Neutral Citation Number: [2022] EWHC 39 (Admin)

Case No: CO/3173/2021

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

Cardiff Civil Justice Centre
2 Park Street
Cardiff CF10 1ET

Date: 18th January 2022

Before:

Mr Justice Eyre

- -

Between :

1) QUEEN STREET PROPERTIES LIMITED	**Appellants**
2) 18 CHURCHILL WAY LIMITED	
- and -	
CARDIFF CITY AND COUNTY COUNCIL	**Respondents**

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- -

Rowena Meager (instructed by way of **direct access**) for the **Appellants**
Chris Royle (instructed by **Wilkin Chapman LLP**) for the **Respondent**

Hearing date: 19th November 2021

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Judgment

Mr Justice Eyre :

Introduction.

1. Mr. Philip Ryan is the sole director of and shareholder in each appellant. The respondent council issued summonses against each appellant seeking liability orders in respect of unpaid non-domestic rates. The summonses were heard together by District Judge Khan on 18th and 19th May 2021.

2. By his reserved judgment of 9th June 2021 the district judge held that the First Appellant was the rateable occupier of and liable for the unpaid non-domestic rates in respect of 105 – 107 Queen Street, Cardiff ("the Queen Street Property") for periods from 25th June 2018 to 31st March 2020. He also found that the Second Appellant was the rateable occupier of and liable for the unpaid non-domestic rates in respect of 18 Churchill Way, Cardiff ("the Churchill Way Property") for periods from 14th August 2018 to 31st March 2020.

3. The Appellants appeal by way of case stated against those decisions. In essence the Appellants say that while the district judge may have stated the law correctly he failed to apply it correctly and that as a consequence the approach he adopted was wrong in law. The case stated prepared by the district judge was dated 31st August 2021 and provided to the parties on 6th September 2021.

The Factual Background.

4. As will be seen there is a marked similarity between the cases of each appellant but those cases are to be considered separately.

5. Queen Street Properties was the lessee of the Queen Street Property at all relevant times. Since December 2014 those premises had operated as a fish and chip shop trading under the style "Parc Lane Traditional Fish & Chips". Queen Street Properties' case was that it was not the rateable occupier but that the rateable occupier for the periods with which the district judge was concerned was Parc Lane Restaurant Ltd. That company's occupation was said to have been pursuant to a Management Agreement and Licence between it and Queen Street Properties dated 25th June 2018. Parc Lane Restaurant was, like each appellant, a company of which Mr. Ryan was the sole director and shareholder. It was dissolved through the compulsory striking off procedure under section 1000 of the Companies Act 2006 on 17th September 2019.

6. The Council said that Queen Street Properties had been in rateable occupation throughout. It contended that the references to Parc Lane Restaurant were simply ruses to avoid liability and that the purported licence was a sham created to support this subterfuge.

7. 18 Churchill Way was at all relevant times the lessee of the Churchill Way Property. Its case was that the rateable occupier for the material periods was CW18 Trading Ltd. That again was a company of which Mr. Ryan was the sole director and shareholder. Its occupation was said to have been pursuant to a Management Agreement and Licence dated 14th August 2018. That company was also dissolved under the section 1000 procedure with the dissolution and striking off in its case being on 17th November 2020.

8. As with the Queen Street Property the Council said that 18 Churchill Way had been in rateable occupation of the Churchill Way Property throughout with the references to CW18 Trading being disingenuous and with the purported licence being a sham.

9. At the trial the Council's evidence came from its Principal Rating Officer, Caroline Dulson. Miss. Dulson exhibited various documents about the properties and the history of Mr. Ryan's directorships and his dealings with the Council. Miss. Dulson attended the hearing and was cross-examined.

10. Mr. Ryan had made a witness statement in respect of each property. Each statement had exhibited sundry documents. In the case of the Queen Street Property the exhibited documents had included a number of invoices, receipts, and related trading documents in respect of the fish and chip business. Mr. Ryan did not attend the hearing. The day before the hearing an email had been sent to the court on behalf of Queen Street Properties saying that Mr. Ryan had been subject to pressure on his health and that the Appellants (as they have become) "believe that it would be injurious to and upon the health and well-being of Mr. Ryan to endure the hearing, the benefit being outweighed by the detriment". No medical evidence was advanced in support of that explanation and Miss. Meager did not seek an adjournment. The district judge continued with the hearing in Mr. Ryan's absence on the basis that he had made an informed decision not to attend. Mr. Ryan's witness statements were admitted in evidence but as will appear in the absence of Mr. Ryan and given that Mr. Ryan was not cross-examined on the statements little weight was attached to them.

The District Judge's Judgment and the Parties' Contentions in Outline.

11. The district judge's reserved judgment running to 39 pages and 166 paragraphs was handed down on 9th June 2021.

12. The district judge set out the relevant provisions of the Local Government Finance Act 1988. He identified the test of rateable occupation as being that described by Tucker LJ in *John Laing & Son Ltd v Assessment Committee for Kingswood Assessment Area* [1949] 1 KB 344. He noted that the burden and standard of proof were to be applied in accordance with the approach laid down in *Ratford v Northaven DC* [1987] 1 QB 357. The district judge summarised the effect of that as being that once the Council had proved that the rate had been duly demanded and not paid the burden was on the respondent to the summons to show it was not in occupation though depending on the evidence produced the burden might then shift back to the Council. The district judge noted, at [20], Mr. Royle's acceptance on behalf of the Council that even when premises were occupied there was no presumption that the owner is the occupier. In that regard the district judge quoted Buckley LJ's judgment in *Southwark LBC v Briant Colour Printing Co Ltd* [1977] 1 WLR 942 at 960 rejecting the proposition that there was such a presumption and saying that:

> "…in my view no such presumption exists, unless it be purely a presumption of fact, that is to say, an inference which can be drawn from the fact that the owner is the owner of the property, when there is nothing to indicate that he is not the person in occupation of it: but that is merely a circumstance which has to be taken into account in conjunction with all the other relevant circumstances of the case, and the question who is in occupation has to be answered as a question of fact in the light of all those relevant circumstances."

13. I note at this stage that the Appellants do not disagree with the district judge's statement of the law in this respect but they do say that the approach he in fact took did not accord with his correct recital of the law.

14. The district judge then identified the authorities which he regarded as governing his approach to the question of whether the purported licences were shams. He said that the test to be applied was that enunciated by Diplock LJ in *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786 at 802 and explained, by reference to *National Westminster Bank plc v Jones* [2001] 1 BCLC 98 and *Hitch v Stone* [2001] EWCA Civ 63, that he did not accept Miss. Meager's submission that his analysis was to be confined to a consideration of the documents themselves without regard to the surrounding circumstances.

15. The district judge first addressed the Churchill Way Property. He considered Miss. Meager's argument that by her answers in cross-examination Miss. Dulson had accepted that CW18 Trading may have been in occupation at the relevant times. The district judge concluded that this had not been an acceptance by Miss. Dulson that that company had been in rateable occupation. He explained that he regarded as relevant the Council's evidence as to the history of previous companies based at the Churchill Way Property and as to the history of the directorships held by Mr. Ryan. The Council had said that these demonstrated a pattern of companies being formed and then dissolved as a way of avoiding sums properly due as tax. The district judge said that this history was relevant to his assessment of the "credibility of the documents produced by Mr. Ryan".

16. The district judge noted that Mr. Ryan had not explained the nature of CW18 Trading's business and that there was a paucity of documents in relation to that company. At [57] he said:

> "… there are no accounting records as are required under the Companies Act 2006, s.386. There is no evidence of how any such utility bills were paid. There is no evidence from any member of staff that worked for CW18 Trading Ltd. There is no payroll evidence; there are no employment contracts; there are no bank statements."

17. At [58] the district judge noted that Mr. Ryan was the sole director of CW Trading and said that it would have been "entirely reasonable and practicable" for Mr. Ryan to have produced such documentation. The absence of any of those documents was crucial to the district judge's conclusion which was set out in these terms:

> "59. A proper inference is that the documents that I have identified do not exist. I am of the view that CW18, given the paucity of the evidence, were not in actual occupation of the property. As a result, the licence to occupy is rendered meaningless.
>
> 60. This is a case where the burden is on the Respondent to prove CW18 was in actual occupation, on balance of probabilities. The Respondent does not come close to satisfying that burden.
>
> 61. The fact that the Respondent is entitled to possession (a fact accepted by Mr Ryan on behalf of the Respondent); and the fact that the property is occupied, leads me to the conclusion that the Respondent is in actual occupation for the purposes of the first ingredient of the common law test set out in *Laing*."

18. Next, the district judge explained that he was satisfied that the evidence of gas bills relating to the premises in the names of different companies was because 18 Churchill

Way had given those names to the gas supplier. He was satisfied that 18 Churchill Way's occupation had been exclusive. The district judge took the view that there did not appear to be any issue about the other elements of the *Laing* test and he stated in short terms his view that those requirements had been met.

19. The district judge then addressed the question of whether the purported licence to CW18 Trading was a sham. Before engaging on that exercise he explained that he was not convinced it was necessary on the facts of the case given his finding that 18 Churchill Way had been in actual occupation. He dealt with the question of sham at the invitation of both parties.

20. The district judge concluded that the purported licence was a sham. He explained the factors which had led him to that conclusion. Most important was the fact that the licence provided for a weekly rental of £1,100. This would equate to an annual fee of £57,200. The argument for 18 Churchill Way was that this was a typing error but the district judge took the view that if the licence had been a genuine contract such an error would have been noticed. He agreed with Miss. Dulson's evidence that this showed the licences being "rolled off without scrutiny, or intending them to be adhered to". In addition the district judge was influenced by the fact that the licence had been signed on behalf of 18 Churchill Way by a person other than Mr. Ryan with the identity of that signatory not being stated. The district judge took the view that "the purpose of the different signature was an attempt to suggest the agreement was one conducted at arm's length and, therefore, genuine". Finally, the district judge had regard to matters outside the document. He took account of his finding of fact that CW18 Trading had not been in actual occupation. In addition he took account of the history of other companies of which Mr. Ryan had been a director saying that it showed "a pattern of limited companies being set up, taking a licence to occupy and then being dissolved. This repeating process has every appearance of being a tax avoidance scheme." He said that in considering the true intention of the parties to the licence he had regard to "this pattern of cyclical incorporation and dissolution" and to the apparent absence of any assets or income of CW18 Trading.

21. It was common ground that a fish and chip shop had operated from the Queen Street Property. Rather more documentation had been provided in respect of those premises than had been the case with regard to the Churchill Way Property and the district judge considered the documents in turn. He noted that some carried rather more weight than others particularly when Mr. Ryan had not attended to enable him to be questioned about their context. The documents included some documents from Parc Lane Restaurant. However, in the view of the district judge that documentation was partial. He noted that some parts of that company's bank statements but not others had been provided and found that, in the absence of explanation from Mr. Ryan, the only sensible explanation for the partial disclosure was that the undisclosed documents or parts of documents would have undermined Queen Street Properties' position. Moreover, in the view of the district judge those documents which had been produced raised a number of questions as to Queen Street Properties' contentions. He concluded that the limited evidence of payments being made to the landlord of the premises by Parc Lane Restaurant suggested that Queen Street Properties was in actual occupation and that the payments were being made on its behalf.

22. At [147] and following the district judge explained that the force of the evidence which had been provided to him on Queen Street Properties' behalf was "significantly

undermined by the selective nature of the disclosure, as well as the gaps and the flaws" which he had identified in it. He regarded the fact that occupation of the premises had continued after the striking off of Parc Lane Restaurant as posing a fundamental difficulty for Queen Street Properties' position. He noted Queen Street Properties' failure to produce supplier contracts for the period after the dissolution of Parc Lane Restaurant and said that this pointed to "the real position" which was that Queen Street Properties "was always in actual occupation; Parc was set up to avoid business rates but with insufficient regard to legal and practical requirements underpinning those arrangements. That is the only logical explanation for the Respondent's disclosure failings." The district judge commented further on the absence of the records or minutes which would have been expected to exist if Parc Lane Restaurant had been an active company in occupation of these premises. That led to the conclusion, at [154], that Queen Street Properties had failed to prove that Parc Lane Restaurant was in actual occupation of these premises.

23. The district judge summarised his conclusion thus at [155]:

> "The very natural inference from the Respondent's right to possession of the hereditament is that it was in actual occupation. This inference is further supported by the selective disclosure; the muddled documentation; the payments between companies; and the Respondent's liability to pay what seems to be a significant amount of rent. I am satisfied, during the relevant periods of rateable occupation, that it was the Respondent that was in actual occupation, and its actual occupation satisfies the first ingredient as set out in *Laing*."

24. He then explained in short terms his conclusions that the occupation was exclusive for the purposes of Queen Street Properties and that the other requirements of the *Laing* test had been met.

25. The district judge then turned to address the question of whether the purported licence was a sham referring back to the explanation he had given for addressing that question in relation to the purported licence of the Churchill Way Property.

26. This licence was also found to be a sham. Again the district judge took account of the signing of the licence by an unidentified person on behalf of Queen Street Properties and of the fact that the licence fee was stated to be £7,500 per week which was again said by Mr. Ryan to have been a typing error. In respect of this licence the district judge also took account of the fact that the sales particulars which had been put in evidence described an established business as being for sale. He took this as revealing that there was indeed an established business but that it was being conducted by Queen Street Properties. The district judge had regard to the striking off of Parc Lane Restaurant as an indication that it "was never formed to be a real business".

The Case Stated.

27. The case stated by the district judge posed four questions:

> "1) Was I entitled to find that 18 Churchill Way Limited was in actual occupation of 18 Churchill Way for the purposes of rateable occupation?
>
> 2) Was I entitled to find that any licence between 18 Churchill Way Limited and CW18 Trading Limited was a sham?

> 3) Was I entitled to find that Queen Street Properties Limited was in actual occupation of 105-107 Queen Street for the purposes of rateable occupation?
>
> 4) Was I entitled to find that any licence between Queen Street Properties Limited and Parc Lane Restaurant Limited was a sham?"

28. My powers are laid down thus in section 28A (3) of the Senior Courts Act 1981:

> The High Court shall hear and determine the question arising on the case (or the case as amended) and shall—
>
> (a) reverse, affirm or amend the determination in respect of which the case has been stated; or
>
> (b) remit the matter to the magistrates' court, or the Crown Court, with the opinion of the High Court,
>
> and may make such other order in relation to the matter (including as to costs) as it thinks fit.

The Approach to be taken to determining Rateable Occupation.

29. It is common ground that the crucial question in determining whether the Appellants are liable on the summonses is whether they were in rateable occupation of the premises in question. It is also common ground that the test for rateable occupation is that laid down by Tucker LJ in these terms in *John Laing* at 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."

30. Each of those four elements must be established. In the circumstances of this case there was little controversy about the third and fourth and in reality the case turns on the first element with the question being whether the Appellants were in actual occupation of the properties in question.

31. As explained in *Ratford* the burden is on the Council to show that the rate in question has been duly published and demanded and that it has not been paid. When that is shown the burden falls on the respondent to a summons to show sufficient cause why it should not pay the rate in question. That, however, is a swinging burden in the sense that the evidence advanced by a respondent may mean that the rating authority in question becomes called upon to disprove inferences arising naturally from such evidence.

32. The question of actual occupation is a matter of fact which is to be determined in the light of the relevant factual circumstances. Actual occupation is different from ownership and from the legal right to possession of particular premises. It follows that there is no presumption of law that the owner is the rateable occupier of occupied premises in the absence of other explanation. That is the consequence of the passage from Buckley LJ's judgment in *Southwark LBC v Briant Colour Printing Co Ltd* which was quoted by the district judge and which appears at [12] above. Nonetheless the fact that premises are occupied; that a particular person is the owner and so entitled to possession; and the absence of evidence of an occupier other than the owner are

potentially relevant circumstances. In an appropriate case the court is entitled to infer from those matters that the owner is in actual occupation for the purposes of liability to rates. The circumstances of each case must be considered but in an appropriate case such an inference can arise naturally or as a *prima facie* explanation of the circumstances. In that regard it is helpful to note Buckley LJ's consideration in the *Briant* case of the decision of Widgery J in *Liverpool Corporation v Huyton-with-Roby UDC* 10 RRC 256. At 957 E – F Buckley LJ said:

> "He [Widgery J] appears to have treated ownership as the basis of a presumption of a special kind, particularly applicable to rating law. Speaking for myself, I would take the view that it is no more than a feature of the facts of any particular case to be taken into account with all other relevant facts in determining, on an overall view, who is in actual occupation. While I think that *Liverpool Corporation v. Huyton-with-Roby Urban District Council* may have been properly decided on its facts, I consider, with deference to Widgery J, that he was mistaken in treating ownership, as he appears to have done, as giving rise to any presumption of occupation by an owner, beyond the limited scope of a "presumption of fact," which reduces the significance of ownership to that of one of the circumstances of the case to be taken into account in deciding who on the balance of probabilities is in actual occupation."

33. It is also relevant to note the terms in which Sir John Pennycuick agreed with Buckley LJ in rejecting the presumption which had been advanced in the *Briant* case. At 961B he said that no such presumption exists and added:

> "The true statement of the law in this respect is that contained in the speech of Lord Atkinson in *Winstanley v. North Manchester Overseers* [1910] A.C. 7, 14: "But owners in possession are prima facie occupiers, unless it be shown that the occupation is in some one else." Nowhere is there reference to rateable occupation. That statement, which has been frequently cited and applied, as I read it simply sets out the prima facie inference to be drawn where a property is occupied and no one other than the owner can be shown to be the occupier. In such circumstances the prima facie inference is that the owner should be regarded as being in occupation. It is an inference, or presumption, which can be rebutted by evidence that the owner is not in fact in occupation."

Was the District Judge entitled to find that 18 Churchill Way Ltd was in Actual Occupation of the Churchill Way Property?

34. Miss. Meager contended that the key to understanding the district judge's approach lay in looking at what he said in his judgment at [60] and [61]. When that was done it was apparent, she said, that rather than making a finding of fact based on the evidence before him the district judge was applying an impermissible presumption based on 18 Churchill Way's ownership of the Churchill Way Property. The district judge failed to explain how the Second Appellant was shown by the evidence to be in actual occupation of that property. In her skeleton argument at [27] Miss Meager characterised the district judge's failing thus:

> "Establishing actual occupation is a question of fact. What is required is for the court to establish that an identifiable party was, by evidence, in actual occupation. It is absolutely clear that the Judge has undertaken no such exercise in respect of A2's alleged actual occupation of the premises. He has simply proceeded on the basis that because A2 was the leaseholder it was entitled to possession and because the premises was, according to R's case, a property that was occupied, it must follow, absent evidence of any other party

> being in actual occupation, that A2 was in actual occupation, despite there being no evidence at all of the same."

35. In addition the Second Appellant argues that the district judge erred in law in his findings as to the other elements of the *John Laing* test. I note that this line of argument was not foreshadowed in the Application to State a Case which addressed solely actual occupation and the alleged error in respect of the first *John Laing* requirement. No point was taken by Mr. Royle for the Council and as the points can be dealt with shortly I will address them though their absence from the application indicates that they were not the true substance of the Second Appellant's concerns. It is said that the district judge's finding that there was exclusive occupation by 18 Churchill Way could not stand in the light of Miss. Dulson's acceptance that CW18 Trading may have been in occupation. There should have been but was not a "reasoned finding of fact" as to how and by whom the property was used. Moreover, the district judge was wrong to approach the case on the basis that there was no issue on the other elements and to say that there was "agreed evidence" in respect of the nature and duration of the occupation.

36. For the Council Mr. Royle emphasised the high hurdle which has to be surmounted before an appellate tribunal can hold that a judge who has stated the law correctly has not applied it correctly. He also pointed out that the district judge had heard the cross-examination of Miss. Dulson. Accordingly, the interpretation of that evidence and of what Miss. Dulson was and was not accepting were pre-eminently matters for him.

37. I am not persuaded by Miss. Meager's critique of the district judge's approach and of his judgment. The judgment is to be read as a whole in the light of the evidence which was before the district judge and of the case as it was presented to him. It is right that a judge who states the law correctly can be found to have applied it incorrectly. Mere recitation of the correct approach does not prevent a judge from falling into the error of actually applying a different approach. Nonetheless the language of any judgment must be read as a whole and particular passages must be seen in the light of those which precede and follow them. Thus the context of passages in which a judge sets out his or her approach to the case in question includes those passages where that judge has explained his or her understanding of the applicable law and the language of the former must be read in the context of the latter.

38. In considering the judgment of District Judge Khan it is important to remember the reality of the hearing before him and the case that was presented to him. The Second Appellant's case was put forward on the basis that the Second Appellant had not been in actual occupation but that CW18 Trading had been in occupation pursuant to a licence granted by the Second Appellant. Having taken its stand on that issue and having made that contention the Second Appellant cannot criticise the district judge for focusing his attention upon it.

39. Here the district judge undertook a detailed analysis of the questions of actual occupation and of whether CW18 Trading was in actual occupation of the Churchill Way Property. Having undertaken that exercise the district judge found that CW18 Trading had not been in actual occupation. The balance of his findings were expressed in short terms but that is not a criticism and in large part is the consequence of the way in which the Second Appellant had advanced its case.

40. In my reading of the judgment [61] does not show the district judge applying an impermissible presumption of law. Rather it shows him drawing a legitimate (indeed the only realistic) inference from those circumstances which remained after his rejection of the case which the Second Appellant had advanced as to the occupation of the property by CW18 Trading.

41. Miss. Meager contends that the district judge's finding of exclusive occupation by the Second Appellant is not based on a reasoned finding of fact. I reject that criticism. At [62] the district judge sets out his findings and his reasoning. That paragraph is to be seen in the context of the preceding detailed analysis of the parties' factual contentions. The district judge was entitled to see the evidence and this issue against the background of his rejection of the Second Appellant's case that CW18 Trading had been in occupation. His findings and reasoning are expressed in short terms but are none the worse for that and the findings were clearly open to him.

42. Similarly the district judge's treatment of the third and fourth requirements was also short but entirely adequate in the circumstances of the case as it had been presented to him. His reference to "agreed evidence" in respect of the nature and duration of the occupation might have been better expressed as an acceptance of Miss. Dulson's evidence in the absence of challenge or as a rejection of the challenge thereto. Nonetheless to the extent that this was an infelicitous turn of phrase it does not show an error of law in a case where the district judge had considered and rejected the Second Appellant's evidence as to occupation and had accepted the evidence advanced by the Council.

43. It follows that there was no error of law in the district judge's finding that 18 Churchill Way was in actual occupation of the Churchill Way Property.

Was the District Judge entitled to find that Queen Street Properties Ltd was in Actual Occupation of the Queen Street Property?

44. The Appellant says that the district judge's approach to the Queen Street Property showed many of the same errors of law as had affected his approach to the Churchill Way Property. In addition Miss. Meager said, at [47] of her skeleton argument, that Miss. Dulson had "failed to separate out the legal tests for rateable occupation, the status of the licence agreement and, whether a transaction or series of transactions amounted to a tax avoidance scheme" and that the district judge "followed Ms Dulson down that path of confusion, conflating issues and failing to recognise the significance, or lack thereof, of the points that Ms. Dulson was advancing". The judge was, it is said, wrong in principle to be influenced by the limited disclosure of documents from Parc Lane Restaurant. Finally, it is said that at [155] the district judge had showed the same erroneous approach as he had taken to the Churchill Way Property of presuming that ownership demonstrated actual occupation.

45. I reject those criticisms. Much of what I have already said in respect of the district judge's approach to the Churchill Way Property applies here *mutatis mutandis* and I will not repeat the points I have already made.

46. The attack on the judge's approach to this property must be seen against the background of the district judge's careful analysis of the documents which had been put before him. He explained the conclusions which he drew from the various categories of documents

and the ways in which he found that they weakened rather than supported Queen Street Properties' contentions. That was a careful and properly reasoned analysis of the material and it contained no error of law.

47. Regardless of whether or not Miss. Dulson was confused the district judge's judgment shows no confusion as to the correct approach. It is clear that when he talked of documents being drawn up for the purposes of tax avoidance the district judge was referring to attempts to escape liability for non-domestic rates and that he was considering whether the documents demonstrated a true picture or a false one. That again was a proper and permissible approach.

48. At first sight there is more force in the criticism that the district judge should not have been influenced by the partial disclosure of documentation from Parc Lane Restaurant. Although Mr. Ryan was the sole shareholder in and sole director of that company and of Queen Street Properties they were separate companies and Mr. Ryan was not entitled to require Parc Lane Restaurant to act in the interests of Queen Street Properties. However, the apparent force of this contention disappears when regard is had to the point which the district judge was actually making. This was not a case where no documents from Parc Lane Restaurant had been put in evidence. Rather it was one where some documents from that company had been relied on by Queen Street Properties. The judge was influenced by the partial nature of this disclosure. He was so influenced where no explanation had been provided for the partial disclosure and where it was on the face of matters puzzling. Thus the district judge noted that some pages of Parc Lane Restaurant's bank statements had been disclosed but not others. In the absence of explanation the district judge was entitled to infer from this that he was deliberately being shown a partial picture because revelation of the full picture would have been harmful to Queen Street Properties' case.

49. Similarly the approach which the district judge took at [155] cannot be criticised. It followed his rejection of the contention that Parc Lane Restaurant had been in occupation and is to be seen against the conclusion, implicit in the findings at [150], that Queen Street Properties had been running the fish and chip business. The judge expressly and correctly said that the right to possession gave rise to an inference and he then identified the other matters of fact which supported that inference. There was no error of law in doing so.

50. The judge then dealt shortly with the other *John Laing* requirements but the reasoning he set out was compelling in the light of the findings he had already made and cannot be said to have shown any error of law.

The Approach to determining the existence of a Sham.

51. There is no dispute that the district judge was right to find the test of a sham in Diplock LJ's formulation in *Snook v London & West Riding Investments Ltd*. Miss. Meager also now accepts that the effect of *National Westminster Bank plc v Jones* and *Hitch v Stone* is that in determining whether the purported licence was a sham the district judge was not confined to the document itself and was entitled to look at the surrounding circumstances and the actions of the parties to the licence.

52. However, Miss. Meager did say that as a matter of law the only prior events which can be relevant to the question of whether a document is or is not a sham are those leading

to the signing or execution of the document. She did not base this proposition on authority but contended that it was a matter of principle and that dealings which were not related to the execution of the document in question could not be relevant to the issue of whether or not it was a sham. I do not accept that the position is as stark as Miss. Meager submitted. She was right to say that the test is one of relevance but what is relevant must depend on the circumstances of the particular case and it cannot be said as a matter of law that dealings other than those leading to the execution of the particular document will never be relevant to the question of whether it is a sham. The court's focus must be on the particular document and the parties to it but that focus is not to be artificially confined. The question of relevance can only be answered by looking to the facts of the particular case and the issues involved. It can readily be seen that the fact that a party to a challenged document had created a false document in the past in wholly unrelated dealings between different parties is unlikely to be relevant or of assistance in determining whether a different document is a sham. Conversely if the creation of the challenged document is said to be part of a pattern of conduct or of a continuing series of dealings then other parts of that pattern or other elements in that series may be relevant and may assist the court in its determination. Such matters could operate either in favour of upholding the challenged document or in support of its characterisation as a sham. Thus if one party to a document were able to show that despite some unsatisfactory or bizarre aspects of the particular document it was part of a course of conduct in which documents in that form were acted upon by him and the parties to the other documents then that could be relevant as countering the suggestion that the document in issue was a sham. Conversely if it could be shown that a party had consistently failed to implement documents drawn up in a particular way that could be an indication that there was no intention to implement a challenged document. Much will depend on the circumstances of the particular case but I do not accept that as a matter of law only circumstances relating to the making of the challenged document can be relevant.

Was the District Judge entitled to find that the Churchill Way Licence was a Sham?

53. The Second Appellant says that the district judge's approach was flawed in two respects.

54. First, it is said that the district judge placed too much weight on the figure for rent in the licence and to the failure to identify the signatory other than Mr. Ryan. That line of criticism cannot assist the Second Appellant. The terms and form of the licence were clearly relevant to the question whether it was a sham. The district judge was, therefore, entitled to take account of such matters. The weight to be attached to them was very much a matter for the district judge and his conclusion that these were features of the document indicative of a sham did not involve any error of law.

55. Second, it is said that the district judge took account of irrelevant matters. In that regard the Second Appellant says that the district judge erred in taking account of his finding that CW18 Trading had not been in actual occupation of the Churchill Way Property at the material times. In addition the district judge is said to have erred in taking account of Mr. Ryan's dealings with other companies and the documents drawn up in relation to them. Further, the district judge erred in being influenced in favour of a finding of sham by what he characterised as the tax avoidance purpose of the other dealings. In that regard it is said the district judge failed to take account of the fact that in order to be effective for tax avoidance purposes a document must be effective to create legal

rights. That meant that the tax avoidance purpose should have been seen as a factor operating in favour of upholding the licence.

56. I reject those criticisms. The judge was clearly entitled to take account of his finding as to actual occupation. The finding that notwithstanding the licence CW18 Trading had not been in actual occupation of the property was obviously relevant to the question of whether there was any reality to the licence. This is demonstrated by considering what would have been the position if the district judge had found as a fact that CW18 Trading had been in actual occupation of the property. In such circumstances that finding would have been a potent factor in favour of upholding the licence and of rejecting the sham contention. The contrary finding was also highly relevant. The judge was also entitled to have regard to Mr. Ryan's actions in relation to other companies and to the creation of other documents for the purpose of escaping liability to non-domestic rates. In circumstances where Mr. Ryan was the sole shareholder in and director of both the parties to the purported licence the district judge was entitled to take account of what he saw as being a pattern of behaviour. There was no error of law in regarding this as a matter supporting the other factors in showing that the licence was a sham. Miss. Meager was right to say that in order to be of any use for tax avoidance purposes a document has to be legally effective. However, when seen in context the district judge's references to tax avoidance were references to the creation of a false appearance in order to escape the liability which would follow from revelation of the true position. He was characterising the licence as being such a document and as being, as he said at [82], "a licence that was just for show".

57. Accordingly, the conclusion that the purported licence in respect of the Churchill Way Property was a sham is not vitiated by any error of law.

Was the District Judge entitled to find that the Queen Street Licence was a Sham?

58. The district judge's approach to this purported licence mirrored that which he had taken in respect of the other purported licence. His finding that it was a sham was made against the background of his finding that Queen Street Properties had been in actual occupation of the Queen Street Property. He was influenced by the rental figure and the unidentified second signatory on the licence. The district judge regarded the sales particulars which had been provided as relevant and showing that Queen Street Properties had been operating the fish and chip shop from the premises throughout. He took account of the history of the dealings to conclude that Parc Lane Restaurant was never formed to be a real business and rightly regarded this finding as relevant to his assessment of whether the purported grant of a licence to that company was a sham. These were all matters to which the district judge was entitled to have regard and the Appellant's argument that he was not so entitled cannot be sustained. It follows that no error of law has been shown in this regard.

The Answers to the Case Stated.

59. In those circumstances I affirm the decisions of the district judge. I dismiss the appeal and answer each of the questions posed in the case stated in the affirmative.