Neutral Citation Number: [2025] EWCA Civ 1601

Case No: CA-2024-002439

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
HIS HONOUR JUDGE KLEIN (sitting as a Judge of the High Court)
AC-2024-LDS-000096

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 December 2025

Before :

THE PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE FALK
and
LORD JUSTICE HOLGATE

- -

Between :

THE KING (on the application of Emeraldshaw Limited)	**Appellant**
- and -	
Sheffield Magistrates' Court	**Respondent**
- and –	
Sheffield City Council	**Interested Party**

- -
- -

Matthew Collings KC and Oliver Jackson (instructed by **Irwin Mitchell LLP**) for the **Appellant**
The Respondent was not represented and did not appear.
Rowena Meager (instructed by **General Counsel, Sheffield City Council**) for the **Interested Party**

Hearing date : 29 October 2025

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Approved Judgment

This judgment was handed down remotely at 4pm on 9 December 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Holgate :

Introduction

1. The central issue in this appeal is the legal basis and scope of the decision in Rossendale *Borough Council v Hurstwood Properties (A) Limited* [2021] UKSC 16; [2022] AC 690 ("*Rossendale*"). There the Supreme Court applied the "*Ramsay* principle" (*WT Ramsay Limited v Inland Revenue Commissioners* [1982] AC 300) to certain rate mitigation schemes for avoiding liability to non-domestic rates ("NDR") in respect of unoccupied hereditaments. In this context, we have to decide whether it is arguable that the defendant, the Sheffield Magistrates' Court, erred in law in deciding that it was the appellant, Emeraldshaw Limited, which had the real and practical entitlement to possession of its commercial property rather than its tenant, Space to Help (Yorkshire) ("STHY"), so that the appellant was to be treated as "the owner" of that property and therefore liable to pay NDR for the property as an "unoccupied hereditament" under s.45 of the Local Government Finance Act 1988 ("LGFA 1988").

2. The interested party, Sheffield City Council ("SCC"), is the billing authority under the LGFA 1988 for its administrative area. It is responsible for sending out a notice to each ratepayer stating the amount of NDR that party is liable to pay to the authority and for taking proceedings to enforce payment of NDR due.

3. The valuation officer for SCC's area is an official of the Valuation Office Agency (an executive agency of HMRC). He or she is responsible for compiling and maintaining the local non-domestic rating list setting out each relevant non-domestic hereditament (a unit of rateable property) in that area and its rateable value (ss.41 and 42 of the LGFA 1988). The valuation officer may make alterations to the list (pursuant to regulations made under s.55 of the LGFA 1988) to reflect, for example, material changes in circumstance relating to a hereditament, so as to maintain the accuracy of the list. The information in the list is used by the billing authority to compute the amount of NDR payable by the ratepayer for each hereditament on that list.

4. This case is concerned with warehouse and office premises known as Minit House 1, Orgreave Way, Sheffield. On 7 June 2021 the rating list showed that the property comprised two hereditaments: (a) part ground floor with a rateable value of £68,000 and (b) part ground floor and first floor with a rateable value of £90,000.

5. Between June 2021 and November 2022 demolition and redevelopment works were carried out so as to create four units, 1 to 4, Minit House, in place of the 2 two former units at that address. On 16 April 2023 the valuation officer altered the rating list with effect from 3 November 2022 to delete the entries showing the two former hereditaments and to enter the four newly created hereditaments, each with separate rateable values.

6. According to SCC's records, the former hereditament (a) had been vacant since 13 November 2019 and the former hereditament (b) had been vacant since 8 May 2021.

7. On 7 June 2021 the former owner of Minit House sold the freehold of that property to the appellant. On the same date the appellant entered into a written agreement granting a tenancy at will of the former hereditament (a) to STHY. By a written agreement

dated 9 November 2021 the appellant granted a tenancy at will of the former hereditament (b) to STHY. In each case a nominal rent was payable.

8. The appellant sent copies of the agreements to SCC and contended that the effect of the tenancies at will was that STHY was "the person entitled to possession" of each of the two hereditaments then shown in the rating list and so by s.65(1) was to be treated as "the owner" of those units. On that basis the appellant said that any liability for the unoccupied hereditaments under s.45 of the LGFA 1988 was borne by STHY and not the appellant. However, the legislation exempted an "owner" which is a charity from liability to pay any NDR for an unoccupied hereditament if it appeared that when next in use the hereditament would be wholly or mainly used for charitable purposes (s.45A until 31 March 2024 and thereafter sched.4ZB to the LGFA 1988).

9. SCC did not accept the appellant's argument. SCC considered that the tenancies at will did not have the effect of making STHY the owner of the two hereditaments in place of the appellant. The authority sent rates bills to the appellant in respect of the two former hereditaments covering the period 8 June 2021 to 2 November 2022. When the appellant did not pay, SCC laid a complaint before the Sheffield Magistrates' Court and summonses were issued against the appellant for non-payment of rates.

The proceedings in the Magistrates' Court and in the High Court

10. A four day contested hearing took place before District Judge Spruce between 30 January and 2 February 2024. He handed down judgment on 21 March 2024 and granted liability orders against the appellant in the sums claimed by SCC.

11. In summary the district judge held that:

    (1) The agreements failed, as a matter of property law, to create valid tenancies and so STHY had not become the person entitled to possession, and thus the owner, of the two hereditaments;

    (2) Alternatively, applying the principles laid down in *Rossendale*, even if the agreements created valid tenancies at will as a matter of property law, the tenancy agreements did not have the effect of making STHY the owner because they did not confer on that company a real and practical entitlement to occupy the hereditaments or to confer a right of occupation on someone else, or to bring the property back into occupation, in line with the purposes of the LGFA 1988;

    (3) Alternatively, the agreements were a sham and on that separate ground STHY did not become the person entitled to possession of the hereditaments;

    (4) Accordingly, the tenancy agreements did not have the effect of transferring liability to pay NDR from the appellant to STHY.

12. The appellant then sought to challenge the district judge's decision in a claim for judicial review. The Statement of Facts and Grounds sought to advance a diffuse range of grounds.

13. On 2 August 2024 Her Honour Judge Kelly refused permission on the papers on the basis that the challenge should have been brought by an appeal by way of case stated.

14. A renewed application for permission to apply for judicial review came before His Honour Judge Klein at a hearing on 22 October 2024. He decided that an appeal by way of case stated would not provide a sufficiently adequate alternative remedy and so decided the application for permission to apply for judicial review on the merits. He decided that the first ground of challenge, that the district judge was wrong to find that the agreements did not create tenancies as a matter of property law, was arguable (ground 1). He also decided that ground 3(a), that the district judge had wrongly placed a burden of proof on the appellant in relation to the sham issue, was arguable.

15. However, the judge decided that all of the other grounds of challenge were not arguable.

16. In particular, he decided that the district judge had not made any public law error when he decided that, applying *Rossendale*, STHY was not entitled to possession of the hereditaments for the purposes of s.45(1) and s.65(1) of the LGFA 1988. It did not have a real and practical entitlement to possession for the purposes of the legislation. The grounds of challenge were mainly a disagreement with the weight given by the district judge to certain matters of evidence, without showing that his conclusions had been irrational. He rejected the appellant's contention that the building work carried out during the period covered by the summons was irrelevant. The extent of the building work and under whose control it was carried out had supported the district judge's conclusion that the appellant, not STHY, was in practical control of the property. That "was a key and unimpeached finding" [37]. Judge Klein acknowledged criticism of two aspects of the district judge's reasoning but he regarded those as non-material, taking into account also the main conclusions of the district judge relevant to the *Rossendale* issue which could not be impugned [38]-[39]. He recognised that the district judge had made no finding that the scheme in the present case involved an abuse of a regulatory regime, but he held that the *ratio* in *Rossendale* did not lay down any such requirement for the *Ramsay* principle to apply to a scheme for avoiding liability for NDR on an unoccupied property.

17. Even if the district judge had found that the agreements had been effective as a matter of property law to create tenancies and were not shams, Judge Klein decided that the appellant rather than STHY would be the owner liable to pay NDR on the unoccupied hereditaments if, applying *Rossendale*, STHY did not have a real and practical entitlement to possession of those properties for the purposes of s.45 of the LGFA 1988. Given that there was no arguable ground of challenge on the *Rossendale* issue, the judge decided, applying s.31(3C) and (3D) of the Senior Courts Act 1981 that if the conduct complained of under grounds 1 and 3(a) had not occurred, it was highly likely that the outcome for the appellant would not have been substantially different: the liability orders would still have been made against the appellant in respect of the unpaid NDR for the unoccupied hereditaments ([34] and [44] to [46]).

18. For those reasons, notwithstanding the judge's finding that grounds 1 and 3(a) were arguable, he refused the appellant permission to apply for judicial review of the district judge's decision to make the liability orders and dismissed the claim.

Grounds of appeal

19. The appellant appeals to this court against Judge Klein's order on the following three grounds:

> **Ground A**
> The Judge at the renewal hearing was wrong to hold that it was not arguable that the district judge had misapplied *Rossendale* in finding that STHY was not entitled to possession of the relevant property within the meaning of section 65(1) of the Local Government Finance Act 1988 ("LGFA 1988").
>
> **Ground B**
> The Judge was wrong to hold that it was not arguable that the district judge had erred in concluding that the tenancy agreements were shams.
>
> **Ground C**
> The Judge was wrong to hold that section 31(3D) of the Senior Courts Act 1981 was engaged.

20. On 23 April 2025 Stuart Smith LJ granted permission to appeal on those three grounds. Therefore, the question for us to decide is whether the appellant should be granted permission to apply for judicial review of the district judge's decision.

21. We do not have to address ground 1 in the High Court. The parties are agreed that that court has determined that, if the present appeal should be allowed and in due course the matter should proceed to a judicial review, it is arguable that the agreements between the appellant and STHY were effective to grant tenancies to the latter as a matter of property law.

22. The appellant accepts that ground C only arises if it is successful under both grounds A and B; that is, both the *Rossendale* and sham challenges must be arguable. If only the issue raised by ground B were to be arguable (i.e. that the agreements were genuine), the appeal would be dismissed and the High Court's order refusing permission to apply for judicial review upheld.

23. Not surprisingly, therefore, the parties focused their submissions on the *Rossendale* issue. I will address matters in the following order:

> The statutory framework
>
> The *Rossendale* decision
>
> The tenancies at will
>
> The District Judge's decision
>
> The appellant's submissions on the *Rossendale* issue
>
> Ground A – The *Rossendale* issue

I am grateful to all counsel for their written and oral submissions.

The statutory framework

24. Section 43 deals with the liability to pay NDR on occupied hereditaments. By s.43(1), where a hereditament is shown in a local non-domestic rating list a person who is in occupation of all or part of the hereditament is liable to pay NDR for each chargeable day to the billing authority (s.43(7)). Generally, the amount payable for any chargeable day is the rateable value shown for the hereditament in the rating list for that day multiplied by the national non-domestic rating multiplier (formerly s.43(4), now sched.4ZA).

25. Section 45 deals with the liability to pay NDR on unoccupied hereditaments. By s.45(1) a person is liable to pay to the billing authority (s.45(7)) NDR for any day of the financial year on which a hereditament is shown in the local non-domestic rating list, it falls within a class prescribed by regulations, none of the hereditament is occupied, and that person is the "owner" of the whole of the hereditament. Generally the amount payable was to be calculated in accordance with s.45(4) (see now sched. 4ZB) and in those cases was the same as that payable if the hereditament had been occupied.

26. However, the reliefs from liability differed in some respects. Whereas, a charity could obtain 100% relief in respect of rates for an unoccupied property (s.45A), it was only able to obtain 80% relief for an occupied property (s.43(5) and (6)) and had to apply to the billing authority for discretionary relief in respect of the remaining 20% of the rates bill.

27. Section 65(1) provides:

> "(1) The owner of a hereditament or land is the person entitled to possession of it."

28. Section 65(2) provides that whether a hereditament or land is occupied, and who is the occupier, is to be determined by reference to the rules which would have applied for the purposes of the former General Rate Act 1967, that is to say the principles established by case law. It has been laid down by *John Laing & Son v Assessment Committee for Kingswood Assessment Area* [1949] 1 KB 344, 350; *Cardtronics UK Limited v Sykes (Valuation officer)* [2020] UKSC 21; [2020] 1 WLR 2184 at [13] and *Rossendale* at [21] that there are four essential ingredients of rateable occupation:

    (1) actual occupation; which is

    (2) exclusive for the particular purposes of the possessor; and

    (3) of some value or benefit to the possessor; and which

    (4) is not for too transient a period.

29. A building in the course of construction or alteration preventing use for its purpose is not in rateable occupation and liable to NDR under s.43 of the LGFA 1988 (see Ryde on Rating and the Council Tax – Division B, Chapter 2 paras.96-108). So in *Arbuckle Smith & Co. Ltd v Greenock Corporation* [1960] AC 813 a warehouse purchased for conversion to a bonded store but which could not be used for that purpose until substantial alterations had been carried out, was not in rateable occupation.

The *Rossendale* decision

30. The main issue between the parties is whether the decision in *Rossendale* is limited to the types of rate mitigation schemes considered in that case and/or the reasons why those particular schemes did not result in the tenant being treated as the "owner" under s.65(1) and liable for NDR on the unoccupied hereditaments, or whether the Supreme Court laid down a broader principle not restricted to schemes of that kind.

31. The leading judgment was given by Lord Briggs and Lord Leggatt JJSC, with whom the other members of the court agreed.

32. The case concerned two schemes for the avoidance of NDR in respect of unoccupied hereditaments. Both involved the registered owner of premises setting up a company as a special purpose vehicle ("SPV") without any assets or business. The owner granted a short lease of each property to the SPV intending that that company would become the owner of the property and liable for NDR. Under one scheme the SPV was immediately put into members' voluntary liquidation so that the company could rely upon an exemption from rates during the winding up. The period until the lease was disclaimed by the liquidator was deliberately prolonged. Under the second scheme the SPV was dissolved, whereupon the lease, along with the accompanying liability for rates, vested in the Crown as *bona vacantia*. There might then be a considerable delay before the billing authority discovered the dissolution and prompted the Crown to disclaim the lease. Under either scheme disclaimer of the lease would result in the registered owner becoming entitled to possession again, whereupon it could set up another SPV and repeat the process. If the registered owner found a tenant to occupy the premises, it would terminate the lease to the SPV and that new tenant would pay NDR on the occupied hereditament.

33. It was common ground that the schemes were not shams. As a matter of property law they did genuinely confer an entitlement to possession upon the SPVs. It was also common ground that the sole purpose of the leases was to avoid liability to pay NDR and that they had no business or other "real world" purpose [5].

34. The Supreme Court dealt with the *Ramsay* principle at [9] to [17]. The principle is based upon the modern purposive approach to the interpretation of all legislation, a matter of central importance. The court's task is to give effect to Parliament's purpose as revealed by the language of the provision in question read in the context of the statute as a whole including its scheme ([9] to [10]).

35. A transaction which is otherwise effective to achieve a tax advantage is not to be treated as ineffective, simply because it was undertaken to avoid tax. But the general expectation is that Parliament does not intend to exempt from tax a transaction "which has no purpose other than tax avoidance". So the *Ramsay* principle may result in the whole or part of a transaction being disregarded which has no business purpose and is solely aimed at the avoidance of tax [11].

36. Sometimes the *Ramsay* principle is applied to a scheme aimed at tax avoidance which involves a series of steps planned in advance. It is necessary to consider not just the steps individually, but the scheme as a whole. Although the issue may be whether a statutory provision applied to a transaction which occurred, or a state of affairs which existed, at a particular point in time, the fact that it formed part of a preconceived plan

which includes other steps may well be relevant to whether that transaction or state of affairs "falls within the statutory description, construed in the light of its purpose". The *Ramsay* principle does not require that the other steps were bound to happen, only that they were planned to happen at the time when the first step in the sequence took place and did in fact happen [12].

37. The essence of the approach is that the court gives the statutory provision a purposive interpretation to determine the "nature of the transaction to which it was intended to apply" and then decides whether the actual transaction, which may involve considering the overall effect of a number of elements intended to operate together, "answered to the statutory description" [13]. The House of Lords and the Supreme Court have approved the following helpful statement by Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Limited* [2003] HKCFA 52; 6 HKCFAR 517:

> "the driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, *viewed realistically.*" (emphasis added)

38. In deciding whether a statutory provision imposes a charge, or grants an exemption from a charge, the *Ramsay* principle involves two components: ascertaining (1) the class of facts (including transactions) intended to be affected by that provision and (2) whether the facts of the case fall within that class, or whether they answer to the "statutory description" [15].

39. The purpose of the rating of unoccupied hereditaments is to stop owners leaving their property vacant to suit their own convenience or financial advantage; it is to encourage owners to bring empty property back into use ([23] to [24]). The aim of deterring owners from leaving property unoccupied for their own advantage and encouraging them to bring empty property back into use for the benefit of the community at large is also reflected in the exceptions to liability and in the zero-rating schemes for charities and certain amateur sports clubs. The rationale for those exceptions is that "the owner" (i) may be unable to bring the property back into occupation, or (ii) has a reasonable excuse for not doing so, or (iii) is making some other valuable contribution to society ([25] to [27]).

40. Although, as a matter of title, the person entitled to possession of real property has the legal right to enjoy the property, whether through personal occupation or by putting others into possession or occupation as tenants or licensees [28], the relevant question is who really has control of the property, including its letting [29]. On the question why is the liability to pay NDR on unoccupied property imposed on the person entitled to possession, the Supreme Court gave this answer at [30]:

> "But in relation to the central purpose of providing an incentive to bring unoccupied property back into use, the intention is clear. It focuses the burden of the rate precisely on the person who has the ability, in the real world, to achieve that objective."

The emphasis again is on the court looking at the circumstances of a case with realism.

41. The Supreme Court accepted that in "a normal case" the person who, as a matter of the law of real property, has the immediate legal right to "actual physical possession" of the property is the "owner" for the purposes of ss. 45(1) and 65(1) of the LGFA 1988. That accords with the legislative purpose of imposing the liability for NDR on the person who controls whether the property is left unoccupied as an incentive to bring the property back into use for the benefit of the community [47].

42. At [49] the Supreme Court stated:

> "In our view, Parliament cannot sensibly be taken to have intended that "the person entitled to possession" of an unoccupied property on whom the liability for rates is imposed should encompass a company which has no *real or practical ability to exercise its legal right to possession and on which that legal right has been conferred for no purpose other than the avoidance of liability for rates.* Still less can Parliament rationally be taken to have intended that an entitlement created with the aim of acting unlawfully and abusing procedures provided by company and insolvency law should fall within the statutory description." (emphasis added)

43. Thus, the ratio of *Rossendale* is that the "owner" of a hereditament for the purposes of s.65(1) of the LGFA 1988 is the person who has the immediate legal right to actual physical possession of that property, unless, in the circumstances of the case, he or she has no real or practical ability to exercise that right, so as to bring the property back into use, and has only been granted that right for the purpose of avoiding liability for NDR (see also [60] and [61]).

44. Counsel told us that some advocates and courts read *Rossendale* as applying the *Ramsay* principle in circumstances which are "unusual" and not in "ordinary" cases. The concept of an "unusual" case has therefore been treated as a filter which must be satisfied before the principles in *Rossendale* may be applied. As a result there have been arid debates about what may constitute "ordinary" or "unusual" circumstances. All this involves a misreading of the Supreme Court's decision (including [61]). The correct principle is that stated in [43] above. It is self-evident that (i) a person with the legal right to possession of property will ordinarily have the real and practical ability to exercise that right and to bring a property back into use and (ii) it will be unusual for such a person to lack that ability. The Supreme Court's use of the words "ordinary" and "unusual" went no further than that.

45. Similarly, it is wrong to treat the last sentence of [49] of *Rossendale* as deciding that a grant of legal right to possession (e.g. to a tenant) will only be treated as falling outside s.65(1) where the arrangement involves acting unlawfully and abusing company and insolvency law procedures. The last sentence of [49] simply emphasises *a fortiori* that the SPV schemes in *Rossendale* fell outside the proper scope of an entitlement to possession for the purposes of ss.45(1) and 65(1) of the LGFA 1988. That is clear from the opening words "Still less…".

46. We were also told that some practitioners and courts read *Rossendale* as deciding that a person granted a legal right to possession of property does not lack the real and practical ability to bring it back into use unless the six features of the SPV schemes

identified in [46] are present. That is wrong. Those six matters are not a checklist or a set of criteria for determining in any case coming before the courts whether the principle in *Rossendale* applies. This goes back to the straightforward distinction drawn in [15] between the interpretation of the statutory provision in question and its application to the facts of a particular case. In [43] above, I set out the legal principle laid down in *Rossendale* for the correct interpretation of the legislation. *Rossendale* at [46] simply summarises an analysis of the circumstances of the two schemes in that case to which s.65(1), as interpreted by the court, was applied (see e.g. [48]).

47. This is also made clear in the judgment at [59]:

> "In a similar way 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. The fact that the property is by definition unoccupied means, as Henderson LJ said, that there is no scope for identifying as the owner anyone in actual occupation. But it does not preclude asking the question whether a lease granted as part of a scheme for tax avoidance having the characteristics set out in para 46 above confers an entitlement to possession in the relevant real and practical sense, so as to identify the lessee as the owner for the purposes of the liability for business rates. If it does not do so, in particular because, under the scheme, there is no question of the SPV being able to exercise any of the attributes of a person with an entitlement to possession, and in particular to bring the premises back into occupation by itself or by anyone else, then the lessee under that lease will not be the owner. The landlord, as grantor of the lease, will be the owner, because the landlord will not by the grant of the lease have transferred to the lessee a real entitlement to possession."

The beginning of that paragraph restated the court's interpretation of the legislation. The judgment then referred to the characteristics of the SPV schemes in [46] simply for the purposes of deciding whether the circumstances of those cases satisfied the test in ss.45(1) and 65(1) (see also [62]).

The tenancies at will

48. The two tenancies at will were in substantially the same form.

49. Clause 1 described the permitted use as:

> "An office or warehouse or storage or event space or for charitable events and any use sui generis with such events or for any use that the Landlord from time to time permit."

50. Clause 2.1 granted a tenancy at will to STHY from the date of the agreement, terminable at any time (clause 2.2) by a written notice served in accordance with the provisions in clause 2.3.

51. Clause 3.2 imposed an absolute prohibition on the tenant assigning, underletting, charging, parting with or sharing possession of, or otherwise disposing of, the demised property or any part thereof. It also prohibited the tenant from sharing occupation of the property or any part of it save with the landlord's consent.

52. Clause 3.3 required the tenant to keep the property clean and tidy and to make good any damage it caused to the property during occupation, but added that the tenant had no obligation to maintain the property when out of occupation.

53. Clause 3.7 allowed the appellant an unusually broad right of access to the property during the duration of the tenancy:

> "The tenant shall allow the Landlord (and all others authorised by the Landlord) to enter the Property at any reasonable time for the purpose of ascertaining whether the terms of this agreement are being complied with and for any other purposes connected with the Landlord's interest in the Property."

The District Judge's decision

54. The whole of the warehouse/office property was transferred to the appellant on 7 June 2021 [DJ 17]. The mechanism relied upon by the appellant for transferring liability for NDR were the two tenancies at will dated 7 June and 9 November 2021 corresponding to the two hereditaments then entered on the local rating list ([DJ 25] and [DJ 33]).

55. The district judge stated at [DJ 68] to [DJ 74] that, in accordance with *Rossendale*, the test he had to apply was whether, during the period for which SCC sought a liability order, STHY had a real and practical entitlement to possession of the property ([DJ 70] to [DJ 72]). The judge said at [DJ149] that the analysis of the features of the SPV schemes in *Rossendale* at [46] "might assist" him to reach a conclusion on the application of that test in this case, but he did not treat those matters as determinative (see [DJ 74] and [DJ80]). However, in order to avoid any unnecessary misunderstanding of his reasoning, it would have been better if the judge had not used the word "criteria".

56. For the duration of the tenancies the appellant demolished an office building and carried out works of alteration, so as to reconfigure the two hereditaments in existence on 7 June 2021 to form four hereditaments by 3 November 2022. The appellant terminated the tenancies at will on 3 November 2022 (see [DJ56] and paras.7 to 8 of the witness statement of Ms. Weldon, the Business Rates Manager for MCR Property Group of which the appellant formed a part). The appellant then granted new occupation leases to new tenants [DJ 117].

57. The appellant submitted an application for planning permission on 17 August 2021, shortly after becoming the owner of the property, for the demolition of an office building. The demolition works were to start on 20 September 2021 and be completed

by 9 November 2021. On 27 August 2021 the appellant submitted a second application for planning permission for the alteration and refurbishment of the warehouse premises. A further application for extensive renovations was made on 25 November 2021. This was a planned enterprise which predetermined the future use of the property. Commercial tenants were lined up ([DJ 127] to [DJ 129] and see Stephen Foster's first witness statement on behalf of SCC).

58. On 14 September 2021 the site was secured by a steel fence preventing access (Mr. Foster's first witness statement para.28).

59. The appellant's case in the Magistrates' Court was that it was entitled to enter the premises and carry out the works pursuant to clause 3.7 of each tenancy ([56] to [57]). It submitted that STHY had a real and practical entitlement to the exclusive possession of the property by being able to bring the hereditaments back into occupation, by making space available for charitable events, and by being able to confer rights of occupation on someone else [DJ 77]. SCC's case was that the demolition and extensive works of alteration showed that the appellant had retained practical control of the property and its future use and had not transferred the real and practical right to exclusive possession to anyone else [DJ 59].

60. The district judge decided that the extent of the demolition and works of alterations was "manifestly inconsistent" with STHY having a right to exclusive possession [DJ 60]. He added that there was no evidence of STHY having ever been consulted by the appellant about the works [DJ 62].

61. The district judge returned to the demolition and conversion works at [DJ 117]. He said that although the appellant had suggested that the demolition and other works "could have been worked around", it had not produced any evidence as to how that had happened (if it had) or could have happened. Given the extent of the work, extensive risk assessments would have been required. The appellant had not produced any evidence of such assessment [DJ 118]. In any event, both parties approached the case on the basis that it was only concerned with the application of s.45 of the LGFA 1988. It was not concerned with the application of the legislation dealing with partly unoccupied hereditaments (see s.44A). The district judge pointed out that s.45 applies where a person is the "owner" (i.e. the person entitled to exclusive possession) of the whole of the hereditament (s.45(1)(b)). That requirement for STHY to have been in possession of the whole of the hereditament could not have been satisfied [DJ 119]. The extensive demolition and other works undermined any suggestion that STHY would have been able to make use of the property.

62. The district judge dealt with the suggestion that STHY had organised charitable events in the premises at [DJ 93] to [DJ 105]. One food bank event was said to have taken place on 31 July 2023 but that postdated the end of the chargeable period (2 November 2022), once the four new hereditaments had been created, and was irrelevant. The appellant had also said that one book event took place on 2 September 2022. But the judge decided that no supporting evidence had been produced. Instead, the sparse evidence before the court appeared to have been "manufactured" *ex post facto.* The judge found that STHY never arranged for any events to be held during the relevant period ([DJ 100] to [DJ 105]). The appellant had not sought to obtain any evidence from STHY to show that it made any use of the property or had a role in bring it back

into use ([DJ 94] and [DJ 112] and see also second witness statement of Carol Allen, Chief Financial Officer of MCR Property Group at para. 21).

63. The district judge addressed the issue of who in reality had the practical ability to determine what happened to the property and who really had control over its letting (that is bringing the property back to use) at [DJ 124] to [DJ 138].

64. The judge pointed out that by definition a tenancy at will provides no security of tenure to the tenant [DJ 124]. He found that the chronology of the redevelopment of the property, the appellant's lining up of commercial tenants and the carrying out of demolition works represented powerful evidence that the appellant continued to treat the property entirely as its own and not as if it had transferred a real and practical entitlement to possession to STHY. That was reinforced by the appellant's reliance upon clause 3.7 of the tenancy agreements ([DJ 126] to [DJ 131]). Even so, clause 3.7 could not justify the part demolition of demised premises [DJ 133].

65. The judge concluded that the appellant's approach to STHY's rights and obligations under the tenancies at will indicated that there was no intention for the tenant to use the property or to bring it back into occupation in line with the purpose of the legislation. STHY had no role in bringing the hereditaments back into use ([DJ112] and [DJ122] to [DJ123]). Based upon his earlier findings the district judge decided that STHY had no real interest in what happened to the property. The practical ability to decide whether or not the property should remain unoccupied remained with the appellant which maintained control over the property ([DJ 136] and [DJ 138]). The tenancies at will had been entered into solely for the purpose of avoiding liability for NDR [90].

66. The judge drew the strands together at [DJ 149]. He said:

> "i. The *unusual* features of this case mean that the court can properly look beyond the fact of the TAWs [tenancies at will] to examine more closely the circumstances of whether ownership was transferred in a relevant real and practical sense.
>
> ii. The TAWs were entered into *solely* for the purpose of Emeraldshaw avoiding liability for payment of the business rates.
>
> iii. There is no proper evidential basis by which this court could conclude that the TAW agreements were granted with the *intention* of allowing Space To Help (Yorkshire), as Tenant, to make any use of the premises; or to give STH(Y) a role in the premises being brought back into use.
>
> iv. At all times Emeraldshaw had *control* over the use of the property, and the practical ability to determine what would happen to it.
>
> v. There was never any intention that the business rates would ever be paid.

> vi. The fact of the TAWs did not create a real and practical entitlement either for STH(Y) to occupy the property or to confer a right of occupation on someone else. Neither Emeraldshaw nor STH(Y) were ever, in reality, likely to, or even interested in, bringing the hereditaments back into occupation, in line with the purpose of the legislation.
>
> vii. The TAW agreements did not confer an entitlement to possession in the relevant real and practical sense, envisaged by the Supreme Court."

On a fair reading of the district judge's judgment as a whole, it is apparent that his conclusions rested on the terms of the tenancies at will in the context of the demolition and substantial works carried out by the appellant while those tenancies subsisted, leading to the creation of new units for occupation by new tenants to whom the appellant, not STHY, granted leases.

The appellant's submissions on the *Rossendale* issue

67. I will briefly summarise the appellant's submissions.

68. First, it is submitted that the district judge was wrong to apply the "real and practical" test in *Rossendale.* He erred in law by proceeding on the basis that the court should generally look beyond the law of real property to make a "holistic" enquiry as to whether the tenant's occupation was real and practical. Instead, for the large majority of cases, including the present case, the question posed by s.65(1) is answered simply by applying the law of real property to determine whether the tenant had the immediate legal right to actual physical possession of the hereditament. The "real and practical" test in *Rossendale* is limited to "extreme cases" where, for example, landlords seek to abuse procedures provided by company and insolvency law.

69. Second, the district judge's reasoning was "bare and conclusory". It did not explain why this was an unusual case.

70. Third, the analogy drawn by the district judge between the structure of regional Space to Help companies and the SPVs in *Rossendale* was unsubstantiated [DJ 145] to [DJ 146].

71. Fourth, even if this was an unusual case so that the real and practical test was applicable, the district judge's application of that test was unsupportable:

    (1) The judge was wrong to place significant weight on the sole purpose of the agreement being to avoid paying NDR (see e.g. [DJ 74] and [DJ 90]). That was irrelevant to the proper interpretation of the statutory scheme (see Kerr J in *R (Principled Offsite Logistics Limited) v Trafford Council* [2018] EWHC 1687 (Admin) at [118)]);

    (2) The district judge was wrong to find that the tenancies at will were not granted with the intention of allowing STHY to make any use of the property or to bring it back into use. There is nothing unusual about a tenant going in and out of occupation in a minimal way;

(3) The carrying out of the "renovation works" during the lifetime of the tenancies was consistent with clause 3.7 of the agreements. What happened was not unusual;

(4) Tenancies at will are common throughout the country. The judge took into account the ability of the appellant to terminate the tenancy on immediate notice, but ignored the ability of STHY to do the same. The fact that an arrangement is a tenancy at will does not give the landlord control of the property for the purposes of s.65(1) of the LGFA 1988.

Ground A - the *Rossendale* issue

72. I have analysed the *Rossendale* decision in [30] to [47] above. A major part of the appellant's case is based on a misreading of that authority. There is no requirement for the court to be satisfied that the circumstances of a case are unusual before it is permissible to apply the *Rossendale* test referred to in [43] above.

73. The district judge did not proceed on the basis that he should put to one side the law of real property to make a "holistic" enquiry as to whether the tenant's occupation was real and practical. Instead, at [DJ 124] the judge asked himself a question which Mr. Collings accepted was relevant in this case: in reality did STHY have the practical ability to determine what happened to the property and could therefore be regarded as "the owner"; did it have control over the letting of the property? In doing so the judge paid careful attention to the terms of the tenancies.

74. No criticism can be made of the judge for saying that a tenancy at will provides no security of tenure and is usually only suitable for temporary short-term use. He was then entitled to say that the tenancies had to be seen in the context of the circumstances of this case, the project for the redevelopment (including part demolition) of the two hereditaments to produce four units in place of the two let to STHY. The appellant acted on the basis that the wording of clause 3.7 of the tenancy agreements had enabled it to enter the premises to carry out those extensive works.

75. The district judge summarised the circumstances of the redevelopment project at [DJ 124] to [DJ 138] having in mind, no doubt, the evidence to which he had already referred in his judgment and his earlier findings. He cannot be criticised for merely having said in [DJ 137] "this is a holistic picture". He was not substituting some improper test for that laid down in *Rossendale*.

76. The evidence before the district judge on the redevelopment project and on what occurred during the period of unpaid NDR provided an ample basis for the judge to conclude that STHY had no real and practical ability to exercise the right to actual physical possession of the property or to bring that property back into use. That was a matter of judgment for the district judge on the material before him. It cannot be argued that he made any public law error in reaching that conclusion. His conclusion was not irrational. His reasoning was not "bare and conclusory".

77. There is an air of unreality about the appellant's case. The redevelopment scheme lasted for roughly the same period as STHY's tenancies at will. It was a scheme carried out, and no doubt paid for, by the appellant (or the group of which it forms a part) and certainly not by STHY. It was carried out so that the appellant could relet

the building following partial demolition and the completion of the new units. The terms of STHY's tenancies enabled the appellant to terminate those rights at will when it was ready to relet the premises to new tenants. The appellant had new commercial tenants ready to take up the new leases and it did take steps to terminate the charity's tenancies when the works were finished. The fact that STHY also had the legal ability to bring its tenancies at will to an end is nothing to the point. In contrast to the appellant's position, its right to terminate the tenancies could not enable it to bring about the occupation of the premises. By exercising that right it would cease to have any interest in the premises. A tenant at will can only sublet while its own interest subsists and may only assign or sublet another tenancy at will. There is no security of tenure. But in any event STHY was prohibited from assigning, or subletting, or parting with or sharing possession of, or otherwise disposing of the demised property or any part thereof (insofar as that property still remained in existence). The appellant's works involved the demolition of the office building, part of the demise to STHY. It has not been suggested that the redeveloped building corresponded to the demise to STHY under either tenancy at will.

78. On the material before the judge, and in these circumstances, I find it difficult to see how a judge could rationally have concluded that STHY did have a real and practical ability to exercise a right to actual physical possession of the property.

79. I see no arguable basis for impugning the district judge's decision to make a liability order because of the analogy he sought to draw between the Space to Help companies and the SPV in the company dissolution scheme in *Rossendale.* Paragraphs [DJ 145] to [DJ 146] were in no way necessary to the judge's reasoning in any event. The same is also true of his reliance upon the fact that STHY had not been registered as a charity with the Charity Commission. Those points do not provide any basis for impugning the judge's application of the "real and practical ability" test in *Rossendale* and his conclusion that the tenancy arrangements with STHY from their inception to their end had no purpose other than to avoid liability for NDR.

80. Given the district judge's unimpeachable reasoning, it is untenable for the appellant to complain that the judge erred by placing significant weight on his conclusion that the *sole* purpose of the tenancy agreements was to avoid liability for NDR. Such a finding forms a significant and integral part of the test laid down in *Rossendale* (see [43] above). The judge applied both parts of that test. He did not simply decide that the agreements served no purpose other than to avoid liability for NDR. He also decided that STHY had no real and practical ability to exercise the right to actual physical possession of the two hereditaments let to it or to bring them back into use.

81. Here, the appellant's argument gains no support at all from the following statement of Kerr J in the *Principled Office Logistics* case at [118]:

> "The modern cases on rates avoidance schemes – such as *Makro, PAG Management Services Ltd* and *Rossendale* – stand for the proposition that where transactions are genuine and mean what they say, their meaning and effect, and the general law, must not be distorted or manipulated in the name of morality, so as to prevent avoidance of rates in circumstances where the statutory provisions provide for no rates to be payable."

The application of the *Ramsay* principle to schemes for avoiding liability for NDR, in particular on unoccupied property, was not in issue in that case and the judge's statement predated the decision of the Supreme Court in *Rossendale*. In any event, the *Ramsay* principle is a principle of statutory interpretation based on the identification of the purpose of the legislation in question. The application of that principle does not in any way involve the court distorting or manipulating the meaning and effect of a transaction or arrangement "in the name of morality".

82. For all these reasons, I conclude that ground A is wholly unarguable.

Ground B – the sham issue

83. In view of the conclusion I have reached on ground A, this ground does not arise for decision. However, in order to assist courts at first instance and litigants I will refer to two matters.

84. First, the concept of a sham is very specific and somewhat narrow. In *Snook v West Riding Investments Limited* [1967] 2 QB 786 Diplock LJ (as he then was) laid down at p.802 the classic formulation for deciding whether a transaction, document or acts are a sham:

> "it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v. Maclure* and *Stoneleigh Finance Ltd. v. Phillips*), that for acts or documents to be a "sham," with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived."

Likewise, the Supreme Court stated in *Rossendale* at [36]:

> "For a transaction or document to be characterised as a sham in English law, it is necessary to show that the parties intended that the transaction or document should not actually create legal rights and obligations but should merely appear to do so, with the object of deceiving third parties."

85. Second, the Supreme Court reiterated at [36] that "tax avoidance is the spur to executing genuine documents and entering into genuine arrangements", that is documents and arrangements which are not a sham (citing *Inland Revenue Commissioners v McGuckian* [1997] 1 WLR 991, 1001G and *UBS AG v Revenue and Customs Commissioners* [2016] UKSC 13; [2016] 1 WLR 1005 at [67]. As Lord Reed JSC stated in *UBS*, the *Ramsay* line of authority has nothing to do with the concept of a sham as defined in *Snook.* Instead, in *Rossendale* the requirement to review the facts in the round, called for the examination of the other elements of the schemes, all of which were pre-planned and designed purely for the avoidance of rates without any

business or other purpose [36]. The same thinking appeared later on in *Rossendale* at [46] where the court said: "the leases were not shams and created genuine legal rights and obligations". In other words, when the *Ramsay* principle and *Rossendale* are applied, the billing authority is not required to show that the relevant transactions were a sham.

Ground C - Section 31(3C) and (3D) of the Senior Courts Act 1981

86. As I have already noted, it is common ground that ground C does not arise unless the issues raised by both grounds A and B are arguable. In my judgment the *Rossendale* issue in ground A is unarguable and so ground C cannot succeed.

Conclusion

87. For these reasons I would dismiss the appeal and uphold the decision of HHJ Klein refusing the appellant permission to apply for judicial review of the defendant's decision dated 21 March 2024.

Lady Justice Falk

88. I agree.

The President of the Family Division

89. I also agree.