

# Knowsley Hall

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G R E E N H A L G H   K E R R

## Rates Avoidance Update

*Data Driven Litigation*

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# Overview

- What have been the recent changes in approach?
- How should Councils approach the changes?
- What role can data play in informing and supporting the approach?

# Hurstwood – Beyond Ownership

- Hurstwood has, in the 17 months since being handed down, become a case widely recognised as leading authority on statutory interpretation;
  - [60] “... But a recognition that section 65(1) is speaking of an entitlement to possession which vests in the person concerned a real and practical ability either to occupy the property or to put someone else into occupation of it, is **a purposive interpretation which achieves some coherence between the language of the statute and its purpose** in identifying the “owner” of an unoccupied non-domestic property as the person who is liable for business rates.”
  - [61] “... 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.”

# Hurstwood – Affirmed

- Senior Courts have repeatedly affirmed the approach set out in *Hurstwood*;

- (as recently as last week), per Asplin LJ in PSV 1982 Limited v Sean Anthony Edward Langdon [2022] EWCA Civ 1319 at [29];

*“Further, the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language **as far as possible in a way which best gives effect to that purpose**: *Hurstwood Properties (A) Ltd v Rosendale BC* [2021] UKSC 16, [2021] 2 WLR 1125 at [10] and *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209 at [70].”*

- Other Examples:

- Milton Keynes Hospitals NHS Foundation Trust v The Commissioners for Her Majesty's Revenue & Customs [2021] EWCA Civ 942 at [22-23]
- Re. Bulb Energy Limited [2021] EWHC 3680 (Ch) at [35]

# Hurstwood – So What?

- Firstly, *Hurstwood* marks a shift in Senior Courts' approach to avoidance. Prior to this, ratepayers had been receiving more and more endorsement of avoidance practices.
- Courts of first instance have taken notice of this change and are becoming more willing to investigate transactions beyond the superficial, asserted level.
- Avoidance is therefore, in many cases, still capable of challenge

# Tips for Councils

- Inspections are invaluable
- Any challenge to a ratepayer's assertions on ownership or occupation should be raised early, in writing
- Cross check documents or assertions against data held by the Council or which is publicly available
- Ask the common sense questions: who buys stock, pays staff, pays bills, receives the money from the till, owns the contents of the hereditament, etc.?
- In the absence of a credible and consistent answer, be prepared to litigate

# Use of Data

- Councils and their partners have huge amounts of data; it should be used.
- At the outset, it can offer an insight as to whether someone can't pay or won't pay
- It can tell you whether litigation is worthwhile, not just on prospects of success but on prospects of recovery
- Data, whilst capable of manipulation and presentation, is usually given significant weight by Courts. It can make or break a case

# Data – Whether to Litigate

- Councils themselves often have information about ratepayers, particular where they're individuals resident in their area:
  - Benefits
  - Welfare issues and vulnerability
- Councils' partners can offer even more detailed information:
  - Tracing information
  - Digital communications, including whether they're being read or ignored
  - Details of assets and property holdings



# Data – Whether to Litigate

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- When potentially not to litigate:
  - Policy; where vulnerability is identified
  - Benefit; where there is no prospect of recovery, nor an ongoing liability to conclude
- When to potentially litigate:
  - Where communications are being ignored
  - If significant assets are identified
  - Where the data demonstrates that which is asserted by the ratepayer to be incorrect

# Data – Whether to Litigate

- The key is making use of the data; the information available to partners such as Destin, Whyte & Co and Telsolutions is detailed and invaluable
- Often, this data is never sought out by Councils and utilised by their own recoveries teams or passed to their lawyers
- Combining partners' data with the Council's own and that which is publicly available can result in more accurate advice on recovery prospects if passed on to lawyers, whilst ensuring a tailored approach to vulnerable customers or those unable rather than unwilling to pay

# Data – Use in Litigation

- Information from Enforcement Agents is often pivotal in fending off applications to set aside Liability Orders.

## Case Study

In November 2019, Mr P applies to set aside a total of 9 Liability Orders dating from July 2015 to June 2019. Trying to demonstrate that the applications were prompt, Mr P asserts that he knew nothing of the Liability Orders until September 2019.

Enforcement Agents' records showed attendance personally on Mr P in 2017, resulting in payments in June and August 2017.

Mr P's inability to explain the clear evidence from the Enforcement Agent meant that not only were the applications for pre-2017 Liability Orders found not to be prompt, his credibility was so badly damaged that all 9 Liability Orders were left in place.

# Data – Use in Litigation

- Where cases turn on entitlement to Small Business Rates Relief, data from Destin can be determinative.

## Case Study

Company L, a law firm, refused to make payment of NNDR when demanded contending that it had an entitlement to SBRR.

The Council passed the matter to Greenhalgh Kerr, but were also making use of data from Destin.

On receipt of the data from Destin, demonstrating a lack of entitlement to SBRR based on the number of hereditaments owned, a single letter detailing the data set and outlining the relevant legislative provisions was sufficient to prompt payment.

# Data – Use in Litigation

- Test purchase type data is one of the most powerful ways to demonstrate who derives benefit from a hereditament.
- Where Councils provide commercial waste services or hold licensing data for a hereditament, these can be indicative of who is in actual occupation thereof.
- Information at Companies House demonstrating the asset position of a company, and/or that it is dormant, is pivotal when assessing real and practical ability to occupy
- Ratepayers' own data, or its absence, is also a factor. Banking evidence and invoices should line up, for example, but often don't.

# Summary

- Challenges to avoidance are possible, but an assessment of prospects of success and likelihood of recovery should be made early on
- The assessment is more accurate with good data
- Identify all data sources available and collate them
- Seek data from the ratepayer, setting out the basis for challenge as soon as practicable and inviting a response
- Once data has been collated, put it in the hands of recoveries teams or lawyers
- Should the decision be to litigate, consider whether the available data can be deployed in the proceedings (or to avoid proceedings entirely)

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# Questions?

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