Business rates relief: an empty promise?

Even before the current Covid-19 outbreak, non-domestic rates were a critical concern for landlords and tenants of business premises alike. This crisis, and subsequent lockdown, has provoked even closer focus on the issue, and led to some major changes to the rates regime.

There is good news for businesses in England[1] occupying premises for use in the retail, hospitality and leisure sectors: they will not have to pay any business rates for the 2020-21 tax year under the new Expanded Retail Discount[2], and if the premises in question have a rateable value of less than £51,000, they will also be eligible for a cash grant of up to £25,000 under the new Retail, Hospitality and Leisure Grant[3].

There are some interesting points thrown up by those schemes, and the guidance[4] bears careful reading. Not everyone would guess that employment agencies qualify but employment solicitors do not, or that massage parlours qualify but chiropractors do not. Perhaps we can look forward to chiropractors arguing that the manipulations that they were performing were merely pleasurable massages in order to escape rates liability. And there is a curious mismatch between premises ordered[5] to close or cease providing services and those obtaining relief: funeral directors can stay open but do get relief, banks can stay open but do not get relief, but bureaux de change must close and cannot get relief. Those who are still digesting the Supreme Court's recent pronouncements on ATMs in supermarkets in *Cardtronics v Sykes* [2020] UKSC 21 may be interested to note that supermarkets are granted relief but that ATMs that are separate hereditaments are not.

But these are questions for another day (and another article). This paper focuses on "everyone else": those who did not qualify for rates relief under the existing regime, and who are not eligible for the new relief scheme. Many premises are sitting empty and unused, but is there still a rates liability, and if so does it fall on the landlord or the tenant?

The four conditions for rates liability

Section 43(1) of the Local Government Finance Act 1988 ('**the 1988 Act**') provides that, if the premises (referred to as the hereditament) are in the rating list, rates are payable by the person who

[1] This article only covers the position in England; the Welsh Government have been somewhat more generous.
[2] Guidance available here
[3] Guidance available here
[4] Available here.
[5] By the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020

is in "occupation" of all or part of the hereditament. The test for occupation is well known, and the four conditions are set out in *John Laing & Son Limited v Assessment Committee for Kingswood Assessment Area* [1949] 1 K.B. 344:

> *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.*

The first condition

To the tenant and landlord of a large office premises, sitting empty and unused, the first "actual occupation" condition may seem quite promising. In *Associated Cinema Properties Ltd v Hampstead Borough Council* [1944] 1KB 416 Du Parque LJ held:

> *a mere intention to occupy premises on the happening of a future uncertain event, cannot, without more, be regarded as evidence of occupation*

This sounds rather like the present situation: the lifting of the lockdown is a future uncertain event, and so, it might be argued, the tenant's intention to go back into occupation is not a problem. The sting in the tail is however in the 'without more'. Lord Denning, in *Bexley Congregational Church Treasurer v Bexley London Borough Council* [1972] 2 QB 222 explained:

> *when premises are left vacant, a mere intention to occupy them in the future does not constitute occupation. There must be something such as furniture, left on the premises or some use being made of them.*

This will rule out many premises currently let to a tenant. In most cases, the tenant will be intending to use them again in the future once the lockdown is lifted and government guidance allows, and is unlikely to have gone to the trouble and expense of completely emptying the premises of all furniture and equipment. Indeed, they may be unwittingly also be making 'some use' of the premises: although there is a *de minimis* threshold, even very slight use can pass the threshold, as is strikingly illustrated by *Sunderland CC v Stirling Investment Properties LLP* [2013] EWHC 1413 (Admin), where the placing of a 100 x 100 x 50 mm Bluetooth box in a 1500 m^2 unit to perform marketing and advertising functions. was sufficient use for the company which owned the box to be in "occupation". Companies who leave email and network servers running in their offices might well face a similar fate.

However the situation of furniture or items left in place but not being used might now fall within section 65(5) of the 1988 Act, not in force at the time of the *Bexley* case. It provides that (emphasis added):

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

There does not appear to be any decided case on this point, but it could at least be a valuable argument for a tenant to deploy against a local authority seeking rates for premises that are not being used at all.

The third condition

A tenant of a commercial lease who is held to be in actual occupation is also likely to satisfy the second and fourth conditions, but might reach for the third *John Laing* condition: any technical use or occupation during the lockdown might well feel like it is of no value or benefit to the tenant in question. During lockdown, the premises may well be a liable from which no-one could generate profit. The words of Bowen LJ in *West Bromwich School Board v West Bromwich Overseers* (1884) 13 QBD 929 may seem resonant:

> *If land is by law struck with sterility when in any and every body's hands, so that no profit can be derived from the occupation of it, it cannot be rated*

However, this statement, and the third *John Laing* condition, must be properly understood. The word 'profit' is with respect perhaps ill-chosen, since the condition is that no value can be obtained, and not that no money can be made, as clarified by Lord Herschell LC in *LCC v Erith Churchwardens and West Ham Parish (Churchwardens)* [1893] AC 562:

> *Now, if land is "struck with sterility in any and everybody's hands," whether by law or by its inherent condition, so that its occupation is, and would be, of no value to any one, I should quite agree that it cannot be rated to the relief of the poor. But I must demur to the view that the question whether profit (by which I understand is meant pecuniary profit) can be derived from the occupation by the occupier is a criterion which determines whether the premises are rateable*

In most cases, there probably is 'value or benefit' to the tenant in having the premises available to it once the lockdown ends. Another way of considering the question is whether any tenant would be prepared to take over the lease without demanding a reverse premium: if they would, there is value to the lease.

Vacant property relief

What then is the reward for a landlord or tenant that manages to satisfy the four *John Laing* conditions and escape the reach of section 43 of the 1988 Act? Only the opportunity to rely on section 45 of the same Act. The drafting of this section is strewn with double negatives, but the practical effect is that, if the premises are not "occupied", three months' relief from rates is granted, unless the premises falls within one of the special classes that qualify for longer relief.

These special classes are set out in regulation 4 of the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008/386. Most concern particular uses, but two are of interest in the current situation. These are set out in Regulation 4(c) and (d), which provide that no rates are payable for unoccupied premises:

> *(c) whose owner is prohibited by law from occupying it or allowing it to be occupied; or*
>
> *(d) which is kept vacant by reason of action taken by or on behalf of the Crown or any local or public authority with a view to prohibiting the occupation of the hereditament or to acquiring it*

The interpretation of Regulation 4(c) has on occasion been considered by the courts:

a. In *Tower Hamlets LBC v St Katherine by the Tower* (1982) 80 LGR 843, it was held that, where a certificate was required certifying the fire escape from the building before the building could be occupied, and no such certificate had been issued, no rates were payable.

b. In *Regent Lion Properties Ltd v Westminster City Council* [1990] 39 EG 57 it was held that, where a notice under the Health and Safety Act required removal of asbestos before the building could be occupied, no rates were payable from the date of the notice until the remedial works were done.

c. By contrast, in *Pall Mall Investments (London) Ltd v Gloucester City Council* [2014] EWHC 2247 (Admin) where the dilapidated condition of the building meant that occupation

created a risk that the owner might be prosecuted under health and safety legislation, but no prohibition had been issued, rates were payable.

Probably therefore, Regulation 4(c) would apply where legislation has been passed expressly prohibiting the building to close but not if its occupation only risked breaching the law. Most premises that have actually been ordered to close will already qualify for the new Expanded Retail Discount, but that relief only applies to occupied properties, not vacant ones. If a property has been ordered to close and is unoccupied, this would seem a good argument against rates liability.

Businesses that have not actually been ordered to close may have to rely on Regulation 4(d). The argument would be that the combination of the coronavirus legislation and government guidance prohibiting people from leaving home without a reasonable excuse and to work at home if at all possible was "action taken by...any public authority" and that the premises were being "kept vacant" because of that guidance. The difficulty might be showing that the guidance was action taken "with a view to" prohibiting the occupation of the premises, rather than "with a view to" the slowing of virus transmission but with the foreseeable effect that the premises would be unoccupied. However, a business facing severe cashflow difficulties might want to deploy this argument against the local authority.

Dispute process for unpaid business rates

Obviously all businesses should pay the taxes they owe. But there are several areas discussed above where there a lack of clarity as to the degree of liability, and ratepayers are entitled to raise respectable arguments that dispute their liability. Given that for many businesses their difficulties are temporary ones of cashflow, rather than underlying profitability, it may also be worth running the risk of an adverse liability order and costs order at the end of a trial if the alternative is having to find substantial cash sums now.

If a ratepayer does raise a dispute but ultimately loses, how long might it be before they have to pay up? The process is set out in Non-Domestic Rating (Collection and Enforcement) (Local List) Regulations 1989.

Demand notices are sent once a year, and are in most cases meant to be sent on or as soon as practicable after 1st April of the year in question. The default payment instalments are set out in Schedule 1 to the regulations and will be most cases be 10 monthly instalments.

If an instalment is missed, the local authority must send serve a further notice on the ratepayer stating the instalments required to be paid. If the missed instalment is not paid within 7 days of the

service of the further notice, then the whole yearly amount becomes payable in a further 7 days (so 14 days after the further notice).

Normally, before a liability order can be sought, a reminder notice must be sent, but if the whole yearly amount has become payable the local authority do not need to do this and can proceed directly to seeking a liability order. This is done by making complaint to a justice of the peace, and requesting the issue of a summons directed to that person to appear before the court to show why he has not paid the sum which is outstanding. There will be at least 14 days' notice of the hearing from the date of the summons.

At that hearing the magistrates court must make the liability order if it is satisfied that the sum has become payable by the defendant and has not been paid. It is therefore important to attend and dispute the liability. The summons or the local authority may say that the ratepayer does not have to attend: this is correct, in that they cannot be compelled to attend, but it ignores the practical importance of attending.

If there is enough merit to the objection that the court cannot be 'satisfied' the magistrate will then list for a trial in front of a district judge (sitting in the Magistrates Court). There is no direct authority on the threshold to be met but on an application to set aside a liability order the ratepayer must show that there is "*a genuine and arguable dispute as to the defendant's liability"* (see *R (Brighton and Hove City Council) v Brighton and Hove Justices* [2004] EWHC 1800 (Admin)), and it seems likely that the test would be similar at a first hearing.

Timescales will obviously depend on both how quick the local authority are to seek a summons, and on the court's listing practices, but it is likely to be several months before any final liability order (and any costs order) is made.

If any ratepayer wished to appeal and obtain clarity of some of the more interesting point of law, appeal is by way of case stated, which (if permission were granted) would take longer still to be resolved.

Once a liability order has been made, the local authority can take all the same enforcement actions as someone enforcing a judgment debt. Theoretically there is a power to commit an individual debtor to prison (but not directors of a company) although the court is likely to want all other reasonable steps to have been exhausted first.

It may be possible therefore for a ratepayer to deploy arguments as to actual occupation, value or benefit, or entitlement to longer vacant relief to escape liability, or at least to defer (albeit to increase) the pain of having to pay rates on premises affected by the lockdown. Whether it is worth

it will depend on the individual commercial circumstances of the premises and the ratepayer, as well any caselaw that emerges over the coming months.