Neutral Citation Number: [2021] EWHC 3003 (Admin)

Case No: CO/3475/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2021

Before:

KATE GRANGE QC (sitting as a Deputy Judge of the High Court)

- -

Between :

The Queen on the application of CAVA BIEN LIMITED	**Claimant**
- and -	
MILTON KEYNES COUNCIL	**Defendant**

- -
- -

Sami Rahman (instructed by **Prime Solicitors**) for the **Claimant**
David Graham (instructed by **Milton Keynes Council**) for the **Defendant**

Hearing date: 13 October 2021

- -

Approved Judgment

Kate Grange QC (sitting as a Deputy Judge of the High Court):

INTRODUCTION

1. The Claimant, Cava Bien Ltd, is a small fashion retail company, which operates from a unit on an industrial estate in Milton Keynes. On 2 September 2020 the Defendant refused its applications for business rate relief and a grant which it had applied for under schemes designed to support certain businesses during the coronavirus pandemic. By these judicial review proceedings the Claimant seeks to challenge those refusals. The Defendant admits that it erred in law when it rejected the applications on the basis that the property was not occupied by the Claimant; it now accepts that the property was in some form of beneficial occupation by the Claimant at the material time. However the Defendant seeks to defend these proceedings in reliance on s. 31(2A) of the Senior Courts Act 1981 ('the 1981 Act'). It contends that it was "highly likely" that the outcome of the applications would not have been substantially different if the unlawful conduct had not occurred, because it would have refused them due to a lack of evidence that the property was wholly or mainly used as a "shop" which was "reasonably accessible to members of the public".

PROCEDURAL HISTORY

2. On 28 September 2020 the Claimant filed an application for judicial review. Four grounds of challenge were identified:

   i) Ground 1 – failure to disclose relevant information by failing to disclose the notes of inspections of the property;

   ii) Ground 2 – failure to take into account supporting video evidence as well as a sworn Statutory Declaration confirming occupation of the property;

   iii) Ground 3 – failure to take into account that the Claimant's liability for business rates had continued unabated;

   iv) Ground 4 – failure to properly evaluate the appropriateness of the decision in the light of all relevant facts.

3. No Acknowledgement of Service (AOS) or Grounds of Resistance were served by the Defendant by the relevant deadline of 28 October 2020 and the papers were prepared for determination of permission for judicial review. On 21 December 2020 an application seeking an extension of time to file an AOS was made, however on 15 January 2021 this was refused by Mr David Lock QC sitting as a Deputy High Court Judge. Mr Lock QC granted permission for judicial review and set case management directions. He noted that the Defendant had failed to provide disclosure of the inspection reports which it claimed to have carried out to support the case that the property was unoccupied and he set a date for disclosure of the same.

4. On the same day that Mr Lock QC granted permission, the Defendant filed an AOS and Summary Grounds of Defence. Those were accompanied by a witness statement from Mr Robert Hayle, the Defendant's Business Rates Team Leader, dated 15 January 2021. Mr Hayle was the officer within the Council who made the decisions

under challenge by the Claimant. On 13 May 2021 the Defendant confirmed that it wished to rely on its Summary Grounds in defence of the claim.

5. Shortly before the substantive hearing a flurry of additional evidence was served by both parties. On 30 September 2021 the Claimant made an application for permission to rely upon the witness statement of Mr Ibrahim Oluwakemi, sole director and majority shareholder of the Claimant company, dated 30 September 2021. Unfortunately that application was not placed before me until the day before the hearing, due to an administrative error on the court's part which was not the Claimant's fault. On 8 October 2021 the Defendant made an application for permission to adduce a second witness statement from Mr Hayle dated 7 October 2021. In that statement Mr Hayle sought to correct and clarify a number of matters in his first statement and he also sought to respond to the witness statement of Mr Oluwakemi. The Defendant also made a written application to cross-examine Mr Oluwakemi at the substantive hearing. On 12 October 2021 the Claimant filed a supplementary statement from Mr Oluwakemi dated 12 October 2021. That further statement was said to be in response to Mr Hayle's second witness statement.

6. At the outset of the hearing on 13 October 2021 I made clear that the submission of late evidence on the part of both parties was unacceptable and was to be discouraged, not least given the numerous recent cases which have affirmed the importance of procedural rigour in judicial review proceedings. However, in the interests of expediency and given the limited time available for the hearing, I indicated that I would allow the evidence into the proceedings, but on the basis that it was open to either party to make submissions about its weight and relevance given the particular exercise the court has to perform under s. 31(2A) of the 1981 Act. As is apparent from paragraph 52 below, both parties accept that the exercise I have to conduct should primarily focus on the evidence in existence at the time of the relevant decisions and I should be cautious about relying upon statements or speculation after the event. In addition, and perhaps most significantly, there was very little reference at all to the additional evidence in the parties' oral submissions. Much of that evidence is simply irrelevant to the issue I have to decide (or relates to complaints which are not relevant to the pleaded grounds for judicial review) and so I say no more about it at this stage.

7. Sensibly, given the lateness of the application and the exceptional course which this would have represented (see *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841), the Defendant did not pursue its written application to cross-examine Mr Oluwakemi at the substantive hearing.

THE RELEVANT SUPPORT SCHEMES

8. The Retail, Hospitality and Leisure Grant Fund Scheme (RHLG) was set up and funded by the Department for Business, Energy and Industrial Strategy ('BEIS') to support eligible retail and hospitality businesses, pursuant to section 31 of the Local Government Act 2003 ('the 2003 Act').

9. Section 31 of the 2003 Act provides, so far as material:

> "'31 Power to pay grant

> (1) A Minister of the Crown may pay a grant to a local authority in England towards expenditure incurred or to be incurred by it. …
>
> (3) The amount of a grant under this section and the manner of its payment are to be such as the person paying it may determine.
>
> (4) A grant under this section may be paid on such conditions as the person paying it may determine."

10. BEIS published a document 'Grant Funding Schemes: Small Business Grant Fund and Retail, Hospitality and Leisure Grant Fund Guidance' in March 2020, paragraph 2 of which explained:

> 'This guidance sets out the criteria which central government considers for this purpose to be eligible for the Small Business Grant Fund and the Retail, Hospitality and Leisure Grant Fund…'

11. The scheme utilised the existing non-domestic rating system in order to provide grants for eligible businesses. As set out at paragraph 14, eligible businesses with a rateable value of over £15,000 and less than £51,000 will receive a grant of £25,000 in line with the eligibility criteria.

12. Paragraphs 24 to 25 of the guidance set out the relevant criteria:

> Retail, Hospitality and Leisure Grant
>
> 24. Hereditaments which on the 11 March 2020 had a rateable value of less than £51,000 and would have been eligible for a discount under the business rates **Expanded Retail Discount Scheme** had that scheme been in force for that date are eligible for the grant….
>
> 25.Eligible recipients will be entitled to receive one grant per hereditament from the earlier of the date of payment of the grant by the Local Authority or 1st April 2020." (emphasis added)

13. It being common ground that the property was a "hereditament" for the purposes of non-domestic rating law with a rateable value of under £51,000, it follows from the above criteria that the Claimant's application had to satisfy the Council that the property would have been eligible for a discount under the 'Expanded Retail Discount Scheme' ('ERDS').

14. The ERDS is a scheme whereby the Ministry of Housing, Communities and Local Government ('MHCLG') funded a 100% discount from business rates for eligible

businesses in the year 2020/21 pursuant to s.31 of the 2003 Act. The discount was granted by billing authorities using their discretionary power to grant relief from rates under s.47 of the Local Government Finance Act 1988. The eligibility criteria for the ERDS was set out in guidance issued by MHCLG on 2 April 2020, namely the 'Business Rates: Expanded Retail Discount 2020/21: Coronavirus Response – Local Authority Guidance'. That Guidance provided, so far as relevant, as follows:

> "2. This guidance sets out the criteria which central government considers for this purpose to be eligible for the Expanded Retail Discount...
>
> …
>
> **Which properties will benefit from relief?**
>
> 10. Properties that will benefit from the relief will be occupied hereditaments that are wholly or mainly being used:
>
> a. as shops, restaurants, cafes, drinking establishments, cinemas and live music venues,
>
> b. for assembly and leisure; or
>
> c. as hotels, guest & boarding premises and self-catering accommodation.
>
> 11. We consider shops, restaurants, cafes, drinking establishments, cinemas and live music venues to mean:
>
> i. **Hereditaments that are being used for the sale of goods to visiting members of the public:**
>
> - Shops (such as: florists, bakers, butchers, grocers, greengrocers, jewellers, stationers, off licences, chemists, newsagents, hardware stores, supermarkets, etc)
>
> - Charity shops
>
> - Opticians
>
> - Post offices
>
> - Furnishing shops/ display rooms (such as: carpet shops, double glazing, garage doors)
>
> - Car/caravan show rooms
>
> - Second-hand car lots
>
> - Markets
>
> - Petrol stations

- Garden centres

- Art galleries (where art is for sale/hire) …

…

14. To qualify for the relief the hereditament should be wholly or mainly being used for the above qualifying purposes. In a similar way to other reliefs (such as charity relief), this is a test on use rather than occupation. Therefore, hereditaments which are occupied but not wholly or mainly used for the qualifying purpose will not qualify for the relief. For the avoidance of doubt, hereditaments which have closed temporarily due to the government's advice on COVID19 should be treated as occupied for the purposes of this relief.

15. The list set out above is not intended to be exhaustive as it would be impossible to list the many and varied uses that exist within the qualifying purposes. There will also be mixed uses. However, it is intended to be a guide for authorities as to the types of uses that the Government considers for this purpose to be eligible for relief. Authorities should determine for themselves whether particular properties not listed are broadly similar in nature to those above and, if so, to consider them eligible for the relief. Conversely, properties that are not broadly similar in nature to those listed above should not be eligible for the relief.

16. The list below sets out the types of uses that the Government does not consider to be an eligible use for the purpose of this relief. Again, it is for local authorities to determine for themselves whether particular properties are broadly similar in nature to those below and, if so, to consider them not eligible for the relief under their local scheme.

i. **Hereditaments that are being used for the provision of the following services to visiting members of the public**

- Financial services (e.g. banks, building societies, cash points, bureaux de change, short-term loan providers)

- Medical services (e.g. vets, dentists, doctors, osteopaths, chiropractors)

- Professional services (e.g. solicitors, accountants, insurance agents/ financial advisers)

- Post office sorting offices

ii. Hereditaments that are not reasonably accessible to visiting members of the public" (emphasis in original)

15. It follows from this guidance that, in order to satisfy the relevant criteria for a grant or rates relief, the Claimant had to be able to establish that:

    i) The property was an occupied hereditament as at the qualifying date of 11 March 2020 (the 'occupied criterion'), and

    ii) The property was wholly or mainly being used as a "shop" (or was broadly similar in nature to a "shop") which meant being used for the sale of goods to visiting members of the public (the 'use criterion').

16. The guidance also made clear that the property would not be an eligible use for the purpose of the relief if it was "not reasonably accessible to visiting members of the public" (the 'accessibility criterion').

THE FACTUAL BACKGROUND

17. On 1 February 2016 the Claimant company entered into a lease with the landlord of Unit 1, Bringewood Forge, Blakelands, Milton Keynes for the demise of the property for a period of 10 years.

18. It appears to be common ground that in March 2016, Mr Oluwakemi contacted Milton Keynes Council and notified them that he would be moving out of the property and it would therefore be unoccupied. The company was subsequently provided with six-months' business rate relief which ended in September 2016.

19. Mr Oluwakemi has asserted that he subsequently attended the Council offices again in early November 2019 to inform them that the property had been re-occupied and the business was operating from the property. However that attendance by Mr Oluwakemi appears to be disputed by the Council, as is evident from e-mail exchanges discussed below.

The e-mail exchanges between Mr Hayle and Mr Oluwakemi

20. On 26 March 2020 Mr Oluwakemi e-mailed the Defendant asking for confirmation that his retail business operating from the unit would receive a grant of £25,000 from the Retail, Hospitality and Leisure Grant Scheme ('RHLG'). In his e-mail response of 27 March 2020 Mr Hayle explained that grants were only applicable "to occupied properties that are reasonably accessible to visiting members of the public". He explained that the Council currently had the property listed as unoccupied and had inspected the property 11 times (and had 9 letters returned) with no sign that the property was occupied. He also stated "If the property is occupied, it is not reasonably accessible and therefore, unfortunately you are not entitled to the grant scheme."

21. In e-mail responses on 27 March 2020 Mr Oluwakemi denied that the property was unoccupied and inaccessible to the public and asked for clarification about which property had been visited by the Council. He also stated that he had visited the Council's offices in 2019 and had met with the "Head of Business Rate" to confirm that the property was occupied.

22. On 1 April 2020 Mr Hayle confirmed that the Council believed it had been inspecting the correct property, which he said appeared empty in the photographs the inspector had taken. He also questioned whether Mr Oluwakemi could have spoken to the Head of Business Rates in 2019; Mr Hayle had been the Business Team leader for the last 18 months and the Council's records showed that the last time Mr Oluwakemi contacted them was in 2016 when he had advised that he was vacating the property and it was empty.

23. On 1 April 2020 Mr Oluwakemi responded and stated that, in fact, the person he had spoken to at the Council was called "Lewis" and the Defendant had been incorrectly sending letters to a London office and not the Milton Keynes unit. He also asked for all details of (1) the dates when the inspections of the property were carried out, (2) the photographs of the empty property the inspector had taken, (3) the 2016 email in which he had said the property was empty and (4) copies of all relevant letters with Royal Mail or sent to the Milton Keynes unit.

24. Later on 1 April 2020 Mr Hayle explained that there was no "Lewis" in the whole of the relevant department and so he wasn't sure who the Claimant met to advise in 2019 that the property was occupied. He also provided the dates of the inspections of the Milton Keynes property which listed 7 visits between 2016 and 2018 and three visits in 2019, including on 16 December 2019. Photographs taken on these visits were said to be attached where available. Mr Hayle also provided details of the mapping systems which had been used to ensure that the Council was inspecting the correct property.

25. On 2 April 2020 Mr Oluwakemi explained by e-mail that the name of the person he met to inform the Council in 2019 that the property was occupied was "Louise" not "Lewis". He also disputed the contention that the property was unoccupied. He asserted that the photographic evidence showed that the property was in occupation in December 2019. He attached to his response a video clip showing a UPS driver collecting one of his customer's orders from the unit on 27 November 2019. That video clip shows multiple boxes being collected from the reception of the unit. Mr Oluwakemi also noted that a number of letters had wrongly been sent to the company's London office and not the Milton Keynes unit.

26. On 21 April 2020 Mr Hayle responded to the further information provided by Mr Oluwakemi. He noted that the information provided about notifying the council of occupation in 2019 had changed several times; he explained that no-one called "Louise" had worked in the department since August 2017. He continued:

> "As I have stated in previous emails we have inspected this property on multiple occasions, if you were trading from the property (to be entitled to the grant), the property must be reasonably accessible by visiting members of the public. i.e. a shop where a customer can walk in and browse the stock. Had the door been open and customers been able to walk in my inspector would have done so to verify occupancy.
>
> If I was to amend the account to show the property is occupied; based on your statement that the orders were stacked and ready for collection it is my assumption that you are online business.

> Unfortunately, online businesses do not qualify for the grant or relief, even though they are retail companies."

27. Later, on 21 April 2020 Mr Oluwakemi responded asserting that the property was wrongfully listed by the Council as unoccupied. His response included the following paragraph:

> "Secondly, it seems to me you are making a lot of assumptions. Your assumption that we are an online business is wrong. We are not an online pure-play business. Though we have an on line presence, we do not only sell through the internet. We trade both in house and online just like many other businesses do. Members of the public can come into our property, browse a variety of our stock and services, and make a purchase of our goods and services. Some customers take away their purchase or service, while other customers place orders, which are then delivered to the customer. Our business is not a high street shop. The office next to our property was burgled last year. Milton Keynes Police contacted us so we have security in place to ensure that our business doors are secured. Other members of the public don't have a problem accessing our building; we can't speak for your inspectors.*"*

28. He also asked for clarification of the criteria which was being applied by the Council under the relevant government guidance. Mr Oluwakemi sent a further e-mail on 24 April 2020 chasing for a response from the Council and asserting that the video evidence was proof that the property was occupied. He explained that the business was fully operational until March 2020 when the coronavirus lockdown restrictions took effect.

29. On 26 April 2020 Mr Hayle responded as follows:

> "As I have previously stated in all of my emails, I will not be amending the account as I do not believe the property is occupied. If you disagree with my determination the correct course of action is to withhold payment of your Business Rates instalments. The Council will then follow the statutory recovery procedures as detailed in the Non-Domestic Rates Collection and Enforcement Regulations 1989 and apply for a Liability Order from the Magistrate's Court. At the application for a Liability Order you will have the opportunity to present your evidence that the property is occupied.*"*

Exchanges May-September 2020

30. On 14 May 2020 the Claimant sent to the Defendant a pre-action letter before action threatening judicial review proceedings if the Council didn't amend its records to reflect the fact that the property was occupied. In that letter it was noted that the Claimant had not yet made any application for a grant, but was seeking an amendment

to the Council's records on occupation which was likely to prevent the Claimant qualifying for support once an application was made. The letter summarised the background to the dispute as follows:

> "Our Client's lease of the Property commenced in February 2016. In March 2016 our Client notified the Council that the Property was unoccupied and, accordingly, was provided with a six-month business rate relief, being maximum period permitted by the Council. This relief ended in September 2016. In preparation for trading, our Client moved some retail-fitting infrastructure, operating equipment, and goods into the property in March 2019, and commenced operating its business from the Property in November 2019. Accordingly, from this time, the Property was occupied, and our Client was trading from the Property until forced to shut down business operations in March 2020 due to the government's response to the COVID-19 pandemic with the imposition of lockdown restrictions."

31. On 1 June 2020 Mr Hayle responded to the pre-action letter. He agreed that, after taking out the lease in February 2016, Mr Oluwakemi had e-mailed the Council in March 2016 to advise that the property was unoccupied. But he did not accept that there was evidence showing that the property had subsequently become occupied in 2019 and he doubted the account given by Mr Oluwakemi that he had informed the Council of the same in 2019. He continued:

> "Please see the below in response to the three points you raise in your first paragraph on your client's position.
>
> (i) Please refer to your own background summation whereby it is agreed that your client contacted us to request an exemption as the property was unoccupied.
>
> (ii) No evidence has been provided to show that the property has been occupied since November 2019, the only evidence that has been provided is an undated video.
>
> (iii) Insufficient evidence has been provided and your client's statements have changed several times.
>
> In response to your client's assertion that the property is occupied the Council has already provided details of the 10 occasions over the past three years that the property has been inspected. A simple internet search of the company also shows little online presence. I would expect a retail shop that is reasonable accessible to visiting members of the public to advertise online, or provide detail of opening hours. Cava Bien have not posted anything on their Facebook page since 2017, the web link associated to the account does not load and they have not had any feedback on amazon since April 2019,

> interestingly all of their feedback on amazon is from when the property was agreed to be unoccupied."

32. Mr Hayle included in the letter a number of screenshots, including from Facebook and Amazon to support his assertions about a lack of online presence. The Facebook screenshot showed an offer for women's clothing dated 18 October 2017. The Amazon screenshot included a number of reviews dating between February 2019 and April 2019. He also provided hyperlinks to the relevant eligibility criteria for each of the schemes. In doing so, he explained:

> "…the guidance states that the hereditament must be accessible to visiting members of the public. Therefore if the company is an online retailer or a warehouse (whereby health and safety may restrict access to large parts of the property) the hereditament is not used wholly or mainly (paragraph 14) for retail purposes."

33. On 25 June 2020 Mr Oluwakemi made a statutory declaration in the presence of his solicitor and in his capacity as sole director and majority shareholder of the Claimant company. In that he stated, so far as material, as follows:

> "2. In February 2016, I took on a lease for a property situated at 1 Bringewood Forge, Blakelands, Milton Keynes, MK14 5FJ ("the Property").
>
> 3. Due to the burglary of most of our retail Inventory stock in February 2016 (Crime Reference No. J1/16/580), our business was significantly impacted so we could not commence operations at the Property as planned. In March 2016, I attended Milton Keynes Council and notified them that we would be moving out of the Property and it would therefore be unoccupied. I was subsequently provided with a six-month business rate relief. This ended in September 2016.
>
> 4. Due to some challenges with the Business and funding, the Property remained unoccupied until March 2019 when I began to get the Property ready for trading.
>
> 5. In November 2019, the Business began trading from the Property.
>
> 6. In early November 2019, I attended the office of Milton Keynes Council and spoke to a receptionist, to explain that the Property was now occupied. The receptionist advised me that she would call the Head of Rates to attend to me. I informed the member of staff who attended to me that the Property was now occupied. Although there has been some confusion as to the name of the person I spoke with on that occasion, I confirm I spoke with a female member of staff.

> 7. Since November 2019 I confirm that the Property has been occupied and the Business has been operating from the Property.
>
> 8. I confirm that the video supplied to Milton Keynes Council as evidence showing a UPS driver collecting goods from the Property was filmed on 27 November 2019.
>
> 9. I confirm that the Property is mainly used for retail purposes and is accessible to visiting members of the public that can browse a variety of our stock, and make a purchase of our goods and services – I can categorically confirm that the Business is not an internet-only retailer and the Property is not a warehouse fulfilment centre, contrary to the assertions of Milton Keynes Council.
>
> 10. I solemnly and sincerely declare that and I make this solemn declaration conscientiously believing the same to be true, correct and in good faith by virtue of and in accordance with the Statutory Declarations Act 1835."

34. By letter dated 26 June 2020 the Claimant's solicitors sent the statutory declaration to the Defendant requesting a reclassification of the status of the Property at the material date as "occupied" and acknowledgement of the use of the Property as being mainly for retail purposes and accessible to visiting members of the public. The letter also asserted that the Defendant's visits to the property fell before the relevant date and no inspection of the property had taken place since December 2019.

35. On 8 July 2020 Mr Hayle responded by letter to the Claimant solicitor's request to reclassify the property. He refused that request, stating as follows in the key paragraphs of the letter:

> "Thank you for your letter dated 26 June 2020. I apologise if my previous letter was ambiguous, but no change will be made to this account outside of a Liability Order hearing as I do not believe the property was occupied on the 11 March 2020.
>
> I appreciate that your client has submitted a statutory declaration, but parts of his story have changed several times throughout the course of our correspondence and the Council has no record of his visit to our offices...."

36. Subsequently, on 31 August 2020 the Claimant wrote to the Defendant requesting support for the business, including under the RHLG scheme. The Claimant again asserted that the property had been wrongly classified as unoccupied and as a warehouse and reiterated that the property was mainly used as a retail business

accessible to visiting members of the public that can browse a variety of stock and make a purchase of goods and services.

37. On 2 September 2020 Mr Hayle refused the application for a grant payment in a brief e-mail sent to Mr Oluwakemi. In that e-mail he referred to the contents of his 8 July 2020 letter to the Claimant's solicitor and stated "I don't feel it needs to be explained any further bearing in mind the lengthy correspondence we have had previously. For the avoidance of doubt your application for a grant payment is hereby refused."

The Inspection Reports

38. Exhibited to Mr Hayle's first statement are the inspection reports of the property which were completed by the Defendant between June 2016 and July 2020. These indicate that the property was inspected on 21 June 2016, 16 September 2016, 22 February 2018, 28 June 2018, 24 October 2018, 8 January 2019, 9 April 2019, 17 September 2019, 9 December 2019 and 23 July 2020.

39. Given that the Claimant did not purport to be occupying the property until November 2019, the most relevant inspection report is that of 9 December 2019. That inspection was carried out by an officer called Kirk Norval, who appears to have been instructed on 10 May 2017 to "see if there are any signs of occupation". In the inspection report itself a box is ticked under the heading "External" stating "Limited Access?", although there is no indication on the form or in any evidence before me about what this means. A question is asked about "Stock Seen?" to which the answer is "No" and a box is also ticked stating "Property Unoccupied". The only other notes in the form state "No sign of use". As explained by Mr Hayle in his second statement (paragraphs 6 and 25) no photographs were filed with the report (although photographs were taken during earlier inspections).

40. On 23 July 2020 a similar inspection report was completed which contained identical information to that completed in in December 2019, save that photographs of the outside of the property were taken showing an industrial unit, but with no signage present. I note that it is the Claimant's case that, by July 2020 the property was closed due to the Coronavirus lockdown.

THE ARGUMENTS

41. On behalf of the Defendant, it is accepted that the property was in some form of beneficial occupation by the Claimant's business by 27 November 2019, as shown in the video evidence which was submitted by Mr Oluwakemi to the Council on 2 April 2020. Beneficial occupation for the purposes of rating liability may be slight if there is an intention to occupy the whole premises, as highlighted in *Macro Properties Ltd v Nuneaton & Bedworth BC* [2012] EWHC 2250 (Admin) at [23]-[24] and [43]-[45] and therefore it is on that basis that Ground 2 of the claim is conceded.

42. I note that Grounds 1, 3 and 4 were not pursued at the substantive hearing by the Claimant – there being no mention of them in the written or oral submissions of Mr Rahman who appeared for the Claimant. In any event, I do not see what they add of any significance to Ground 2 of the claim which is conceded and which was clearly the central complaint by the Claimant.

43. Despite the Defendant's concession on the subject of occupation of the premises, the Defendant submits that, in reliance on s.31(2A) of the 1981 Act, the outcome for the Claimant would not have been substantially different because it is highly likely that the decision would have been refused on the basis that there was inadequate evidence of use as a "shop" and there was insufficient evidence that it was reasonably accessible to visiting members of the public (i.e. it says that the use and accessibility criteria were not satisfied). In support of that contention Mr Graham for the Defendant makes a number of key points which I have summarised below:

i) The contemporaneous e-mail exchanges show that the Claimant was aware of the relevant guidance pertinent to the relevant grant and rates-relief schemes and therefore was aware of the different criteria which had to be met.

ii) Although it is accepted that the primary focus of the decision was on the lack of occupation of the property by the Claimant, the Claimant was also put on notice that the Defendant wished to see corroborating evidence of use as a shop and that it doubted the property's accessibility to the public. This was not a situation in which the Claimant was asking the Defendant to exercise its general discretion in favour of e.g. rates relief, but instead it was evident to all that specific criteria were relevant to the schemes and had to be satisfied.

iii) The onus was on the Claimant to show why it qualified for the grant and/or rates-relief and it was not for the Defendant Council to make out the case for that or to assist the Claimant in putting the case together.

iv) The question whether the Claimant's property was operating as a "shop" (or was broadly similar in nature to a "shop") and whether it was "reasonably accessible to members of the public" were matters of ordinary language which were for the local authority to determine.

v) The Claimant provided insufficient evidence in support of its application demonstrating that the property was in use as contended for by Mr Oluwakemi. Had it been used in the manner contemplated by the RHLG scheme one could expect to see evidence e.g. of advertisements, sales floor staff present at the property, records of visits by members of the public, visual merchandise, sales displays, signage and/or records of purchases.

vi) A central and important question was what evidence was there which supported use as a "shop" together with reasonable accessibility to the public? The answer to that was that the only evidence available consisted of the inspection reports, the video clip, the Statutory Declaration and other assertions in correspondence by the Claimant, together with the local knowledge and research done by the Defendant's officers. That was an inadequate basis upon which to conclude that the relevant criteria were satisfied.

vii) The Claimant had been provided with a fair opportunity to submit additional supporting evidence when it made its application, but none was provided. The onus had to be on the Claimant to properly evidence the application being made.

viii) The question of what weight to give the location, layout, accessibility to inspection and appearance of the property as against Mr Oluwakemi's representations was a matter for the Defendant's judgement and it committed no error of law in concluding that the use criterion was not met.

ix) The limit of the court's inquiry into the facts is if the primary decision-maker is said to have reached perverse factual conclusions or to have decided facts without taking relevant material into consideration, or to have considered and been influenced by irrelevant material: *R (St Helens Borough Council) v Manchester PCT* [2009] PTSR 105 at [13]; *Benson v Secretary of State for Communities and Local Government & Others* [2018] EWHC 2354 (Admin) [4]-[5]. Here there is no basis for suggesting that any such errors occurred when the Defendant was considering the application and indicating that evidence of shop use was lacking.

x) The Defendant was reasonably entitled to doubt the credibility of Mr Oluwakemi's account of shop use, given that the property was not in the form of a typical residential unit, was located on an industrial estate (rather than in a shopping centre or shopping street), gave no outward sign of being used as a shop at the dates of inspections and was locked when its officer had attended.

xi) The Defendant was also reasonably entitled to doubt the credibility of Mr Oluwakemi based on the inconsistent accounts he had given about who he spoke to in the Council in November 2019 to inform them that the property was occupied. In particular, the court should assume that the Council would not have accepted the statements made by Mr Oluwakemi in his Statutory Declaration on that basis.

xii) Mr Hayle's evidence (as set out in his first witness statement dated 15 January 2021) was that the Claimant's property was "not a typical shop premises that one would find on a high street or in a retail park" (para 4). At paragraph 11 of that statement he says that it remains his view, on the evidence presented up to and including the application in August 2020, that the grant would have been refused in any case, since the property did not appear to be used in a manner similar to a shop for the sale of goods to visiting members of the public. He expresses the same view in his second statement dated 7 October 2019, having taken into account the subsequent witness statement of Mr Oluwakemi i.e. he says he remains unsatisfied that the Claimant met the eligibility criteria.

xiii) Although the decision-letter itself dated 2 September 2020 (and the earlier e-mail it referred to dated 8 July 2020) only referred to occupation as the basis for refusal, this court should look at the totality of the exchanges which took place before the decision was taken and could conclude that the decision-maker was "highly likely" to come to the same decision on the evidence before the decision-maker. Further, the court should not speculate on what other evidence might have been adduced, but was not.

xiv) Because the evidence before the decision-maker was insufficient to show that there was occupation of the property, it followed that there was inadequate evidence that it was reasonably accessible to the public.

xv) The visit report dated 9 December 2020 showed that there was "limited access" and it could be inferred from this that the visiting officer would have tried to speak to someone at the premises before completing the form in that way.

xvi) It is for the decision-maker and not the court to decide, subject to *Wednesbury* review, on the manner and intensity of inquiry to be undertaken into any relevant factor accepted or demonstrated as such, see Laws LJ in *R (Khatun) v Newham London Borough Council* [2005] QB 37 at [35]. It was therefore impermissible for the court to speculate on what further inquiries might have been carried out had the error about occupation not occurred, since it was not unreasonable for the Council not to carry out further inspections, including an inspection where access to the property was gained (if necessary by appointment with the Claimant in advance).

xvii) Even as at today's date and on the basis of the additional evidence the Claimant has submitted shortly before this substantive hearing (in the form of witness statements from Mr Oluwakemi), the Claimant cannot show that the property was used as a "shop" at the relevant time.

44. For the Claimant, Mr Rahman submits that this court cannot be satisfied that it was "highly likely" the outcome would have been the same, but for the error of law committed by the Defendant. He submits that the tenor of all the key exchanges between Mr Oluwakemi and the Defendant was the lack of evidence about the Claimant's *occupation* of the property. He suggests that this court cannot simply strip out the "conduct complained of", namely the error over whether the Claimant was occupying the property, and conclude that the decision was highly likely to have been the same, without entering into a speculative exercise about whether alternative grounds for refusing the applications were available.

45. Although Mr Rahman accepts that questions of use and accessibility were touched upon as part of the pre-decision exchanges, he submits that the parties never in fact got beyond a dispute about occupation. He also submits that the Claimant reasonably understood at the time that demonstrating occupation of the property was the central problem for him and that if he could get over that hurdle he would qualify under the schemes. He points out that nowhere in the correspondence was the Claimant asked to provide evidence that the property was in use as a shop and accessible to the public; hence the focus of the Claimant was on establishing occupation rather than providing information about numbers of customers, accessibility and layout and whether it was an online or ordinary retail business. He accepts that the burden fell upon the Claimant to provide evidence in support of the applications, but he points out that the reality of the situation was that the parties were in a lengthy period of dialogue before the application was made, at which time the central focus had been on the question whether the Claimant was occupying the property at all.

46. Mr Rahman submits that, even if one does try to carry out the exercise of stripping out the error of law over occupation, what is left is an unsatisfactory and inadequate evidential picture which does not enable the court to make the necessary factual and evidential assessment which would be required under s.31(2A) of the 1981 Act. He points out that there are difficulties with the evidence the Defendant sought to rely upon at the time, including the visit reports to the property, many of which pre-date

the time when the Claimant was re-occupying the property, are of poor quality and are inconsistent with the video evidence submitted by the Claimant, which is now accepted by the Defendant as showing evidence of occupation.

47. Mr Rahman contends that if occupation hadn't been in issue and if instead the question of use and accessibility to the public had been the focus, a site visit could have been agreed with the Claimant at which time the Defendant's officers could have entered the premises and completed a more comprehensive and informative inspection of the property. He asserts that it would have been unreasonable for the Defendant to dismiss the application without visiting the premises and conducting a proper inspection. He also argues that some of the evidence which was submitted by the Claimant, including the video from 27 November 2020 substantiated the Claimant's account of shop use and accessibility to the public. Although the shop was not a typical walk-in store and was accessible via a buzzer (in a similar manner to e.g. some jewellery stores) that did not preclude the Claimant from satisfying the necessary criteria.

48. Mr Rahman asserts that the credibility assessments and assumptions which the Defendant invites this court to make as part of the s. 31(2A) exercise (including about whether the Claimant did inform the Defendant that it was in occupation in November 2019 and, if not, what conclusions follow from that) are not matters which this court should properly embark upon. He submits that this court's function is not to determine credibility issues, nor is this court equipped to make any such assessments when performing the exercise envisaged in section 31(2A). He argues that any decision-maker determining the application would need to grapple with the consequences of Mr Oluwakemi's statutory declaration in which he asserts not only that he was in occupation, but also that the retail unit was accessible to members of the public who could browse a variety of stock and was not an internet-only retailer or warehouse centre. He points out that the consequences of making such a statutory declaration were serious, including charges for perjury if it was found to be false and any decision-maker would need to weigh that up, alongside the other evidence available, before deciding whether the matters set out in the statutory declaration were false.

49. With reference both to the evidence before the decision-maker and the subsequent statements made by Mr Oluwakemi, Mr Rahman submits that there was evidence pertaining to shop use and accessibility to the public, including Facebook and Twitter accounts which were identified by the decision-maker at the time. He also submits that there was further evidence which could have been advanced by the Claimant had it been clear that occupation was not the central issue. He says that the exercise that this court has to carry out is a straightforward one. It is to ask whether, on the information available today, there is good quality evidence which shows that the decision was highly likely to be the same. In the absence of such evidence he invites me to dismiss the Defendant's case under s.31(2A).

50. Finally Mr Rahman made a number of oral and written submissions including to the effect that the decision-maker approached the applications with a closed mind and rejected the Claimant's evidence out of hand without properly considering it. He also suggested that the Court could infer that there had been discrimination and breaches of the Equality Act 2010 in the approach to the applications. However, it was accepted that these were not part of the pleaded grounds for judicial review and, in

any event, were not said to be of central relevance to the objective exercise which this court has to carry out under s.31(2A) of the 1981 Act. In those circumstances I wish to make clear that I have not taken those matters into account when reaching my decision in this case.

THE TEST TO BE APPLIED UNDER s.31(2A) SCA 1981

51. Section 31(2A) of the Senior Courts Act 1981 provides that:

> "The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
>
> (2B)The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

52. The proper approach to this test is not in dispute between the parties. It has been considered in a number of authorities and it seems to me that the central points can be summarised as follows:

i) The burden of proof is on the defendant: *R (Bokrosova) v Lambeth Borough Council* [2016] PTSR 355 [88];

ii) The "highly likely" standard of proof sets a high hurdle. Although s. 31(2A) has lowered the threshold for refusal of relief where there has been unlawful conduct by a public authority below the previous strict test set out in authorities such as *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1988) 57 P & CR 306, the threshold remains a high one: *R (Public and Commercial Services Union) v Minister for the Cabinet Office* [2018] ICR 269 at [89] per Sales LJ, approved by Lindblom, Singh and Haddon-Cave LLJJ in *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] PTSR 1446 at [273].

iii) The "highly likely" test expresses a standard somewhere between the civil standard (the balance of probabilities) and the criminal standard (beyond reasonable doubt): *R (Ron Glatter) v NHS Herts Valleys Clinical Commissioning Group* [2021] EWHC 12 (Admin) at [98] per Kerr J.

iv) The court is required to undertake an evaluation of the hypothetical or counterfactual world in which the identified unlawful conduct by the public authority is assumed not to have occurred: *R (Public and Commercial Services Union) v Minister for the Cabinet Office* (supra) [89], *R (Plan B Earth) v*

Secretary of State for Transport (supra) [273], *R (Ron Glatter) v NHS Herts Valleys Clinical Commissioning Group* (supra) [98].

v) The court must undertake its own objective assessment of the decision-making process and what the result would have been if the decision-maker had not erred in law: *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* [2018] 1 WLR 5161, judgment of the whole court at [55], *R (Gathercole) v Suffolk County Council* [2020] EWCA Civ 1179, [2021] PTSR 359 at [38] per Coulson LJ, (Asplin and Floyd LLJJ concurring at [78] and [79]).

vi) The test is not always easy to apply. The court has the unenviable task of (i) assessing objectively the decision and the process leading to it, (ii) identifying and then stripping out the "conduct complained of" (iii) deciding what on that footing the outcome for the applicant is "highly likely" to have been and/or (iv) deciding whether, for the applicant, the "highly likely" outcome is "substantially different" from the actual outcome': *R (Ron Glatter) v NHS Herts Valleys Clinical Commissioning Group* (supra) [98]-[99].

vii) It is important that a court faced with an application for judicial review does not shirk the obligation imposed by section 31(2A); the matter is not simply one of discretion but becomes one of duty provided the statutory criteria are satisfied: *R (Gathercole) v Suffolk County Council* (supra) at [38], [78] and [79] and *R (Plan B Earth) v Secretary of State for Transport* (supra) at [272].

viii) The provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application should instead be rejected. The provision is designed to ensure that the judicial review process remains flexible and realistic: *R (Gathercole) v Suffolk County Council* (supra) at [38], [78] and [79].

ix) The provisions 'require the court to look backwards to the situation at the date of the decision under challenge' and the 'conduct complained of' means the legal errors that have given rise to the claim: *R (KE) v Bristol City Council* [2018] EWHC 2103 (Admin) at [139] per HHJ Cotter QC, citing Jay J in *R* (*Skipton Properties Ltd) v Craven DC* [2017] EWHC 534 (Admin) at [97]-[98].

x) The Court can, with due caution, take account of evidence as to how the decision-making process would have been approached if the identified errors had not occurred. Section 31(2A) is not prescriptive as to material which the Court may consider in determining the “highly likely” issue: *R (Enfield LBC) v Secretary of State for Transport* [2015] EWHC 3758 at [106], per Laing J. Furthermore, a witness statement could be a very important aspect of such evidence: *R (Harvey) v Mendip District Council* [2017] EWCA Civ 1784 at [47], per Sales LJ, although the court should approach with a degree of scepticism self-interested speculations by an official of the public authority

which is found to have acted unlawfully about how things might have worked out if no unlawfulness had occurred: *R (Public and Commercial Services Union) v Minister for the Cabinet Office* (supra) [91].

xi) Importantly, the court must not cast itself in the role of the decision-maker: *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* (supra) at [55]. While much will depend on the particular facts of the case before the court, 'nevertheless the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law.' *R (Plan B Earth) v Secretary of State for Transport* (supra) [273].

xii) It follows that where particular facts relevant to the substantive decision are in dispute, the court must not 'take on a fact- finding role, which is inappropriate for judicial review proceedings' where the 'issue raised…is not an issue of jurisdictional fact'. The court must not be enticed 'into forbidden territory which belongs to the decision-maker, reaching decisions on the basis of material before it *at the time of the decision under challenge,* and not additional evidence after the event when a challenge is brought'. To do otherwise would be to use s.31(2A) in a way which was never intended by Parliament: *R (Zoe Dawes) v Birmingham City Council* [2021] EWHC 1676 (Admin), unrep., at [79] – [81] per Holgate J.

xiii) The impermissibility of the court assuming the mantle of the decision-maker has been particularly emphasised in the planning context where e.g. it may require an assessment of aesthetic judgment or adjudicating on matters of expert evidence: *R (Williams) v Powys CC* [2018] 1 WLR 439 per Lindblom J at [72] and *R (Thurloe Lodge Ltd) v Royal Borough of Kensington & Chelsea* [2020] EWHC 2381 (Admin) at [26] per David Elvin QC (sitting as a Deputy High Court Judge).

xiv) Finally, the contention that the s.31(2A) duty is restricted to situations in which there have been trivial procedural or technical errors (see e.g. the dicta of Blake J in *R (Logan) v Havering LBC* [2015] EWHC 3193 (Admin) at [55]) was rejected by the Court of Appeal in *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* [2018] 1 WLR 5161 [47] and [55] and in *R (Gathercole) v Suffolk County Council* (supra) [36], [77] and [78].

53. I should make clear that, although the Court of Appeal decision in *Plan B Earth* was reversed in the Supreme Court on a question as to whether oral statements in Parliament by ministers amounted to 'government policy', the Supreme Court did not address the s.31(2A) duty – see *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2020] UKSC 52. Nevertheless the parties are agreed

(and I accept) that the important statements by the Court of Appeal in *Plan B Earth* about the limitations of the court's task under s.31(2A) of the 1981 Act remain good law and I note that they are entirely consistent with the earlier Court of Appeal decision in *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* (supra) at [55].

ANALYSIS UNDER S.31(2A) OF THE 1981 ACT

54. Applying those legal principles to the facts of this case, I am unpersuaded that the statutory test for refusal of relief has been satisfied. That is for the following key reasons.

55. First, the central focus in the decisions in question and in all the pre-decision exchanges between the parties was the question of occupation. The Defendant simply did not accept that the Claimant was occupying the property at the relevant time and that is the thrust of what was being communicated to the Claimant both before and at the time the decision was made. The decision itself (in the e-mail dated 2 September 2020) refers back to the Council's letter of 8 July 2020 and that only makes reference to rejecting the application based on a lack of occupation as at 11 March 2020. It follows that this is not a case where I can see clear reasons being addressed in the alternative in the relevant decision letters about why the other relevant criteria were not satisfied.

56. Although some of the pre-decision e-mail exchanges between the parties make reference to the need for the property to be categorised as a "shop" where customers can walk in and browse the stock and that it must be reasonably accessible to the public, on a sensible reading of the correspondence it is clear that occupation was the key area in dispute. Because the Council did not believe that the Claimant was occupying the property, it followed that it also did not accept that it satisfied the other relevant criteria. It is also clear that occupation became the predominant focus as the exchanges between the parties developed, such that the decision letter (of 8 July) did not address any other criteria.

57. Secondly, in those circumstances and given the centrality of the occupation matter, I have found it an extremely difficult exercise to try to strip out the unlawful conduct and decide whether it is "highly likely" that the effective outcome would have been the same. The error about whether the Claimant was occupying the property was a fundamental one which, in my judgment, infected other aspects of the decision-making process. I am being asked to speculate about how the decision might have proceeded and on what basis had that error not been made and had it been accepted that the Claimant was in occupation of the premises at the relevant time. That requires me to speculate both about the process that would have been followed in obtaining evidence relevant to the decision and about the substance of the decision on the evidence available.

58. Thirdly, when I do attempt to carry out the necessary counterfactual exercise, it becomes apparent that some of the evidence which the Defendant appears to have relied upon to reject the contention about use and accessibility of the property (as well as occupation) in the pre-decision exchanges, was itself flawed and of very poor quality. In particular, the Defendant sought to rely on its own inspection visits and the records of inspections which had been carried out. That is evident, for example,

from Mr Hayle's e-mails dated 27 March 2020 and 21 April 2020 and from his letter dated 1 June 2020. In each of those communications reliance is placed on the "multiple occasions" (sometimes expressed as the 10 or 11 occasions) on which the Council had inspected the property but found it unoccupied and that was being used as a reason to doubt its use and accessibility as well as occupation on the Claimant's part. But that ignores the fact that, on the Claimant's own case, the property was unoccupied until March 2019 when preparations to begin trading began. What Mr Hayle hasn't grappled with anywhere in these communications with Mr Oluwakemi is the fact that only the December 2019 inspection was of any potential relevance to the application.

59. The inspection report from December 2019 is also of extremely poor quality and provided little useful information to the decision-maker. I am unable to accept Mr Graham's submission that ticking the box "Limited Access?" meant that someone would have tried to speak to someone at the premises before completing the form in that way. There is simply no evidence before me which supports that contention. Overall the inspection report is unhelpfully brief with no information about what steps were taken to carry out the visit or access the property and no photographs provided with the visit report. That visit report is also directly contradicted by the video evidence which demonstrates occupation as at late November 2019. That leads me to the conclusion that some of the inquiries which were conducted by the Defendant itself and which were being relied upon at the time were flawed and provided no proper information to any decision-maker.

60. Fourthly, by the time the decision was taken to reject the applications on 2 September 2020 the statutory declaration had been made by Mr Oluwakemi on 25 June 2020 and any hypothetical decision-maker would have to grapple with the evidential weight to be given to that declaration and the matters set out within it, when viewed against e.g. the inconsistent accounts which Mr Oluwakemi had given about who he spoke with at the Council to tell them he was in occupation of the property in November 2019.

61. I am concerned at the suggestion from the Defendant that I should assume (as part of the counterfactual exercise I am conducting) that the matters set out in Mr Oluwakemi's statutory declaration would have been rejected as truthful on the basis that Mr Oluwakemi lacked credibility and his account was not to be believed. While I can see that the Council had expressed some doubts about some of what Mr Oluwakemi had said in earlier e-mail messages, nowhere do I see in the contemporaneous documents any assessment of what weight (if any) was being given to the statutory declaration.

62. Further, it seems to me that for this court to make its own assessment about what weight to give to the statutory declaration, including on the basis of the Claimant's credibility, would be to cast itself in the role of decision-maker in a way which the authorities strongly caution against. This is not a question of precedent fact, but an assessment of conflicting evidence coupled with an evaluation of Mr Oluwakemi's credibility. In my judgment making any evaluation of these matters is to stray into the forbidden territory of assessing the merits of the matter which is the subject of this judicial review and runs contrary to this court's fundamental function which is to uphold the rule of law (see in particular paragraph 52 sub-paragraphs (xi) and (xii) above).

63. I recognise that the Claimant may have an uphill task in persuading the Defendant that the use and accessibility criteria are made out. If the visit reports are discounted, the evidence in support of those criteria was not extensive and it is accepted that the burden falls on the Claimant to satisfy those aspects of the eligibility criteria. But taking account of what was available, including the video evidence and the statutory declaration I do not consider it to be so weak that it is "highly likely" the applications would have been rejected.

64. Fifthly, in my assessment this is a case in which the decision maker might well have concluded that they had insufficient information on which to make a rational decision and decided to (1) request more information from the Claimant and/or (2) conduct further inquiries including a pre-arranged visit at which time access to the property could be guaranteed.

65. As to the former and looking at the totality of the exchanges between the parties, I have some sympathy with Mr Rahman's submission that Mr Oluwakemi reasonably believed that occupation of the property was the primary hurdle he needed to overcome. It is also evident from the recent statements before me that Mr Oluwakemi believes that he has further evidence which is pertinent to use and accessibility of the property and which was not considered by the decision-maker at the time. Had he known that occupation was accepted, but that use and accessibility were in issue, he would have had a fair opportunity to address those specific concerns and to adduce evidence meeting those points.

66. As to the latter, the Defendant had decided to conduct visits to the property and placed reliance on the reports of those visits when erroneously rejecting the contention that the Claimant was in occupation of the property. Those were investigations which it decided were appropriate in this case, no doubt as part of discharging its duty of reasonable inquiry (as discussed in *R (Khatun) v Newham London Borough Council* [2005] QB 37 and the principles summarised in *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647). Had the error about occupation not been made it seems to me that the decision-maker might well have decided that a specific visit was necessary and appropriate to consider the particular questions of use and accessibility at which time access to the property might have been secured by pre-arrangement, particularly given the nature of the business the Claimant contended he was operating. Further, in my judgment, it might well have been unreasonable for the Defendant not to carry out such further inquiries given the paucity of reliable evidence contained in the existing inspection reports.

67. Had either course been taken, it is not for this court to speculate on what the outcome might have been and what additional evidence might have been obtained which was pertinent to the use and accessibility questions.

68. Finally, I note on the basis of the recent (late) witness evidence submitted by the parties, that there is a serious dispute as to whether, even now, the Claimant can satisfy the necessary use and accessibility requirements. This court is not equipped, nor is it the function of this court, to determine such a dispute. But the very fact that the parties are in disagreement as to what the recent evidence from the Claimant shows, suggests to me that this is a case which should properly be remitted back so that the decision can be re-taken absent the error over occupation.

CONCLUSIONS

69. Overall and bearing in mind the significant hurdle which the "highly likely" test represents, I find that the Defendant has not discharged that burden in this case. This is a difficult case in which to disentangle the unlawful conduct complained of from the other circumstances of the case, with the effect that when that counter-factual exercise is carried out, there is too much uncertainty about the outcome to satisfy the necessary test. The decision must therefore be quashed so that the Defendant can take the decisions again, properly directing itself as to the fact of the Claimant's occupation at the relevant time.

70. Accordingly, I allow the claim for judicial review and remit the matter back to the Defendant for the decisions to be retaken.