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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Claim No. KB-2023-004692

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/2025

Before :

CHARLES BAGOT KC, sitting as a Deputy High Court Judge

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Between :

THE MAYOR AND COMMONALITY AND CITIZENS OF THE CITY OF LONDON

Claimant

-and-

(1) 48TH STREET HOLDING LIMITED

(2) PRINCIPLED OFFSITE LOGISTICS LIMITED **Defendants**

- -

David Forsdick KC and Kate Traynor for **the Claimant**

Andrew Brueton (on a noting brief only) instructed by **Gregsons Solicitors** for **the First Defendant**

Dan Kolinsky KC and Luke Wilcox instructed by **Mills and Reeve LLP** for **the Second Defendant**

Hearing dates: 23, 24 January 2025

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Approved Judgment

Note: The documents before the court at trial were contained in a core bundle, the references to pages of which in this judgment follow the format [CB/page/paragraph] and an authorities bundle for which the format [AB/tab/page/paragraph] is used. Numbers alone in square brackets [5] are to the paragraphs of the authority being discussed.

CHARLES BAGOT KC, Deputy High Court Judge:

This judgment is in 9 parts as follows:

I. INTRODUCTION

1. For as long as there have been taxes there have been creative attempts to avoid them. Taxes on property have an even longer pedigree than those on income. There is an equally long history of litigation to set the boundaries of such taxes and define the key terminology interpreting them.

2. As a sub-set of property taxation, rating as a tax dates back to the start of the seventeenth century. For much of that time, rates were imposed on the basis of occupation of property. Latterly, different priorities mean that the focus of taxation has in some

instances shifted to encompass the ownership of vacant property, so as to encourage it to be brought back into occupation. From the mid-1960s, developments in rating meant that local authorities had the discretion to rate the ownership of unoccupied properties as well as occupied ones. By the late 1980s, the position moved beyond one of discretion so that there became two routes to rates liability running in parallel. The first is on the basis of occupation of a relevant property (or part thereof), known in rating as a "hereditament". The second is on the basis of ownership of specific classes of hereditament specified by regulations and where the hereditament is wholly unoccupied.

3. From 2008, the effect of the relevant Regulations was to impose liability for rates on the owner of unoccupied property once it had been unoccupied for a period of three months. In effect, there was a three-month exemption period, free from liability from rates. However, if a property was occupied for more than six weeks[1], and then once more became unoccupied, the property would not be within the class of rateable unoccupied property for three months beginning on the date that it became unoccupied again. In effect, a fresh three-month exemption period would be triggered.

4. So it is that an industry has developed around providing property owners with services to mitigate rates on vacant property by bringing those properties into temporary occupation, thereby triggering a further exemption period, free from rates liability. This case concerns whether a particular scheme has successfully achieved that aim within the legal framework which applies.

5. I am grateful to all the parties' legal representatives for their assistance in the preparation of this matter and the extensive documents, as well as their helpful written and oral submissions. I have received further copies of written submissions since the oral hearing. Although it is not realistic or necessary to mention or rule upon every

[1] By Regulations introduced in 2024, this period has been increased to 13 weeks, hence the use of the past tense here. The present claim is under the 2008 Regulations, although the parties pray in aid the decision-making process around the 2024 Regulations in interpreting the legal effect of the preceding regime.

point raised in oral and written submissions in this judgment, I have taken them into account when reaching my conclusions.

6. The parties have agreed a factual basis upon which this claim has proceeded. The trial focussed on legal submissions. So that the basis of this judgment is clear, I will summarise the background by reference to aspects of the parties' agreed case summary [CB/356-359], suitably adapted where appropriate for this judgment.

7. In outline, this is a debt claim brought by the Claimant, the City of London ("COL"), under regulation 20 of the Non- Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989 ("the 1989 Regulations") to recover unpaid non-domestic rates ("NDR") totalling £111,475.30, plus interest, in respect of the 1st Floor, 6th Floor and part of the 4th and 5th Floor ("the Premises") of 2 America Square, London EC3N 2LU ("the Building") against the First Defendant, 48th Street Holding Limited ("48SHL"), together with a claim for declaratory relief against both Defendants ("the Part 8 Claim").

8. COL is the local authority and billing authority, with respect to NDR, pursuant to the Local Government Finance Act 1988 ("the 1988 Act") for the area of the City of London, which includes the Building.

9. 48SHL is the registered leasehold proprietor of the Premises under Title Number NGL638356.

10. The Second Defendant, Principled Offsite Logistics Limited ("POLL") is in the business of providing rate mitigation schemes ("the RMS") for unoccupied properties to third parties. The types of scheme here are also referred to as intermittent occupation schemes.

11. For more than a dozen years, there have been disputes and litigation between POLL (and other companies) and various local authorities concerning whether the provider of RMS was in occupation for rating purposes and the efficacy of those schemes. That body of case law concerning the rates effects of intermittent occupation schemes has

continued to grow. This is despite the attempts of Kerr J in particular to avoid further disputes, including by setting out in an annex to the decision in *R (Secretary of State for Health and Social Care (on behalf of Public Health England)) v Harlow DC* [2021] 4 WLR 65, the key propositions of law as to when premises are occupied, building on his earlier decision in *R (POLL) v Trafford Council* [2018] RA 499 ("*POLL v Trafford"*).

12. I can conclude this introduction by recording that the Defendants here deny all of the present claim.

II. THE RATE MITIGATION SCHEME AND AGREED FACTS

13. 48SHL engaged POLL to provide the RMS services ("the Services") at the Premises to reduce liability for unoccupied property rates in respect of those Premises.

14. The RMS is intended to operate as follows:

a. upon the relevant premises becoming vacant, the effect of s.45(1) of the 1988 Act and regulation 3 and 4a of the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008 ("the 2008 Regulations") is to confer an exemption from liability for unoccupied rates for three months;

b. upon expiry of that three-month period, 48SHL grants POLL a lease of the premises, and contemporaneously, a break notice is served terminating the lease 6 weeks thereafter;

c. upon the grant of the lease POLL places boxes and their contents in the premises for those six weeks. It claims to be liable for occupied rates for that period;

d. at the end of the six weeks, the lease ends, and the boxes are removed;

e. on the asserted basis that the placing of the boxes in those circumstances means that the premises were "occupied" within the meaning of regulation 5 for those six weeks, 48SHL then claims a right to a further three-month exemption;

f. the result is a 67% reduction in 48SHL's liability for unoccupied rates;

g. in return for running the RMS at the Premises, POLL is paid a share of the NDR savings achieved; and

h. the cycle repeats as long as the premises are not leased to others for their beneficial occupation.

15. The chronology at [CB/360] details how this scheme operated at the premises. As noted above, there are no issues of fact in this case and no dispute has been raised with any factual matter stated by Mr Black, Assistant Director, Financial Shared Services for COL with responsibility for the administration and collection of NDR in his statement, dated 27 October 2023 in support of the claim.

16. It is common ground that:

a. the placing of the boxes is solely to attempt to generate "occupation" for the purposes of regulation 5;

b. the placing of the boxes and their contents in the premises serves no commercial or business purpose save for rate mitigation, which is the business purpose of POLL;

c. the benefit of the "occupation" is solely the claimed rate mitigation benefits;

d. the lease and other legal arrangements between POLL and 48SHL are genuine, and produce the legal results for which they provide; and

e. the rates mitigation scheme at issue is materially the same as that considered by Kerr J in *POLL v Trafford* and found to be effective.

III. THE DEMANDS FOR PAYMENT AND THE PROCEEDINGS

17. COL served on POLL demands for payment of unoccupied rates due in discharge of their liability for the periods of POLL's leases. POLL paid those demands in full and no issues arise.

18. COL served on 48SHL demands for payment of unoccupied rates for the recurring three-month periods in 2022 and 2023 when it was in possession of the Premises. Those demands are the subject matter of this dispute.

19. There is no dispute as to the periods or the sums claimed of £111,475.30, the issue being whether in law 48SHL is liable for that total sum for the relevant periods.

20. The chronology at [CB/360] sets out the steps in the proceedings in detail. In summary, proceedings were issued by CPR Part 8 claim form on 4 December 2023. The parties agree that this is the correct procedural route. Acknowledgements of service were dated 19 February 2024, on behalf of 48SHL, and on 12 March 2024 on behalf of POLL. A case management Order was made, by consent, by Master Brown on 10 May 2024, putting in place limited directions, given the matter proceeds on agreed facts, listing this matter for trial.

IV. THE ISSUE IN DISPUTE

21. The central issue in the case (which will be determinative of it) is whether the rate mitigation scheme operated on behalf of 48SHL by POLL at various office suites in the Building is effective to generate repeating three-month periods of exemption from empty rates.

22. That will turn on whether, on a purposive construction of the legislation, the placing of boxes and their contents in the premises for 6 weeks means that the premises are "occupied" within the meaning of regulation 5 the 2008 Regulations for that 6-week period thus avoiding regulation 5 and triggering a fresh three-month period of exemption.

V. THE LEGAL FRAMEWORK

23. As introduced above, there is a statutory and regulatory framework concerning rates liability.

24. S.43 of the 1988 Act imposes rates liability on the occupier of occupied hereditaments [AB/1/4].

25. S.45(1) imposes liability on the owner in respect of classes of unoccupied property prescribed by the Secretary of State ("SoS") under s.45(1)(d) [AB/1/6]. Regulation making powers are provided: S.45(9) and (10) [AB/1/6-7] which give a discretion to the SoS to prescribe the classes of qualifying hereditament "*by reference to such factors as [he] sees fit*".

26. Since the enactment of the Rating (Empty Properties) Act 2007, the quantum of rates liability on (qualifying) empty properties is the same as if the property was occupied [AB/7/50-51], whereas there was previously a 50% discount.

27. S.65(1) of the 1988 Act defines the owner of a hereditament as "*the person entitled to possession of it*" [AB/1/8]. Section 65(2) provides that the pre-existing judge made rules as to what constituted occupation continue to apply [AB/1/8]: *"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 …"*

28. The 2008 Regulations were made under s45(1)(d) and (9) of the 1988 Act [AB/3/11].

29. Regulation 3 prescribes 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 regulation 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. The effect of regulation 3 is that unless a hereditament benefits from an exemption, full rates are payable for the full period when the property is unoccupied [AB/3/12].

30. Regulation 4 sets out the categories of hereditament which are not prescribed. The relevant exemption here is regulation 4(a)[2], which provides [AB/3/13]:

"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"

31. Regulation 5 is the other relevant provision upon which the efficacy of intermittent occupation schemes turns. It provides [AB/3/14]:

"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."

32. Thus, periods of occupation of less than 6 weeks do not trigger a fresh three-month exemption period from empty rates liability under regulation 4(a). The RMS is designed to overcome regulation 5 by generating occupation of more than six weeks.

33. The 2008 Regulations do not contain any free-standing definition of occupation, nor do they purport to modify the definition contained in s.65(2) of the 1988 Act. But the proper approach to the meaning of occupation and whether it is satisfied by the RMS is an issue between the parties.

34. As noted in footnote 1 above, regulation 5 of the 2008 Regulations was amended by the Non-Domestic Rating (Unoccupied Property) (England) (Amendment) Regulations 2024 ("the 2024 Regulations") so that, with effect from 1 April 2024, the period of continuous occupation required to re-engage regulation 4(a) is 13 weeks.

35. The parties differ as to the significance of that change and the background to it.

[2] Regulation 4(b) provides a longer 6-month period for "qualifying industrial hereditaments" - as defined in reg 2 – broadly industrial and storage premises but not offices.

VI. THE DECISION IN *POLL v TRAFFORD* AND THE CHALLENGE TO IT

36. The parties agree that the RMS here is materially the same as the one considered and found to be effective by Kerr J in *POLL v Trafford*[3].

37. That could be a beginning and an end to this matter, but COL says that *POLL v Trafford* was wrongly decided for two reasons, in summary:

    a. Firstly, it did not apply the principles in the line of cases concerning avoidance schemes, including and following *W T Ramsay v. Inland Revenue Commissioners* [1982] AC 300 ("*Ramsay")* [AB/19/196-236], which the Supreme Court in *Hurstwood Properties Ltd v. Rossendale Borough Council* [2021] UKSC 16; [2022] AC 690 ("*Hurstwood"*) at [9] subsequently held applied in the rating context [AB/24/354].

    b. Secondly, irrespective of *Ramsay,* for there to be rateable occupation (for the purposes of s.65(2) and regulation 5) the four ingredients identified in *John Laing v. Kingswood* [1948] 1 KB 344 ("the Laing Ingredients") must be present **[AB/12/97]**. Here, the necessary "beneficial occupation" and "volition to occupy" of the claimed "occupation" under the RMS are wholly dependent on the rate exemption intended to be secured through the RMS and do not exist independently of it. The Laing Ingredients have to be present before considering whether the exemption is triggered. Adopting that approach, the Laing Ingredients are not present. Here, the sole benefit to POLL of its "occupation" is the securing of a share of the savings arising from the RMS if, but only if, the RMS is effective. *POLL v Trafford* wrongly held that that was a relevant and sufficient "benefit". As to volition to occupy, *POLL v Trafford* wrongly held that a volition to occupy solely

[3] The parties agree that nothing turns on the fact that the decision was one of the Administrative Court.

to secure the rate savings was sufficient. On the contrary, the intention to occupy has to exist independently of the RMS. There was no such independent intent here.

38. Thus, COL argues that the RMS is ineffective either: (1) through application of the *Ramsay* principles; and/or (2) because there was not in any event rateable occupation - the Laing Ingredients not being present.

39. Whilst the first point is, at least in part, an argument that the law has moved on since *POLL v Trafford*, via the *Hurstwood* decision, the second point also arose and was ruled upon in *POLL v Trafford*: see for instance at [5; 124-5], [AB/17/177 & 182-3]. Hence it is a direct challenge to Kerr J's decision, another first instance decision in the High Court.

40. I bear in mind *Willers v Joyce (No 2)* [2018] AC 843, where Lord Neuberger PSC explained the approach which judges sitting in the High Court should take when faced with challenges to the correctness of previous High Court decisions at [9]:

> *"So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so."*

41. Lord Neuberger's formulation is consistent with the classic statement of Lord Goddard CJ in *Police Authority for Huddersfield v Watson* [1947] KB 842 at 848:

> *"the modern practice, and the modern view of the subject, is that a judge of first instance, though he would always follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity."*

42. POLL says that this principle applies *a fortiori* where, as here, a judge is being asked to depart from a consistent line of previous High Court authority.

43. Before coming on to consider COL's arguments to defeat the effect of it, I will examine the decision in *POLL v Trafford* [AB/17/166-183].

44. Kerr J examined the case law going back to Victorian times at [44] to [58] which included a similar selection to the one placed before me and discussed in submissions, drawn from the large body of case law on rateable occupation. No issue was taken by the parties with that summary; hence I gratefully adopt it:

> "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.
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> 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.
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> 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".
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> 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.
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> 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.
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> 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."

45. Kerr J then examined and discussed at [59-66] the statutory and regulatory regime already set out in section V above before turning to the relevant case law upon it:

"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."

46. I may have to undertake that perilous task later in this judgment given, as discussed above, COL says that in the light of the Supreme Court's later decision in *Hurstwood* (*v Rossendale*) the *Ramsay* principle is engaged, but was not considered by Kerr J.

47. As for COL's second argument here, that the RMS was ineffective because there was not in any event rateable occupation in fact and law, Kerr J dealt with the argument to that effect in *POLL v Trafford* as follows at [116-125]:

"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."

48. It follows that Kerr J resolved the question of the efficacy of the RMS in POLL's favour.

49. In a subsequent decision also of Kerr J, in *R (Secretary of State for Health and Social Care (on behalf of Public Health England)) v Harlow DC* (op.cit.) ("*PHE v Harlow*") [AB/18/184-105], a public body which moved crates of documents into and out of a property in cycles, seeking rate mitigation, challenged the billing authority's decision that it had not been in rateable occupation.

50. The documents were records which PHE needed to, or might on review decide that it needed to retain pursuant to its document retention policy as part of its organisational memory [9]. There were between 20 and 40 crates and they took up only a small proportion of the property [14-15]. PHE was not legally bound to store the documents

at the property or anywhere else [61]. Kerr J resolved the judicial review in PHE's favour holding, in summary:

a. This was not a case where there was an intention to create a semblance of occupation, different from reality [60];

b. The proposition that no benefit accrues to a possessor motivated by the prospect of rates exemption until the occupation has ceased was rejected. That an occupier must wait until its exemption crystallises does not stop current occupation conferring the present benefit of notching up another day of the period that will produce the exemption [62];

c. 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 [64]. 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. However, that purpose must go beyond upkeep and development of the property itself (the caretaker cases and *Arbuckle*) and occupation is not established by leaving abandoned goods there which are not worth the trouble in removing [65].

d. The old cases do not deal with intention to occupy coupled with the motive of obtaining a rates exemption. That is dealt with in *Makro Properties* and *POLL v Trafford* [68].

e. The result is simple: an intention to occupy means what it says. It does not matter whether the occupation is out-sourced (as in *POLL v Trafford*) or kept in house, as in this case [69].

f. The proposition that the cases required the use to be of significant value to the possessor independently of the gaining of a rates exemption was an approach rejected in the *POLL v Trafford* [70].

51. Kerr J concluded [84] by:

> "…expressing the hope that further challenges of this kind in "rates exemption hunting" cases will be few and far between, especially if the guidance in annexes A and B[4] to this judgment is followed. The possessor of the property in question can, under the law, determine when it is in rateable occupation and when it is not, in order to benefit from the rates exemption which the legislature, in its wisdom, has ordained.
>
> 85. 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" (per Judge Jarman QC in *Makro Properties*, at para 56). It is for the legislature to change the position if it decides to do so."

52. The only other case which I need mention at this stage is *Sunderland CC v Stirling Investment Properties LLP* [2013] RA 411 [AB/15/131-145], which postdated *Makro* but predated the decisions of Kerr J in *POLL v Trafford* and the *PHE* case. The intermittent occupation in that case was of a warehouse by a Bluetooth transmitter. Wilkie J held that the Bluetooth use 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, which was used for the purposes of advertising and not warehousing. The judge 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 [72-74].

53. I turn to the challenges to *POLL v Trafford*.

[4] A checklist of propositions of law to enable district judges to determine disputes as to whether premises were rateably occupied and a protocol for the swift and efficient determination of such disputes.

VII. THE *RAMSAY* ARGUMENT

(a) The decision in *Hurstwood*

54. As set out above at [37(a)], COL contends that *POLL v Trafford* is wrongly decided, firstly, because it did not apply the principles in the line of cases concerning avoidance schemes, including and following *Ramsay,* which the Supreme Court in *Hurstwood* subsequently held applied in the rating context [14] and indeed is an application of general principles of statutory interpretation (applying *Barclays Mercantile* [2005] 1 AC 684).

55. I was taken through extensive passages of the facts and principles in *Hurstwood* and the cases on the *Ramsay* principles preceding it which I do not propose to set out in full, but I bear in mind that line of cases and the whole decision, aspects of which I have summarised and extracted below.

56. COL points to the confirmation in *Hurstwood* of the importance in interpreting any legislation of identifying its purpose and to give effect to that purpose [10] and:

> "11 The result of applying the purposive approach to fiscal legislation has often been to disregard transactions or elements of transactions which have no business purpose and have as their sole aim the avoidance of tax. This is not because of any principle that a transaction otherwise effective to achieve a tax advantage should be treated as ineffective to do so if it is undertaken for the purpose of tax avoidance. It is because it is not generally to be expected that Parliament intends to exempt from tax a transaction which has no purpose other than tax avoidance.
>
> […]
>
> 13…[citing from *Arrowtown*]
>
> The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

57. To return to what Kerr J described as the perilous task of attempting to paraphrase the *Ramsay* principle or approach, fortunately I can draw this from the judgment of Lord Briggs and Lord Leggatt JJSC with whom the other Justices agreed:

> "15 In the task of ascertaining whether a particular statutory provision imposes a charge, or grants an exemption from a charge, the *Ramsay* approach is generally described -as it is in the statements quoted above- as involving two components or 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"" (*Barclays Mercantile* at para 32). This may be described as a process of application of the statutory provision to the facts. It is useful to distinguish these processes, although there is no rigid demarcation between them and an iterative approach may be required.
>
> 16 Both interpretation and application share the need to avoid tunnel vision. The particular charging or exempting provision must be construed in the context of the whole statutory scheme within which it is contained. The identification of its purpose may require an even wider review, extending to the history of the statutory provision or scheme and its political or social objective, to the extent that this can reliably be ascertained from admissible material."

58. In the context of rating legislation, the mischief with which the relevant statutory provisions were intended to deal was to stop the owners of premises leaving them unoccupied to suit their own convenience and to their own financial advantage [23] and this was reflected in the exceptions from liability in the 2008 Regulations [25-6].

59. The scheme in some of the cases under consideration entailed the commission of an aggravated criminal offence [41]. The relevant facts in the schemes under consideration were summarised. The leases were not shams and created genuine rights and obligations. Their sole purpose was the avoiding of liability for business rates. They did not involve any role in making use of the property or any role in its being brought back into use. It was really the defendant landlord who had control of letting the property. Each scheme integrally involved the misuse of a legal process, the dissolution of a company, and the directors' breach of statutory and fiduciary duty by the acceptance of the leases and, on one variant, the commission of criminal offences [46].

60. The definition of "owner" of a hereditament in s.65(1) of the 1998 Act as "the person entitled to possession of it" is to be interpreted as denoting in a normal case the person who as a matter of the law of real property has the immediate legal right to actual

physical possession of the relevant property [47]. However, unusually, in that case, using that approach would defeat the purpose of the legislation [48]:

> "49 In our view, Parliament cannot sensibly be taken to have intended that "the person entitled to possession" of an unoccupied property on whom the liability for rates is imposed should encompass 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.
>
> […]
>
> 51 We emphasise that this conclusion is not founded on the fact that the Defendant's only motive in granting the lease was to avoid paying business rates, although that was undoubtedly so. If the leases entered into by the defendants had the effect that they were not liable for business rates, their motive for granting the leases is irrelevant. Nor does it illuminate the legal issues to use words such as "artificial" or "contrived" to describe the leases, when it is now accepted that they create genuine legal rights and obligations and were not shams. Our conclusion is based squarely and solely on a purposive interpretation of the relevant statutory provisions and an analysis of the facts in the light of the provisions so construed."

61. The answer did not lie in classifying all concepts as either commercial or legal, which would be a negation of purposive construction [56].

62. There was force in concerns around an interpretation which allowed for the denoting of someone other than the person with the immediate legal right to possession of the property making the test uncertain and difficult to apply. But it was a purposive construction to interpret this as vesting in the person having a real and practical ability to occupy or put someone else in occupation [60]. The test might need some further adjustment in other factual situations. The fact that the law of real property might not prove a reliable guide in an unusual case of the present kind was not an objection to the Court's preferred interpretation. The value of legal certainty did not extend to construing

legislation in a way which would guarantee the effectiveness of transactions undertaken solely to avoid the liability which the legislation sought to impose [61].

(b) COL's case

63. COL says that on a proper application of the *Ramsay* principles and line of cases through to *Hurstwood* (as discussed in the preceding sub-section) this scheme falls to be disregarded because:

a. the "class of facts" to which "occupied" in s.65(2) and regulation 5 is intended to apply is occupation which is consistent with the Statutory Purposes. The RMS is not within that class of facts, not least because it is contrary to the Statutory Purposes;

b. the "occupation" is generated solely to avoid the liability which the legislation sought to impose and serves no business purpose. This is a stronger case than *Furness v Dawson* [1984] AC 474 because there the scheme as a whole had a commercial purpose separate from tax avoidance - here there is none. The RMS here exhibits the features of *Ramsay* itself, which led to the scheme being disregarded there.

c. Further, on a detailed examination of the RMS, it does not materially impact 48SHL's beneficial interest;

d. It cannot be supposed that it was part of the legislative purpose of s.65(2) and/or regulation 5 to provide an escape from the liability that the legislation sought to impose.

64. COL took me through the background to the legislative history which, amongst other things, evolved to address the "social anomaly" of failing to rate empty properties to prevent people keeping it empty for long periods and to reduce the waste of accommodation. The efficient use of property was also the background to the doubling of the empty rate, under the 2007 Act, to bring it in line with the occupied rate. The

2008 Regulations were stated to be providing a "strong incentive" for owners to relet, redevelop or sell empty buildings. As explained in *Hurstwood*, the exemptions from unoccupied rates are understandable in that context.

65. Regulation 4(a) gives some leeway to find a new use or new occupier, via a short period of non-occupation. The purpose of regulation 4(a) is not to enable a landowner to generate a repeating exemption while keeping his property empty directly contrary to the statutory purpose. The purpose of regulation 5 is to prevent short periods of occupation triggering a further three-month exemption period. It is, thus, designed to further the overarching Statutory Purpose and is a further manifestation of that purpose. Its purpose is not to encourage or facilitate avoidance of the liability for unoccupied rates the legislation has imposed.

66. POLL is mistaken in saying that it is for the legislature to intervene and in drawing support from the limited intervention in the 2024 Regulations[5], extending the period from 6 to 13 weeks, making schemes less attractive but still effective. COL argues that this does not help as the premise of the 2024 Regulations was that the mitigation schemes were effective (effectively on the basis of the mistaken assumption that *POLL v Trafford* was correctly decided): see the Explanatory Memorandum at [AB/32/448/4.3; 449/5.6; 450/7.3-5]. Properly understood, there was not a need for legislative intervention as the existing law, via the *Ramsay* principles, rendered these schemes ineffective.

67. "Occupied" in regulation 5 can only mean the same as in s.65(2) properly understood - construed by reference to the Statutory Purpose. There is no difficulty in so doing. In *Hurstwood*, the purposive approach to construction was strong enough to result in a defined, legal term of art ("entitled to possession") being construed inconsistently with its established meaning in order to promote and not frustrate the statutory purpose there. By contrast "occupied" is not a defined term. S65(2) incorporates the pre-1988 judge

[5] The Non-Domestic Rating (Unoccupied Property) (England) (Amendment) Regulations 2024.

made rules but there are no such rules addressing the situation here (relying on *POLL v Trafford* [116]).

68. The result is that the "class of facts" to which "occupied" in s.65(2) and regulation 5 is intended to apply is occupation which furthers and is consistent with the Statutory Purpose. It is not "occupation" that is inconsistent with the Statutory Purpose or that undermines the incentives to which it is directed.

69. COL disavows this being a question of "morality" but rather one of giving effect to the Statutory Purpose. Having identified the applicable "class of facts", the particular scheme should be looked at "in the round" not focusing on discrete steps within it, consistent with *Ramsay* and *"*realistically*".* Doing that, it is evident that:

    a. The RMS is inconsistent with and contrary to the Statutory Purpose.

    b. "Planting a flag" solely to avoid liabilities is not within the class of facts with which occupied in the statute and regulation 5 is concerned.

    c. "Occupation" properly construed, requires the Laing Ingredients to be present prior to, and absent, the rate mitigation effect of it. If the benefit here to POLL is said to be occupation for reward, then it only derives from avoiding the liability Parliament sought to impose. Plus, the necessary "volition" is in the same way solely to avoid the liability imposed.

70. COL also relied on the application of the principles in the post-*Hurstwood* case of *Revenue and Customs Commissions v. Altrad Services Limited* [2024] 1 WLR 4397 *("Altrad")* [AB/25/375-410]. The taxpayers devised a series of transactions designed to artificially inflate their qualifying expenditure on plant and machinery, thus securing additional capital allowances without incurring the economic burden typically associated with such increases. The scheme involved selling assets to a bank and immediately leasing them back with the option to re-purchase, effectively creating a loop that could be repeated indefinitely to generate perpetual tax benefits. The Court of Appeal took a holistic view of the transactions, at 4428E. It concluded that the taxpayers

did not, in reality, cease to own the assets when they sold them to the bank, and they would, throughout the planning steps, continue to have uninterrupted beneficial use of the assets. Thus, the intermediate steps that took place between the sale to the bank and their re-acquisition had to be disregarded at 4428H.

71. COL contends that the relevant documents to which I was taken, namely the RMS contract [CB/84-7], the lease [CB/57], the break notice [CB/73] and indeed POLL's marketing material on its website at [CB/96-143]:

    a. Makes no appreciable impact on 48SHL's beneficial interest so that its occupation is essentially unimpeded;

    b. POLL's only involvement is placing and removing boxes of which photographs are taken;

    c. The RMS serves no commercial or business purpose. Further, the placing of the boxes serves no purpose other than securing the exemption;

    d. POLL's volition to occupy and benefit from its "occupation" is wholly predicated on the efficacy of the RMS and have no independent existence.

72. COL says that it does not need to say that *Makro* or *PHE* were wrongly decided (a question which it says for another day is whether they survive the *Ramsay* principles), as on the facts there was some slight benefit arising from the occupation not related to the RMS.

(c) POLL's case

73. POLL position can be summarised more briefly. It does not shy away from the relevance of *Ramsay* in the light of *Hurstwood*. But it underlines that the *Makro* line of cases was not cited in *Hurstwood*, a case which was not concerned with the operation of regulation 5 and which was factually very different. The outcome in *Hurstwood* is not of assistance, even if the principles drawn from it must be considered.

74. POLL underlines the importance of understanding the purpose or mischief to which the legislation is directed. It points to the binary nature of the concepts of an occupied or unoccupied hereditament. It is a mistake to talk of a liability for unoccupied rates until the four s.45(1) statutory preconditions are met. If those are not satisfied then there is no avoidance, there is just no liability for rates.

75. The statutory scheme here delegates the power of prescription to the SoS as to the circumstances in which unoccupied rates arise. That is a wide power exercisable by Statutory Instrument.

76. The proper interpretation is informed by the approach to the 2024 Amendment Regulations. The SoS was actively considering the policy questions of whether and if so how to alter the prescription regime, "eyes wide open" to "box shifting". Conscious thought was given to changing the conditions for occupation (and the meaning of it) but the SoS declined to do so. Key to that was preserving the coherence of the scheme and not complicating its application in the real world. The choice was made instead to alter the re-setting period to 13 weeks, whilst maintaining the use of the familiar concept of rateable occupation.

77. Relying on *PAG*, it is far from clear that intermittent occupation schemes are necessarily contrary to Parliament's purpose even if that purpose is articulated in the stark, simplistic form adopted by COL. In some cases, the use of an intermittent occupation scheme may in fact *further* the purpose of bringing properties into fresh long-term occupation. At the very least, the position is much more nuanced than COL's position.

78. COL's arguments in reliance on the *Ramsay* principle and *Hurstwood* are not made out: they rest on an overly simplistic reading of the purpose of the empty rates regime which pays insufficient attention to the structure and content of the legislation itself, or to the consequences of COL's approach for the wider integrity and operation of the rating system.

(d) Discussion

79. In my judgment, COL's position is correct to the extent that *POLL v Trafford* must be seen in the light of the Supreme Court's subsequent decision in *Hurstwood*. This brings to bear the *Ramsay principles* to rating schemes as discussed in sub-section (a) above.

80. I should still guard against descending into any moral judgement or distorting of legislation, but I should have regard for the statutory purpose.

81. That then begs the question of what the statutory purpose is here. To put it more formally, what is the "class of facts" to which the legislation is intended to apply and does the RMS in the round and in the real world, answer that statutory purpose.

82. COL asks the rhetorical question whether, armed with *Hurstwood* at [13], were the statutory scheme construed purposively, would it be intended to apply to occupation for its own sake ("planting a flag") by a rates mitigation company whose only purpose is avoidance of rates that Parliament has chosen to impose. I do not agree with COL's submission that the answer is "obvious".

83. The general anti-avoidance rule is just that, a general principle, it does not mean that every scheme which drives at avoidance is to be struck down or that the general principle must always lead to the same result.

84. One of COL's propositions is, in summary, that the purpose of the statutory scheme is to incentivise landlords to bring properties back into use, so anything that undermines that is undermining the statutory scheme. That is an overly binary approach to my mind. The learning from *Hurstwood* [11], as set out above, is that it is not generally to be expected that Parliament intended to exempt from tax a transaction which has no purpose other than tax avoidance. But this makes clear a general not absolute position, the first part of which also confirms that there is not a principle that a transaction otherwise effective to achieve a tax advantage should be treated as ineffective to do so if it is undertaken for the purpose of tax avoidance.

85. The difficulty I have with COL's position is that the statutory scheme here is much more nuanced than it contends. Under the 2008 Regulations, it already provided a specific exemption which showed that the purpose went wider than merely incentivising, to supporting landlords with empty properties, potentially on an ongoing basis. So, at least to some extent, the statutory purpose encompassed competing considerations or to put it another way, a balance of different considerations.

86. It is not "obvious" that interim occupation schemes are automatically or even necessarily contrary to Parliament's purpose; they could even bring benefits: see for instance the observations of Norris J in the *PAG* case [AB/16/161/58 to 162/60].

87. COL's contention is that regulation 5 was designed to prevent short periods of occupation from allowing exemption. It was not an invitation to enter into preconceived plans for incurring the short term "planting of a flag" so as to create an exemption inconsistent with the statutory scheme.

88. Contrary to COL's submissions, I do consider that the approach taken in the 2024 Regulations, the Consultation process which preceded them and the Explanatory Memorandum to them, is instructive as to the statutory purpose and intention of the legislature, before and after this point. This was a golden opportunity to address the "mischief", should the statutory purpose be so offended by schemes such as the present one, which had already been held to be effective in 2018 in *POLL v Trafford*. Instead, a careful balancing act was carried out between competing priorities, whilst keeping the effectiveness of the measures under review [AB/450/7.3- 451/7.5]. The "reset period" triggering repeated periods of relief was extended, thereby rendering such schemes less attractive, whilst explicitly maintaining the effectiveness of RMS using minimal occupation, such as "occupation with a single box of files" [AB/448/4.3 & 449/5.6].

89. The outcome in *Hurstwood* is not surprising on the unusual facts in that case and given the illegality and distortion of proper process which it involved. But I do not consider

that that case, or the *Ramsay* principles, mandate or even support an outcome in COL's favour here, on very different facts.

90. Properly understood, it seems to me that the statutory purpose, whilst directed at bringing unoccupied properties back into use, also envisages providing scope for ongoing support, thereby opening the door or leaving the door open (given the legislature's documents before and with the 2024 Regulations expressly recognising that RMS were already operating effectively) for RMS such as this one, albeit limiting their effectiveness by adjusting the Regulation 5 time period.

91. It seems a little unlikely that no one had thought what the impact of *Hurstwood* (and the *Ramsay* approach) might be in formulating or responding to the consultation and then when the revised Regulations were being considered and drafted. I doubt that there would have been the sort of institutional assumption (COL would say misapprehension) that the law was settled by *POLL v Trafford* and the legislation had to "work around" the premise that intermittent occupation schemes were effective, of the type suggested by COL. Indeed, it was open to the legislature to be more radical, sweeping away the effect of *POLL v Trafford* and altering the threshold definition of occupation, but a conscious choice was made not do go down that path.

92. Naturally, I accept the proposition from *Ramsay* [326-327] that the Courts are not "obliged to stand still" and leave it to Parliament to deal with matters by "hole and plug" methods. This is COL's "whack-a-mole" argument. But that does not mean that the Courts should intervene too readily where their general task is interpreting the existing legislative framework and considering the statutory purpose. Especially where the legislature has recently looked at matters and decided to proceed in a particular way, i.e. the concerns around Parliamentary (or ministerial) congestion highlighted in *Ramsay* do not appear to apply. As importantly, here it is not a matter for primary legislation, given the power to change the relevant provisions can be made more nimbly by

Statutory Instrument and the yet further Consultation process shows this remains under consideration.

93. I consider that the concerns around creating uncertainty, highlighted by POLL, are well founded. *Hurstwood* at [60-61] is not authority for the proposition that such considerations should always be put to one side given it was concerned with "an unusual case of the present kind". It was the particular features of that case which resulted in the outcome there and they are quite distinct from the circumstances here.

94. To my mind, the statutory purpose is confirmed by the decision in the 2024 Regulations (and the consultation process leading up to it) to maintain that exemption route but recalibrate it to make it less advantageous to exploit. Thereby, there was an adjustment balancing the range of purposes, including bringing properties back into use, supporting landlords with empty properties and making the system practical to apply on the ground. The desire to avoid over-complicating the process for billing authorities was also material to the decision not to re-visit the traditional case law approach to defining occupation. This was expressly considered, but not proceeded with, given the risk of disruption to long-established rating principles [AB/450-451] and the Consultation documents preceding it [CB/150-224].

95. The outcome of the line of cases dealing with intermittent occupation schemes is consistent with the interpretation of the statutory purpose discussed above: to encourage properties to be brought back into use but to allow some leeway for landlords and provide a system which is workable for billing authorities. Or looking at it the other way around, I do not consider a greater focus on *Ramsay* undermines the established line of authority on intermittent occupation schemes.

96. Even though at the time, pre-*Hurstwood,* Kerr J was of the view that he did not need to consider it, in my judgment, the conclusion the Judge reached is consistent with a proper consideration of the *Ramsay* principle, understood and applied in the light of *Hurstwood*.

97. For these reasons, I agree with POLL's position on this argument. COL's reliance on the *Ramsay* principle and *Hurstwood* to defeat the RMS are not made out. They rest on an overly simplistic reading of the purpose of the empty rates regime which pays insufficient attention to the structure and content of the legislation itself, or to the consequences of COL's approach for the wider integrity and operation of the rating system.

VIII. THE RATEABLE OCCUPATION ARGUMENT

(a) COL's case

98. In addition to the *Ramsay* argument and putting that to one side, COL says there is a separate and stand-alone reason why *POLL v Trafford* is wrongly decided and this scheme fails.

99. As summarised at 37(b) above, for there to be rateable occupation the four Laing Ingredients must be present **[AB/12/97]**. Here, the necessary "beneficial occupation" and "volition to occupy" of the claimed "occupation" under the RMS are wholly dependent on the rate exemption intended to be secured through the RMS and do not exist independently of it. The Laing Ingredients have to be present before considering whether the exemption is triggered.

100. Adopting that approach, the Laing Ingredients are not present. Here, the sole benefit to POLL of its "occupation" is the securing of a share of the savings arising from the RMS if, but only if, the RMS is effective. *POLL v Trafford* wrongly held that that was a relevant and sufficient benefit. As to volition to occupy, *POLL v Trafford* wrongly held that a volition to occupy solely to secure the rate savings was sufficient. On the contrary, the intention to occupy has to exist independently of the RMS. There was no such independent intent here.

101. If the Laing Ingredients only exist because of the rating exemption, there is no rateable occupation. That is consistent with basic logic and principle and with the approach in *S Franses Ltd v Cavendish Hotel (London) Ltd* [2019] AC 249 *("Frances")*: see [1; 5-6; 8; 16-19; 22].

(b) POLL's case

102. POLL contends that S.65 requires the focus to be on the principles which would have applied if the 1967 Act had not been passed. The concept of occupation is to be read consistent with and informed by the existing font of knowledge on rateable occupation. There is a continuous thread through the common law on that. Applied here, the definition of rateable occupation is satisfied.

103. POLL relied on the historical case law which I have already summarised. It also pointed out that in *Makro*, which COL is not seeking to challenge in this claim, Judge Jarman QC highlighted [3-4] the reversal of the usual roles introduced by the 2008 Regulations [AB/14/115]. Until that point the focus was on the potential ratepayer arguing that it was not in occupation and the billing authority arguing for occupation. The scheme created a re-set period which is parasitic on the concept of occupation, all the caselaw historically being used to catch 'occupation' being used on the opposite side.

104. The SoS starts with a blank canvas and made policy choices for the 2008 and 2024 Regulations. There is a complete choice of conditions to impose and how to approach the re-set period under secondary legislation. The only sensible meaning to give to the word "occupied" is occupied in the terms that concept is understood in the wider rating statutory scheme and long-standing case law.

105. A decision that this concept means something different would disassemble a consciously assembled set of Regulations and an established statutory scheme, imperilling the important goals of coherence and ease of understanding.

106. POLL highlighted that the July 2023 Business Rates Avoidance and Evasion Consultation, which led to the 2024 Regulations, was carried out on the basis that: [CB/186/2.5]

> "There is no statutory definition of what constitutes 'occupation' of a property, and minimal occupation possibly of no material benefit to the occupier, except as a method to avoid paying rates, may be sufficient to allow ratepayers access to a further rate-free period."

107. It tied in with this the fact that consultees were asked both about adjusting the re-set period but also whether to add additional conditions to the meaning of occupation [CB/188-9] (emphasis in the original) in this passage, which was followed by questions around these points:

> "2.16 To more directly address the issue identified in paragraph 2.5, the government could also consider **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.**
>
> 2.17 Under this approach the government would amend the Non- Domestic Rating (Unoccupied Property) (England) Regulations 2008 setting out the additional conditions of occupation. Those further conditions would have the object of ensuring the use of the property must be more than is currently necessary under the normal rules of occupation."

108. POLL highlights the active assumption that the general law definition applies and that assumption that the SoS had power to take action in that regard, but ultimately did not: see the discussion below of the Explanatory Memorandum with the 2024 Regulations.

109. The Summary of Responses to the Consultation, in March 2024 [CB/206; 209-210; 215-6], showed that a decision had been made to take action on the re-set period to disincentivise "box shifting" as well as announcing a further consultation on the merits of a "General Anti-Avoidance Rule" for business rates. Responses regarding the possibility of changing the definition of occupation were the background to the decision of the SoS not to do this, with responses noting 55% of local authorities in favour but

> "62% of businesses and business representative bodies and 82% of agents were opposed to changing the definition of occupation, raising concerns that adding additional conditions or tests for occupation risked cutting across established caselaw, which in turn could lead to varying definitions of occupation within the business rates system."

110. This is reflected in the Explanatory Memorandum with the 2024 Regulations [AB/32/448-451].

111. This is a complete answer to COL's case that it was Parliament's intention in 2008 or 2024 to read regulation 5 in a way discordant with established rating principles and definitions. This was confirmation that there was a desire not to disrupt the coherence of the system. This is a powerful indicator against COL's assertion that Parliament's intention could not possibly be to allow mitigation schemes to be on the right side of the line and the Court should intervene. The SoS has the power to intervene by Statutory Instrument, but is actively resisting the bespoke approach which COL advocates on the grounds of coherence.

(c) Discussion

112. This argument is a direct challenge to the correctness of the *POLL v Trafford* decision on its own reasoning, without reference to the *Ramsay* and *Hurstwood* argument so I will as part of my determination need to consider the principles of judicial comity. But in deference to the detailed arguments advanced, I will outline my own conclusions as they also underpin my conclusion on judicial comity.

113. True it is, as COL submits, that *Franses* is authority for the proposition that a conditional intention was not in the nature or quality of the intention required. But that was in the context that the intention was truly conditional there, namely a landlord's intention to refurbish *if an order for possession was secured but not if the tenant left voluntarily*. I do not consider that the parallel with the present case is sound or determinative. POLL manifested its intention by the placing of the boxes and this was not a conditional

intention simply because the cumulative rates mitigation would accrue at a future point. Beneficial occupation does not depend on profitability.

114. In considering the Laing Ingredients, I agree with Kerr J's conclusions. Possession of value to the possessor is present where the value is the occupancy itself. This provides the necessary "benefit" and "volition" to occupy. It does not matter that this is not realised until the next exemption period is triggered and it does not require some other purpose beyond that of occupation itself (leading to rates mitigation).

115. The need for the occupation be of "value or benefit to the possessor" was not the central issue in *Laing*, though it is notable that, in concurring, Jenkins J observed [AB/12/106/357] 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".* So it is that POLL is occupying for the purpose of its business.

116. I do not consider that there is support in the case law for introducing an additional distinct step in the process of considering whether the necessary occupation is present, beyond the Laing Ingredients, especially against the background of the long common law history in relation to such concepts and the uncertainty which this would introduce.

117. That would be contrary to the need for coherence in the law and the following of precedent. It is an important part of the statutory purpose or its implementation, that the principles to be applied can be readily understood by billing authorities and ratepayers without needing to engage in a complex legal analysis or investigations.

118. POLL is correct to point out that in *Makro,* which COL is not seeking to challenge in this claim (but indicated it might in future), Judge Jarman QC highlighted [3-4] the reversal of the usual roles introduced by the 2008 Regulations [AB/14/115]. Until that point the focus was on the potential ratepayer arguing that it was not in occupation and the billing authority arguing for occupation. The scheme created a re-set period which is parasitic on the concept of occupation, all the caselaw historically being used to catch

'occupation' being used on the opposite side. That is indicative of a statutory purpose to maintain the long-established concept of occupation, without a gloss or qualification.

119. I agree with POLL that the position can be tested in this way – if the empty rates regime were to be abolished tomorrow, so that (as before 1966) only occupied properties were liable to rates, would a property occupied by POLL be regarded as occupied, so that POLL is liable to rates, or unoccupied, so that POLL pays nothing? The answer is that POLL's presence would plainly amount to occupation, on the principles established in the cases examined in the preceding sections of this judgment, and billing authorities would doubtless demand rates of an occupier in POLL's position in such a scenario. The empty rates regime explicitly rests on that same understanding of occupation, through the adoption without modification of the common law understanding of the term.

120. *Makro* [27; 43-46] also confirms that the focus is on at least slight use and intention, not the motivation, contrary to COL's argument. The need for actual occupation is met where slight occupation is accompanied by an intention to occupy. That is the position in the present case.

121. *Makro* also highlights [56] that if the upholding of a scheme to avoid paying rates has succeeded then it is for the legislature to determine whether further reform is needed. COL's argument here is based on the existing reasoning in *POLL v Trafford*, separate from arguments arising from the *Ramsay* principles. But, in any event, I do not consider that this proposition falls foul of *Ramsay* or *Hurstwood*. I agree with POLL that if legislation produces clear tramlines and someone organises themselves to fall within them, then it is not for the Court to get involved in moral judgments. If the Government does not like the position, it can amend it and here that can be done by Statutory Instrument. The Supreme Court emphasised that the conclusion reached was not founded on the fact that the defendant's only motive was to avoid paying business rates in *Hurstwood* [51], it was focussed upon construing the relevant provisions.

122. Indeed, the Consultation process, the analysis of the responses to it and the Explanatory Memorandum to the 2024 Regulations, as discussed above, show that the SoS actively considered adopting an approach of the type advocated by COL, but rejected it on grounds of preserving coherence in the law. That also tends to confirm that COL's approach is not the proper approach under the 2008 Regulations either or there would be no need to consider changing the Regulations. In the discussion of the *Ramsay* argument in section VII, I rejected the proposition that everyone involved in the consultations, formulation and introduction of the 2024 Regulations overlooked this approach.

123. That is not to turn one's face away from considering the statutory purpose at this stage. But I consider that this can be done as part of the consideration of the Laing Ingredients.

124. I do not accept the proposition that this mandates the need for the benefit to be something other than rates mitigation.

125. The *PHE* decision builds on *Makro* by showing the mandatory nature of storing the documents is not operative. COL says it accepts the decision in *PHE* for present purposes, taking issue only with the criteria in the appendix as the business of occupation cannot be within the statutory ambit. But its characterisation of *PHE* as a case where records needed to be stored, so something of value, does not reflect Kerr J's finding that PHE did not need to store the records there or anywhere and might ultimately dispose of them [61]. The use must serve a purpose but crucially that purpose can be obtaining a future rates exemption [64].

126. COL says that here the objection is to anything which is purely for rates avoidance. But opening up an enquiry into the value of occupation, where some occupation is productive and some is not, does beg the question of the criteria to be applied. I also consider it be contrary to *Makro*. It is clear from *Hurstwood* [60-61], that the process of interpretation is not boundless, however much uncertainty it creates. Where the substitute concept being suggested is the amorphous one of "productive use" in lieu of

well-established concepts, and where the SoS has further possible measures actively under consideration. Here, it is the legislator who has decided to prioritise legal certainty, so the Court does not have to make that judgement call.

127. Whatever my conclusions might be, this brings me back to the question of judicial comity.

128. On this limb, it would only be open to me to reach a different conclusion from that in *POLL v Trafford* if I was convinced that judgment was wrong and/or there was a powerful reason to do so. I am afraid that COL's arguments do not come close to persuading me to adopt that course.

129. Indeed, as discussed above, I agree with the conclusion reached by Kerr J that the Laing Ingredients are satisfied via this RMS, which the parties agree is materially the same scheme as the one here, for the reasons he gave.

130. COL's additional observations around the limited impact of the scheme on 48SHL's beneficial interest do not really take matters much further in circumstances where it is common ground that the lease is not a sham and has the effect it is intended to have. This contrasts with the situation in *Altrad*, where the taxpayers did not, in reality, cease to own the assets when they sold them to the bank and continued to have uninterrupted beneficial use of the assets.

131. In my judgment, to go down the road suggested by COL would involve the Court engaging in impermissible value judgments about intermittent occupation schemes, going beyond merely having an eye to the statutory purpose. As set out above, that purpose is much more nuanced and is not binary, contrary to COL's characterisation of it.

132. COL's approach would also call into question the whole line of cases from *Makro* onwards, on the 2008 Regulations. Whilst COL said the question of whether those cases survive is "for another day", striking down this scheme, without addressing those wider

questions, would give rise to small factual differences generating undesirable uncertainty for those seeking to understand and apply the law day-to-day.

133. On the basis set out above, I reject COL's argument that there was no rateable occupation by POLL or that the RMS is ineffective for that reason.

IX. CONCLUSION AND OUTCOME

134. In conclusion, I reject COL's arguments on both the application of the *Ramsay* principles and the proper approach to rateable occupation. I find that the RMS is effective.

135. It follows that I do not consider that COL, as Claimant, is entitled to the sums claimed or the declaratory relief sought against the Defendants. Therefore, I dismiss the claim.