THE VALUATION TRIBUNAL FOR ENGLAND

Summary of Interim Decision: ndr, jurisdiction, whether a challenge to an entry in the rating list through no valid completion notice being served should be by way of judicial review or proposal. President found that the matter could be decided by way of proposal.

Re: 1st Floor, The Horizon, 99 Burleys Way, Leicester,

2nd Floor, The Horizon, 99 Burleys Way, Leicester,

Ground Floor, The Horizon, 99 Burleys Way, Leicester,

Ground Floor, Thames Tower, 99 Burleys Way, Leicester,

1st Floor, Thames Tower, 99 Burleys Way, Leicester,

2nd Floor, Thames Tower, 99 Burleys Way, Leicester

APPEAL NOs: 246525454690/538N10

246525454849/538N10

246525454856/538N10

246525454862/538N10

246525454867/538N10

246525454875/538N10

BETWEEN: Delph Property Group Ltd (Appellant)

and

Mrs Janet Alexander (Respondent 1)

(Valuation Officer)

Leicester City Council (Respondent 2)

(Billing Authority)

BEFORE: Mr G Garland, President

SITTING AT: NSPCC National Training Centre, 3 Gilmour Close, Leicester LE4 1EZ

ON: 17 January 2018

APPEARANCES:

Mr Luke Wilcox of Landmark Chambers for the Appellant

Mr George Mackenzie of Francis Taylor Building for the Valuation Office Agency (Respondent 1).

Mr Tom Gosling of 23 Essex Street for the Billing Authority (Respondent 2)

Summary of Decision on Preliminary Points

1. The Tribunal has jurisdiction to hear the appeals.

2. Any time constraints to challenging the entry in the list on the basis that it shows a hereditament that ought not to be shown must meet the regulatory timeframe for proposals (and appeals where they apply) and, any other regulatory requirements such as those in respect of the material day provisions. The Tribunal cannot prescribe its own time constraints.

Introduction (containing agreed facts)

3. The property at 99 Burleys Way, Leicester (previously known as Thames Tower and now known as The Horizon) was originally constructed in the 1970s as an office building with floor plates on the ground to second floors comprising more than 1,200 m^2 per floor. Above the wide frontage there was a central tower forming the third to sixteenth floors of the building, with available office space of less than 500 m^2 per floor.

4. In late 2006 the then owners, Brampton Asset Management (Leicester) Ltd, began a scheme of redevelopment with the tower floors being converted into 112 dwellings whilst the ground to second floors were refurbished but remained office accommodation.

5. All rating assessments were deleted from the rating list with effect from 23 October 2006. At the time that works commenced the building included the following hereditaments:

    a. 1st, 2nd (Part) and 3rd to 9th Floors – RV £172,000

    b. Part Ground Floor RV £31,500

    c. Part Ground Floor (Stiches Clothing) RV £6,400

    d. Part Second Floor RV £38,000

6. The residential accommodation created on the third to sixteenth floors came into the council tax valuation list on various dates from the end of 2008.

7. There is no detailed schedule of works undertaken to the building available as the former owner went into administration in 2010 and was subsequently wound up. The contractor, J H Hallam, also went into liquidation in 2013.

8. The only evidence available relating to the works carried out to the offices under appeal is provided by Corrigan Gore Project Management who, in 2010, carried out a due diligence investigation into the building on behalf of the Appellant, at the time of their purchase of the building which completed on 3 November 2010, and that provided by Leicester City Council for the hearing.

9. The ground floor offices comprised two separate office areas either side of the central core and reception with the first and second floors being single spaces but capable of division. The rating assessments for the office floors were deleted from the rating list in accordance with Valuation Office Agency practice at the time.

10. The works undertaken on the appeal floors were certified as complete by Leicester City Council's building control department for building regulations purposes on 3 October 2008. An enquiry officer from Leicester City Council conducted an inspection of the property on 27 January 2009 accompanied by Ivan Lloyd, the managing agent of Brampton. The enquiry officer considered the works to have reached practical completion and recommended service of a completion notice.

11. The offices were marketed by agents as refurbished and available for letting both by Brampton and, from November 2010, by Delph. At practical completion of the refurbishment project, the offices were complete to what is understood as 'Category A' that is beyond 'shell and core' with raised floors, suspended ceilings, lighting, cooling and power cabling and sockets all installed. The space was therefore available and ready for bespoke fit out by the incoming tenant.

12. Completion Notices under Schedule 4A to the Local Government Finance Act 1988 were issued by post setting a completion date of 6 February 2009. The precise date on which the notices were issued is unclear but they were headed 'Date of Service: 06/02/2009'. The notices were issued by ordinary post and sent to the correspondence address held at Companies House for both the company secretary and a director, rather than to the company's registered office address. It is not known whether this address was given either by the company or by their agent for service of notices. The memorandums drawn up by the Council's enquiry officer on 3 February 2009, subsequent to the meeting of 27 January 2009, record Brampton's address as 20 Brampton Grove, London NW4 4AG.

13. It is not known whether the completion notices were received by the owner but they were not returned undelivered to the council and the owner did not appeal or challenge the notices.

14. The rating list was altered by the VO on 9 March 2009 to assess the three separate floors from 9 February 2009 and the entries were carried forward into the 2010 rating list. On 6 September 2010, with effect from 4 August 2010, the rating list was altered to change the address of the appeal floors from 'Thames Towers' to 'The Horizon'. No other changes to the assessments were made at this time.

15. Following practical completion of the works in 2008, the following lettings took place:

    a. Small Ground Floor Suite of 106 m^2 from March 2013

    b. Large Ground Floor Suite of 600 m^2 from June 2014

    c. First Floor from March 2015.

16. At the time of the letting of both the large ground floor suite and the first floor, the landlord and tenants entered into specific licenses for alterations and fitting out works to take place.

The appeals and proceedings

17. On 31 March 2015, Delph's former agent, Knight Frank, made proposals seeking both the deletion of the hereditaments on the ground to second floors and a reduction in the rateable values. The effective date of all the changes sought was 1 April 2010. Altus Group were instructed to take over all the proposals in July 2016 (which by then had become appeals) and recently agreed a reduction in the rating assessments which left those appeals seeking a deletion outstanding.

18. The detailed reasons in the proposal (appeals) were set out as being:

> *This assessment is incapable of occupation and should not have been entered into the list. VTE decision 0119M27310/212N05 Tull Properties*

Ltd V South Gloucestershire Council issued on 7th October 2013 determined that a refurbished building is not a new building so the completion notice procedure is not valid. In addition under 120131 UKUT 0430 (LC) Aviva Investors and PPG Southern V Whitby (VO) it was determined that a hereditament should only be assessed for rating purposes when it is fully fitted out and ready for occupation . This assessment is incapable of beneficial occupation for office purposes and should be deleted.

19. The parties made application for the appeals to be treated as complex in accordance with the Tribunal's Consolidated Practice Statements (CPS3). I agreed to the request and also decided to add the Billing Authority as a party to the appeals, as in part the issues in dispute could have required evidence on the service of the completion notices. The VTE made Directions which the parties complied with and a bundle of evidence was provided prior to the hearing.

Preliminary Issue - Jurisdiction

20. The first respondent raised a preliminary issue as to whether the VTE was able to override, dis-apply or otherwise overlook the mandatory statutory deeming provision in s.46A(2) of the Local Government Finance Act 1988 in circumstances where a completion notice has not been quashed or set aside by the High Court in judicial review.

21. The second respondent remained neutral on this point. I must add that this argument was only introduced for the first time by the first Respondent within his skeleton argument a week before the hearing. The Appellant initially sought a postponement which I refused, bearing in mind the need to progress cases, but by the time of the hearing had provided a second skeleton argument addressing the issue.

22. In order to decide this point it was necessary to review the legislation, case law and previous decisions of this Tribunal.

23. I found the convenient way to set out the process by recording the wise words of Mr Justice Holgate when he heard the judicial review application in *Reeves (VO)* v. *VTE (and others)* [2015] EWHC 973 (Admin)*:*

> *"5. The general legal principle is that a building in the course of construction is treated as not constituting a hereditament for rating purposes because it cannot be occupied for its intended purpose (Arbuckle Smith & Co Limited v Greenock Corporation [1960] AC 813). The same principle may also apply where a building cannot be occupied while it is being modified so that it may be used for a new purpose. But where a newly constructed or altered building becomes capable of occupation for its intended purpose, it is then treated as a hereditament which may be entered in the rating list (Porter (Valuation officer) v Trustees of Gladman Sipps [2011] RA 337, paragraph 41).*
>
> *6. These principles are supplemented by the completion notice code contained in section 46A and Schedule 4A of the 1988 Act. Two types of notice may be served. First, where a billing authority is of the view that a new building can reasonably be expected to be completed within three months, the authority is to serve a completion notice on the owner of the building as soon as reasonably practicable (Schedule 4A, paragraph 1(1)). The notice must specify the completion day proposed by the authority (paragraph 2(1)), being no later than 3 months from the date of service.*
>
> *7. The second type of notice covers a situation where the billing authority considers that a new building has already been completed (paragraph 1(2)), in which case the completion date in the notice must be the date upon which it is served (paragraph 2(3)).*
>
> *8. In either case, if the owner does not agree with the completion date specified in the notice he may appeal to the Valuation Tribunal for England ("VTE") under paragraph 4(1). The only ground of appeal under that provision is that the building to which the notice relates has*

not been, or cannot reasonably be expected to be, completed by the date stated in the notice.

9. In effect, Schedule 4A contains provisions for determining the date on which the new building is deemed to be completed. Under paragraph 3 an agreement may be made between the owner and the billing authority as to the completion date, in which case the completion notice is treated as having been withdrawn. Under paragraph 5 if no appeal is made against the completion notice, and no agreement reached under paragraph 3, the completion date is taken to be the date stated in the notice. But where an appeal is made the completion date is the date determined by the Tribunal (paragraph 4(2)).

10. Where an appeal against a completion notice is made, the only question which the Tribunal is asked by Schedule 4A to answer is: what is the completion date?"

24. The matter before me was the correct approach for a challenge where the Appellant was of the opinion that no valid completion notice had been served. I also thought it might be helpful to set out a full review of the correct route for all of those matters that might be appealed in connection with a completion notice dispute (as encouraged to do so in *Reeves*).

25. In order to understand the point counsel for the Respondent was making, he helpfully set out the legislation. Section 42 of the Act which is referred to in s. 46A, provides as follows:

42.-Contents of local lists

(1) A local non-domestic rating list must show, for each day in each chargeable financial year for which it is in force, each hereditament which fulfils the following conditions on the day concerned-

(a) it is situated in the authority's area,

(b) it is a relevant non-domestic hereditament,

(c) at least some of it is neither domestic property nor exempt from local non-domestic rating, and

(d) it is not a hereditament which must be shown for the day in a central non-domestic rating list.

26. Office premises are relevant non-domestic hereditaments within the meaning of s. 42(1)(b) of the Act .

27. Counsel argued that the combined effect of s. 46A(2) and s. 42(1) is that where a completion notice takes effect (whether because no appeal is made against it or because the VTE determines the relevant completion day on a statutory appeal under Sch. 4A to the Act), the Valuation Officer is bound to enter it in the relevant local list with effect from the completion date.

28. The appeals before the Tribunal which were the subject of this dispute, were made through a proposal seeking removal of the entry in the rating list on the basis that the appeal hereditaments 'ought not to be shown in the list'.

29. Counsel concluded that where the Valuation Officer is bound to enter a hereditament into the relevant local rating list as a result of mandatory statutory provisions, it cannot be said that a hereditament shown in the list 'ought not to be shown in the list' unless there is a subsequent material change in circumstances which leads to a valid completion notice being overtaken/superseded by later events.

30. In my view the correct way in which to challenge whether a 'valid' completion notice was in force was through a proposal seeking a removal of the entry in the rating list on the basis that it 'ought not to be shown in the list'. I make this decision for a number of reasons.

31. In *Foster* v. *Chief Adjudication Officer and another* [1993], Lord Bridge sitting in the House of Lords found, when addressing the issue of the jurisdiction of the social security commissioner, the following at page 764 (E):

It is said that, if the commissioner were intended to have power to hold a provision in a regulation to be ultra vires and to determine whether or

not it was severable, one would expect to find that he was also empowered to make a declaration to that effect, which he is not. This, again, I find quite unconvincing. The commissioner has no power and no authority to decide anything but the issue which arises in the case before him, typically, as in this case, whether in particular circumstances a claimant is or is not entitled to the benefit claimed. If the success of the claim depends, as here, on whether a particular provision in a regulation is both ultra vires and severable, the commissioner's decision of that question is merely incidental to his decision as to whether the claim should be upheld or rejected. If not appealed, his opinion on the question may be followed by other commissioners, but it has, per se, no binding force in law. To my mind it would be very surprising if the commissioners were empowered to make declarations of any kind and the absence of such a power does not, in my opinion, throw any light on the question presently in issue.

32. As counsel for the Appellant put to me, the Respondent's opinion is incorrect as he seems to have misunderstood what is being appealed and sought from the Tribunal. A proposal to remove from the list a hereditament which 'ought not to be shown' does so, on the basis that the hereditament is not complete and no (valid) completion notice was served. The Tribunal simply had to find whether or not there should be an entry in the list. There was no need for the Tribunal to decide to quash the completion notice for which it held no power to do so. As part of that test the Tribunal had to decide whether a (valid) completion notice had been served and if it wasn't, whether there should be an entry in the list. If the building was complete and ready for occupation, then the Tribunal would be justified in leaving the entry alone (as suggested in *Reeves*).

33. This in a nutshell addresses counsel's point. Mr Mackenzie's starting point was an assumption that a valid completion notice had been served and on that basis the entry made and the list altered. If the Tribunal found that no completion notice (valid) had been served, then the question was whether the list was correct and the hereditament ought to be shown in it? When I say no

(valid) completion notice had been served, it might be on one of a number of grounds. These included whether service took place or that whilst service took place, the document purporting to be a completion notice was so defective in law that it could not possibly be said to be a completion notice, or as in the appeals before me, there is no provision in law to serve a completion notice.

34. Counsel for the Appellant drew to my attention the Court of Appeal's decision in *UKI (Kingsway) Ltd v Westminster City Council* [2017] EWCA Civ 430 where the past President of this Tribunal was found to be correct in deleting the rating list entry in accordance with a proposal when proper service had not taken place. At no time did the Court of Appeal question jurisdiction, which of course they were entitled to do so. The question wasn't whether to quash the completion notice but whether a completion notice had been served? If no completion notice had been served then, in that appeal, there should be no entry in the rating list as a completion notice was relied upon.

35. The decision of the President of the Upper Tribunal (Lands Chamber) in *Reeves* (but when sitting as a High Court judge) found that a challenge to the validity of a completion notice could be made through a proposal:

> *"60. I would add, in relation to paragraph 13 of the VTE's decision in December 2013, a few comments. The making by this Court of an order to quash the Tribunal's order to delete the hereditament from the rating list does not render the VTE's decision on the invalidity of the completion notice academic, or indeed improperly require the ratepayer to re-litigate an issue. The position remains that the deeming effect of the completion notice could not be relied upon in this case. The correct procedure for the ratepayer to have followed would have been to make a proposal challenging the entry of Beluga House in the list. That could have been dealt with at the same time as any completion notice appeal. That course was open to the first interested party but was not taken."*

36. Furthermore, despite the observations of Mr Justice Holgate that it wasn't an academic exercise in *Reeves*, the fact of the matter was that the decision in Beluga House that no valid completion notice had been served and therefore the building was not capable of occupation meant that the decision of this Tribunal was ineffective. This resulted in the rating list being inaccurate, an issue which concerned the President of the Lands Tribunal in *Simpsons Malt Ltd & Others* v. *Mr Craig Jones & Others (VOs)* [2017] UKUT 460 (LC):

> *…That is not to say that the special features of rating are irrelevant, including in particular the need, in the public interest, to ensure that the rating list is accurate…*

37. When questioned, Respondent's counsel was of the opinion that a judicial review challenge could only decide whether a valid completion notice had been served. It could not alter the list (see *Reeves*). This meant that a finding of such would only result in the Valuation Officer altering the rating list if he were able to and felt inclined to do so. He would be under no obligation to do so (although he would have a duty to maintain an accurate list but might decide it remained accurate without a completion notice being served) and the remedy would then be for the Appellant to make a proposal to delete the entry.

38. It would appear to me that a solution was being proposed by the Respondent which wouldn't necessarily remedy the point in question.

39. As found in *UKI Kingsway* the service (or indeed the contents) of a completion notice, which is a statutory notice and can have significant repercussions for ratepayers, should not been taken lightly by the Billing Authority or in a shambolic way. The onus is on the Billing Authority to ensure they undertake the process properly. Indeed Valuation Officers should satisfy themselves that the notice they receive complies with the law and that they are correctly making an entry in the rating list. It would be wrong to require the recipient to undertake judicial review as a check for both the Billing Authority and Valuation Officer.

40. However, a word of caution for Tribunal panels and parties. The Tribunal should not allow frivolous appeals seeking deletion of the entry in the rating list where the completion notice can be read in such a way to give force to the intention of the Billing Authority or that a challenge could be made through a completion notice appeal.

41. The Tribunal put to counsel for the Respondent a couple of examples where it would be clear to everyone that no valid completion notice had been served, one where the date set was nine months in advance for the work to be completed and the other where the notice failed to name the building to which it related. Counsel was quite clear that despite the obvious flaws the Valuation Officer would enter what he considered to be the properties in the list, even though he knew the notices were defective and that the Appellants would need to challenge the notices by judicial review. In fact, time and again the higher courts have referred to the Tribunal dealing with matters that are obviously wrong within its own jurisdiction without requiring parties to launch off into expensive and often sterile litigation where the outcome is plain to all before it begins. This cannot be right.

42. I must also add that encouraging parties to seek judicial review when a much more proportionate and less burdensome solution is available does not seem an attractive proposition for the parties or the higher courts. Whilst the Respondent Billing Authority remained neutral on this point, I'm not sure continual visits to the High Court for judicial review applications would be an attractive proposition to the vast majority of Billing Authorities in this country.

43. I have also reviewed the correct approach on a completion notice appeal. In *Reeves* Mr Justice Holgate stated, when confronted with an argument as to the matters the Tribunal can decide on a completion notice appeal, the following:

> *"26. All of these points only serve to emphasise that the question whether there is jurisdiction in a schedule 4A appeal to consider the invalidity of a completion notice needs to be determined in a contested case, or at least one where an undisputed assumption that jurisdiction*

exists is tested with the assistance of counsel appointed as a friend of the court. Full argument and citation of the relevant statutory provisions and authorities would be necessary."

44. For completeness, I have decided that the only issue for the Tribunal to decide where an appeal is made against a completion notice, is the date. This is confirmed in *Reeves* (para. 10) and indeed was acknowledged by the past President of this Tribunal in *Prudential Assurance Company Limited* v *Valuation Officer* [2011] RA 490 and as recorded as such in *Reeves* when confronted with a completion notice appeal:

> *"58. I therefore conclude from this review of the legislation that the Tribunal in this case was not empowered to make the order that the subject hereditament, namely Beluga House, be deleted from the 2005 rating list.*
>
> *59. I do not find that conclusion surprising for a series of reasons. First, the completion notice code simply provides a deeming provision for the completion date of new buildings. However, a completion notice may be invalid simply because it was incorrectly served or because the new structure does not fall within the definition of a new building, that is to say reasons which have nothing to do with the date when a new development is completed. Second, treating a completion notice as invalid merely prevents reliance upon that notice in order to create a deemed completion date. Thirdly, that does not alter the continuing duty of the valuation officer under section 41(1) of the 1988 Act to maintain an accurate list based on the information that comes to his attention. In most cases a building is likely to be completed at some point in time, if not by the date deemed to be the completion date under Schedule 4A. Fourthly, it seems to me to have been unlikely that Parliament would have intended to confer on the VTE a power to direct the deletion of a hereditament simply because a completion notice is held to have been invalid and, as a result, the deeming provisions in section 46A and Schedule 4A do not apply, bearing in mind the*

valuation officer's continuing duty under section 41(1) and the fact that he is not the originator of a completion notice.

…Indeed, at paragraph 6 of the decision in the Prudential case the Tribunal took a completely different view of its jurisdiction, in contrast to the present case, by stating that an appeal against a completion notice under Schedule 4A is limited to challenging the date of completion and does not cover any wider or more fundamental aspects".

45. Both parties before me agreed that this was correct, and whilst not properly argued before me, the wording of the legislation and the views of the High Court and the past President of the Tribunal, confirm that. Therefore in respect of an appeal against a completion notice the Tribunal can only decide the date. However, Appellants would do well to heed the decision of the High Court in *Reeves*, in that all the Tribunal can do is amend (or quash – see *Spears Brothers* v. *Rushmoor District Council* [2006] RA 86) the notice, and this may still leave an inaccuracy in the list.

46. Therefore if an Appellant is of the opinion the outstanding work cannot be completed within three months, an appeal against a completion notice will not necessarily, if he is successful, produce the desired outcome which is a removal of the entry from a rating list. It may be that, as in the case of *Reeves*, the list is closed and no alteration can take place but it may also be because despite the decision of the Tribunal, the Valuation Officer is satisfied that the list is correct regardless of whether or not a completion notice exists (a completion notice is not a prerequisite of a new entry in the Rating List).

Preliminary Issue - Time Constraints

47. There was a second preliminary point raised by the second Respondent in respect of the appeals before me. Counsel stated there was an irrebuttable presumption that the completion notices were valid arising from the Appellant's excessive delay in advancing the appeals (making proposals).

48. The completion notices were served on or about the 6 February 2009. The original owner did not seek to challenge or appeal those notices. The

Appellant acquired its interest in the hereditaments on 3 November 2010, following apparently extensive enquiries and investigations. It must have known of the hereditaments' appearance in the rating list and/or the completion notices at the time. A challenge to the list on the basis of a lack of a valid completion notice was not made until 31 March 2015. The Appellant had provided no evidence to the contrary or to explain the delay.

49. In support of this contention the second Respondent relied on the decision of the past President in *Friends Life Company* v. *Alexander (VO)* (June 2012 – 052019398853/036N10) where Professor Zellick recorded that a challenge to a completion notice must be timely and excessive delay will create an irrebuttable presumption that the notice is valid.

50. I can deal with this point quite quickly. Once I decided that the correct appeal procedure was to submit a proposal on the grounds stated by the Appellant, any time constraints must be the subject of those contained within the relevant regulations. The artificial constraints created by Professor Zellick as far as I can see have no statutory force and simply don't exist.

51. I am in no way criticising Professor Zellick, in fact I can see clearly what he was seeking to achieve and indeed from reviewing a number of the decisions, the very narrow point raised by the Respondent Valuation Officer earlier has never been fully tested and, therefore the President was, in considering these matters under a proposal, developing law which I believe to be correct (and confirmed by the Court of Appeal).

52. Appellant's counsel did make one concession on this point and that was to clarify all he was seeking was to address the periods where he believed no lawful completion notice had been served, the hereditaments were not occupied and were not capable of occupation.

53. Time delays of such magnitude as provided in these appeals do not sit happily with me. It might be very difficult for parties to ascertain the condition of each hereditament at any one time. Indeed both the Respondents in this appeal will consider they have been placed in a difficult position.

54. The persuasive or legal burden of proof on these appeals to satisfy me that they were not capable of occupation during the period of dispute (provided I find that no valid completion notice could have been served), and therefore the Valuation Officer should not have entered them into the list, falls on the Appellant. If he, in this appeal or any Appellant in any other, is unable to satisfy the panel as to the condition of the hereditament under appeal, then the appeal should not be allowed.

55. Finally these appeals (proposals) were not made by the initial owner or indeed during the life of the hereditaments' entries in the previous list. The question to be asked was whether at the date the list was compiled (or when removal is being sought) the entry in the list was correct on the basis that it allegedly showed a hereditament that ought not to be shown. It would be quite wrong in law to continue to allow an entry to exist where it relied exclusively on a completion notice that has never been served or did not exist even when a new list came into force or ownership of the building changed hands. This does mean though that if at the 'material day' the hereditament was occupied or indeed capable of occupation the appeal (if other panels follow my reasoning) cannot be allowed.

56. As a result of my interim decision (which I will publish) the parties are directed to advise me within 28 days of receipt whether:

    a. The matter is to be appealed;

    b. A substantive issue hearing is now required; or

    c. The appeals will be settled.

Mr G Garland

President

Mr J Bestow

Registrar

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