

Empty Rates Avoidance

An update from the trenches...

Richard Kerr

Commons Forms Of Avoidance:

- 1. (Mis)Use of Limited Companies**
- 2. Intermittent Occupation**
- 3. Charities**

1. (Mis) Use Of Limited Companies – empty property

Typically warehouse/offices

Email notification from Landlord

Bills go unpaid

No sign of use of property

- Apply more scrutiny at the beginning
 - Reasonable execution of duty to collect rates
 - Uniform approach – not everyone is trying it on, but increased vigilance will help recovery rates

1. (Mis) Use Of Limited Companies – empty property

What to look for at the outset:

- Copy lease
- Written/verbal confirmation from a director – letterhead?
- Nothing wrong with newly formed company but....

1. (Mis) Use Of Limited Companies – empty property

If the bills go unpaid.....

- Inspections (and photos if possible)
- Further information from the landlord
 - Rent payments (what have they done about collecting unpaid rent?)
 - Utilities
 - Insurance
 - Property to let?
 - Queries with the lease

Augustine Housing Trust v Grays Magistrates Court [2011]

Useful case and held that councils are entitled to ask for such documentation as they think is necessary to assist them in making the decision on relief, such as audited accounts etc.

[Early warning: Thomas More Law – Kevin Gregory]

1. (Mis) Use Of Limited Companies – empty property

What do you do once you have concluded your investigations?

- Need to make a decision on whether to re-bill the landlord
 - Flush out evidence/get paid
- Effectively arguing the lease is a sham

Sham lease defined by Diplock LJ in *Snook v London & West Riding Investments Limited* [1967] as:

“acts done or documents executed by the parties to the “sham” which are intended by them to give third parties or to the court the appearance of creating between parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intended to create. For acts or documents to be a “sham”, with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating”.

1. (Mis) Use of Limited Companies – Occupied

Shops/cafes/restaurants

Trading

Series of sub-lets or licences

Enforcement Agents unsuccessful

- Put pressure on the EAs to see evidence of 3rd party ownership – they are still the best method of enforcement with a trading business
- Licencees – can they provide proof of trading
 - Bank statements
 - PAYE / VAT
 - Utilities
 - Public liability insurance

1. (Mis) Use of Limited Companies – Occupied

- How does the arrangement with stock work in practice?
- Inspections – ask for documents:
 - VAT registration
 - Headed paper/invoices
- Examine the lease – are they allowed to sublet? (remember – liability for rates is a factual consideration – occupier doesn't need formal entitlement)
- Are there paramount control issues?

1. (Mis) Use of Limited Companies

- Consider re-billing

Re Evidence/burden of proof

- *Pall Mall Investments v London Borough of Camden* [2013] provides a useful summary and guidance on the burden of proof that will affect the parties.

Ratford v North Haven District Council [1987] “all the rating authority has to show in the first instance is that (a) the rate in question has been duly made and published (b) it has been duly demanded from the respondent and (c) it has not been paid. If these three things are shown, the burden then falls on the respondent to show sufficient cause for not having paid the sum demanded...the question whether a person who appears to be in occupation of a particular property is in actual occupation of it will be peculiarly within his knowledge.

It seems to me probable that the legislature in enacting section 97(1) would have contemplated that the burden of proving a defence based on non-occupation of the property would in the first instance fall on the respondent. However the standard of proof will merely be that of the balance of probabilities and in Donaldson LJ’s words in Forsyth v Rollinson, like all cases of the burden of proof of litigation, it is a swinging burden. As the evidence of varying weight develops before the Magistrates the eventual burden of proof will, in accordance with ordinary principles of evidence, remain with or shift to the person who will fail without further evidence”.

1. (Mis) Use of Limited Companies

- Burden of proof shifts – Ratford v North Haven (1987) and from Westminster v Tomlin (1990)

“the rating authority cannot know the full circumstances surrounding each rateable property in its area, and if the authority establishes a prima facie case that the rates have been properly demanded and not paid, the burden of proof then shifts to the respondent of the summons to appeal and show for one reason or another why he has not paid”.

1. (Mis) Use of Limited Companies

Other considerations:

- With unoccupied, it is usually the landlord
- With occupied properties, you are trying to find the individual or company actually running the business
- May be stuck with the original leasee – can they pay? Will winding them up resolve the situation?
- Usually a lease in place
 - LL not bothered as long as the rent is being paid
 - The parties won't normally want to agree a new lease
 - May be no choice but to get orders against leasee to get rid – damage limitation

2. Intermittent Occupation

- No blanket approval
- Up to occupier in each case to prove rateable occupation
- Slight use coupled with intention **may** amount to actual occupation
- Beneficial did not simply mean goods belonging to the owner – what is the benefit?

2. Intermittent Occupation

What information should you ask for?

- Head commercial agreement between the landlord and tenant (occupancy may not derive from the tenancy agreement alone.)
- Tenancy agreement (if third party occupant)
- Storage agreements
- Delivery/collection notes.
- Any photographs taken on delivery or collection showing goods in situ.
- Invoices for items stored for the relevant periods.
- Any documentation evidencing how the tenancy agreement was surrendered.

2. Intermittent Occupation

- Costs position very favourable to councils – *Bradford v Booth* – as long as you have acted reasonably in fulfilling statutory duty, ought not to be penalised on costs just because you did not obtain an order
- Reputation – commercial settlement?

3. Charities

- Tie ups with commercial “rates reduction” companies – openly advertising the use of charitable occupation as a way to save 70-80%
- Consistent approach required – avoid allegations of unfair treatment
- “Occupied” relief – test set out in *Milton Keynes v PSCT* – need to demonstrate using premises wholly or mainly – physical sense

3. Charities

- Unoccupied – what evidence have they got of intention?
 - Any business plan?
 - Still “wholly or mainly” test for the days in question
 - Must be at least 24 hours
 - No fundraising – is raising awareness fundraising?
 - Is getting a kickback from the landlord fund raising?
 - Inspections and photos helpful
 - Beware those charities that are well organized (Photographic Angle) – just because you or the DJ doesn’t like it, doesn’t mean they are not entitled to relief

- Unlikely the lease or licence can be attacked – always worth checking for issues such as exclusivity

3. Charities

- Damage limitation exercise
 - Unlikely charity will be able to afford full rates
 - War of attrition on legal costs?

- Be careful on service of summons – unincorporated association – Reg 13(2)(b) 1989 Regs “company” – registered office, so service on trustees personally

3. Charities

- Africa Relief Trust
 - Trustees being pursued
 - Charitable status removed – end of tenancies at will?

- Safe Africa
 - Trustees being pursued
 - Approached by Merrick Gillis/Peers – new trustees appointed

- Art Aid CIO
 - Fareham BC obtained order on 29th January 2016

3. Charities

- Search & Rescue Support Services
 - CVL 5th February 2016

- Conserve Africa Foundation
 - Limited company in liquidation (Leeds petition)
 - BUT there is also an unincorporated trust
 - Ernest Rukingira disputing liability saying ex-trustee Harriet Jackson did not have authority

Empty Rates Avoidance

An update from the trenches...

Any questions or queries:

Richard.kerr@greenhalghkerr.com

0333 200 5225