



Neutral Citation Number: [2021] EWHC 3011 (Admin)

Case No: (1) CO/523/2021
(2) CO/949/2021

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

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET
Date: 15/11/2021

Before :

HIS HONOUR JUDGE JARMAN QC

Sitting as a judge of the High Court

Between :

(1) K PUB TRADING LIMITED

(2) P TRADING LIMITED

- and -

CARDIFF CITY AND COUNTY COUNCIL

Claimants

Defendant

Ms Rowena Meager (instructed on direct access) for the **claimants**
Mr Christopher Royle and Mr Phillip Gale (instructed by **Wilkin Chapman LLP**) for the
defendant

Hearing dates: 1 October 2021

Approved Judgment

HH JUDGE JARMAN QC:

1. This judgement concerns two claims for judicial review against Cardiff City and County Council (the council) as rating authority for the city in respect of two licenced premises in Churchill Way Cardiff called Kings and Pulse. The landlord of Kings is Churchill Acquisitions Ltd (Churchill), and that of Pulse 4CW Properties Limited (4CW). Each of these companies was incorporated in 2019 and the sole director was Phillip Carl James Ryan until he resigned in January 2020 and Richard Imlach was appointed in his place. On 17 February 2020 4CW granted a management agreement and licence (the licence) in respect of Pulse to P Trading Limited (P). On 2 March 2020 Churchill granted a similar licence in respect of Kings to K Pub Trading Limited (K). Mr Imlach is the director of K and P and has filed the evidence upon which they rely in these claims.
2. K issued its claim form for judicial review, number CO/523/2021, in February 2021. Permission was given by HH Judge Lambert, sitting as a judge of the High Court, on consideration of the papers on 24 June 2021. It was directed that the hearing should be listed for one day. P issued its claim form for judicial review in March 2021, number CO/949/2021. By order dated 28 July 2021, HH Judge Keyser QC, sitting as a judge of the High Court, observed that the issues appeared substantially similar in each and directed that that claim be listed for a rolled up hearing on the same date as CO/523/2021, so that the substantive hearing would follow immediately in the event of permission being granted.
3. Both these claims came on for hearing before me. Each claimant was represented by Ms Meager, and each defendant was represented by Mr Royle and Mr Gale. On the morning of the hearing Ms Meager made oral applications to amend the detailed grounds to include a ground of irrationality, and to adduce a late second witness statement from Mr Imlach. Mr Gale pursued a written application to strike out each of the claims for failure to comply with court orders for the filing of bundles and skeleton arguments. Mr Royle pursued a written application to adjourn the hearing on the basis that the defendant because of those failures had not had a fair chance to prepare for the hearing. In the event I dismissed all these applications, giving my reasons orally, and proceeded to hear the claims. At the end of oral submissions I then indicated I would reserve judgment on the substantive and rolled up hearings and gave an opportunity to Mr Royle to file any further submissions in writing and to Ms Meager to respond. This judgment takes into account those further submissions.
4. In my judgment, the claim form and the detailed statement of facts and grounds, which are substantially identical in each claim and not professionally drawn, do not clearly set out what is challenged or upon what grounds. In section 3 of the claim forms, details of the order sought are given rather than of the decision to be judicially reviewed. Where the date of the decision is requested the information given in each claim is “Decision awaited-Defendant has been inordinately tardy and/or is guilty of maladministration by its deliberate default.”
5. In the detailed grounds in each claim, the relief that is sought is to direct the council to recognise K and P as the rateable occupant of Kings and Pulse respectively and to investigate complaints dated 26 June 2020, an order preventing the council issuing a non-domestic rate demand (NDRD) to other parties, and damages equal to sums payable to K and P under Covid-19 schemes. Reference is made to the Local

Government Finance Act 1988 (the 1988 Act) and to the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989 (the Regulations) as requiring the rating authority to serve a NDRD on or as soon as practicable after 1 April in the relevant year. Ms Meager submits that the identification of K and P as such occupant goes to what relief, if any, is appropriate, and that the court could as an alternative direct the council to make as decision as to who are such occupants.

6. Under the heading “grounds” it is said that the council’s conduct in refusing to engage with K and P is “indefensible both as a matter of law and fairness” and that K and P are unable to articulate its grounds further. Any objections to K or P as the rateable occupant [of Kings and Pulse respectively] are unknown to K and P and it is submitted that the burden of proving lack of rateable occupation is upon the council. As to such occupation, it is further stated that as the council has not challenged the occupation of K and P or requested any information or documentation, that it is assumed that the council has accepted K and P as in rateable occupation or has waived its right to challenge the same or in the alternative is estopped from denying the same. Under the heading “Further Ground Damages” it is said that the council has denied K and P the ability to claim grant aid under Covid-19 regulations and the value of those grants are sought as damages.
7. In its grounds of resistance to each claim the council took a number of points including that neither the grounds for review or the evidence of Mr Imlach set out clearly what decision was under challenge or upon what basis.
8. In each case the council relies upon the evidence of Gary Watkins, the operational manager of the council’s revenue services. He sets out, in respect of each of the premises in question, that there have been several different companies registered as ratepayers in the last few years which have then been dissolved with no assets, leaving unpaid liability orders obtained by the council. Mr Imlach was the sole director of most of these companies, and in some of the others was a co-director with Mr Ryan. The total unpaid rates by 2018 in respect of Kings was over £70,000 and in respect of Pulse was over £300,000.
9. Mr Watkins points out that in each case in 2019 there was ongoing litigation in the Cardiff Magistrates Court when the council was seeking liability orders in respect of these premises against other companies, Churchill Bar Ltd in respect of Kings and Churchill 3 Ltd in respect of Pulse. At this time until its dissolution in November 2020 the sole director of the former was Mr Imlach. As a result of the dissolution the proceedings for a liability order was withdrawn.
10. In the proceedings for a liability order in respect of Pulse, Churchill 3 Ltd, the directors of which were Mr Imlach and Mr Ryan, claimed that another company known as Pulse Leisure Limited was liable under a licence agreement between the two companies, the latter of which was dissolved after commencement of the proceedings for a liability order. District Judge Harnes in the magistrates court handed down judgment on 28 February 2020 holding that that licence was a sham.
11. Just after that judgment, in March 2020, letters and copies of the licence agreements between 4CW and Churchill (to whom the leasehold interest of Pulse and King had been transferred) as licensors and P and K respectively as the licensees (together with a cheque drawn for payment of rates) was delivered to the council.

12. Mr Watkins continues that 100% rate relief is available to leisure and hospitality businesses in Wales for the financial years 2020-2021 and 2021-2022. Premises closed as a result of the pandemic restrictions are to be treated as occupied for the purposes of such relief. Accordingly there is nothing for K or P to pay by way of rates on the premises in question during this period (save possibly for a very short period in K's case between 2-31 March 2020).
13. The council's grounds of resistance in K's claim state that the effect of no decision as to who is responsible for the rates in question is that nobody pays the rates and that it was only because of the grant situation that there is any potential benefit in the proceedings. It is also stated that the burden of proving that K is rateable is upon K, and that the production of the licence is not proof of actual occupation and no further information or records of actual occupation had been submitted.
14. Mr Watkins in his evidence refers to the fact that in March, October and December 2020, after the successive introductions of restrictions in respect of hospitality premises because of the Covid-19 pandemic, The Welsh Government introduced non-statutory and discretionary grants, the purpose of which was to support businesses with cash flow problems during closure or restrictions. Businesses that were registered for business rates and were trading and generating revenue on given dates were eligible to apply for grants, but these were at the discretion of the local authority.
15. It appears to be accepted by the council that K's application for a grant has been refused, but Mr Watkins states that there was no entitlement to a grant because they are discretionary and there are ample reasons, which he sets out, as to why the applications for a grant were dubious and ought to be refused.
16. Similar points were taken in the grounds of resistance to P's claim. It is not always easy to see from the evidence a clear distinction between the decision making process in relation to NDRD on the one hand and in relation to the applications for grants on the other. Although there is a degree of overlap and dependency between the two, they are distinct decisions and in my judgment ought to be approached as such.
17. Ms Meager submits that in both cases, the council's evidence in respect of its decision in relation to grants is unclear and incomplete. In my judgment there is some force in that submission. However, in my judgment this is a natural consequence of the unclear way in which the claims have been formulated.
18. By the time of the hearing before me, as I understood the position, it was common ground that the council has not yet made a decision in relation to NDRD for the period in question in respect of either Kings or Pulse, although I was told by Mr Royle upon instructions that decisions on these are expected shortly. Mr Watkins in his evidence gives some explanation for the lack of such decisions. He says that the council would usually test a claimed change in occupation by test purchases, and by examining documentation such as VAT receipts, licencing and insurance documents. However such investigation was prevented by the Covid-19 lockdown in March 2020. No inspection was carried out prior to renewed restrictions imposed in December 2020.
19. As for the grants, Mr Watkins points to the history of non-payment of rates in respect of the premises in question, including the litigation referred to above. In dealing with

the grant applications made by K and P in 2020, he says that the council had concern that the loss to the public purse in this regard should not be “compounded” by the payment of grants.

20. In her skeleton argument covering both claims, Ms Meager says that it is the council’s failure to make a decision which is challenged and that K and P’s claims for an order requiring the council to recognise them as the rateable occupiers of Kings and Pulse respectively is wholly illustrative of that. She then goes on to refer to the legal framework to support that submission, in respect of which there was no dispute before me.

21. Section 43 of the 1988 Act deals with premises, or hereditaments as they are referred to, which are occupied, and subsection (1) provides:

“43 Occupied hereditaments liability.

(1) A person (the ratepayer) shall as regards a hereditament be subject to a non-domestic rate in respect of a chargeable financial year if the following conditions are fulfilled in respect of any day in the year—

(a) on the day the ratepayer is in occupation of all or part of the hereditament, and

(b) the hereditament is shown for the day in a local non-domestic rating list in force for the year.”

22. Unoccupied premises are dealt with in section 45, subsection (1) of which reads as follows:

“45 Unoccupied hereditaments: liability.

(1) A person (the ratepayer) shall as regards a hereditament be subject to a non-domestic rate in respect of a chargeable financial year if the following conditions are fulfilled in respect of any day in the year—

(a) on the day none of the hereditament is occupied,

(b) on the day the ratepayer is the owner of the whole of the hereditament,

(c) the hereditament is shown for the day in a local non-domestic rating list in force for the year, and

(d) on the day the hereditament falls within a prescribed by the Secretary of State by regulations.”

23. The mischief which these provisions were intended to address was referred to by the Supreme Court in *Hurstwood Properties (A) Ltd v Rossendale BC* [2021]. The court at paragraph 23 cited previous Court of Appeal authority as follows:

“In *Hastings Borough Council v Tarmac Properties Ltd* [1985] 1 EGLR 161 Lawton LJ said that the mischief with which the relevant statutory provisions were intended to deal “can be clearly identified. Parliament wanted to stop the owners of premises ... leaving them unoccupied to suit their own convenience and to their own financial advantage.””

24. The word ‘owner’ in that subsection is defined by section 65 as the person entitled to possession of the relevant hereditament. That latter phrase was considered by the Supreme Court in *Hurstwood* at paragraph 59 as follows:

“...in the present case we consider that the words “entitled to possession” in section 65(1) of the 1988 Act as the badge of ownership triggering liability for business rates are properly construed as being concerned with a real and practical entitlement which carries with it in particular the ability either to occupy the property in question, or to confer a right to its occupation on someone else, and thereby to decide whether or not to bring it back into occupation.”

25. And at paragraph 61:

“It may be that other factual situations may demonstrate that this test needs some further adjustment. For example the letting of unoccupied business property by a parent company to a wholly owned and controlled subsidiary would not of itself cause the subsidiary to fail to satisfy the ownership test merely because the management of the affairs of the subsidiary (including whether to bring the premises back into occupation) rested with the parent’s board. We would, however, reject the criticism that the test is insufficiently certain. In any ordinary case the test will easily be satisfied by identifying the person who is entitled to possession as matter of the law of real property. The fact that the law of real property may not prove a reliable guide in an unusual case of the present kind is not in our view an objection to our preferred interpretation. The value of legal certainty does not extend to construing legislation in a way which will guarantee the effectiveness of transactions undertaken solely to avoid the liability which the legislation seeks to impose.”

26. It was common ground before me that liability for occupied premises depends upon the concept of ‘rateable occupation’, which requires four matters to be established. In *John Laing & Son Limited –v- Assessment Committee For Kingswood Assessment Area & Others* [1949] 1 KB 344 Tucker LJ set these out at page 350 as: (i) actual occupation; (ii) occupation that is exclusive for the particular purposes of the possessor; (iii) the possession must be of some value to the possessor; and (iv) the possession must not be for too transient a period.

27. The duty to serve a NDRN is set out in paragraphs 4 and 5 of the Regulations as follows:

“4.—(1) For each chargeable financial year a charging authority shall, in accordance with regulations 5 to 7, serve a notice in writing on every person who is a ratepayer of the authority in relation to the year.

5.—(1) Subject to paragraph (2), a demand notice shall be served on or as soon as practicable after—

(a)except in a case falling within sub-paragraph (b), 1st April in the relevant year, or

(b)if the conditions mentioned in section 43(1) or 45(1) of the Act are not fulfilled in respect of that day as regards the ratepayer and the hereditament concerned, the first day after that day in respect of which such conditions are fulfilled as regards them.”

28. That duty and the consequences of a failure to comply with it were dealt with in *North Somerset DC v Honda Motor Europe Ltd* [2010] EWHC 1505 (QB) by Burnett J, as he then was, at paragraphs 60 and 61, as follows:

“ In summary, therefore, a failure to serve a Regulation 5 notice as soon as practicable does not result in automatic invalidity. Rather, the court determining any issue resulting from such a failure will have regard to the length of delay and the impact of that delay upon the ratepayer, in the context of the public interest in collecting outstanding rates. The greater the prejudice to the ratepayer flowing from the delay, the more likely will be the conclusion that Parliament intended invalidity to follow.

Prejudice may flow to business ratepayers in any number of ways as a result of a late notice to pay rates. Prejudice is different from inconvenience...the prejudice relied upon must be substantial and certainly not technical or contrived. It is in that way that I shall consider the question of prejudice argued for by the defendants in these proceedings. The countervailing public interest is in the collection of taxes, the interests of other tax payers and the revenues of the local authority concerned.”

29. The concept of “as soon as practicable” was dealt with in paragraph 64:

“In the context of an obligation to serve notices under Regulation 5 of the 1989 Regulations, Parliament can be taken to have been well aware of the constraints under which billing authorities operate in terms of manpower and resources. That is so whether a billing authority administers the system in-house, or has contracted others to perform the services. To that extent, the Webster definition: 'possible to be accomplished within known means and resources' can properly be applied to the obligation under Regulation 5. That, in my judgment, is for

practical purposes synonymous with 'feasible'. A billing authority will not be able to rely upon the suggestion that home-grown problems and inefficiencies rendered impracticable what would otherwise have been practicable.”

30. In my judgment the main reasons for the council’s failure to issue a NDRD in both these cases for the financial years in question were twofold. The first was the ongoing proceedings in the magistrates court to determine liability which were frustrated by the dissolution of the companies which the council claimed were liable and/or the claims by newly incorporated companies, namely K and P.
31. The second was the unprecedented restrictions imposed as a result of the pandemic, which meant that the council could not carry out its usual investigations such as test purchases. Mr Watkins accepts in his evidence that such investigations could have been carried out between the first and second lockdowns in summer and autumn of 2020 but says that such investigations were not then a priority given the business rates holiday which continued. I consider that such an approach, coming so soon as it did after the first lockdown, was a reasonable one.
32. In my judgment these were not home-grown problems or inefficiencies, but involved known means and resources which rendered it unfeasible in the particular circumstances of each case to investigate the issue of actual occupation or to render a NDRD. Moreover, in these circumstances, the council was entitled to take the view that in absence of such investigations the assertion of actual occupation by K and P respectively together with copies of the licences relied upon by them were not sufficient to satisfy the council that such occupation was established.
33. Ms Meager submits that in failing to issue NDRDs to K and P in respect of the premises and periods in question, then insofar as the council had regard to the history of companies concerned with those premises and the involvement of Messers Imlach and Ryan in them, then such regard was to extraneous matters and in effect pierced the corporate veil.
34. That concept was considered by the Supreme Court in *Hurstwood* in the context of ownership for rating purposes. The court at paragraphs 64 and 65 said:

“Talk of “piercing the corporate veil” is a metaphor that is liable to obscure more than it illuminates. As Lord Sumption said at the start of his discussion of the topic in *Prest [v Petrodel Resources Ltd* [2013] UKSC 34] (at para 16): “Piercing the corporate veil’ is an expression rather indiscriminately used to describe a number of different things. Properly speaking, it means disregarding the separate personality of the company.”

The separate personality of a company refers - as Lord Sumption had already noted at para 8 - to the doctrine that a company is treated in law as a person in its own right, capable of owning property and having rights and liabilities of its own which are distinct from those of its shareholders. In *Salomon v A Salomon & Co Ltd* [1897] AC 22 the House of Lords

confirmed that this doctrine applies as much to a company that is wholly owned and controlled by one individual as to any other company; so too does the rule of limited liability, which limits the liability of a shareholder for debts of the company to the amount invested by the shareholder in the company.

65. In *Prest* Lord Sumption proposed that two distinct principles underlie the cases apparently concerned with piercing the corporate veil. The first, which he called the “concealment principle”, involves the interposition of a company or perhaps several companies to conceal the true nature of an arrangement. In these cases, the court is merely looking behind the company to discover the facts which the corporate structure is concealing and applying the ordinary legal or equitable principles to those facts. This concealment principle “is legally banal and does not involve piercing the corporate veil at all” (para 28). The second principle, which Lord Sumption dubbed the “evasion principle”, was said to comprise “a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company” (para 35). This principle was said to apply: “when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company’s separate legal personality.””

35. In my judgment the council has not sought to deprive K and P of the advantage which either of those companies would otherwise have had by the company’s separate legal personality. It is not seeking to impose liability on Mr Imlach or anyone other than the company properly liable either by reason of being in rateable occupation or being the owner. It is clear in my judgment from paragraphs 59 and 61 of *Hurstwood* that such history and involvement may impact not only upon real and practical entitlement to occupy but also upon the issues of prejudice to K and P and the public interest in the collection of taxes and the position of other ratepayers.
36. Accordingly in my judgment the challenge to the council’s failure in each case is not made out. That makes it unnecessary to decide on the council’s other procedural points but for the sake of completeness I shall do so but only need to do so briefly.
37. The first is the claims have not been promptly. However, as Judge Lambert observed in giving permission to K, in respect of the complaint of ongoing failure to issue NDRDs the claimants were justified in waiting a reasonable time to see if the duty would be complied with.
38. The second is that there was non-compliance with the pre-action protocol, which Ms Meager accepted. Had the substantive grounds been made out, then it is unlikely that

this point would have been sufficient to defeat the claim. As it is, such non-compliance serves to underline the difficulties in understanding what the claims are really about.

39. Third is that other remedies, such as ADR, private law claims, or a complaint to the Public Services Ombudsman, have not been exhausted. I am not satisfied that any of these have been made out. It is difficult to see that ADR was a reasonable avenue to pursue in these cases or that they fit neatly into private law claims. The Ombudsman may make recommendations which, although persuasive, are not compulsory.
40. Finally, it is said that K and P failed to disclose material facts, namely the history of non-payment set out above and the involvement of Mr Imlach. However, in my judgment these facts were in the public domain and/or known or readily discoverable by the council and indeed relied upon by the council.
41. As for the claim for an order that the council should investigate the complaints dated 26 June 2020, these were set out in email to the council from K and P, referring to the fact that the council had not responded to previous emails. It was said that litigation was being considered and a request was made to treat the email as a formal complaint invoking the council's complaint procedure. It was stated that the council was required to accept the company in question as the rateable occupier of the premises in question and to issue an NDRD to it. It was stated that failure to do so within 14 days would result in the issue of a judicial review application without further notice.
42. Mr Watkins, in his witness statement, states that the complaint procedure is intended to assist citizens who have not been able to access council services or who have suffered poor service, and it was not considered that the letters constituted a complaint about service. He exhibits the council's policy in respect of complaints to make good that point. In my judgment, given that it was indicated by K and P that judicial review applications would be made if their demands were not met, the council were entitled to approach the letters on this basis.
43. Insofar as the challenge relates to the council's position as to the grants available, and it is by no means clear that there is a free-standing challenge in this regard, in my judgment the council was entitled to proceed as it did for the reasons it gives. As the grants were discretionary it was well within the discretion of the council to have regard to the concerns it has expressed.
44. In relation to K's applications, such concerns included that each of these were made for the benefit of K but using a rate account number in the name of Churchill Bar Limited. At the time of the May 2020 application that company was subject to strike off action at Companies House and was in litigation with the council. Shortly afterwards, similar applications were received from other companies in respect of other premises but using the same bank details as given in K's application.
45. K's application in October 2020 specified turnover as £125,000 but no VAT number was given despite this figure exceeding the VAT threshold. Social media pages for Kings indicated that that premises did not re-open at the end of the summer lockdown. By the time of the December 2020 application, turnover was given as nil.

46. P also made an application for a grant in respect of Pulse in December 2020. Among the concerns which the council had in respect of this application was that the licence relied upon was similar to the previous one found to be a sham. It was submitted using a rate account number for Churchill 3 Limited, which was a party to the licence found to be a sham. Turnover for December 2019 was given as £3,000 but P was not incorporated until the following month, and turnover for December 2020 was said to be higher, despite Covid restrictions being in place.
47. On behalf of the council, it is submitted that it was not satisfied in respect of these applications that K and P were in rateable occupation at the relevant time, but even if they were, the reasons set out above were sufficient to justify exercising its discretion in refusing the applications. It was also concerned that the non-payment of rates in respect of these premises and the effect on the public purse should not be compounded by the payment of grants. The real point of these claims is to secure such grant aid and that if the council were entitled in its discretion to refuse such aid, then the claims are rendered pointless.
48. There is the additional point that in respect of refusal of the grant applications (as opposed to the ongoing failure to issue NDRDs which was the focus of Judge Lambert's observations on promptitude), then any challenge to such refusal has not been made promptly.
49. I accept the council's submission in this regard. It follows in my judgment that the claims by K and P for damages is not made out.
50. The conclusion is that K's claim is dismissed. I shall give permission to P to bring its claim, but in the result that too is dismissed. Counsel helpfully indicated that any consequential matters which cannot be agreed should be the subject of written submissions, which should be exchanged and filed within 14 days of hand down of his judgment) and determined on the basis of such submissions.