EMPTY PROPERTY RATES
MITIGATION SCHEMES – NEW AND OLD

Last December’s Autumn Statement contained the outline of a new measure designed to encourage speculative development. The Chancellor announced that ‘newly built commercial property completed between 1 October 2013 and 30 September 2016 will be exempt from empty property rates for the first 18 months, up to State Aid limits and subject to consultation’.

One of the reasons why speculative developments have dried up over recent years is the enormous risks that developers face of having to pay empty property rates should their schemes remain vacant upon completion. The theory is that allowing a significant period free of empty rates on completion could help stimulate new schemes.

The promised consultation was finally launched on 12 June leaving very little time for the new scheme to be implemented by 1 October. Unfortunately, it is now clear that the scheme on offer will fail to meet its laudable objectives for a number of reasons. Firstly, rather than a statutory exemption for qualifying new-build development, the grace period is to be at local authorities’ discretion. Whilst councils’ costs will be fully reimbursed by the Exchequer, the extra uncertainty caused by the discretionary nature of the relief will discourage developers from embarking on costly and borderline viable schemes.

Of greater significance, the scheme is subject to the normal European State Aid rules, limiting each company to a total of €200,000 over a three-year period. Relief capped at this level is inadequate to change behaviours and to encourage new large-scale development, especially for property companies with more than one scheme.

The consultation sets out plans to limit the relief to premises wholly or mainly comprising new structures, for which a set of definitions not used elsewhere within rating is required. The clear intention of this overly complex proposal is to exclude most refurbishment schemes from the ambit of the new relief.

The consultation paper can be viewed here. Responses are required by 26 July and we have fed in our comments for inclusion in the representations being submitted by the key trade and industry organisations and the professional rating bodies.
EMPT Y PRO PERTY RAT ES MITI GAT I O N SCHEMES – CLARITY EMERGES

Owners of vacant properties continue to seek to avoid or at least mitigate their empty property rates liabilities and the courts have been increasingly active in recent months determining the validity of certain schemes.

Occupation by charities – meaning of ‘wholly or mainly used for charitable purposes’

Letting a vacant property to a charity provides significant benefits as charities are entitled to 80% mandatory relief from rates and local authorities can exercise a discretion not to charge the remaining 20%, albeit that few do so nowadays as they have to fund at least half of the costs. The critical issue so far as entitlement to the mandatory element of relief is concerned, is that the legislation (Section 43 Local Government Finance Act 1988) provides the following qualifying conditions:

(a) The ratepayer is a charity or trustee for a charity and (b) the hereditament is wholly or mainly used for charitable purposes (whether of that charity or of that and other charities).

We reported in our July 2012 Rating News Update a case involving the letting of a property in Chester to the Public Safety Charitable Trust (PSCT) which installed bluetooth transmitters in vacant premises claiming 80% mandatory charitable rates relief. The Magistrates’ Court found for the charity holding that although the transmitters only occupied a small amount of space, the occupier needed access across other parts of the property in order to move and service the equipment. Cheshire West and Chester Council appealed and the case was heard in the High Court in May, along with two related cases involving the same scheme operated in two other council areas; South Cambridgeshire and Milton Keynes. In those instances the magistrates had found for the councils having decided that PSCT’s use was not ‘wholly or mainly’ used for charitable purposes.

High Court rules that extent of use is relevant – efficiency of use is not

This followed closely behind another High Court decision in Kenya Aid Programme (KAP) v Sheffield City Council concerning two large modern warehouses occupied by KAP for the storage of furniture prior to shipping it to schools in Kenya. The furniture was spaced out generously, presumably to give the impression of extensive use of the premises. The Magistrates’ Court determined that KAP was not entitled to charitable relief as the premises were not ‘wholly or mainly used for charitable purposes’, ruling that this legislative requirement meant that there was a floorspace dimension in determining whether a charity was entitled to mandatory rates relief. KAP had argued that as the only use being made was for charitable purposes, their use of the premises was clearly wholly for charitable purposes.

Lord Justice Treacy in the High Court stated:

“ In my judgement the decision of the District Judge was flawed. Whilst the judge was entitled to… look at the whole of the evidence before him and decide on a broad basis whether the premises are being used wholly or mainly for charitable purposes, and whilst the judge was correct to take into account the extent to which the premises were used, he also wrongly took account of other factors.”

Those other factors which were wrongly considered by the magistrates were, firstly, their consideration of the inefficiency of furniture storage use and, secondly, whether KAP could have satisfied their storage needs in one rather than two buildings.

The High Court therefore overturned the ruling and returned it to the magistrates for review.

The judgement suggested that it is appropriate, albeit not necessarily conclusive, to have regard to the amount of floorspace occupied when judging whether premises are ‘wholly or mainly used’ for charitable purposes, but somewhat confusingly identified that efficiency of use is not a relevant consideration.

‘Extensive use’ necessary to qualify for charitable relief

Rather greater clarity emanated, however, from the High Court’s judgement in the PSCT cases. The court found no reason to divert from the approach in Kenya Aid and decided conclusively in favour of what they described as the ‘extent of use interpretation’ to judge whether occupation was ‘mainly’ for charitable use, dismissing the charity’s claim that if the only use was charitable, then their occupation must be wholly for charitable purposes (the ‘purpose of use interpretation’).

Mr Justice Sales couldn’t have been clearer when he stated

“ It is reasonable to infer that Parliament intended that the substantial mandatory exemption from rates for a charity in occupation of a building should depend upon the charity actually making extensive use of the premises for charitable purposes, rather than leaving them mainly unused.”

He therefore dismissed PSCT’s appeals against the Magistrates’ Court decisions which had found that the charity was not entitled to charitable relief and referred the decision in the Cheshire West case, which had been in PSCT’s favour, back to the magistrates for review.

However, before that review could take place, South Cambridgeshire Council applied for a winding up order against PSCT which was issued by the court last week.
INTERMITTENT OCCUPATION

Perhaps the most practised means of legitimate empty property rates mitigation is that of intermittent occupation. The Regulations provide that so long as a property is occupied for a minimum of six weeks, then when it is vacated a period free from empty property rates is granted – six months for warehouse and industrial premises and three months for other property uses. This scheme can be repeated so that one occupies for six weeks and vacates claiming three or six months free and then reoccupies for a further six weeks etc.

The key question therefore is what constitutes occupation for rating purposes which will create the rates free period after six weeks’ occupation?

Last summer we reported the landmark High Court decision concerning Makro Properties – see our July 2012 Rating News Update.

In that case, the lower Magistrates’ Court considered the long established tests as to what constitutes ‘rateable occupation’ and decided that when Makro stored between 16 and 100 pallets of files and till receipts, which it had a legal obligation to retain, it did not meet two of the tests. Makro’s use was deemed not to be ‘actual occupation’ as it was ‘de minimis’ (only about 0.2% of the total floor area of some 13,000 sq m) and was not ‘beneficial’ as the company actually incurred costs in moving the files from where they had been storing them.

That case was appealed and the High Court issued judgement in favour of the ratepayer. So far as ‘actual occupation’ is concerned the legislation states that a person is liable for occupied rates if in ‘occupation of all or part of the hereditament’ and unoccupied liability applies if ‘on the day none of the hereditament is occupied’. Here there was clearly occupation that the Judge found to be ‘not trifling’ and even though only a very small percentage of the building was in use, this was sufficient to constitute ‘actual occupation’.

The magistrates had also misdirected themselves in considering whether Makro could have arranged their affairs more effectively or profitably. The proper question was whether there was benefit being derived from the occupation of the actual property. As the ratepayer needed to store the files somewhere they were clearly in ‘beneficial occupation’.

Use of a ‘minute fraction’ of a property’s floor area can comprise rateable occupation

Notwithstanding this ruling from the High Court, Sunderland City Council pursued another case where minimal use was being made of premises for the minimum six week period, this time by a company called Complete Mobile Marketing which was using warehouse premises for the broadcasting of bluetooth messages from a small electronic device. The High Court was asked to determine whether the District Judge in the Magistrates’ Court had erred in finding:

(i) that the bluetooth apparatus constituted occupation, and
(ii) that there was rateable occupation, notwithstanding its purpose was for advertising rather than warehousing which was the description of the premises in the rating list and the purpose for which the property had been constructed.

The High Court dismissed Sunderland’s appeal recently. Mr Justice Wilkie found that housing just one bluetooth device in a 1,500 sq m property was sufficient to constitute actual occupation. He said "the fact that the nature of their undertaking was such that, once they had identified the optimum location for their equipment, they did not need to “use” more than a minute fraction of the area encompassed within the premises did not prevent their occupation being rateable occupation "

So far as use of a warehouse for advertising purposes was concerned, he added "there is nothing in the legislation which limits the ability of a local authority to levy rates to occupation for a purpose which is identical to the description of the hereditament in the rating list "

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OUR CONCLUSIONS FROM THESE HIGH COURT JUDGEMENTS

In the light of these High Court decisions, we now have clarity as to the extent of use required to constitute occupation and the meaning of ‘mainly used’ in the context of charitable occupation of premises. There is a clear and substantial distinction between the very modest occupation required to meet the tests for rateable occupation and the extensive use required in order to qualify for charitable rates relief.

‘Minute’ use can be sufficient to constitute rateable occupation so long as it also meets the test of being ‘beneficial’. Use of premises for a purpose that differs from its intended use or from its description in the rating list does not prevent rateable occupation arising.

Neither of the High Court judgements in Kenya Aid and PSCT specifies that at least half of a property’s floorspace needs to be occupied in order to fulfil ‘mainly used’ and there could be circumstances where a lesser degree of occupation might be considered to be sufficiently extensive to be ‘mainly used for charitable purposes’. We have no doubt that the most certain route to achieving mandatory charitable relief is to ensure that the charity is occupying premises for its charitable purpose and using more than half of the floorspace. However, the High Court’s comment in Kenya Aid that efficiency of use is not a relevant consideration implies that one can legitimately adopt that charity’s approach of spacing out the furniture it was storing as opposed to stacking it to make most efficient use of the space.

ADOPTING LAWFUL MEANS TO MINIMISE EMPTY RATES LIABILITY

There is no ‘one-size-fits-all’ solution to empty property rates mitigation, but our team of experts will be able to devise a bespoke strategy, tailored to your business and property circumstances and attitude to mitigation schemes.

We may be able to remove all liability by obtaining a deletion of the property’s assessment or its reduction to a nominal figure, or by the application of one of the various exemptions.

Should we be unable to remove all liability, we will work with you to achieve the greatest possible reduction guiding you through other options including intermittent and charity occupation. We work with a range of carefully vetted third party organisations who can assist with implementation of our strategies.