R (Makro) v Nuneaton & Bedworth: 'The Ghost of Occupation'

Aidan Briggs addresses the latest development in Business Rates from the High Court, from which businesses great and small stand to benefit.

R (Makro Properties Ltd) v Nuneaton & Bedworth Borough Council
[2012] EWHC 2250 (Admin)
HHJ Jarman QC

Introduction

Practitioners seeking imaginative ways to minimise their clients' business rates liability in a tough market should look no further than this decision of the Administrative Court. Wholesale giant Makro used just 0.2% of their premises for six weeks to reap a saving of £117,000. HHJ Jarman QC's decision is one which flies in the face of the stated intentions of the recent changes in the law. It makes some surprising factual findings and dramatically alters the test to be applied – the requirement for actual occupation is now a nominal, rather than a substantial, test – but on any analysis it is sound both in logical and jurisprudential terms.

That there is no 'de minimis' threshold in this area of rating law makes the avoidance tactic used by Makro equally applicable to every kind of business in all kinds of properties. However, considering the strong indication in the Judgment that the law is in need of review, this may be an opportunity whose days are numbered.

Facts

The case concerned a retail warehouse in Coventry. Two companies, both part of the Makro group, owned the freehold and leasehold respectively, although the leasehold was surrendered in December 2009 and thereafter occupation by the latter company was under license. Makro claimed the property was occupied from 23 November 2009 until 12 January 2010 and then empty until 23 July 2010.

To those familiar with the recent changes in Business Rates legislation, those periods will be immediately recognisable. Following the enactment of the Rating (Empty Property) Act 2007 and the Non-Domestic Rating (Unoccupied Property)(England) Regulations 2008, the previous rating exemption for unoccupied properties was limited to six months, which period could only be re-started after six weeks' occupation.

Thus Makro argued they had availed themselves of a new six-month period of exemption by virtue of their occupation between November 2009 and January 2010. In that six-week period 16 pallets of paperwork (which Makro was legally required retain) were stored in the warehouse, amounting to 0.2% of the 140,000 ft2 of available space. In July 2010 another 40 pallets of paperwork were delivered, covering about the same space.

The nature of the scheme was never in doubt. As HHJ Jarman QC put it, "all that mattered to [Makro] was

that there should be some occupation sufficient for rating purposes for six weeks or more and that then there should be none."

The Law

Under s.43 Local Government Finance Act 1988 a ratepayer is liable for rates in respect of a listed hereditament for a given day if "on the day the ratepayer is in occupation of all or part of the hereditament".

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By contrast a hereditament is unoccupied if on the given day "none of the hereditament is occupied" and it falls within a prescribed class – in this case the property had to be a 'qualifying industrial hereditament' under reg.3 of the 2008 Regulations and must have been unoccupied for a continuous period not exceeding six months.
Moreover, under reg. 5 a property remained 'continuously unoccupied' if it was occupied for a period of less than six weeks.
The test of 'occupation' agreed between the parties was that set out in Laing v Kingswood [1949] 1 KB 344 Four ingredients must be satisfied:

1) There must be actual occupation or possession
2) That use must be exclusive for the particular purpose of the possessor
3) The possession must be of some value or benefit to the possessor
4) The possession must not be too transient

Findings of the Trial Judge

District Judge Friel sitting at Ruby & Leamington Magistrates' Court found against Makro on three grounds:

First, applying the de minimis principle, he found there was no rateable occupation during the six-week period: "There must come a point at which the billing authority and the court can reasonably say that the usage is so miniscule as not to amount to rateable occupation". He found that 0.2% fell short of this threshold.

Second, the District Judge further found that any occupation was not beneficial to Makro because the storage was mandatory and had to be done somewhere.

Third, he specifically found that the only reason for moving the paperwork to Coventry was to minimise liability to business rates. He applied the principle from *Furniss v Dawson*[1] and found that, looking at the end result of the transaction, there was no commercial or business purpose other than the avoidance of rates and therefore no benefit to Makro.

The Appeal

Makro lodged an appeal by way of case stated, inviting the opinion of the High Court on:

1) Whether the warehouse was in rateable occupation between 25 November 2009 and 12 January 2010 and again after 23 July 2010;
2) If so, whether the warehouse was unoccupied between January and July that year; and
3) Whether the freeholder or leaseholder/licensee was the liable party.

The Legal Dichotomy

At the heart of the legal argument was a conflict between strict and purposive interpretations of the statute. The council and the Judge below followed strong precedent[2] in applying the de minimis principle; bearing in mind the stated intention of the 2008 reforms to "enhance the supply of commercial property to new and existing businesses and thereby to help reduce rent levels", Parliament must have intended that occupation within the six-week window was to be more than merely nominal. If Makro succeeded, argued Ms Wigley for the council, then an avoidance scheme would have succeeded against the aim and purpose of the law.

Appearing for Makro, Richard Glover QC was unrepentant as to the nature and motivation of the scheme and maintained that the de minimis principle had no place in the interpretation of the statute.

1 [1984] A.C. 474
2 *Winbourne & Cranbourne v East Dorset* [1940] 2 KB 420; *Gilmore v Baker Carr* [1962] 1 WLR 714; *London Library v Cane* [1960] 1 QB 373

Indeed, he did not shrink from arguing that a single file left in the warehouse could be sufficient for occupation. He maintained that on the authority of Harrow *LBC v Ayiku*[3] taxation statutes should be strictly interpreted and where there was a tenable reading of the law which favoured the statute, that reading should be preferred.

Sitting in the Administrative division of the High Court, HHJ Jarman QC found in Makro's favour on all three questions, disagreeing with all of the District Judge's key findings.

Decision of the High Court

Firstly, and most surprisingly, the judge found that the use made of the warehouse – 0.2% of the available storage space – "cannot be said to be trifling". HHJ Jarman did not give any indication of what 'trifling' use might be, but as we shall see below, he does contemplate that such a level might exist.

3 [2002] EWHC 1200

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HHJ Jarman QC felt unable to go as far as saying a single file would suffice for occupation: "I am not prepared to hold that in considering whether there is occupation of part or of none of the hereditament, use which is regarded as trifling must nevertheless as a matter of law always be taken into consideration".

Instead the Judge avoided setting a physical threshold and opted for a mixed test: "The proper approach to be drawn from the authorities in my judgment is to consider both use and intention. If there is clear evidence or inference of an intention to occupy, such an intention taken together with the user, albeit slight, may be sufficient to amount to occupation… Slight user without evidence of intention may not be sufficient."

Having taken this route, he held that Makro did have an intention to occupy, not merely to give a 'semblance' of occupation. The motivation behind that occupation was to avoid business rates, but this did

not erase the intention presently to occupy. The intention element has some precedent – even shops which are shut up in the winter months may still be considered 'occupied'[4] – and particular reliance was placed upon the decision of Collins MR in R v Melladew[5]:

"In the case of an owner who tries to let the intention is not to occupy … The intention … was as far as possible to avoid the semblance of occupation while carefully guarding the substance. He carefully contained the control, while his continuous intention was to utilise the premises for the purpose of his business whenever the opportunity offered."

But whereas Collins MR looked behind the ratepayer's façade, HHJ Jarman QC saw nothing inconsistent in the only motivation for occupation being the avoidance of rates – the intention was definitely to occupy. Similarly, the overt intention to return to occupation did not alter the hereditament's unoccupied state during the six-months from January to July 2010.

On the question of beneficial occupation, HHJ Jarman QC gave the Furniss v Dawson argument very short shrift; the use was not prevented from being beneficial simply because Makro was obliged to store the material somewhere and it was irrelevant whether a sound business or commercial case could be made for the storage.

Moreover, since it was the intention to occupy rather than the motivation to avoid rates which was key, the liability for rates belonged to the leaseholder company, even after the lease expired – it's continuing occupation by license did not alter the position.

4 *Southend-on-Sea corp v White* [1900] 65 JP 7
5 [1907] 1 KB 192, 202

The New Test

It is submitted that the effect of HHJ Jarman's judgment, although not expressed in these terms, is that there is now no substantial threshold for occupation; the first requirement is now a technical, rather than a substantial requirement.

HHJ Jarman QC was not prepared to accept that a 'trifling' use must always be considered – so not completely ruled out – yet his finding that 0.2% did not constitute trifling usage makes for an almost impossibly low threshold. In reality despite being acknowledged, the de minimis principle is diminished almost to vanishing point.
There must be some occupation, but the intention and benefit tests must now determine whether that occupation is sufficient to qualify for rateable liability.

The new test may be expressed thus:

1) Is there actual occupation, however slight?
2) Is that occupation exclusive for the particular purpose of the possessor?
3) Is that occupation accompanied by evidence, direct or inferred, of an intention to occupy?
4) Is that occupation of some value or benefit to the possessor?

Comment

That ratepayers can reduce their bills by 80% by leaving a single file in a warehouse will doubtless leave billing authorities seething, but HHJ Jarman QC meets this criticism head-on: "It has often been emphasised that the court is not a court of morals, but of law. If the outcome of this case is seen as unacceptable then it is for the legislature to determine whether further reform is needed."
This marks a divergence from the Scottish courts, who have taken a more pragmatic approach. In *English Speaking Union Scottish Branches Educational Fund v City of Edinburgh Council* 2009 S.L.T. 1051 for example, dealing with a similar avoidance tactic by charities occupying small (but much more than 0.2%) proportions of buildings, the Outer House rejected the strict legal analysis, instead a broad interpretation in the name of common-sense.

For the legislature, this is merely the latest in a string of set-backs in the interpretation of rating legislation. The apparent conflict between the two decisions of Burnett J in *North Somerset District Council v Honda Motor Europe Ltd & ors* [2010] EWHC 1505 (QB) and *Secerno Ltd v Oxford Magistrates' Court & Vale of White Horse District Council* [2011] EWHC 1009 (Admin) as reported last year[6] will now not be resolved after the latter case was refused permission to appeal.

For the time being, this is a decision no property practitioner should be without; Makro's approach succeeded because they were scrupulous in evidencing at each stage the company's intentions. It has been commented that Local Authorities themselves currently spend about £50m each year in empty property rates – it will be interesting to see whether they feel able to adopt this newly-legitimised tactic.

Aidan Briggs
Ely Place Chambers

With thanks to Craig Barlow

Aidan Briggs is on the panel of counsel to the London Boroughs' Legal Allicance and has written on Business Rates for the New Law Journal. He is standing counsel to the London Borough of Southwark on all Council Tax and Business Rates issues.