Neutral Citation Number: [2021] EWHC 909 (Admin)

Case No: CO/2122/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2021

Before :

MR JUSTICE KERR

- -

Between :

THE QUEEN (on the application of THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE on behalf of PUBLIC HEALTH ENGLAND)	**Claimant**
- and -	
HARLOW DISTRICT COUNCIL	**Defendant**

- -
- -

Ms Jenny Wigley (instructed by **Davitt Jones Bould Limited**) for the **Claimant**
Ms Kelly Pennifer (instructed by **Greenhalgh Kerr Solicitors LLP**) for the **Defendant**

Hearing dates: 23rd and 24th February 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time of hand-down is **15:00** on **Friday 16 March 2021**

Mr Justice Kerr :

Introduction

1. The court must now return to the question of what constitutes occupation of premises for non-domestic rating purposes, explored in many cases down the years; in recent times notably by Wilkie J in *Sunderland CC v. Stirling Investment Properties LLP* [2013] EWHC 1413; by HHJ Jarman QC in *R (Makro Properties Limited) v. Nuneaton & Bedworth BC* [2012] EWHC 2250 (Admin); and by myself in *R (Principled Offsite Logistics Ltd) v Trafford Council* [2018] EWHC 1687 (Admin).

2. The claimant's (**PHE**'s) challenge is to the defendant's (**Harlow**'s) decision dated 26 February 2019 refusing to recognise PHE's claim to a three month exemption from payment of unoccupied non-domestic rates starting on 28 June 2018, following a period of claimed occupation (from 1 May to 27 June 2018) by PHE of its premises in Harlow which are its future national headquarters.

3. The conventional starting point for determining whether premises are occupied for rating purposes is to apply the four tests derived from Tucker LJ's judgment in *JS Laing v Kingswood Area Assessment Committee* [1949] 1 KB 344, 350:

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

However, the third of these four requirements has given rise to difficulties which this case provides an opportunity, I hope, to resolve.

4. To that end, there are two annexes to this judgment. The first (A) states what I believe are correct propositions of law that will enable district judges to determine most if not all disputes of this kind. They comprise Tucker LJ's first, second and fourth propositions and incorporate an expanded version of the third one. The propositions are only a checklist and should not be taken as anything like a complete statement of law that has evolved over centuries.

5. The second annex (B) sets out a suggested protocol for swift and efficient determination of such disputes, in a manner that should save time and costs, reduce unnecessary controversy and avoid the need to bring disputes of this kind frequently to the higher courts. If it is not followed, the parties resistant to it could find district judges or other courts disposed to impose costs sanctions against them.

Facts

6. The claimant is, for the time being, charged with protecting the nation's health and wellbeing. It owns the Glaxo Smith Kline Building in Harlow, Essex, (**the property**) which it purchased in 2017 from Glaxo Smith Kline, the well known pharmaceutical company. Harlow is the local billing authority for non-domestic rates. On 12 March 2018, Harlow issued a demand to PHE for £2.50444 million for the 2018-19 financial year.

7. PHE's policy is (or was at the time) to pay invoices without argument and claim money back afterwards if the amount paid turns out to be disputed. PHE therefore paid Harlow the sum demanded on or about 1 April 2018. PHE then sought advice from rating agents then known as **GVA** (now, Avison Young) on how to mitigate rates liability.

8. GVA advised, as explained by Mr David Baughan of PHE in his witness statement:

> "… that genuine occupation of the site for a continuous period of six weeks, would give rise to relief being granted for three months following vacation of the hereditament. Furthermore, that to show rateable occupation PHE could store items/records which were of value to our organisation for that period."

9. PHE therefore moved certain chattels into the property with the intention of occupying it during the six week period from 1 May to 27 June 2018. On 1 May 2018, about 30 crates of documents were moved into the property from PHE's current headquarters in Colindale, London. Mr Baughan's evidence is that 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.

10. An inventory of the crates was kept, including a description of their contents. Some of the documents were about an outbreak of swine flu in 2009. Others related to public health records of research done and contracts made in furtherance of PHE's work. There were documents about staff training records, service level agreements, building plans and deeds and other "corporate records" (as described in the inventory) of various kinds.

11. Ms Alexandra Joseph of GVA emailed Harlow on 1 May 2018 informing Harlow that PHE was now "in occupation of this hereditament". Harlow responded the next day asking for an internal inspection of the property. The first such inspection took place on 10 May 2018, attended by, among others, Ms Jan Smith and Ms Donna Beechener, both of Harlow's revenue and benefits department.

12. Ms Smith took notes and some photographs. She saw the boardroom table with chairs round it and electronic equipment, suitable for corporate board meetings. They were much the same on that day as when she later photographed them, in December 2018. Ms Smith and Ms Beechener were treated to coffee and biscuits. It was explained to them by PHE staff that "30 to 40 crates" had been moved to the property; and that the boardroom was used for occasional meetings as it was close to Addenbrookes Hospital.

13. Mr David Allen, in charge of storage of PHE's records, explained in his witness statement:

> "In order to clarify the position I can confirm that the boardroom furniture and the tea and coffee making facilities, which had been left at the Property by the previous owners Glaxo Smith Kline, have been used occasionally for meetings when PHE staff and project directors visit the site. These meetings were to discuss the future development and promotion of the site and were of frequency that was no greater than would be reasonably be expected for a project of this size and complexity. The maintenance staff were housed in another building and only visit the building for maintenance purposes. To the best of my knowledge it was only used on an occasional basis by senior PHE staff for

> the purposes of promoting the development of the site as you would expect with any major redevelopment programme."

14. Ms Smith's handwritten note made during her visit on 10 May 2018 records:

> "Come here regular to keep eye on it. 30 – 40 crates. Clinical scientist on sabbatical for a year or so. Moved his stuff for 6-8 weeks then putting it back. Move some people out. Mainly storage + have meetings here as close to Addenbrooks (hospital)."

15. Ms Smith saw what she thought were about 20 to 25 crates at the property, which would have fitted into the back of a small transit type van. Only a small proportion of the property was taken up by these crates. Ms Smith and Ms Beechener were not permitted to open the crates and inspect their contents, for reasons of confidentiality, it was explained to them. They also saw certain cleaning products and electric floor polishers, which Ms Smith photographed.

16. Ms Smith considered that the crates could just as well have been stored at PHE's Colindale premises. Harlow decided to seek legal advice. A further inspection of the interior of the property was arranged and took place on 20 June 2018. Again, Ms Smith and Ms Beechener attended. The cleaning materials and floor polishers were still there. This time, they were allowed to view and photograph the contents of three crates, though PHE's project manager who was present was concerned about confidentiality.

17. The first crate contained, according to Ms Smith's statement:

> "several empty boxes, promotional materials and obsolete stationary relating to the Health Protection Agency which ceased to exist in 2013 when it became a part of the Claimant, a Christmas gift from Fortnum and Mason, a very old Nokia mobile phone and a Blackberry…. [a]nd a number of folders, in which were printed emails from 2005–2009. The names on the emails included [*names given – former employees*]".

18. The second crate they opened contained, Ms Smith explains:

> "a number of lever arch files which were marked so as to suggest that they contained IT documents from 2009 and 2010. The folders were marked on the outside with a red "X", which I understand to be commonly used to denote documents that can be destroyed. The crate also contained tender documents from 2005 relating to the Health Protection Agency which as stated above ceased to exist in 2013."

19. And, Ms Smith states, the third crate contained:

> "a further copy of the Health Protection Agency's 2005 tender document, the box contained a further 2010 tender document along with various papers dated 1993."

20. On 27 June 2018, at the end of the six week period, PHE moved the crates out of the property and back to their Colindale premises. GVA sought confirmation from Harlow that it would recognise an exemption from rates in respect of an unoccupied period to follow for the next three months. The correspondence then started to become more contentious and lawyers became involved.

21. On 21 August 2018, Ms Smith emailed GVA as follows:

> "… Mrs Donna Beechener, Revenues and Benefits Manager and I undertook two internal inspections of the premises during the period 1 May 2018 to 27 June 2018. On the first visit, which took place on 10 May 2018, we were shown into a small storage room situated within the main building complex where there were approximately 20 sealed crates on metal shelves. Mrs Beechener and I were advised that the crates could not be opened, but it was clear from the weight of samples that were lifted they were not empty.
>
> A second visit was arranged for 20 June 2018 and on this occasion permission was given for a small selection of crates to be opened. One crate contained what appeared to be the discarded desk contents of a former employee, another two crates contained obsolete stationary and various documents dating from between 1993 and 2010.
>
> Having taken legal advice, the Council is of the view that rateable occupation did not take place during the period specified, being 1 May 2018 to 27 June 2018.
>
> In reaching this decision I have taken account of the quantity and contents of the crates and have concluded that beneficial occupation did not take place, and in accordance with case law, John Laing & Sons y Kingswood Area Assessment Committee (1949), all four ingredients of occupation must be present for rateable occupation to take place.…".

22. On 11 October 2018, PHE wrote to Harlow referring to PHE's document retention policy and enclosing an inventory of the contents of the crates stored at the property during the six week period from 1 May to 27 June 2018. It was explained that PHE's position was that the documents needed to be retained for the time being, and why. GVA wrote to Harlow the next day disputing Harlow's proposition that the contents of the crates were of no value to PHE.

23. Ms Lorna Rawlinson of Harlow visited the property on 18 October 2019. By then, there were once again crates there; about 27 of them this time. PHE was claiming to have started a further six week period of occupation. One crate was opened for Ms Rawlinson; it contained site plans and deeds from PHE's Colindale premises. Ms Rawlinson photographed these.

24. After some further correspondence, Ms Beechener of Harlow eventually wrote the letter setting out the decision challenged in this case, dated 26 February 2019. Some of the letter debated matters of law, which I need not here set out. As to factual matters, Ms Beechener wrote:

> "Officers from the Revenues & Benefits service, including myself, undertook an inspection of the above premises on the morning of 10th May 2018. Officers were met by representatives of PHE and their rating agent (GVA) and were shown the boardroom and then taken to a lower ground floor storeroom where they were shown a small number of crates, approximately 20, in a large space fitted with extensive mobile shelving. The crates were of the type supplied when moving offices. I have enclosed a copy of the photos taken on that visit. The crates seen were labelled as 'PHE Colindale' but were not numbered.
>
> Officers were advised that the crates had been moved from Colindale 'as a small building where a researcher worked had been demolished and the contents had been moved to Harlow'. Officers requested access to view the content of a selection of the crates during the visit but were refused and advised 'unfortunately as this was someone's personal research notes/paperwork we would not be able to view the contents'. This response applied to all the boxes stored at Harlow when we visited. Additionally officers were advised PHE were unsure where the Researchers items would be kept when removed

> from the Harlow site. If the items were of value / needed to be kept surely, a secure place would be needed as the premises at the Collingdale site where the items were from had been demolished.
>
> …
>
> A second visit was afforded to the Council's Revenues & Benefits service on 20 June 2018 to view the contents of a small number of crates. Officers were met by a PHE Project Manager who escorted Jan Smith and I directly to the lower ground storage area. We requested to view the contents of three crates at random. The PHE Project Manager stated that there may be issues with taking photos of some of the contents if, for example, it was sensitive material. In the event there was nothing that the PHE Project Manager was not happy for us to photograph.
>
> The PHE Project Manager explained that the boxes in the first aisle (about 6 or 7) contained the belongings of various staff and that they (the staff) had already been down to Harlow to confirm that they were happy for us to view and photograph the contents. I have enclosed photos of some of the contents of the crates that were selected.
>
> The items in the crate appeared to be the contents of someone's desk / drawers. The crate included several empty boxes (which had previously contained gifts), various promotional materials, obsolete stationery from the Health Protection Agency which ceased to exist in 2013 when it became part of PHE, a Christmas gift from Fortnum and Mason, and what can only be termed as an obsolete Nokia mobile and Blackberry.
>
> There were also folders containing printed emails from 2005/2009. The emails included the name [*name given*] who according to Linkedin retired from PHE in 2013 and [*another name given*], who may also have retired (based on publicly available information). There was no name, or number on the crate marking the owner of the contents but it is likely that the contents belonged to one of these individuals, and was actually items they had not disposed of when leaving. The PHE Project Manager advised "you know what people are like, they're asked to pack up their stuff and leave it 'til the last minute so they don't get time to go through it before it's taken away".
>
> The 2nd box that was opened contained a number of lever arch files which appeared to contain IT related information from 2010. Each folder was marked with a red X on its side. There were a few tender documents in the box from 2005.
>
> The 3rd box contained various papers some dated from 1993, which appeared to be agreements.
>
> …
>
> As the items witnessed in the crates do not correlate to the inventory, and setting aside the fact the boxes weren't numbered, it is difficult to see that PHE had an imperative need to preserve the items found. Additionally the items witnessed do not appear to be required to be stored in accordance with the Record Retention & Disposal Schedule V02.00, and therefore cannot be deemed to be items of valuable scientific and or property information."

25. Such were the findings of Harlow about the chattels stored at the property. On the basis of those findings, Harlow decided that PHE had not been occupying the property during the period from 1 May to 27 June 2018 and a subsequent six week period starting in September 2018.

Grounds of Challenge

26. PHE says that decision was wrong in law and that Harlow must have applied the wrong legal test; and that on the undisputed facts the only conclusion legally open to Harlow was that PHE had been in occupation of the property during the two six week periods. PHE therefore asserts that Harlow must repay the £2.50444 million paid to it by PHE.

27. I reviewed some of the relevant case law on occupation and the applicable statutory provisions in my judgment in the *Principled Logistics* case, at [44]-[71] (the cases considered at [72]-[77] subsequently went to appeal and I need not consider them further here). I do not think it would serve any useful purpose to repeat that account of the law, though I will have to add to it when considering the submissions.

28. I included in that account reference to the Local Government Finance Act 1988 (**the 1988 Act**) and the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008 (**the 2008 Regulations**). Rather than set these out again at tedious length, I gratefully adopt the uncontroversial summary in the skeleton argument of Ms Jenny Wigley, for PHE:

> "The result of these provisions is that it is possible to reduce the non-domestic rates liability for a property by occupying it for a period of six weeks, then leaving it empty for three months in a cyclical pattern. The effect is that the property is subject to occupied rates during the six week occupation period and is effectively exempt from liability during the periods of vacancy. The total rates liability for such a property is approximately one third of what it would be if the property were left empty for the same period."

29. I paraphrase the main points made by Ms Wigley in submissions as follows, by reference to the four requirements for occupation stated by Tucker LJ in the *JS Laing* case.

30. As to the first requirement that there must be actual occupation, i.e. a physical presence at the property, the presence need not be substantial; it can be slight or minimal, as in the *Makro Properties* case, where filling 0.2 per cent of available storage space was sufficient; and the *Sunderland CC* case, where the siting of a small bluetooth box in an otherwise empty large warehouse also sufficed.

31. In a much older case the use of property to gather water naturally was enough for occupation (*Liverpool Corporation v. Chorley Union Assessment Committee* [1913] AC 197). And in a series of car park cases, nothing beyond making the space available for cars to park is required for occupation (*City of London Real Property Co Ltd v. Stewart* (VO) (1960) 6 RRC 398; *Slough BC v. Lane* (VO) [1965] 11 RRC 43 and *Wokingham Corpn v. Walker* (VO) (1965) 11 RRC 64).

32. The second requirement for occupation is that the occupation must be exclusive to the occupier; it must not be shared with another. It was accepted by both parties in the present case that this requirement was met and no further consideration of that requirement is therefore needed here.

33. The third requirement is that "the possession must be of some value or benefit to the possessor", in Tucker LJ's words in *JS Laing*. Ms Wigley submitted that the hurdle is

again low. It means only that the occupation must serve a purpose of the occupier (the *Liverpool Corporation* case, per Lord Atkinson at 207; *London County Council v. Churchwardens and Overseers of the Poor of the Parish of Erith* [1893] AC 562, HL, per Lord Herschell at 585).

34. The possessor's purpose must, however, go beyond upkeep or development of the property itself; thus, presence and use by a caretaker does not amount to occupation: *Arbuckle, Smith & Co Ltd v. Greenock Corporation* [1960] AC 813, per Lord Radcliffe at 827-8. Further, there must be an intention to occupy the property; goods stored there must not have been (by inference) abandoned because it is not worth the trouble to remove them (see Wright J's judgment in *London County Council v. Hackney Borough Council* [1928] 2 KB 588).

35. Subject only to those restrictions, minimal use for storage of items belonging to the possessor, together with an intention to occupy, establishes occupation, even if the storage is whimsical (for example, by a collector of empty pizza boxes); even if it is voluntary and not legally compelled; even if the items could more easily and cheaply be stored elsewhere; and even if the possessor's motive is rates mitigation (as in the *Principled Offsite Logistics* case).

36. Where the possessor's motive is to mitigate rates liability, that necessarily includes an intention to occupy the property: see HHJ Jarman QC's judgment in *Makro Properties* at [27]. An intention to occupy was decisive in In *R v. Melladew* [1907] 1 KB 192, CA, where the deliberately absent owner left his property in a state suitable for resumed profitable use should he return.

37. Cases where the issue of intention to occupy is not addressed and no finding made on the issue are an unreliable guide to whether occupation should be found on the facts, as HHJ Jarman QC indicated in *Makro Properties* at [41]-[43], when considering the decision of the Divisional Court not to reverse that of the magistrates in *Wirral BC v. Lane* (1979) 21 RRC 340, DC; and *obiter* comments made by Lord Denning MR in *Minister of Transport v. Holland* (1962) 14 P&CR 259 (a compulsory purchase case).

38. The fourth requirement is, again in Tucker LJ's words, "the possession must not be for too transient a period". Ms Wigley pointed out that this requirement will inevitably be met where, as in this case, the building is a permanent structure and the use of the property is, in accordance with the statutory provisions, for a period of six weeks.

39. In the light of that body of law, Ms Wigley submitted in detail that Harlow had applied the wrong tests when considering the issue of occupation during the two six week periods in 2018; and that, by the same reasoning, the only conclusion reasonably open to Harlow on the undisputed facts were that the property was indeed occupied by PHE during those periods.

40. Moreover, Ms Wigley submitted that the property was clearly unoccupied outside those six week periods when, for three months, the crates of documents and other items were not there. Harlow had erred, in particular in its letter of 26 February 2019, in requiring an "imperative need" to preserve the items and by requiring that those items must be "valuable scientific and/or property information". Nor did it matter

whether the items photographed correlated precisely with the descriptions in the inventory.

41. The presence of cleaning equipment and electric floor polishers during the three month periods did not alter that conclusion because section 65(5) of the 1988 Act (in materially the same terms as its predecessor, section 46A of the General Rate Act 1967, interpreted by Schiemann J in *Sheafbank Property Trust plc v. Sheffield MDC* [1988] RA 33) provides:

> "A hereditament which is not in use shall be treated as unoccupied if (apart from this subsection) it would be treated as occupied by reason only of there being kept in or on the hereditament plant, machinery or equipment—
>
> (a) which was used in or on the hereditament when it was last in use, or
>
> (b) which is intended for use in or on the hereditament."

42. The presence of contractors for the purpose of maintaining the building did not amount to occupation, applying the reasoning in *Arbuckle* and a series of caretaker cases. Nor did occasional use for meetings amount to occupation: that was preparation for future use; in Mr Allen's words "to discuss the future development and promotion of the site" and "no greater than would reasonably be expected for a project of this size and complexity".

43. For Harlow, Ms Kelly Pennifer countered those arguments with the following main submissions, as I paraphrase them and quoting from her skeleton argument. She accepted that PHE's "motivation" was to mitigate rates liability but not that PHE had "an intention to occupy" the property. Rather, PHE had "an intention to give the semblance of occupation".

44. Further, Ms Pennifer submitted that Harlow lawfully declined to accept in its decision letter of 26 February 2019 that PHE had established "an intention to occupy" and that, moreover, such an intention "is not sufficient in and of itself without more to establish rateable occupation". In addition, there must be a benefit to the possessor which must be "more than de minimis".

45. Ms Pennifer disputed Ms Wigley's proposition of law that mere physical presence coupled with an intention to occupy for the purposes of rates mitigation is a thing "of value", in the words of the older cases, or is possession that is "of same value or benefit to the possessor" in the words of Tucker LJ stating the third requirement for rateable occupation in the *JS Laing* case. She submitted that neither *Makro Properties* nor *Principled Offsite Logistics* supported PHE's proposition, which was wrong in law.

46. In support of that position, she made the following points. The use of the property, for rates mitigation purposes, is what must be of value to the possessor. The exemption after six weeks of occupation arises only on the property ceasing to be occupied. The desired benefit – rates mitigation - is therefore not one that accrues from presence in the property but from cessation of use, i.e. vacating the property.

47. Under the legislation, said Ms Pennifer, rates liability accrues on a day by day basis: on a given day, a property is either rateable or it is not. Whether it is depends on

whether on that day each of the four *JS Laing* requirements is met. It follows, she argued, that the benefit of the exemption where a property is continuously occupied for at least six weeks (42 days) enures to the possessor only on the 43rd day when the property becomes empty again.

48. The benefit is accordingly, said Ms Pennifer, absent on days 1 to 41 (or 42) inclusive. Therefore, on those days, the third *JS Laing* requirement is not met; therefore, on those days, the property is not rateably occupied. Alternatively, even if the occupation is of benefit during the 42 day period, it ceases to be so from the 43rd day because the necessary six week period has ended; therefore, the occupation must cease from day 43 without the possessor of the property needing to do anything at all, such as removing chattels from the property.

49. The position is different, Ms Pennifer submitted, from that considered in several of the old cases where the issue was whether a property should be entered in the rating list at all or whether it should not be because it was "struck with sterility" (see e.g. in *Churchwardens and Overseers of Lambeth Parish v. London County Council* [1897] AC 625, HL, per Lord Halsbury LC at 630; cf. the reasoning in *Winstanley v. North Manchester Overseers* [1910] AC 7, HL).

50. Furthermore, if the potential future benefit of a rates exemption accruing at the end of the six week period were itself sufficient to satisfy the requirement that the occupation must be a thing of value, the courts would not have needed to decide in the many "occupation by use" cases (down to and including *Makro Properties* and *Sunderland CC v. Stirling Investment Properties*) whether an actual benefit had enured to the possessor; the potential for future commercial exploitation of the property would have been enough in such cases.

51. Ms Pennifer said *Makro Properties* was not authority against her analysis: it turned on a finding that the occupation was more than slight and trifling; otherwise the judge would not have found the occupation of benefit to the possessor. He attached importance to *Makro* being bound by law to store the goods somewhere. He did not decide that an intention to occupy is always present where the motive is to obtain a rates exemption; he merely upheld the district judge's finding that an intention to occupy was present on the facts.

52. As for *Principled Offsite Logistics*, Ms Pennifer submitted in written argument (though not pressed in oral argument), that if that case supported PHE's proposition of law, it was wrongly decided and should not be followed. In oral argument, she emphasised that it must be distinguished: it turned on a finding that the occupying contractor derived benefit from performing its business function of occupying the property for reward and that this was more than a mere semblance or pretence of occupation.

53. PHE, according to Harlow, could not establish an intention to occupy, as distinct from an intention to "give the semblance of occupation". Nor could it establish that its intention was coupled with actual use that was more than trifling. It was no part of PHE's business (unlike that of Principled Offsite Logistics) to occupy property; its role was to promote the nation's health.

54. Harlow was entitled to find, and did find, that the storage of the items observed and photographed - which was different from their description in the inventory - was trifling and of no value to PHE. By doing so, Harlow did not misapply the law or decide the issue in a *Wednesbury* unreasonable manner. The decision was unassailable and the court could not go behind it, Ms Pennifer submitted.

55. In the alternative, she attempted to defend Harlow's decision on a completely different basis from the grounds of the decision at the time. She argued that if PHE was in occupation of the property from 1 May to 27 June 2018 (and the further six week period in the autumn of 2018), then it was also in occupation during the three month period between 27 June and 26 September 2018, i.e. it remained in occupation at all relevant times.

56. In support of this submission, Ms Pennifer relied on the presence at the property, after removal of the crates, of a model of the property, display boards, the boardroom table, tea and coffee making facilities and cleaning items. She submitted that use of the property for meetings as the property was near Addenbrookes Hospital, coupled with an intention to occupy in order to hold those meetings, was sufficient for occupation that was beneficial to PHE.

57. Ms Pennifer contended that section 65(5) of the 1988 Act could not assist PHE because it only applied to the floor polishers, not the cleaning materials, model of the building, posters and display stands. The *Arbuckle* case did not assist PHE because using the property for meetings about future development of the site went beyond carrying out alterations. And, she said, *Associated Cinema Properties v. Hampstead BC* [1944] 1 KB 412, CA (relied on by PHE) was not relevant because there the ratepayer never entered into possession at all.

58. PHE's riposte to Harlow's alternative case was, first, that the decision challenged makes no mention of this alternative basis for denying PHE its rates exemption. The challenge would remain good because Harlow's decision would be shown to have been made on a flawed basis. In discussion at the hearing it was agreed that Harlow's alternative argument could, however, impact on the court's discretion to withhold relief.

59. Further, Ms Wigley relied on Mr Allen's evidence (quoted above) that use of the property for meetings was confined to discussing the future development of the site. She submitted that the intention was not to occupy then and there but to occupy in future; and that this distinction is supported by the wording of section 65(5) of the 1988 Act (in the context of plant and equipment left on site), which refers to plant and equipment used when the premises were "last in use" or "intended for use", i.e. intended for future use.

Reasoning and Conclusions

60. I do not accept that this was a case where there was an intention to create semblance of occupation, as Harlow suggested. PHE did not set out to convey an impression different from the reality of its presence at the property. It was quite open about what it was doing and why. There is a minor difference between the parties about what the crates contained or may have contained, but that is all.

61. Aside from those points, there is no dispute about the facts. The contents of those crates that were opened are there to be seen in Harlow's photographs. They are clearly documents and items belonging to PHE created or acquired in the exercise of its functions. PHE was entitled to store them somewhere. It was not legally bound to store them at the property or anywhere else; but it had not yet determined that they could safely be disposed of and would not be bound to dispose of them even after so determining.

62. I reject the proposition that no benefit accrues to a possessor motivated by the prospect of rates exemption, until the occupation has ceased. The reasoning is casuistic. Rateable occupation is, indeed, determined under the legislation on a day by day basis; but that same legislation aggregates days of occupation into periods of occupation. 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.

63. I agree with Ms Wigley that the artificial slicing up of occupation into 24 hour periods is inconsistent with the rules on exemptions and with the case law (preserved by section 65(2) of the 1988 Act), including the requirement that occupation must not be too transient (a period that may need to last at least months, especially in the case of temporary structures such as the builders' huts in *Sir Robert McAlpine & Sons Ltd v. Payne* (VO) (1969) 15 RRC 440).

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

65. This is subject to the two caveats alluded to by Ms Wigley. The first is that the purpose must go beyond upkeep and development of the property itself, as shown by the caretaker cases and the decision in *Arbuckle*. The second is that occupation is not established by leaving abandoned goods there which are not worth the trouble of removing (*London County Council v. Hackney BC*).

66. I also accept that if the possessor's motive is to mitigate rates liability, its intention must be to occupy the property in question, at least if its understanding of the law of rates exemptions is correct. That is what HHJ Jarman QC was saying in *Makro Properties* and, with respect, he was correct to do so. It is unreal to suppose that a person intending to gain a rates exemption and knowing that occupation for six weeks is required to gain it does not intend to occupy the property during those six weeks.

67. I agree with Ms Wigley and with HHJ Jarman QC in *Makro Properties* that *Minister of Transport v. Holland* and *Wirral BC v. Lane* are not persuasive against that analysis because in neither case was the intention of the possessor examined and determined as part of the *ratio* of the case. Neither is binding on me and in the *Wirral* case itself the Divisional Court appeared uncomfortable with the decision below.

68. In the modern era, the 2008 Regulations have spawned a tribe of rates exemption hunters, including the professional provider of occupancy services in *Principled*

Offsite Logistics; and that has sharpened the focus in the modern cases on the intention of the possessor. 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 *Principled Offsite Logistics*.

69. The result is simple: an intention to occupy means what it says. It does not matter whether the occupation is outsourced, as in *Principled Offsite Logistics*, or kept in house, as in this case. It does not matter that PHE's public functions do not extend to serendipitous occupation of buildings; it is as much entitled to pursue a rates exemption as anyone else and is acting properly in doing so.

70. I do not accept Ms Pennifer's different interpretation of the cases, which would require the use to be of significant value to the possessor independently of the gaining of a rates exemption. That approach to occupation is, essentially, the one I rejected in the *Principled Offsite Logistics* case. I conclude without difficulty that PHE was in occupation throughout the period from 1 May to 27 June 2018 and during the second six week period in the autumn of 2018.

71. It is clear from the correspondence that Harlow did not correctly apply the law when reaching its decision. The primary facts were undisputed. The suggestion that the descriptions of the goods set out in the inventory provided to Harlow did not properly match the actual goods in the crates, is of no significance. The contents of the crates undeniably included the items photographed by Ms Smith and Ms Rawlinson during their visits. Those items belonged to PHE, which was entitled to store them at the property as much as anywhere else.

72. Applying the law as I have found it to be, there was only one possible conclusion to be drawn from the presence of those goods on the site: PHE was in occupation of it during the two six week periods. It does not matter that the goods in the crates did not precisely match PHE's description of them; nor whether they were of value to PHE beyond being papers and other items yet to be disposed of and which needed to be somewhere until disposed of.

73. I therefore reject the submission of Harlow that the question of occupation was lawfully and rationally determined in its two decisions, the first set out in Ms Beechener's email of 21 August 2018 and the second set out in her decision letter under challenge, dated 26 February 2019. Those decisions proceeded on a wrong understanding of the law and cannot stand.

74. I then turn to consider Harlow's alternative contention that PHE was in occupation at all relevant times and did not cease to occupy the property for rating purposes at the end of each six week period. If that contention were well founded, PHE might be entitled to some relief but it would be pointless to order repayment of the amount paid to Harlow because it would then be lawfully levied and would have to be paid back again by PHE to Harlow.

75. The intention to occupy is, conspicuously, absent except during the six week periods. But there were certain items in the property outside the six week periods when the crates and their contents were not there. If the presence of these items would lead to the conclusion that the property was rateably occupied at those times, the court must go on to consider whether that conclusion is excluded because the occupation is "by

reason only" of the presence of "plant, machinery or equipment" falling within section 65(5) of the 1988 Act.

76. There have been cases where occupation has been found by reason of items of value being stored at premises which are otherwise unoccupied; for example, the books left at a bookshop in *Appleton v. Westminster Corporation* [1963] RA 169, DC. I think that is because an intention to use the premises for the ratepayer's benefit is inferred; the goods in *Appleton* were of commercial value to the leaseholder of the bookshop.

77. I do not think that the same reasoning can be applied to the boardroom table and the chairs round it, the model of the building and the display boards. The furniture was acquired with the building, from Glaxo Smith Kline. The model of the building and the display boards do not indicate a present intention to occupy; they indicate an intention to occupy the building in the future, when it becomes operational.

78. The floor polishers and cleaning equipment are clearly for maintenance and upkeep of the property. It was common ground that contractors would come onto the site to maintain it. The upkeep and maintenance of a building does not amount to rateable occupation, as shown in cases such as *Arbuckle*. Ms Pennifer rightly did not contend that PHE's contractors coming onto the site to maintain the building of itself amounted to PHE occupying the building.

79. As for the use of the boardroom for meetings, also featuring tea and coffee making facilities, the evidence of Mr Allen is that these were "held to discuss the future development and promotion of the site"; were "of frequency … no greater than would be reasonably be expected for a project of this size and complexity"; and that the building "was only used on an occasional basis by senior PHE staff for the purposes of promoting the development of the site".

80. That is a use not amounting to rateable occupation; it is preparation for future exploitation of the property, as in the *Arbuckle* case. Operational use of the site as PHE's headquarters must require the building to be prepared and adapted first. Discussions and planning must precede whatever physical works need to be done. Holding those discussions in the building and serving tea or coffee during them does not make the use present rather than contemplated.

81. For those reasons, I reject the alternative contention of Harlow that PHE was in occupation of the property throughout the material times. I do not think I need to consider the scope of the exclusion in respect of "plant, machinery or equipment" in section 65(5) of the 1988 Act. I did not hear full argument on the scope of those terms, which have surely been considered in other contexts which may throw light on their ambit here.

82. If, however, I did need to consider the scope of that exclusion, I would incline to the view (subject to hearing fuller argument) that the floor polishers, cleaning fluids, furniture, display posters and the model of the building (and, possibly, the tea and coffee making facilities) are all "equipment" and were either "used in or on the hereditament when it was last in use", or "intended for use" in it, or both. For that additional reason, I would not accept Harlow's alternative case.

83. It follows from the above that I am satisfied PHE was in occupation of the property during the six week periods and not in occupation outside those periods. Accordingly, I must allow the claim and Harlow must repay the money paid by PHE following Harlow's rates demand. I will hear counsel on the form of relief that should be granted to give effect to my decision, if the wording of the court's order cannot be agreed.

84. I conclude by thanking counsel for their assistance and 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 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 HHJ Jarman QC in *Makro Properties*, at [56]). It is for the legislature to change the position if it decides to do so.

ANNEX A: PROPOSITIONS OF LAW;

WHEN PREMISES ARE OCCUPIED

(1) The possessor of the property must be in actual occupation of the property, i.e. making some use of the property.

(2) The possession of the property must be exclusive to the possessor; it must not be shared with another person also entitled to possession.

(3) Voluntary use of a small proportion of the property to store a small amount of the possessor's goods is sufficient.

(4) It does not matter if the storage is whimsical or eccentric, for example storage of a collector's items or of redundant items.

(5) The possessor of the property must have an intention to occupy the property, which may be inferred from use of the property.

(6) It does not matter if the possessor's predominant or sole motive is mitigation of or exemption from rates liability.

(7) There is no occupation of a property where the person entitled to possession intends not to occupy it but to create a semblance or pretence of occupation.

(8) The presence in the property of goods not worth the trouble of removing, which may be inferred to have been abandoned, is not sufficient for occupation.

(9) It is not sufficient for occupation if the only use of the property is its upkeep and preservation or alterations in preparation for future occupied use.

(10) The possessor of the property may be a professional contractor whose business is occupation, provided it has the right to exclusive possession.

(11) The possession of the property must not be too transient; it must endure for more than a fleeting period of time.

(12) Occupation may more readily be found too transient where the property in question is a temporary structure than where it is a building for permanent use.

ANNEX B: PROTOCOL FOR RESOLUTION OF DISPUTES ABOUT OCCUPATION OF PREMISES

(1) Where a billing authority or a possessor of non-domestic property raises an issue as to occupation, the following procedures should be observed.

(2) The parties should cooperate in making arrangements for inspection by the billing authority of the property and its contents.

(3) An agreed list of the contents, with at least a generic description, should be produced and signed and dated by both parties, covering the material times.

(4) The billing authority should write to the other party stating whether it considers the property occupied or not, and at what times or over what periods.

(5) The billing authority should include in its written communication to the other party its reasons for its conclusions.

(6) The billing authority should issue any consequent demand for payment of non-domestic rates in the normal way, in accordance with the rating legislation.

(7) If the recipient of the demand disputes liability, it should write to the billing authority stating why.

(8) The recipient should not pay the disputed amount with a view to claiming it back later, since this deprives the magistrates' court of jurisdiction.

(9) Any disputed rates liability should be the subject of a summons for non-payment issued by the billing authority under the rates collection legislation.

(10) The magistrates' court can then determine whether and when a property is occupied or unoccupied and any consequent liability for non-domestic rates.

(11) The unsuccessful party will then have a right of appeal to the Administrative Court, by case stated, with full findings of fact.

(12) A party refusing to follow the procedures set out in this protocol may be subject to costs sanctions imposed by the magistrates' court or any other court.

(13) A party claiming restitution of non-domestic rates wrongly paid should sue in the ordinary courts and may not necessarily recover its costs, even if successful.