceedings against POLL and initially agreed that this court was the appropriate forum to determine the issue of law; but after this claim was brought, changed its mind and now says the matter should be left to the magistrates after all and that this court should only become involved, if at all, on appeal by case stated.

12. Trafford submits that permission should be refused or alternatively the substantive claim dismissed, on the merits; and, in addition, that permission should be refused because the proceedings are academic; because of delay; because there are disputes of fact which cannot be resolved in this court; and because the broad declaratory relief sought is too general and is unworkable.

Facts

13. I must stress that the facts are not all agreed. But the following statement from the council, through its officer Ms Janet Whittle, is not in dispute. POLL "markets its services in mitigating business rates by offering property owners to manage their empty space as effectively as possible by using those premises for the purpose of short-term storage".

14. Trafford, as guardian of the public purse, "seeks to determine if any rates scheme designed to reduce rates liability does actually involve occupation that is actual, beneficial, exclusive and not too transient". Ms Whittle commented in her witness statement that written lease agreements produced were "of dubious origin", with "minimal or no input from the property owner…".

15. I was shown an example of a written lease agreement. Mr Richard Glover QC, for Trafford, was also initially disinclined to concede that POLL's leases were genuine. But he accepted that, if there were no leases at all, POLL could not be liable for any non-domestic rates and that, for the purposes of these proceedings only, I should treat the specimen lease as containing the true terms of the bargain between POLL and the relevant property owners.

16. The terms are these. POLL is the tenant. The rent is a peppercorn. The term is six months. The landlord demises the property to the tenant, POLL. The tenant covenants to pay the rent, if demanded; to pay and indemnify the landlord against "all business rates charged assessed or imposed upon the property from the date of this Lease until the expiration of the Term".

17. The landlord remains responsible for paying utility bills. The tenant must keep the property clean and in good repair, fair wear and tear excepted. The landlord is entitled to access on prior written notice. The tenant must not assign or sublet. The landlord must pay to the tenant "all sums due to the Tenant" within 14 days of invoicing. There are various other normal lease terms, which I need not set out.

18. The financial side of the transaction is said by POLL to be as set out in a single page document setting out "General Terms and Conditions". Trafford does not accept that these terms are applicable in all cases; its position is that they may be applicable in some cases or not, as the case may be. It is necessary to ascertain the terms of the bargain in each case.

19. Trafford contended that the purpose of the transactions was the artificial one of "rates mitigation". However, it disavowed the suggestion that the transactions were a sham. The parties were content with the description of a sham agreement given by HHJ Hodge QC in *Rossendale BC v. Hurstwood Properties (A) Ltd* [2017] EWHC 3461 (Ch) at [67] as one where:

> "the parties to it had the common intention, which necessarily is a dishonest intention, that the transaction should not in fact create the legal rights and obligations which it gives the appearance of creating."

20. I therefore accept for the purposes of this hearing that the terms and conditions mean what they say; there is no element of pretence and the parties were not "doing one thing and saying another" (per Sir Thomas Bingham MR in *Belvedere Court Management Ltd. v Frogmore Developments Ltd* [1997] QB 858, at 876). That does not, of course, prevent Trafford or anyone else contending to the contrary in individual cases, in other proceedings.

21. The terms and conditions state as follows. POLL undertakes "to provide you with a Lease/Licence for our tenancy of your empty commercial property" (clause 11). The "cost of our service is 20% of the rates saving achieved, a minimum fee may apply"; payable "30 days after exit"; however, the fee is refundable "if a local authority successfully disputes our occupation" (clause 14).

22. Clause 15, headed *Guaranteed Saving*, states that fee refunds "will be given to You if You fail to qualify for a rates void period on the property … due to partaking in the service offered by us". There are also various other terms, which I need not set out. There is no mention of storage of goods or any other activity to be undertaken at the property; indeed, as I have said, the property is described as "empty".

23. There is a history of disputes between POLL and Trafford, and between POLL (and other companies) and other local authorities, over whether the company leasing the premises in question was in occupation for rating purposes. The disputes between POLL and Trafford go back to at least 2015. A great deal of correspondence has been generated in the course of Trafford's investigations.

24. By way of example, Ms Whittle learned from the supermarket chain, Sainsbury's, in March 2015 that it had entered into an agreement with POLL "to store our goods" at various times in 2014 and 2015 at four sets of premises in Stretford Mall. Ms Whittle emailed back asking Sainsbury's for documentary proof and asked why it needed POLL's services as it had its own property portfolio.

25. Sainsbury's, not surprisingly, tersely declined to answer. Mr Steve Dawson of POLL took great exception at Trafford's attempt "to interrogate my client on the issue of storage" and declared himself "absolutely furious" that Trafford had conversed "with my client without my permission"; as if his permission were needed.

26. Numerous inspection visits to premises said to be occupied by POLL have been made by local authority officers from Trafford and other authorities. These have generated some friction, but POLL accepts that reasonable investigations by a billing authority are proper and justified and has shown willing to facilitate access to premises on reasonable notice.

27. For example, one such visit was made with POLL's consent on 10 February 2016 to premises in Altrincham once used as a restaurant. The property was found to be in darkness; there was at least one box but no evidence of anything being stored. The POLL employee who admitted Trafford's officer could not answer questions about any deliveries or any storage use; as she explained, she merely inspects the building at the start of occupation and checks it is secure at the end of the occupation period.

28. In June 2017, Ms Louise Shaw of Trafford responded positively to Mr Dawson's request for a meeting to discuss the issues. For clarity, she set out Trafford's position in advance of the meeting:

> "… I cannot advise you how to run a tax avoidance scheme … nor can I turn a blind eye where evidence does not support the claims being made. A lease alone is not sufficient. … having considered the supporting evidence you have provided I am writing to confirm that this is **not** sufficient to support [POLL] being in rateable occupation pre or post April 2017 … .
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> ….
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> … The Council must be satisfied, on a case by case basis that the 4 ingredients of rateable occupation are present and whilst some of the principal elements of occupation have been established, one important exception is the value or benefit of the occupation to [POLL] … The storage questionnaires that have been sent to you attempts [sic] to obtain this information, namely, what benefit to [POLL] is there of storing the goods. I have considered your responses which state that the goods are owned by [POLL] and that you are unable to say where they have been previously, for how long, or the reason for storing the goods. …. Having looked at one of the lists … I can see that the boxes contain very low value goods. Without knowing why [POLL] are storing such low value goods the Council is unable to conclude beneficial occupation. … I do not know of the benefit of storing them. You therefore need to explain in detail how these goods are of benefit to the business needs of the company to enable us to assess if there is rateable occupation. … ."

29. The proposed meeting was held on 23 June 2017. I was told that it was an open meeting, not a without prejudice meeting. Mr Dawson and Ms Shaw attended, among others. It is not agreed what was said at the meeting, but that does not matter since it is common ground that the issues were discussed but no way forward was agreed and the issues remained unresolved.

30. On 29 June 2017, Trafford sent an email reiterating Ms Shaw's position and informed POLL that Trafford did not accept POLL as being in occupation of a particular property at 124-125 Stretford Mall. This led to a pre-action protocol letter from POLL's solicitors dated 13 July 2017, before the making of the specific decision now challenged in these proceedings. POLL proposed to challenge the "ongoing approach" adopted by Trafford.

31. The letter was lengthy but the core proposition was: "occupation is beneficial if the occupier derives, or indeed is capable of deriving, some benefit from the occupation";

but "[t]here is no requirement for the occupation to be profitable … occupation is defeated on beneficial grounds only if there is no value to the occupier from his occupation … [and] [my italics:] "*[t]here is no requirement that the benefit be derived from the use of the property or its intended use…*".

32. The solicitors also argued that there was no suitable alternative remedy. The magistrates' court was unsuitable because, among other reasons, it could not give binding rulings on the issues of law and principle more widely, capable of application beyond the confines of the case before the court. The issues were complex and far reaching, and needed to be "resolved at the level of the Administrative Court".

33. In a long response of 18 August 2017, Trafford accepted that "there is an issue of principle between the Council and [POLL]"; "there must be some value or benefit to the possessor". After a long disquisition on the case law, Trafford denied that it had misdirected itself on whether POLL's occupation was "a thing of value to it". Use of a property to store POLL's own goods could be, but it was for Trafford to decide whether that was made out on the evidence.

34. Trafford did not agree that the magistrates were unable to deal authoritatively with issues of law but added: "we accept that it would be appropriate for this matter to proceed in the Administrative Court where all issues can be addressed". They suggested that any maladministration could be addressed by the Local Government Ombudsman, which would "allow the dispute as to the application of law to be dealt with by an application for declaratory relief".

35. Trafford proceeded to lay informations against POLL for not paying NNDR, on a non-occupier basis, in respect of various properties in its area. They led to the issue of summonses on 6 September 2017 by the Greater Manchester Magistrates' Court. The informations included one complaining of non-payment in respect of 124-125 Stretford Mall, over the period from 1 April to 15 May 2017. Trafford sought a liability order in the sum of £2,438.14.

36. The magistrates' court issued the summonses, setting a hearing date on 29 September 2017, but that hearing was vacated and did not take place. POLL then prepared the present application for permission to seek a judicial review. Other sets of proceedings involving Basildon, then pending, were stayed by consent. The present claim was issued on 27 October 2017.

37. It included a challenge to the decision to seek a summons in respect of 124-125 Stretford Mall; a declaration that Trafford's "general approach" to POLL's non-domestic rating liability was founded on a misunderstanding of the law of beneficial occupation; a declaration that Trafford had unlawfully taken account of POLL's "motivations for its business model"; and a declaration that Trafford had applied a wrong evidential standard.

38. Trafford filed summary grounds arguing that permission should be refused, suggesting that, due to late service of the claim form, the Administrative Court lacked jurisdiction over the claim; resisting permission on the ground of delay and because the "ongoing approach" of Trafford could not properly be challenged; and because no individual decision was challenged apart from the decision to seek the summonses of 6 September 2017.

39. Trafford further submitted that there was an "available and adequate alternative remedy", namely the magistrates' court which could decide issues of law and fact from which (under section 111(1) of the Magistrates Court Act 1980) an appeal lay by case stated as well as a judicial review remedy. The grounds referred to numerous other claims outstanding against POLL and accused it of a breach of its duty of candour by not mentioning them.

40. Further stays of various other pending proceedings involving Lancaster were then agreed. The permission application came before me on the papers, together with various applications it is now unnecessary to rehearse. I directed a rolled up hearing at which all issues would be determined and gave directions for the hearing, including filing of detailed grounds of resistance.

41. In detailed grounds dated 28 March 2018, this time signed by leading as well as junior counsel, Trafford complained of "significant factual disputes at every stage" and asserted that the magistrates' court "is the appropriate forum for resolution of the *factual* issue" of whether there was beneficial occupation in any particular case, a point raising "[n]o point of high legal principle".

42. The detailed grounds continued to oppose permission and relief on numerous bases, factual, legal and procedural; but there was no explanation of why Trafford had evidently changed its mind about the Administrative Court being the "appropriate" forum where "all issues can be addressed". It was said without further explanation of the change of position that there was an alternative remedy which was "fatal to this claim".

43. Leading counsel, Mr David Forsdick QC, warned in the grounds that if the court proceeded to hear the claim, it would either have to hear live evidence (which neither party invited me to do, though I said I would be prepared to do so) or proceed on the basis that Mr Dawson's evidence was contested. I have adopted the latter course, from which the parties did not dissent at the hearing.

Law

44. The modern law relating to non-domestic rating is contained in legislation dating from 1988, to which I shall come shortly. The statutory background and case law goes back to Victorian times. It is convenient to start with the 19th century cases. The concept of occupation in the modern legislation has evolved from the body of case law forming the backdrop to its enactment.

45. In *Hare v. Churchwardens and Overseers of Putney* (1881) 7 QBD 223 the Court of Appeal held that the statutory acquirer of Putney Bridge was not in occupation of the bridge for rating purposes. The statute required the public to have free use of the whole of the bridge, not just a right of way (per Brett LJ at 233-4; see also per Cotton LJ at 237). The occupation was not "beneficial" because the owner could not, by law, benefit financially from the occupation.

46. Bramwell LJ, at 232-2, discounted the notion that the new owner could raise revenue from advertising; any such revenue would not come near covering outgoing expenses. Brett LJ held that there is no beneficial occupation "if by law no benefit can possibly

arise to the occupier"; but there is a "potential beneficial occupation" if "it is merely by his own volition that he is not receiving a benefit which by law he might receive".

47. The opposite result was reached in *London County Council v. Churchwardens and Overseers of the Poor of the Parish of Erith* [1893] AC 562, HL. The purchaser of land used to discharge sewage in the performance of statutory duties was held in rateable occupation because it could change the use of the land if it so chose. The occupation must be "of value" but that did not mean it must be profitable as currently used: per Lord Herschell LC at 591-2.

48. A few years later Lord Herschell sat again with the successor Lord Chancellor, Lord Halsbury LC, in *Churchwardens and Overseers of Lambeth Parish v. London County Council* [1897] AC 625, HL. The county council was held not in rateable occupation of Brockwell Park, having purchased the park pursuant to statutory powers requiring the county council to maintain the park and requiring the park to be dedicated to perpetual public use.

49. Lord Halsbury LC reasoned (at 630) that the county council was merely custodian of the park for the benefit of the public and that its occupation of the park was not beneficial, applying the same reasoning as in the Putney Bridge case which was directly in point. Lord Herschell's reasoning (at 631-2) was to the same effect; he distinguished the *Erith* case, in which use of the land could change.

50. In *R. v. Melladew* [1907] 1 KB 192, the Court of Appeal established that an occupier of potentially profitable commercial property did not cease to occupy it by absenting himself from the property leaving it in a state suitable for resumed profitable use should he return. Lord Collins MR (at 201-2) attached importance to "the intention of the alleged occupier", expressed in earlier cases by the phrases *animus habitandi* and *animus revertendi*.

51. Farwell LJ (at 203-4) described the question whether premises are occupied as one of mixed fact and law. He proposed as a test a question phrased, with respect, in a manner that is difficult to follow: "[h]as the person to be rated such use of the tenement as the nature of the tenement and of the business connected with it renders it reasonable to infer was fairly within his contemplation in taking or retaining it?"

52. Reference was made to premises whose nature is such that physical occupation would always be intermittent, such as a seaside boarding house closed for the winter and open during the summer season. A cattle shed may be occupied for rating purposes thought its occupants be cattle not people. A dwelling house may be rateable where chattels and furniture are left there, though the owners be absent abroad; and so forth.

53. I was referred to several other cases from the first half of the 20th century, which I do not find it necessary to go through in detail; notably, *Winstanley v. North Manchester Overseers* [1920] AC 7, HL; *Liverpool Corporation v. Chorley Union Assessment Committee and Withnell Overseers* [1913] AC 197; and *London County Council v. Hackney Borough Council* [1928] 2 KB 588 (Wright J). They reaffirm but do not alter the applicable principles.

54. Some 20 years later, in *John Laing & Sons Ltd v. Kingswood Area Assessment Committee* [1948] 1 KB 344, CA, contractors were held in rateable occupation of

buildings erected on the site of an airport owned by the Air Ministry to enable the contractors to perform their contract with the Ministry to execute works on the airport site, although the contract made execution of the works subject to control and directions from the Ministry's superintending officer.

55. The case is famed among rating lawyers for the articulation (by Tucker LJ at 350, borrowing from Mr Rowe KC's argument) of "four necessary ingredients in rateable occupation". There must be (i) "actual occupation"; (ii) "it must be exclusive for the particular purposes of the possessor"; (iii) "the possession must be of some value or benefit to the possessor"; and (iv) "the possession must not be for too transient a period".

56. In the next case I will mention, *Minister of Transport v. Holland* (1962) 14 P&CR 259, the Court of Appeal held that the test of occupation was the same in compulsory purchase cases as in rating cases. Unlike in the rating cases the owner argued, as in this case, for occupation. If he were in occupation and had made reasonable efforts to sell his property (blighted by a planned bypass), he could require the local authority to purchase it at a proper price.

57. On the Minister's successful appeal, the owner was held not in occupation; his occasional visits and maintenance work to prepare the property for sale, and the presence of inconsequential chattels left in sheds, were insufficient to amount to occupation. The notice to purchase served on the local authority was therefore invalid, contrary to the decision of the Lands Tribunal below.

58. The same conclusion was upheld in the rating case of *Camden LBC v. Peureula Investments Ltd* [1976] RA 169, where a theatre was left unsuitable for use after the ceiling collapsed during a performance (of the musical *Hair*). The fixed seating, the safety curtain and some carpets remained in the theatre, which the local authority argued was storage akin to warehouse use; but the Divisional Court upheld the magistrate's contrary finding.

59. Such were the cases to which I was referred, among others. There are dozens of rateable occupation cases and the sample chosen by the parties was helpful. But property owners may now also be rated, subject to exceptions, for properties that are not occupied, by them or anyone else. Owner occupiers are rated under section 43 of the Local Government Finance Act 1988, as amended (the 1988 Act); owner non-occupiers, under section 45.

60. To be rateable on a particular day when unoccupied, a "hereditament" (which I shall call a property, or premises) must, among other things, on that day "fall within a class prescribed by the Secretary of State by regulations" (section 45(1)(d) of the 2008 Act). The Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008 (the 2008 Regulations), then prescribe what properties fall into that class.

61. The prescribed class is (regulations 2 and 3) "any non-domestic hereditament consisting of, or of part of, any building, together with any land ordinarily used or intended for use for the purposes of the building or part"; apart from the exceptions described in regulation 4. For present purposes, the exception is (regulation 4(a)): "any hereditament … which, subject to regulation 5, has been unoccupied for a continuous period not exceeding three months".

62. Regulation 5 states, however, that a property which "has been unoccupied and becomes occupied on any day shall be treated as having been continuously unoccupied for the purposes of regulation 4(a) … if it becomes unoccupied again on the expiration of a period of less than six weeks beginning with that day".

63. What does all that mean? It means that the owner of an empty commercial property has a period of three months to find a tenant occupier, without having to pay rates as a non-occupier owner. Once the tenant moves in and occupies, it becomes rateable as occupier and the owner remains non-rateable for the property because the liability to pay NNDR falls on the tenant occupier.

64. But, to benefit the owner, the occupation must last for at least six weeks; if it lasts less than six weeks, the period does not count as an interruption to the emptiness of the property and the owner becomes rateable as a non-occupier at the end of the period of occupation. If the occupation lasts six weeks or more, when it ends the owner will have a further three month period of non-rateability in which to find another (or the same) tenant occupier.

65. Thus, an owner may seek to avoid rates liability by arranging a series of "six weeks plus" occupations by a tenant, provided not more than three months elapse from the end of one such occupation to the start of the next. Billing authorities may question whether the tenant really is occupying the property for rating purposes; but they do not dispute that such is the effect of the statutory provisions, provided the tenant's occupation is real.

66. If it turns out that the tenant is not in occupation, the tenant is liable (having leased the premises and therefore being the person entitled to possession) as a non-occupier and the landlord owner does not obtain the benefit of the statutory provisions. If the tenant has become rateable as an occupier, the landlord owner escapes liability for NNDR for as long as the temporal conditions (the three month and six week thresholds) are met.

67. I was told that billing authorities have no right of entry to check what is going on inside properties whose occupation is in issue. They rely on provision of information and voluntary inspections and must decide whether to levy rates and if so on whom and whether on an occupied or unoccupied basis. If the person levied declines to pay, an information may be laid before the magistrates' court seeking a liability order.

68. The court must then decide the issue of liability. In the usual way, there is a right of appeal by case stated on a point of law. It also turns out that by regulation 20 of the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989, the rates may be recovered "in a court of competent jurisdiction", which appears to include the Administrative Court.

69. In *Makro Properties Ltd v. Nuneaton & Bedworth BC* [2012] EWHC 2250 (Admin) (His Honour Judge Jarman QC), a district judge had found no rateable occupation where leased premises were used only to store certain documents that for regulatory reasons had to be kept for several years. He reasoned that the "steps taken to occupy the premises by storage had no commercial or business purpose other than avoiding a liability to rates".

70. On appeal by case stated, HHJ Jarman QC held that this reasoning was wrong. An inferred intention to occupy, taken together with use of the premises, even if slight, "may be sufficient to amount to occupation as determined in Melladew" ([43]). There was a clear intention to occupy; the question was whether the use was so trifling as not to amount to occupation. It was not trifling, he said: 16 pallets of documents were stored ([44]).

71. The occupation also had to be "beneficial" ([45]). It was: the documents stored were of consequence; they were not merely abandoned debris of no value and considered not worth removing, as in *London County Council v. Hackney BC*. Furthermore, the documents had to be retained for legal reasons ([46]). If the result amounted to avoidance of tax, that was a matter for the legislature; "the court is not a court of morals, but of law" ([56]).

72. In *Secretary of State for Business Innovation and Skills v. PAG Management Services Ltd* [2015 EWHC 2404 (Ch), leases were granted to special purpose vehicles (SPVs) which were then voluntarily wound up to take advantage of a rates exemption for premises owned (or leased) by companies subject to a winding up order in a voluntary winding up.

73. The Secretary of State successfully petitioned Norris J on public interest grounds for a compulsory winding up of the respondent (PAG), which managed the scheme. He contended that the leases were sham transactions. PAG accepted that the arrangements were artificial and entered into for the purpose of mitigating rates liability, but not that they were sham transactions. The scheme was found to be a misuse of insolvency legislation.

74. However, Norris J did not accept on the evidence that the rates mitigation scheme was "by its nature contrary to the public interest" ([55]); nor that such schemes in general "are contrary to the public interest (though they may be)" ([60]). He agreed with HHJ Jarman QC's reasoning in *Makro* and described the question (at [60]) as "a far-reaching economic and political question that is properly the province of Parliament".

75. In the *Rossendale* case, already mentioned (and due to be heard on appeal in November 2018), His Honour Judge Hodge QC considered two similar rates avoidance schemes but declined to strike out claims founded on the proposition that the schemes were ineffective to achieve their objective of avoiding NNDR.

76. He rejected as untenable the plea that the scheme leases were "shams" (see at [67]). He rejected (see at [110]) the possibility that the billing authorities might defeat the effect of the schemes by application of what has been called the *Ramsay* principle, which is not relied on in the present case and which I will not attempt, at my peril, to paraphrase.

77. But the judge left open the possibility that the billing authorities might establish at trial that "the existence of the relevant SPV can … be disregarded, effectively by piercing the corporate veil" ([111]), applying the principles emerging from the decision of the Supreme Court in *Prest v. Petrodel Resources Ltd* [2013] 2 AC 415.

Submissions

78. For POLL, Mr Timothy Morshead QC argued that the parties need to resolve the issue that divides them; Trafford was right to agree that this should occur in the Administrative Court and wrong then to change its mind. The parties agree that occupation must be "beneficial" to be rateable as an occupier but they disagree about what that means. Trafford, Mr Morshead pointed out, has persistently asserted that goods must be "stored" at the properties in question.

79. I note that the verb "stored" connotes a purpose for placing the goods within the property going beyond the purpose of occupying it to enable the landlord to escape rates liability. Trafford has, indeed, stated through Ms Shaw that POLL needs to explain "the benefit of storing them" and "explain in detail how these goods are of benefit to the business needs of the company".

80. While Trafford accepts that storage of goods for an independent commercial purpose, as in *Makro*, amounts to rateable occupation, it does not accept that the mere presence of POLL's goods for the sake of populating the premises for rates mitigation purposes, can be rateable occupation. Mr Morshead's submission is that placing goods in a property to occupy it is beneficial occupation; the act of volition is the hallmark of occupation.

81. Mr Morshead submitted that the purpose of occupying a property need not be commercial to constitute rateable occupation. A whimsical eccentric who placed valueless items in a property for no discernible reason, purely as a hobby, would still be a rateable occupier of the property. The occupier has by volition performed the act of populating the property with things, which is enough for occupation.

82. The motive of the occupier is irrelevant, said Mr Morshead. If motive becomes the subject of the law's enquiry, the exercise becomes one laden with value judgments, such as a judgment that rates mitigation is not a "legitimate" commercial purpose, or that occupation must be the "right kind of occupation". The court must remember to act as a court of law not morals.

83. Nor is the value of what is at the property relevant; an occupier may put in spartan furnishings or none, or goods of value or of no value. Conversely, an eccentric ex-occupier who leaves behind abandoned property may cease to occupy even if what he leaves behind is a priceless Picasso painting. In each case, the determining feature is the will of the person entitled to possession.

84. POLL's argument is that the authorities on rateable occupation going back to Victorian times support this approach and that the authorities on rates avoidance in recent times show that the law may not be distorted in order to prevent avoidance of tax by lawful transactions. It is therefore sufficient that POLL is the exclusive possessor of the properties and that they are populated with goods of some sort.

85. Mr Morshead submitted that the four criteria identified in the *JS Laing* case are all met. There is actual occupation; it is exclusive to POLL; it is of value to POLL; and it is not too transient. The only controversy could arise from the third of these four criteria. But, says Mr Morshead, POLL's occupation is obviously, to POLL's business, a "thing of value" (in Lord Atkinson's phrase in the *Winstanley* case).

86. Mr Richard Glover QC, for Trafford, countered those arguments with the following main points. First, he submitted that the court should not entertain the dispute at all and should refuse permission to apply for judicial review. The differences between the parties should be played out in the magistrates' court. That was an adequate alternative remedy which should, in the usual way, lead the court to decline to permit judicial review, a remedy of last resort.

87. He emphasised that Trafford did not accept that Mr Dawson was a reliable and honest witness in every respect; that there were disputes of fact arising on a case by case basis; that each case had different facts; and that it was for the magistrates to find the facts and apply the law to them, subject to the right of appeal by case stated. That, said Mr Glover, is the correct procedure. The declaratory relief sought amounted to requesting advice from the court.

88. Furthermore, Mr Glover argued that the question asked of the court is academic unless POLL's evidence is untrustworthy. This is because POLL's evidence in the stayed cases was to the effect that goods stored at the premises in question comprised both goods stored on behalf of their third party owners and, in some cases, goods stored and owned by POLL intended for onward sale in the course of POLL's business.

89. While Trafford did not accept the reliability and correctness of that evidence, it constituted POLL's case in the stayed magistrates' court proceedings, which meant that the phenomenon of bare occupation for occupation's sake did not arise on POLL's case. It was Trafford's case, not POLL's, that the latter was undertaking bare occupation without further motive. On POLL's case, the claim was therefore academic and should be rejected as such.

90. Mr Glover relied on Silber J's decision in *R (Zoolife International Ltd) v. Secretary of State for Environment, Food and Rural Affairs* [2007] EWHC 2995 (Admin), and the cases discussed at [30]-[37]. In *Zoolife*, the decision challenged had been withdrawn before the hearing. The discretion to hear cases that have become academic between the parties must be exercised with caution; there must be good reason in the public interest for hearing the case.

91. The rationale is that the court should not decide hypothetical questions or use up its valuable time advising litigants how to order their affairs. Silber J considered that academic issues should not be decided unless there are "exceptional" circumstances; and he suggested there only would be if two conditions were met, in the type of case he was considering.

92. The two conditions are, first, that a large number of other cases exist or are anticipated and, second, that "the decision in the academic case will not be fact-sensitive" ([36]). I note that where those two conditions are met, the issue may be academic as between the parties in the particular case, but the impact of deciding the issue will be far from academic in the wider world.

93. Mr Glover took a further procedural point, open to him because this is a rolled up hearing. He submitted that the claim was out of time as it had not been brought within three months after grounds for the claim first arose. The pre-action protocol letter was dated 13 July 2017; the claim was not brought until 27 October 2017, well over three months later.

94. The position was different here, said Mr Glover, from that in *O'Connor v. Bar Standards Board* [2017] 1 WLR 4833, SC, where the time limit within which a human rights claim must be brought began to run from the date of the act complained of. This challenge here had been conceived as a challenge to Trafford's "general approach" and time had therefore begun to run from the date when that approach was first adopted.

95. For all those procedural reasons Mr Glover submitted that permission should be refused. Alternatively, if it were granted, he invited me to find the claim for judicial review unarguable on its merits or, if arguable, to dismiss it on its merits. He argued that POLL's presence at the properties in question should be regarded as a semblance of occupation and not occupation in fact and law.

96. According to Mr Glover's argument, occupation only qualifies as such if it is beneficial, i.e. a thing of value; and, occupation that is only beneficial if it results in the property being rateably occupied is not of itself sufficient to amount to beneficial occupation. Something more is required: if goods are deposited, a benefit must result from the deposit. The act of occupying must be, he submitted, "functional", not "redundant".

97. Thus, Mr Glover submitted, if bags of shredded paper or other goods of negligible value are deposited at a property, without more, it is open to a magistrates' court to find as a fact that the inferred intention of the depositor is that it wants to *appear* to occupy the property, not that it actually occupies the property.

98. This is not, Mr Glover argued, the same as a sham transaction, though it is a "charade". The contract terms are genuine but the occupation is not. The same would not be true of Mr Morshead's whimsical eccentric, said Mr Glover; for he would have a true intention to use the property in pursuance of his hobby and thus his occupation would be a thing of value to him personally, though not commercially motivated.

99. Trafford argues that if POLL's motive for depositing goods has nothing to do with the goods themselves or their storage, there is no occupation. In such a case, POLL's "purpose" is both ulterior and contingent. If POLL's motive (rates mitigation) is ignored, there is no purpose to depositing the goods and therefore no thing of value to POLL. Its occupation is therefore not, in such a case, beneficial.

Reasoning and Conclusions: Permission

100. I will deal first with the question of permission. In my view, whether there can be rateable occupation where the only purpose of or motive for occupying is rates avoidance, is a point that is plainly arguable. Trafford did not seriously contend otherwise. It is sufficient to record Mr Morshead's submissions, as I have done above, to recognise that they are arguable.

101. Indeed, at one stage Trafford implicitly conceded as much. Its initial response to POLL's suggested challenge to its "general approach" was to recognise that the issue dividing the parties was suitable for resolution in this court. If it had not regarded the merits of POLL's case as arguable, it would doubtless not have made that concession.

102. I consider next whether the right to contest a summons in the magistrates' court is a suitable and adequate alternative remedy which ought to induce me to refuse permission to apply for judicial review in this case. I am surprised this contention is advanced. It

is inconsistent with Trafford's earlier stance that the Administrative Court is the appropriate forum. No explanation for Trafford's change of position has been offered.

103. Furthermore, stays or adjournments of magistrates' court cases involving these parties, other billing authorities and other potential ratepayers, have been agreed, not just by Trafford and POLL, on the strength of these proceedings. I was told that my directions order in February 2018 directly influenced some decisions to agree adjournments. They will have been pointless and achieved nothing but delay, if this case produces nothing of value to these and other interested parties and to the law.

104. It is true, as Mr Glover says, that an appeal could be brought to this court by case stated against a magistrates' court decision with full findings of fact. But Trafford did not advocate this solution nearly a year ago when POLL's challenge was first mooted in correspondence. None of the cases currently before the magistrates' court has, as far as I am aware, produced a decision that could serve as an appropriate vehicle for a case stated appeal.

105. Mr Glover pointed out that magistrates' courts can decide issues of law as well as fact. So they can. But I think Trafford was right to regard this court, as it did initially, as the more suitable forum for determining the issue of law that divides the parties. The course of proceedings elsewhere, in various magistrates' courts, persuades me that the court should do what it can to help, even without the benefit of findings of fact in an individual case.

106. I reject the suggestion that the present claim is academic as between these two parties. There is an extant challenge to a specific decision to lay an information, made on about or shortly before 6 September 2017, seeking a liability order for unoccupied rates in respect of a property at Stretford Mall, Manchester. The lawfulness of that decision is a live issue in this application.

107. Even if I were of the view that the present case is academic as between these two parties, I would regard this case as a paradigm of one where Silber J's two conditions in *Zoolife* are met in substance and there are exceptional circumstances supporting a strong public interest in entertaining the main issue of law.

108. As to Silber J's second condition, I accept that there is fact-sensitivity in the issue of the validity of Trafford's decision to lay the information; but there is also factual evidence before me capable of generating a decision going beyond the immediate dispute about the legality of the decision to lay that information. As for the first condition, the present case is anything but academic for the parties in other cases that are stayed or adjourned.

109. By similar reasoning, and in view of Trafford's initial concession that this court is the appropriate forum, I would have been minded to grant an extension of time if I had been of the view that the claim had been brought out of time. Trafford's response of 18 July 2017 to the pre-action protocol letter sent five days earlier, did include an enquiry as to when POLL were saying grounds for the claim first arose, but also expressed agreement that this court should rule on the substance of the dispute.

110. I do not accept that the claim has been brought out of time. While Trafford's "general approach" to the issue of POLL's occupancy had been extant for more than three

months when the claim was brought, it was appropriate for POLL to challenge the specific decision to lay an information in September 2017, in the light of the earlier pre-action correspondence. The present claim was brought less than two months after that decision was made.

111. For those reasons, I am in no doubt that it is right to grant permission to apply for judicial review, and I do so.

Reasoning and Conclusions: the Substance

112. In the claim form, POLL seeks broad declaratory relief as well as quashing of the decision to lay the information relating to 124-125 Stretford Mall. In his skeleton argument, Mr Morshead explains that he proceeds on the first ground of challenge only. That ground is developed in the detailed grounds under the heading: "incorrect understanding of beneficial occupation".

113. That ground of challenge adequately expresses the contention of POLL in submissions to me and the difference between the parties' submissions on beneficial occupation, which I have summarised above. I propose to deal with the issue on the facts before me, summarised above. Where those facts are not agreed, I proceed on the basis that they are in dispute and would require to be resolved by the magistrates in any proceedings in that forum.

114. I do not accept that I should refrain from deciding the beneficial occupation issue for want of adequate undisputed factual material. In its detailed grounds, Trafford applied contingently to cross-examine Mr Dawson, but did not pursue that application before me. I am therefore not impressed by Mr Glover's argument that POLL's case on beneficial occupation arises only if Mr Dawson's evidence is untrustworthy.

115. The answer to the point is that the issue arises on Trafford's case, which is that his evidence is untrustworthy. It is clear that there are, or are likely to be, cases in which Trafford is or will be alleging before the magistrates that POLL's supposed occupancy of premises is founded on the depositing of redundant goods there for no other business purpose or motive than rates mitigation. That is an adequate factual basis for deciding the issue.

116. I come finally to the substance of the case. In my judgment, the case law to which I was referred provides useful context but does not answer the question that arises for decision. The 19th and 20th century judges were not required to consider a case of occupancy for its own sake, in furtherance of a rates avoidance scheme. To say that the occupation must be "beneficial" prompts the question what that means, but the cases do not provide the answer.

117. The cases on sham transactions, those founded on the *Ramsay* principle, and those founded on lifting of the corporate veil, do not provide the answer either. There is no question here but that the transactions are genuine and produce the legal results for which, by the wording of the documents, they provide. The leases create a genuine relationship of landlord and tenant. The terms of service provide for a genuinely payable fee of 20 per cent of rates saved.

118. The modern cases on rates avoidance schemes – such as *Makro, PAG Management Services Ltd* and *Rossendale* – stand for the proposition that where transactions are genuine and mean what they say, their meaning and effect, and the general law, must not be distorted or manipulated in the name of morality, so as to prevent avoidance of rates in circumstances where the statutory provisions provide for no rates to be payable.

119. Those cases are of some help because they remind me to guard against any moral dimension in the search for the nature of occupation that is "beneficial". Mr Morshead is right to say I must resist any temptation to find that the occupation has to be of "the right kind" to qualify as beneficial. But the occupation still has to be beneficial, in law and in fact, applying a morally neutral analysis.

120. I accept Mr Glover's point that without making any value judgment or descending into ethics or morality, there can in principle be a semblance of occupation where in truth there is none; just as, conversely, there can be a semblance of non-occupation where in truth there is occupation. An example of the latter is *Melladew*.

121. An example of the former would be, for example, placing a scarecrow or dummy in the window of a house uninhabited and deserted by humans, intending to deceive observers into thinking the house was lived in. The motive might be merely to deter burglars pending a sale, if and when a buyer could be found. But the house would no more be occupied than was Mr Holland's in *Minister of Transport v. Holland*.

122. In the present case, the business of the putative occupier is the business of occupation. The purpose of the occupation is not to store goods; it is, so to speak, to plant the occupier's flag; to populate the premises to whatever extent is required to occupy it in law and fact. The reason why that is done – the motive, if you prefer – is rates avoidance for the landlord, but the morality of that is neither here nor there.

123. Let it be assumed, as is likely in most cases of this kind, that the first, second and fourth elements of occupation in *JS Laing* (actual occupation, exclusivity for the possessor's purposes, and occupation that is not too transient) are all present. Is the third element – that possession is of some value or benefit to the possessor - present where the value or benefit is the occupancy itself? That is the question to be decided.

124. Having reflected on this, I cannot see any good reason why, if ethics and morality are excluded from the discussion, the thing of value to the possessor should not be the occupancy itself. The verb "occupy" and the nouns "occupation", "occupancy" and "occupier" are, in the end, ordinary English words. Their meaning has developed in case law to give them a sensible construction, but they have not been given technical statutory definitions.

125. I prefer the submissions of POLL to those of Trafford because they better fit the ordinary meaning of occupation. I find no concept within the meaning of the word requiring a purpose or motive beyond that of the occupation itself. The question is in each case whether the four elements in the *JS Laing* case are present. The third is sufficiently present where the intention is to occupy for reward, without any further commercial or other purpose.

126. It follows that the decision to lay the informations in early September 2017 including the challenged decision were, as it turns out, founded on what I have decided to be a

wrong view of the law. The decision was to lay informations based on POLL being liable for unoccupied rates, not occupied rates. Trafford believed when it decided to lay the informations that POLL could not be in occupation if it had no purpose for occupying beyond that of rates mitigation.

127. Does that mean the decision challenged, to lay the information relating to 124-125 Stretford Mall, must be quashed? In my judgment, it does not. The decision to lay the informations was taken in good faith based on the view of the law set out in Trafford's response to the pre-action protocol letter. That view of the law was not perverse, irrational or obviously ill-founded. As this judgment shows, the law was not clear from the authorities.

128. If the argument before me had gone the other way, Trafford's decision to lay informations would on any view be good in law. It is not retroactively rendered bad in law merely because I have now decided the issue in the way I have. The lawfulness of the decision is to be judged as at the time when it was taken. At that time, Trafford's view of the law was tenable. It follows that the decision to lay the informations was sound and not open to challenge.

129. There is a further reason why the decision to lay the informations was good in law and not capable of being impugned. The facts relating to 124-125 Stretford Mall, or any of the other properties in question, may be such that POLL is found by the magistrates not to be in occupation even adopting the approach set out in this judgment.

130. For example, the occupation may be too transient in a particular case. A billing authority may lay informations seeking rates liability orders on a basis that is not agreed, in fact as well as in law. In the stayed or adjourned cases, it will be for the magistrates' courts to determine the facts and apply the law to them, if the summonses are pursued to trial.

131. In my judgment, it is not necessary and would not be appropriate to grant any declaratory relief. The giving of this judgment is, in my opinion, by itself a sufficient judicial response to the claim. POLL has succeeded in its primary contention of law, but has not succeeded in securing an order to quash the specific decision it has challenged.