IN THE COURT OF APPEAL (CIVIL DIVISION) **CA-2025-001425-B**

ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION (CHARLES BAGOT KC SITTING AS A DEPUTY HIGH COURT JUDGE)

BETWEEN:

THE MAYOR AND COMMONALITY AND CITIZENS OF THE CITY OF LONDON

Appellant

-and-

(1) 48TH STREET HOLDING LIMITED
(2) PRINCIPLED OFFSITE LOGISTICS LIMITED

Respondents

SECOND RESPONDENT'S
REPLACEMENT SKELETON ARGUMENT

References in the form [J/1] are to the paragraphs of the judgment under appeal.

Introduction

1. This appeal is about the treatment of intermittent occupation schemes in non-domestic rating.

2. Intermittent occupation schemes are a long-standing and well-established means by which property owners are able to mitigate the extent of their rates liabilities. The efficacy of such schemes has been recognised in a series of High Court decisions over a number of years. Such schemes are used by a wide range of bodies, including Government departments, and recent Government consultations have proceeded on the basis of the efficacy of such schemes.

3. The appellant, the City of London Corporation in its capacity as billing authority for its area ("the BA"), seeks to overturn the effect of the settled position and to establish that

intermittent occupation schemes such as that operated by the Second Respondent ("POLL") are ineffective.

4. The BA's arguments to that effect are not made out, and the deputy judge below was right to reject them. In summary:

   a. The operation of POLL's scheme is not inconsistent with the underlying purpose of the empty rates regime. When that scheme is properly understood, it is not intended to ensure that all empty property is subject to the empty rate. Rather, the choice of which owners to make liable to the empty rate is left to the Secretary of State as legislator. The Secretary of State has actively considered intermittent occupation schemes, and declined to remove their efficacy. The Secretary of State's consideration of its policy preferences in this area remains ongoing; it would be inappropriate for the Court to intervene in a complex matter of fiscal policy which is under active consideration by the legislature.

   b. The BA's approach to beneficial occupation falls into the error of equating the concept of an "occupation of value" with the derivation of pecuniary gain. That, however, is contrary to well over a century of case law, which establishes that an occupation is beneficial if it is undertaken for a purpose (i.e. deliberately), and there is no legal bar on the occupier deriving a benefit therefrom.

<u>The factual position</u>

5. There is no meaningful dispute as to the factual position, which is set out by the deputy judge at J/13-16, and not repeated here.

6. There is, however, a degree of confusion in the BA's statement of the factual position in its skeleton argument.

7. In particular, the BA's assertion at skeleton para 11 that the arrangements "*did not appreciably impact on [the First Respondent's] beneficial interest*" is hard to understand, given that the BA accepts that POLL would be "*able to assert the usual legal rights and powers conferred on a tenant of property*" (skeleton para 51). Those two statements are inconsistent.

8. Similarly, the BA's suggestion that the arrangements did not impede the First Respondent's "*real and practical ability to use the [demised property] as it wished*" seems to be an argument (per *Hurstwood* – see below) that POLL was not the owner of the property; that however is inconsistent with the BA's decision to levy unoccupied rates on POLL as (it asserts) the owner of the property (BA skeleton para 9(f)).

9. In any case, an intermittent occupation scheme of the kind at issue does not depend on the identity of the occupier of the property, but on the fact of occupation for the requisite period. On that basis, the points raised by the BA in paras 11 and 12 of its skeleton are irrelevant: even if they were well-founded (which they are not), at their highest they would show that the property was occupied by the First Respondent rather than by POLL, and such a finding would have no bearing on the efficacy of the scheme itself.

The law

10. The law of rating is contained in the Local Government Finance Act 1988 ("the 1988 Act"), the secondary legislation made thereunder, and (critically in the context of this claim) the extensive body of case law which has developed over the centuries as to the meaning and operation of the key concepts.

The 1988 Act and its brief history

11. Rating has existed as a tax continuously since 1601. Until 1966, a person was rateable not in respect of the ownership of property, but only in respect of its occupation. Given the very substantial age of rating, there is a considerable body of case law as to the meaning of occupation. That case law is particularly relevant as to the meaning of the term "beneficial occupation", and is addressed below.

12. In 1966, the rating regime was extended to give billing authorities the ability, by resolution, to rate the ownership of unoccupied properties as well as occupied ones, at 50% of the occupied rate (Local Government Act 1966, ss. 20-22).

13. By the time of the 1988 Act, the unoccupied rate ceased to be discretionary, and entered into the general law. The 1988 Act thus creates two routes to liability to rates.

14. The first route arises where a person occupies the whole or a part of a relevant property (known in rating as a "hereditament"): s. 43.

15. The second route arises where a person is the owner of the whole of a relevant hereditament, that hereditament is wholly unoccupied, and the hereditament is within a class of hereditaments to be specified in regulations by (in England) the Secretary of State (s. 45(1)).

16. That latter point is an important one. It was no part of Parliament's purpose to render rateable <u>all</u> ownership of unoccupied property. Parliament could have done so; but it chose not to. Rather, Parliament delegated the judgment as to the qualifying classes of unoccupied property to the Secretary of State. S. 45(9) makes clear that the Secretary of State may prescribe the classes of qualifying hereditaments "*by reference to such factors as [he] sees fit*".

17. S. 65 of the 1988 Act is an interpretation provision which defines, amongst other things, "occupation" and "ownership". The owner of a hereditament is defined as "*the person entitled to possession of it*" (s. 65(1)). That term was the subject of the Supreme Court's consideration in the *Hurstwood* case, which is addressed below.

18. S. 65(2) deals with occupation:

> "*Whether a hereditament or land is occupied, and who is the occupier, shall be determined by reference to the rules which would have applied for the purposes of the 1967 Act had this Act not been passed …*"

19. The 1988 Act thus expressly preserves the law on the identification of occupation which existed at the time of the passage of the Act. Self-evidently, Parliament did not intend to modify the pre-existing law on occupation.

20. In 2007 (before the global financial crisis of late 2008), Parliament passed the Rating (Empty Properties) Act 2007, the effect of which was to increase the amount of the empty rate from 50% of the occupied rate to 100% of it.

21. The extant scheme for the rating of empty property differs, therefore, in some respects to that introduced in 1966:

a. Prior to 1988, billing authorities had a discretion whether or not to introduced empty rates to their areas. That discretion was removed by the 1988 Act and since 1990 the empty rate has been mandatory;

b. Prior to 1988, the conditions under which the empty rate was imposed (if the billing authority elected to impose it) were contained in statute, and thus amendable only by Parliament. With the advent of the 1988 Act, the classes of property to which the empty rate applies is in the discretion of the Secretary of State and can be altered by the Secretary of State by statutory instrument. Since 1988, therefore, the legislature for the purposes of the conditions of the empty rate, and the person whose purposes must be discerned for *Ramsay* purposes, is not Parliament but the Secretary of State; and

c. Prior to 2007, the empty rate was half of the occupied rate. Since 2007 the two rates have been the same.

The Unoccupied Property Regulations

22. The class of hereditaments the ownership of which gives rise to unoccupied rates liability for the purposes of s. 45(1)(d) is prescribed by the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008 ("the 2008 Regs").

23. Reg 3 of the 2008 Regs defines the class of rateable unoccupied property as: "*all relevant non-domestic hereditaments other than those described in regulation 4.*" The term "relevant non-domestic hereditament" is itself defined, in reg 2, as a hereditament consisting of, or of any part of, a building, together with any land ordinarily used or intended to be used for the purposes of the building or part.

24. Reg 4 contains a wide range of hereditaments which are not prescribed. For present purposes, it is sufficient to focus on reg 4(a):

> *"The relevant non-domestic hereditaments described in this regulation are any hereditament—(a) which, subject to regulation 5, has been unoccupied for a continuous period not exceeding three months"*

25. A similar provision applies in respect of industrial hereditaments, save that they are excluded from the class of rateable property for continuous periods of up to six months (reg 4(b)).

26. Reg 5 is the provision on which the efficacy of intermittent occupation schemes turns. At the relevant time, it provided as follows:

> *"A hereditament 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) and (b) if it becomes unoccupied again on the expiration of a period of less than six weeks beginning with that day."*

27. The effect of that provision is that, if a property is occupied for more than six weeks, and then becomes unoccupied again, the property will not be within the class of rateable unoccupied property for three months beginning on the date that it becomes unoccupied again.

28. The 2008 Regs do not contain any free-standing definition of occupation, nor do they attempt or purport to modify the definition contained in s. 65(2) of the 1988 Act. Thus "occupation" in the 2008 Regs has the same meaning as it has under the 1988 Act, i.e. that its meaning is to be determined in accordance with the case law. It is, and since 1990 has been, open to the Secretary of State to adopt a modified definition, or indeed some entirely different trigger, for the purposes of reg 5; but he has not done so.

The 2024 amendments to the 2008 Regs

29. Reg 5 was amended by the Non-Domestic Rating (Unoccupied Property) (England) (Amendment) Regulations 2024 ("the 2024 Regs") so that, with effect from 1 April 2024, the period of continuous occupation required to re-engage reg 4(a) is 13 weeks.

30. The 2024 Regs were made on the basis that intermittent occupation schemes were and would continue to be efficacious.

31. That can be seen from the Government's March 2024 response to its July 2023 business rates avoidance and evasion consultation. The ministerial foreword [SB/61] noted that

the Government had sought to test concrete reforms to help to "*close down known avoidance practices*". In the light of the consultation, the Government proposed:

> "*immediate action on Empty Property Relief. The Empty Property Relief "reset period" will be extended from six weeks to thirteen weeks from 1 April 2024. This will disincentivise the widespread practice colloquially known as "box shifting", in which landlords repeatedly occupy properties for short periods of time in order to claim further Empty Property Relief.*"

32. The Government had also consulted on other approaches to intermittent occupation schemes, including introducing a limit on the number of times that a property's empty rates exemption could be reset by reg 5, and (critically) "*adding additional conditions to the meaning of occupation purely for the purposes of determining whether a property should benefit from a further rate free period*" [SB/53]. The consultation considered (para 2.17) that such additional conditions could be added through an amendment to the 2008 Regs, and would "*have the object of ensuring the use of the property must be more than is currently necessary <u>under the normal rules of occupation</u> to trigger a further rate free period*" (emphasis added).

33. There are four points to make about those aspects of the consultation:

    a. The 2008 Regs operate by reference to the "normal rules of occupation";

    b. The "normal rules of occupation" extend to occupation carried out by "box shifting" as part of an intermittent occupation scheme;

    c. It was open to the Secretary of State, as legislator, to amend the 2008 Regs if such intermittent occupation schemes were considered to be contrary to the Government's legislative purpose in making the 2008 Regs; and

    d. The Secretary of State decided not to make such an amendment.

34. It is also notable that the Government indicated that it would be consulting on the merits of a general anti-avoidance rule for rating; again, the implication is that the government does not consider that any such principle of general anti-avoidance exists at present, even in a post-*Hurstwood* context.

35. That further consultation was published in November 2025 [SB/76]; at the time of writing, therefore, the Government remains actively seized of the issue of intermittent occupation and is seeking views to inform its future approach.

Beneficial occupation

36. It is well-established that, in order to be rateable, occupation must have the four "ingredients" identified by the Court of Appeal in *J S Laing v Kingswood Assessment Committee* [1949] 1 KB 344 (350):

> *"First, there must be actual occupation; secondly, that it must be exclusive for the particular purposes of the possessor; thirdly, that the possession must be of some value or benefit to the possessor; and, fourthly, the possession must not be for too transient a period."*

37. The expression of the ingredients of occupation in *Laing* was not meant to be, and plainly is not, a self-contained statement of what the law requires. Rather, it is a summary of concepts each of which, at that time, already had an extensive body of case law.

38. It is necessary, therefore, to understand what the Court of Appeal meant by an occupation "of some value or benefit to the possessor".

39. The nature of the "benefit" required for beneficial occupation is explored in a number of the early authorities. Three themes emerge.

40. The **first theme** is that occupation will be beneficial where the occupier has some actual occupation of the land, and is capable of generating a benefit from that occupation.

41. The theme can be discerned in the judgment of the House of Lords in *Churchwarden and Overseers of Lambeth Parish v London County Council* [1897] AC 625, in which it was held that the County Council was not in rateable occupation of Brockwell Park, which was dedicated to the public. Their Lordships expressed the non-rateability of the council in a number of ways. As to beneficial occupation, Lord Halsbury LC held (630):

> *"Once it has been found, as in this case, that the occupation cannot as a matter of law be a beneficial occupation, there is an end of the question. … Here there is no possibility of beneficial occupation to the county council; they are incapable by law of using it for any profitable purpose; they must allow the public the free and unrestricted use of it."*

42. The House returned to the point in *Winstanley v North Manchester Overseers* [1910] AC 7, which concerned the rateability of a parson who was the freeholder of a burial ground, and who received burial fees for his own use.

43. Lord Atkinson gave the leading speech. He identified three questions on which the appeal turned, the second of which was whether, if the parson was in occupation of the churchyard, that occupation was beneficial (12).

44. Lord Atkinson held that it was beneficial. His expression of the governing principle, which he derived from *Lambeth Overseers*, was as follows (15):

> *"Whether this occupation is a beneficial occupation—a thing of value within the meaning of the statute of Elizabeth—or not depends upon whether the occupier is or is not by law debarred from deriving any benefit from it. If it is merely by his own volition, and not by the law, that he is deprived of a benefit which he might have received, then there is a "potential beneficial occupation," and he is liable to be rated in respect of it"*

45. Both *Lambeth* and *Winstanley* thus focused not on whether the occupier was in fact making a profitable use from his land, but on whether he was legally capable of doing so. If there was a legal possibility of using the land for financial gain, then the occupation was "beneficial" in the relevant sense. Otherwise, a shop which were operated in such a way as to make a loss would not be occupied by its shopkeeper even though the shopkeeper could increase his prices; or a car park which was made available free of charge would not be occupied unless and until its operator charged a parking fee: *City of London Real Property Co Ltd v Stewart (VO)* (1960) 6 RRC 398 at 401.

46. The **second theme** is that an occupation is beneficial if it is undertaken for the occupier's purposes (whatever those purposes may be).

47. The essence of the requirement is explained by Ryde on Rating at [182] (emphasis added): "*'beneficial occupation' does not connote pecuniary profit; but in order to create liability to rates, 'beneficial occupation' is necessary, <u>if by that term we mean an occupation which serves a purpose</u>*".

48. In *R v Melladew* [1907] 1 KB 192, the Court of Appeal considered a warehouse which, while at times unused, was kept available for use at all material times by its owner, in the event that customers required his warehousing space. The Court held that the warehouse was occupied by the warehouseman at all material times. Collins MR held that it was "*clear from a comparison of many authorities that the intention of the alleged occupier in respect to the hereditament is a governing factor in determining the question whether rateable occupancy has been established*" (201). The focus was on the nature of the business carried on (202).

49. Farwell J put it pithily (204): "*If and so long as he uses the premises for the purposes of his business, he is in occupation of them for rating purposes*."

50. The *Melladew* approach is consistent with *J S Laing* itself, and in particular the judgment of Jenkins J, who held (357) that "*it is said that the possession must be of some use or value or benefit to the possessor; but as to that it seems to me enough to say that the contractors occupied those premises for the purposes of their business*".

51. It is important, in this regard, to be clear about what is meant by an occupational "purpose". In *Wimborne DC v Brayne Construction Co Ltd* [1985] RA 234 (a case about rateable occupation), Lloyd LJ stressed the need to distinguish between the purpose of an occupation and the motive of the occupation. The purpose, he held, was the "*object*" of the activity in question, and he endorsed counsel's submission that "*"purpose" in this context means what a man does rather than why he does it*". Thus, where a building contractor was hired to excavate a lake, on terms that allowed the contractor to retain and sell for profit the excavated gravel, the Court held that the contractor's primary purpose was to excavate a lake; its secondary purpose was to win gravel; and its motive was to make a profit.

52. In that sense, the requirement for occupation to be for a purpose is, in effect, a requirement that the occupation be undertaken deliberately and intentionally. If the

occupier is, and intends to, do <u>something</u> on the property, then the occupier is occupying for a purpose.

53. The <u>**third theme**</u> is that an occupation may not be beneficial is where the occupier's presence in the property is referable to abandonment, rather than a continuing intention to occupy. That principle is expressed most clearly in *Ministry of Transport v Holland* (1963) 14 P&CR 259. The case was a compulsory purchase one, but the claimant's entitlement to compensation turned, under the governing statute, on whether or not he was in beneficial occupation for rating purposes.

54. The claim concerned a large house with a garage and sheds, which the owner had ceased to occupy. The owner visited the house from time to time to maintain it, and kept some gardening tools and miscellaneous bric-a-brac in the sheds and garage.

55. The Court held that the owner was not in beneficial occupation of the property. Lord Denning MR held that the occupation was not beneficial because the presence of the items at issue was because they were of no practical importance and were not worth the trouble of removing (264).

56. The third theme is, in effect, the obverse of the second theme: where the actual presence of the occupier on the land is not deliberate or volitional, and is not referable to any intention to occupy, then it is not occupation "for a purpose" and is thus not beneficial in the relevant sense.

<u>Beneficial occupation: a summary</u>

57. Drawing those threads together, an actual and exclusive occupation which is (a) undertaken deliberately for the occupier's purposes, (b) is not referable to abandonment, and (c) where the occupier is not debarred from deriving a benefit, is an occupation which meets the third *J S Laing* ingredient.

58. All of the above cases were decided before the empty rate was introduced in 1966. There is no indication that Parliament intended to change the meaning of occupation for rating purposes by introducing the empty rate, nor has the BA

suggested that such an intention can be imputed to Parliament either at that time or at any later time.

Intermittent occupation schemes

59. Intermittent occupation schemes have been considered by the High Court on a number of occasions. On all of those occasions, they have found to be effective.

60. The starting point is *R (Makro Properties Ltd) v Nuneaton and Bedworth BC* [2012] RA 285. The case concerned the placement of a number of boxes of documents in a warehouse for a six-week period, followed by a six-month vacancy.[1] The boxes took up about 0.2% of the total floorspace of the warehouse.

61. The High Court held that the placement of the boxes was occupation for rating purposes.

62. As to actual occupation, HHJ Jarman QC reviewed the authorities, and found that, for actual occupation to be made out, there needed to be some actual use of the property, even if slight, combined with an intention to occupy (para 43).

63. As to the element of intention, the Judge rejected the billing authority's contention that the claimant had intended to create only a "semblance" of occupation, given that the scheme was dependent on occupation for its effectiveness (para 27).

64. The Judge cited *Associated Cinema Properties Ltd v Hampstead BC* [1944] 1 KB 416 and found that, while an intention to occupy on the occurrence of some future uncertain event was not evidence of occupation, a present intention to occupy was relevant. That important distinction will be returned to below when the BA's arguments on *Frances* are considered.

[1] Since the property in question was a warehouse, the six-month limit in reg 4(b) applied, rather than the three-month limit which applies to non-industrial properties such as that in the instant claim.

65. On beneficial occupation, the Judge found that the district judge had been wrong to rely on *Furniss v Dawson* as a reason to disregard the steps taken by the claimant to occupy the warehouse, and that moreover, the rates mitigation effects of the occupation were not the only benefit, as the documents in the boxes were required to be stored somewhere (para 46).

66. The Judge concluded by noting that the function of the Court was a court of law not of morals, and that if the result was seen as unacceptable then it was for the legislature to determine if further reforms were required (para 56).

67. The next case in the sequence is *Sunderland CC v Stirling Investment Properties LLP* [2013] RA 411, which concerned the intermittent occupation of a warehouse by a Bluetooth transmitter.

68. The High Court held that the Bluetooth user amounted to rateable occupation despite the fact that only a minute portion of the property was required for the placement and operation of the transmitter. The Court also considered that the disconnect between the nature of the use (a Wi-Fi transmitter) and the planning status of the building (a warehouse) was not relevant to its analysis (paras 20 and 74).

69. *R (Principled Offsite Logistics Ltd) v Trafford Council* [2018] RA 499 concerned materially the same intermittent occupation scheme as that under consideration in this claim, operated by the same party.

70. As in this appeal, the issue for the Judge (Kerr J) was whether or not POLL's placement of boxes of goods into properties amounted to occupation, in circumstances where (as here) the case proceeded on the basis that the only value derived from the occupation arose from its rating consequences.

71. The Judge conducted an extensive review of the authorities on the meaning of occupation, including *J S Laing* and *Makro.* He recorded POLL's submissions that the hallmark of occupation for rating purposes, as it emerges from the authorities back to Victorian times, was <u>volition</u> (para 80). Any other approach would invite the Court to

make inappropriate value-judgments or moral assessments about an occupier's activities (para 82).

72. Turning to the substance of the case, the Judge noted that, while the early authorities provided useful context, none of them was directly on point about the status of occupation for its own sake (para 116).

73. The Judge noted that POLL's legal arrangements with its clients were genuine, and were not shams (para 117), and that the rates avoidance cases to which he was referred, including *Makro,* emphasised 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*" (para 118). The Judge also stressed the importance of guarding against a moral dimension when assessing whether occupation was of the "right kind" to count as beneficial (para 119).

74. On the central issue before him, the Judge held that POLL occupational purpose was to populate the premises to whatever degree was required in law and in fact so as to occupy them; its motive in doing so was to avoid rates, but the morality of that motive was neither here nor there (para 122). The Judge recognised that the word "occupation" is an ordinary English word, and that there is no reason why the thing of value to the occupier cannot be the occupation itself (para 124). The concept does not require anything beyond an intention to occupy for reward, even if that intention is not accompanied by any other commercial or other purpose (para 125).

75. POLL's scheme was thus effective.

76. Both *Makro* and *POLL* were revisited by Kerr J in *R (Secretary of State for Health and Social Care (on behalf of Public Health England)) v Harlow DC* [2021] 4 WLR 65.

77. In that case, a central government body, Public Health England ("PHE"), had itself operated an intermittent occupation scheme at a building which was intended in future to be its headquarters, by moving boxes of its own documents into and out of the property on a cyclical basis (occupation for six weeks followed by vacancy for three months).

78. The Judge again examined the case law on beneficial occupation, before concluding that PHE's storage of documents amounted to occupation of its property during the six-week periods. The crux of the Judge's reasoning is at paras 64:

> *64 In my judgment, Ms Wigley's proposition of law is correct: actual use of the property, even minimal use as in this case, combined with an intention to occupy it is sufficient for occupation, whether the motive is rates mitigation or any other motive. The use need not be substantial, as the cases show. It need not be legally required. It may be whimsical or eccentric. It must serve a purpose of the occupier but that purpose can be obtaining a future rates exemption."*

79. None of the Judge's reasoning depends on the existence of any inherent value in the material stored by PHE; nor does it rely on the existence of any independent purpose to the storage beyond the achievement of the rates mitigation result (contrary to the BA's argument at skeleton para 55).

80. The Judge concluded the main part of his judgment by noting (para 85) that "*Unless the possessor misunderstands the law or takes a wrong step, it is in a position to benefit from the exemption by occupying and then vacating the property at times of its choice. There is nothing surprising or disturbing about that observation; it flows from the established principle that "the court is not a court of morals, but of law" … It is for the legislature to change the position if it decides to do so*."

81. In an attempt to avoid further litigation on the rates effects of intermittent occupation schemes, Kerr J included two annexures to his judgment, the first of which drew together what he considered to be the key propositions of law as to when premises are occupied. Those propositions amount to a recognition that a voluntary and intentional use of premises is sufficient to give rise to rateable occupation, even if the purpose of the occupation is whimsical or eccentric, and that it does not matter if the motivation of the occupation is to secure the mitigation of a rates liability.

Empty rates mitigation and the purposes of Parliament

82. Finally, mention should be made of *Re PAG Management Services Ltd* [2015] BCC 720, which concerned a winding up petition in respect of a company which facilitated

an entirely different kind of rates mitigation scheme, based on the provision of SPVs to which premises could be let, and which were then immediately placed into members voluntary liquidation (so as to engage a different limb of reg 4 of the 2008 Regs).

83. Norris J held that PAG should be wound up by virtue of its abuse of the insolvency legislation. In reaching that view, however, the Judge made a number of findings about the nature and operation of rates mitigation schemes generally.

84. The Judge recorded evidence that, in the 2013-14 parliamentary session, the House of Commons Select Committee for Business, Innovation and Skills had concluded that "*Business rates are a substantial cost to doing business in the United Kingdom, and are one of the highest forms of local property tax in the European Union. Our evidence overwhelmingly cited the issue of Business Rates as one of the principal threats to the survival of existing retail businesses in the High Street. It was also cited as the biggest obstacle to new retail businesses starting up*" (para 58).

85. Similarly, Norris J heard and accepted "*impressive evidence*" that in some contexts, rates mitigation schemes are the vehicle that <u>facilitates</u> the redevelopment of property, in cases where a redevelopment requires the landlord to acquire multiple properties from different tenants, some of which will need to be held void pending the acquisition of the others. In such instances, "*using a mitigation scheme in relation to those void units lowered the cost of the refurbishment scheme and gave the landlord the confidence to go ahead*" (para 59). Norris J also heard evidence of a specific scheme in which, but for a rates mitigation scheme, a redeveloped building would have been demolished, as that was financially preferable to incurring the unoccupied rates liabilities which were accruing (ibid).

86. In those circumstances, Norris J concluded that, on the evidence before him (para 60):

> *"it is not possible to find that NNDR avoidance/mitigation schemes are contrary to the public interest (though they may be): nor would it in principle be right for the court in one case to resolve what is essentially a far-reaching economic and political question that is properly the province of Parliament."*

Hurstwood

87. The BA's skeleton cites a number of authorities on the content and operation of the *Ramsay* doctrine. It is sufficient, however, to consider the operation of that principle as it has manifested in the rating context, via the recent decision of the Supreme Court in *Rossendale BC v Hurstwood Properties* [2022] AC 690.

88. The case concerned the efficacy of a rates avoidance scheme similar to that considered in *PAG*. The BA, correctly, does not rely on the facts of *Hurstwood* as being of relevance to this claim: the nature of the scheme in that case was very different to the instant case in a number of respects.

89. The Court considered the *Ramsay* principle from para 9, noting that it was, in its essence, not particular to taxing statutes, but simply a manifestation of the general legal principle of purposive interpretation.

90. The essence of the interpretative exercise which the *Ramsay* doctrine requires was summarised by the Court at para 15 as involving two stages:

> *"The first is to ascertain the class of facts (which may or may not be transactions) intended to be affected by the charge or exemption. This is a process of interpretation of the statutory provision in the light of its purpose. The second is to discover whether the relevant facts fall within that class, in the sense that they answer to the statutory description"*

91. Turning to the rating legislation, the Court noted (para 21) that the concept of rateable occupation is still largely governed by the common law. The Court recorded, without demur, the *J S Laing* criteria, and said nothing further about the nature or the operation of the occupied rating regime.

92. In paras 22-24, the Court identified three statements relevant to the historical purpose of the empty rates regime: that it was an affront for properties to remain empty for long periods in times of scarcity (para 22); that Parliament wanted to stop the owners of empty premises leaving them unoccupied to suit their own convenience and for their own financial advantage (para 23); and that as well as being to encourage empty properties to be brought back into beneficial use, the regime was also in part to reflect

the fact that empty properties benefit from some local authority services, such as police and fire services (para 24).

93. The Court made no comment at all about reg 5 of the 2008 Regs: *Hurstwood* is silent as to the purpose of that provision. Nor did the Court refer to any of the line of authorities about intermittent occupation schemes which have been described above (indeed, none of *Makro*, *POLL* or *PHE* seems even to have been cited to the Court in argument). Nor did the Court consider any of the extensive body of case law on the concept of beneficial occupation. That may be because the Court was simply not concerned with the operation or the purpose of the occupied rates regime, or with the purposive interpretation of the interaction of occupied and unoccupied rates. The position in *Hurstwood* was that the properties were unoccupied. The schemes relied upon "inertia" (see para 3). The Supreme Court's decision did not lead to the imposition of tax on a counterfactual basis.

94. The Court held that, in the unusual circumstances of the case before it, Parliament cannot have intended that the definition of "owner" in s. 65(1) of the 1988 Act to extend to a company "*which has no real or practical ability to exercise its legal right to possession and on which that legal right has been conferred for no purpose other than the avoidance of liability for rates*. *Still less can Parliament rationally be taken to have intended that an entitlement created with the aim of acting unlawfully and abusing procedures provided by company and insolvency law should fall within the statutory description*" (para 49).

95. The Court emphasised that its decision was not founded on the defendant's rates avoidance motive (para 51).

96. The *Hurstwood* approach was considered by the Court of Appeal in *R (Emeraldshaw Ltd) v Sheffield Magistrates' Court* [2025] EWCA Civ 1601. The Court held that *Hurstwood* established a test which was not dependent on the existence of unusual factors, but rather applied in all cases in a context-specific fashion (para 43). Like *Hurstwood* itself, the Court was not required to consider the meaning of "occupation" as it appears in the rating regime; nor was the Court asked to consider the relationship

between the occupied and unoccupied rating regimes on which an intermittent occupation scheme is based.

<u>**POLL's submissions**</u>

97. POLL's case, in essence, is that the deputy judge was right for he reasons which he gave. The two grounds of appeal will be addressed in turn, though there is a degree of overlap between them.

<u>*Ground 1: the purpose of the empty rates regime and of reg 5 of the 2008 Regs*</u>

98. By this ground, the BA criticises the judgment below on the basis that the deputy judge misapplied *Ramsay*, in failing to hold that POLL's occupation of the Property was not within the class of facts to which reg 5 of the 2008 Regs was intended to apply.

99. As a preliminary point, it is accepted that the *Ramsay* principle of statutory interpretation applies to the 1988 Act and the 2008 Regs. The *Hurstwood* analysis of the 1988 Act's purposes cannot, however, be applied without modification to POLL's scheme. *Hurstwood* was concerned <u>solely</u> with the empty rate, whereas the instant case concerns the interaction of the empty rate with the occupied rate: all parties agree that the term "occupation" in reg 5 has the same meaning as it has in s. 65(2) of the 1988 Act, and the effect of POLL's scheme, if effective, is not to move a property out of rates altogether (as in *Hurstwood*), but to move the test for liability between s. 43 and s. 45.

100. As to the relationship between those sections, the criteria for liability differ in a critical respect. Where a hereditament is occupied, then under s. 43 the occupier is liable to rates. Where, however, a property is not occupied, the owner <u>may be</u> liable to rates under s. 45, <u>if</u> the property which it owns falls into a class which the Secretary of State is empowered to prescribe by reference to such factors as he sees fit.

101. Thus, while Parliament has sought to use empty rates to encourage the re-occupation of empty properties, decisions about <u>which</u> empty properties should be liable to the empty rate are delegated to the Secretary of State.

102. The BA is therefore wrong to assert (skeleton para 66) that the meaning of the 2008 Regs is about parliamentary intention: the content of those regulations is not set by Parliament, but by the Secretary of State. The *Ramsay* exercise must be directed at the Secretary of State's legislative intention.

103. In that regard, it is relevant that, in making reg 5, the Secretary of State did not seek, and has not sought, to apply any modifications to the common law concept of occupation as it has existed since well before 1966. Instead, the reg 5 reset mechanism is triggered by a sufficient period of occupation as that term has developed through the jurisprudence. It is of considerable importance that the Secretary of State has considered, and rejected, modifying the meaning of occupation for reg 5 purposes. It is also of importance that the Secretary of State has amended the 2008 Regs on the basis that intermittent occupation schemes are efficacious. The Secretary of State was under no obligation to accept their efficacy simply because the Courts had so held – it was open to him to amend the law so as to remove the effect of the jurisprudence on intermittent occupation (by changing the occupational requirement in reg 5, for instance).

104. Had the efficacy of intermittent occupation schemes offended the Secretary of State's view of the purpose of the 2008 Regs, then it was open to the Secretary of State to correct the position. He has so far declined to do so. That provides an indication that it is overly simplistic to assert that such schemes are inconsistent with the wider legislative purposes of the 2008 Regs.

105. The Secretary of State's active and ongoing consideration of the issue from a policy perspective provides a clear point of distinction from what the BA calls the 'whack a mole' approach (skeleton para 47(j)): there is a difference between the court intervening to apply a purposive approach to legislation in circumstances where Parliament would otherwise have to intervene on a scheme-by-scheme basis (the premise in *Ramsay* at 326), and the courts being invited to take a decision which the legislator has actively considered and declined to take, and in circumstances where Government consultation of further policy changes on the very point at issue is ongoing (as in the instant context). The Court should take care not to subvert the decisions of the legislature on this matter. Two features requiring caution are present in this case

(unlike *Ramsay*): (a) the Secretary of State is actively reviewing the position and (b) the Court has characterised the key question as a "far-reaching economic and political" one (see para 86 above).

106. As the deputy judge noted (J/85), the 2008 Regs establish a more nuanced position than is recognised by the BA, not least because the legislature in 2024 <u>deliberately</u> left in place the mechanism by which box shifting operates (albeit extending the reg 5 reset period so as to reduce the degree of mitigation which such schemes secure).

107. The BA's attack (skeleton para 71) on this aspect of the deputy judge's reasoning does not withstand scrutiny. Contrary to the BA's argument, the issue is not one of interpreting the meaning of occupation in s. 65(2) by reference to the 2024 Regs. For that reason, *Goulandris v Knight* [2018] 1 WLR 3345 is nothing to the point. Rather, the issue is about identifying the underlying legislative (not parliamentary) intent behind the 2008 Regs including as amended in 2024; and the Secretary of State can be taken to be satisfied with the efficacy of intermittent occupation schemes as a means of triggering reg 5 for the purposes of the 2008 Regs because, having identified the existence of intermittent occupation schemes and identified a means of rendering them ineffective, the Secretary of State made a conscious choice not to do so.

108. Further, the deputy judge was correct to note that, in some cases, intermittent occupation schemes may in fact facilitate the parliamentary purpose behind the empty rates regime more generally (J/86): the introduction of the 100% empty rate predated the 2008 financial crisis, and in the post-crisis world the mitigation effects of intermittent occupation can be the very thing which enables the regeneration or reuse of property to take place as Parliament intended (*PAG*).

109. The BA's unevidenced assertion (skeleton para 68) that rates mitigation schemes ensure the opposite of "*boosting the UK economy and/or generating additional revenue for the public purse*" is contrary to the approach of Norris J in *PAG*, and to the more nuanced approach of the deputy judge below. Indeed, the BA's wider position as to the effects of rates mitigation schemes, as set out in its skeleton at para 68, is unsupported by any evidence, either generally or in respect of POLL's occupation of the Property at issue. In particular, there is no evidence that the Second Respondent was choosing not

to let the Property for its own financial advantage, rather than (say) being unable to let the property because of a lack of market demand.

110. It is also of note that Government departments have themselves used intermittent occupation schemes in respect of Government premises (*PHE*). That indicates that the Government may not view the use of such schemes as contrary to its own purposes.

111. Applying the above analysis within the two-stage approach set out in *Hurstwood*:

   a. What is the "class of facts" intended to be affected by the empty rates regime, and in particular by the reg 5 reset? That is clear – the reg 5 reset is intended to be engaged whenever a property is occupied, <u>as that term is understood by the common law of rating</u>, for a period of more than six weeks. It must be recalled that whenever a property is occupied in that sense, the occupier is liable to rates for every day of the occupation.

   b. Is POLL's occupation of the properties in this case within that class of facts? Do they answer to the statutory description contained in s. 65(2) and reg 5? Again, the answer is clearly "yes": POLL has an actual presence in the properties; that presence is intentional; and that presence is for the purposes of POLL's business.

112. For those reasons, POLL's scheme remains efficacious even when the *Ramsay* approach is applied to the regime, and the deputy judge was right so to hold.

<u>*Ground 2: rateable occupation*</u>

113. By its second argument, the BA contends that, irrespective of its *Ramsay* arguments, POLL was nevertheless not in occupation of the property during the periods when its boxes were placed in the property, because it derived no independent benefit from the placement which existed independently of the statutory scheme.

114. The BA's approach to this ground rests on a flawed understanding of the concept of beneficial occupation.

115. In asserting that the benefit of POLL's occupation is dependent on the rates mitigation effect of the intermittent occupation scheme, the BA is, in effect, equating beneficial occupation with pecuniary or profitable occupation. That can most clearly be seen at BA skeleton para 77, which asserts that POLL would not derive any benefit from its occupation if it were obliged to refund the fees it obtained from the First Respondent.

116. It is well-established, however, that an occupation need not be profitable to be beneficial in the relevant sense (as the deputy judge recognised at J/113).

117. On a correct understanding of the law, an occupation is "of value" or "beneficial" in the relevant sense if it is a deliberate/intentional occupation, in circumstances where the occupier is not debarred by law from deriving a benefit from the occupation. That is clearly the case here.

118. Further, while it is linguistically convenient to say that the sole purpose of the occupation is to secure a rates mitigation effect, it is strictly inaccurate, in the light of *Wimborne*: the rates mitigation effect is, on a proper analysis, POLL's <u>motive</u>. And the motive of an occupation is irrelevant: *Hurstwood.* POLL's <u>purpose</u> (in the *Wimborne* sense – the thing that POLL actually does) is the placement of boxes. The volitional, deliberate placement of the boxes in the property, combined with the absence of any bar on deriving a benefit therefrom, is sufficient to make the occupation a thing of value for the purposes of the third *J S Laing* ingredient.

119. The deputy judge was correct to note that, if the BA's criteria were to be applied, difficulties would arise as to the test for rateability (J/126). To take an example:

  a. A company such as POLL could place ten boxes of paper cups into the property in order to secure a rates mitigation benefit for the landlord;

  b. A company which sells paper cups could place ten boxes of paper cups into a property, in order to store its stock in trade pending sale;

  c. An individual who has formed the whimsical view that paper cups are intrinsically beautiful could place ten boxes of paper cups into a property, until such time as he wishes to view them.

120. In all cases, the act of occupation, the intention to occupy, and the (*Wimborne*) purpose of occupation, are identical. On the BA's approach, the first scenario is not occupation, the second scenario is occupation, and the third is unclear. Yet the only difference between them is the occupier's motive, which is irrelevant. It is not possible to apply the BA's approach consistently or predictably without an enquiry into the mind of the occupier. Put another way, the BA's suggestion that only occupation "properly so called" qualifies for reg 5 purposes (skeleton para 19) involves making distinctions between otherwise identical situations solely on the basis of the occupier's motive. That is not a sound basis for the imposition of a tax. It has similarities in terms of its incoherence with the formulation rejected by the Supreme Court in *Hurstwood* at para 60 ("genuine and commercial entitlement").

121. Nor can that difficulty be left to another day, as the BA suggests (skeleton para 74): the difficulty is inherent to the resolution of the appeal, unless the law is to be left in a state of disarray. The BA's suggestion that the rating scheme is used to making complex and nuanced decisions (para 74(d)) misfires. In the cases cited, the criteria to be applied are clear. Moreover, the Supreme Court's judgment *Nuffield Health* explicitly simplified how mandatory charitable relief should be applied (see para 52).

122. Further, and as the deputy judge recognised (J/119), the deliberate placement of items into a property as part of a business' activity would, pre-1966, have been regarded as occupation on established principles, so as to trigger the payment of occupied rates. There is nothing to suggest that, in introducing the empty rate, Parliament intended to change the meaning of occupation. Such a change, however, is a necessary corollary of the BA's case; nor can the BA's interpretation of Parliament's legislative purpose be achieved without imputing one.

123. Put another way, the meaning of occupation for rating has been consistent since well before 1966, as reflected in the *J S Laing* ingredients; yet the BA contends that some additional component needs to be added to the *J S Laing* ingredients to give effect to the purpose of the empty rates regime, which only came into existence in 1966 (skeleton para 65). That contradiction is a further reason why the entirety of the BA's case is flawed.

124. *S Franses Ltd v Cavendish Hotel (London) Co* [2019] AC 249 does not assist the BA. That case held that, in order for a landlord to object to a tenant's application for a new tenancy under the Landlord and Tenant Act 1954 on the grounds of an intention to redevelop the demised property, what was required was a firm and settled intention to undertake the redevelopment irrespective of the tenant's position. The landlord in that appeal, however, "*intended to carry [the works] out only conditionally on their being necessary to get the tenant out, and not, for example, if he left voluntarily or if the judge was persuaded that the works could be done by exercising a right of entry*" (para 18). Such a conditional intention did not qualify.

125. The nature of the conditionality in *Franses* is not therefore comparable to that which the BA alleges against POLL: POLL has <u>already</u> acted so as to enter occupation. There is no question of POLL's occupation being conditional on the rates effect of its actions: POLL enters occupation before it knows whether or not its occupation will have the intended rating effect, and a failure to secure a rates saving would not alter anything that POLL had done or intended to do during the period of occupation.

126. In other words: *Franses* is irrelevant to the matter at issue, and the deputy judge was right not to rely on it (J/1113).

<u>Conclusion</u>

127. For those reasons, the Court is asked to dismiss the BA's appeal, with costs.

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30 January 2026

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