VALUATION TRIBUNAL FOR ENGLAND

2017 Rating List Appeal appeal: Warehouse and premises; Proposal against Valuation Officer's notice of alteration; new hereditament; lack of small power distribution; no completion notice served following practical completion; Aviva v Whitby (VO) [2013] UKUT 0430 (LC); Porter (VO) v Trustees of Gladman SIPPS [2011] RA 33; appeal allowed.

APPEAL NUMBER:	CHG101152807
RE:	7 A, FAIRLIE ROAD, SLOUGH SL1 4PY (the "subject property")
BETWEEN:	Segro Public Limited Company — Appellant and Lucy Dyer (Valuation Officer) — Respondent
SITTING:	remotely using Microsoft Teams
ON:	Wednesday 3 July 2024
BEFORE:	Gary Garland (President)
CLERK:	David Slater (Registrar and Chief Clerk)
APPEARANCES:	Daniel Kolinsky KC from Landmark Chambers (Appellant's Counsel) Martin Jordan from the Altus Group (Appellant's Expert Witness) David Alford (Valuation Officer's representative)

DECISION AND STATEMENT OF REASONS

Decision

1. The appeal is allowed and the entry deleted with effect from 4 September 2022, as the appeal property was incomplete and therefore not ready for occupation for the purpose for which it was built.

Introduction

2. The appeal property was a vacant warehouse and premises. It was a modern warehouse of 3,137m² , built in 2014, and which had been subject to a programme of works to upgrade it,

in readiness for it to be re-let to a new tenant. This programme of works began on 7 June 2022, following the vacation of the previous tenant FedEx and was completed on 3 September 2022.

3. The warehouse was of steel portal frame construction with profile metal cladding. It had ancillary offices to the front with steel cladding above. The warehouse area had a minimum 10 metres eaves height rising to 14 metres at the party wall. The property was located on the Slough Trading Estate providing good access to the M4, M40 and M25 motorways. The property had 50 dedicated car parking spaces to the front plus a 30 metres deep reinforced concrete yard to the rear. The rear entrance provided clear access for heavy goods vehicles to the loading bay doors.

4. In the settlement of an earlier proposal, the Valuation Officer deleted the earlier list entry from the Rating List. Following the completion of the works, the Valuation Officer reinstated the entry into the Rating List by notice of alteration of his own volition with effect from 4 September 2022. It was agreed that this was the material date for this appeal.

5. The Appellant served a proposal on the Valuation Officer on 31 October 2023 seeking to reverse the effect of the Valuation Officer’s alteration dated 26 June 2023 and therefore a deletion of the existing entry of £302,500 Rateable Value with effect from 4 September 2022. The Valuation Officer determined that the Appellant’s proposal was not well founded and issued a decision notice to that effect on 1 December 2023. The Appellant later appealed the Valuation Officer’s decision notice by making an appeal to the tribunal on 28 February 2024, in accordance with regulation 13A of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009. The appeal was made on the grounds that the valuation of the hereditament was not reasonable. However, given that a deleted entry was sought, the grounds of appeal that should have been cited were that the list is inaccurate in relation to the hereditament (other than in relation to the Valuation). However, as it was clear from the proposal that a deleted entry was sought and no prejudice was caused to the respondent by the mistake when the appeal was made, I decided to proceed on the basis that what I had to decide was whether or not a hereditament existed on 4 September 2022.

6. Although Mr Jordan appeared before me and was available to assist, if required, I decided I did not need to hear from him. Nevertheless, as the Appellant’s case relied on factual evidence produced by Mr Jordan, Mr Kolinsky advised me that Mr Jordan was instructed by the Appellant on a success related fee arrangement. This was important for me know, in view of the Upper Tribunal’s judgment in *Gardiner & Theobald LLP v David Jackson (VO)* [2018] UKUT 0253 (LC).

7. I accepted this expert witness evidence on the above basis as to do otherwise would be contrary to regulation 3 (Discharge of VTE functions – general) of the Procedure regulations and was allowable due to the Tribunal’s rules on admissibility of evidence (regulation 17(2)(a) where the Tribunal can admit evidence whether or not it would be admissible in a civil trial). I therefore considered the “expert” evidence and attached such weight to it as I saw fit.

8. Mr Alford, for the Valuation Officer, appeared before me in a dual capacity, as both Advocate and expert witness.

9. This statement of reasons is not and does not purport to be a full verbatim record of the proceedings.

Agreed facts

10. The following statement of facts was agreed between the parties;

1. Unit 7a is a semi-detached industrial unit of steel portal frame construction providing warehouse and office accommodation of 3,137 m² with circa 1,200m² secure yard to the rear and staff parking to the front. It is situated on an established estate and was assessed throughout the 2017 Rating List as a warehouse and premises at RV £302,500.

2. The warehouse became vacant on 7 March 2022 at the expiry of a lease to FedEx UK Ltd. On 7 June 2022, the landlord began a scheme of works to develop and improve the building ready for marketing to a new tenant. The works reached practical completion on 4 September 2022.

3. The main works to the building were:
• Original sectional loading bay doors and associated running gear and hardware removed and replaced with new.
• All small power, data, lighting and heating was removed throughout the warehouse and undercroft. Emergency signage and lighting remained.
• New kitchen installed in warehouse to match existing.
• New shower room formed in alcove to existing bike store, with stud partition system and mineral wool cavity insulation
• All existing WCs were deep cleaned, not replaced, with associated decoration work to WC areas.
• Suspended ceiling removed from reception area and new MF ceiling system installed.
• All gas pipework removed from the building, including pressure regulator, meter, all pipework, fittings, valves and other accessories.
• The gas boiler and all related systems including flue, control panel, power supply, expansion tank, pipework and values were removed.
• A new electric boiler system was installed into the plant room, replacing the former gas system, to provide for heating of LTHW and domestic services.
• New LED lighting was installed in the offices and warehouse areas, along with new circuits for lighting controls.
• New small power cabling installed in the offices and ancillary areas
• New solar PV system was installed along with panels on roof.

4. Following submission of a Check and Challenge, the existing rating assessment was deleted from the Rating List on 26 June 2023, with effect from 7 June 2022.

5. On 27 June 2023, a new rating assessment for the warehouse was entered into the rating list, with effect from 4 September 2022, the date that practical completion of the building works had taken place.

6. A joint inspection of the property took place on 16 January 2023, in connection with the initial Challenge. At that point the works undertaken had reached completion. The warehouse has not yet been let and it remains in the same condition now as when that inspection took place.

7. The warehouse is advertised as having minimum clear eaves of ten metres, six electric loading doors, eight person lift, WCs at ground and first floor levels and fully fitted ground and first floor offices with LG7 PIR lighting. It is available with PV Panels, EV Charging, energy efficient LED lighting, fully fitted first floor offices, cycle storage and shower facilities and at EPC Rating A.

8. Small power is provided to the ground floor office and kitchen area with 5 single sockets and 13 double sockets installed, and to the first floor offices with 6 single sockets and 1 double socket installed.

9. The loading doors to the warehouse are powered and ready for use. There are also two double power sockets situated adjacent to the six loading doors, one in a corner and one centrally between two doors. These sockets remain from prior to the development works and are live.

10. There are no other power sockets installed within the warehouse area and no cabling installed to provide such sockets. The warehouse area is approximately 80% of the total floor area of the building.

Issue in dispute

11. The issue in dispute was whether or not the appeal property was complete and therefore ready for occupation, at the material date, despite the absence of small power distribution in the warehouse.

Relevant Law

12. Section 41 of the Local Government Finance Act 1988 (“the 1988 Act”) required the valuation officer to compile and then maintain the Rating List. In accordance with section 42 the rating list must show each relevant non-domestic hereditament.

13. The term “hereditament” was defined by section 64(1) of the 1988 Act by reference to its meaning under section 115(1) of the General Rate Act 1967, had that Act remained in force, namely: “Hereditament means property, which is or may be liable to a rate, being a unit of property which is, or would fall to be, shown as a separate item in the valuation list.”

14. Section 46A of and Schedule 4A to the 1988 Act provide for the inclusion of new hereditaments, which have never been previously occupied, to be treated as complete. The definition of a new building was extended following an amendment with effect from 26 December 2023, by the Non-Domestic Rating Act 2023, to include existing buildings which had undergone alterations. Prior to this amendment, it was not possible for a billing authority to serve a completion notice in respect of an existing building which had been deleted from the Rating List, following a scheme of works.

Discussion

15. The facts in this case were relatively straightforward. The appeal property was a modern warehouse that was vacated by its tenant. As was often the case, when a tenant vacated, the landlord had taken the opportunity to refurbish the property, in readiness for reletting to a new tenant.

16. In the case under consideration, the programme of works included a number of upgrades to improve its energy efficiency and performance.

17. Following an earlier proposal made by the Appellant, the Valuation Officer was minded to reduce the then existing assessment to a nominal entry of £0, thereby keeping the appeal property's entry in the Rating List. Mr Kolinsky suggested that the reason for the respondent's reluctance to delete the entry from the list altogether was because they were aware of the potential difficulties of reinstating it at a later date. In other words, Mr Alford could foresee the problem coming, if once the works were completed, the Valuation Officer wanted to reinstate the entry.

18. However, on behalf of the Appellant, Mr Jordan insisted that the entry be deleted and the Valuation Officer eventually acquiesced to that. Mr Alford admitted that it had been put to him afterwards that the Valuation Officer could have asked, the tribunal to make an order under Regulation 38 (7) of its Procedure Regulations, to restrict the period for when the appeal property was deleted from the Rating List to reflect the duration of the programme of works. However, Mr Alford thought that a temporary deletion and later reinstatement would have been outside the scope of the proposal. Therefore, that was why, the earlier proposal was accepted and actioned rather than resisted and the list entry reinstated by the Valuation Officer, leaving the onus on the appellant to appeal to the tribunal against the latter.

19. The Court of Appeal's judgment in *Moore (VO) v Great Bear Distribution Ltd* [2021] EWCA Civ 969 is authoritative as regards the VTE's use of its discretionary power under Regulation 38 (7). In Great Bear, it was agreed between the parties that the list entry of £825,000 Rateable Value should be deleted with effect from 23 June 2014, as the property had ceased to be capable of beneficial occupation due to a programme of works. The Valuation Officer requested that the VTE Vice President Martin Young exercise the VTE's discretionary power under Regulation 38(7) to restrict the period of a deletion to the duration of the works. This was because by the time the appeal came before the VTE to consider, the 2010 Rating List was closed and therefore if the assessment was not reinstated, there was no other vehicle to reinstate it, once the appeal was disposed of. Mr Young declined to make an order under Regulation 38 (7) because following the expiry of the works the appeal property would have had a lower rateable value, so he did not consider it appropriate the reinstate the former entry. Although the Upper Tribunal upheld Mr Young's VTE decision, the Court of Appeal determined that Regulation 38 (7) was appropriate. The fact that the programme of works had reduced the rateable value of Great Bear's property was considered neither here nor there. Lord Justice Arnold said that Great Bear could have made another proposal, following the completion of the works, to benefit from the reduced rateable value.

20. Paragraphs 78 to 79 of the Court of Appeal's judgment set out Lord Justice Arnold's reasoning why he considered the application of Regulation 38 (7) to be appropriate.

> 78. Turning to the fourth ground, I consider that the Upper Tribunal was right to take the ability of the ratepayer to protect itself into account in Avison Young and wrong not to do so in Great Bear Distribution. Counsel for GBD argued that the ratepayer was under no duty to maintain the accuracy of the list, whereas the Valuation Officer was under such a duty. I accept both of these propositions, but I do not agree that they support the approach taken by the Upper Tribunal in Great Bear Distribution. The fact that the ratepayer is under no duty to maintain the accuracy of the list does not justify the ratepayer relying upon its own failure to make a proposal which would have protected its position when the VTE is asked to exercise its discretion in the ratepayer's favour under regulation 38(7). I do not suggest that the Valuation Officer's failure to take unilateral action is an irrelevant consideration, but in my judgment, it is a factor of significantly less weight because the ratepayer will know what works have been carried out and when the works were completed long before the Valuation Officer can find that out.
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> 79. I would add that I am puzzled by the Upper Tribunal's statement that temporally limiting the order was not "in the public interest". By exercising its discretion in the way in which it did, the Upper Tribunal favoured the interests of one ratepayer, GBD, over the interests of other ratepayers in the relevant area (if they are required to make up the shortfall) or over the interests of persons who benefit from the public expenditure which is financed by rates (if other ratepayers are not required to make up the shortfall). This seems a strange conception of the public interest. As I understand it, what the Upper Tribunal meant was that it was not in the public interest for GBD to be overcharged. But, as discussed above, this ignores the fact that GBD could have avoided being overcharged by taking appropriate action.

21. Given the above, had the Valuation Officer did not delete the appeal entry, in the case before me, the situation that the respondent found themselves in could have been avoided.

22. Mr Kolinsky was quite candid in his legal submissions. There was a loophole in the legislation and on behalf of his client, he was exploiting it. I make no criticism of that position as he was clearly following the law and applying it to the best effect for his client, which is the fearless advocate's duty. The hurdle for the Valuation Officer to overcome was that, unless a property was occupied, or deemed complete and ready for occupation by the service of a completion notice, a hereditament can only be reinstated into the Rating List if *it was ready to be occupied for the purposes for which it was built.*

23. In the present case, the billing authority was not in a position to serve completion notice until section 46A of the 1988 Act was amended by the Non-Domestic Rating Act 2023 with effect from 26 December 2023. Following this amendment, a completion notice can now be served in respect of an existing building that has been the subject of a programme of works, like the appeal property in this case, put shortly the lacuna or loophole is now effectively closed.

24. The problem for the Valuation Officer was that unless the appeal property was one hundred per cent complete, it was not possible to reinstate its entry into the Rating List, after it had been deleted. Mr Kolinsky described the refurbishment of the appeal property as a speculative development, as the works were carried out in the absence of a new tenant. Therefore, certain customised works to facilitate occupation had to await until the new tenant and their requirements were known. In this case, Mr Kolinsky conceded that the outstanding works were relatively minor, the absence of small power from most of the warehouse area. There was small power by the roller bay shutter doors but none anywhere else in the

remainder of the warehouse area and cabling and plug sockets would be required before the new tenant could move in. so maybe 99 percent complete but not the one hundred percent the case law required.

25. Mr Alford advised me that the landlord would not install the cabling nor the small power because they would not know where to put it. The decision would be deferred until the tenant's requirements were known. In his skeleton legal arguments, Mr Alford had drawn my attention to the Valuation for Rating (Plant and Machinery) (England) Regulations 2000. He stated that under Class 1 (c) (i) when determining its valuation, only electricals up to the first distribution board were deemed to be part of the hereditament. In other words, the small power was not deemed part of the hereditament.

26. In response, Mr Kolinsky said this was where Mr Alford was going wrong. Mr Alford had erred by focussing his attention on a valuation driven approach. However, unless there was a hereditament to begin with, you had nothing to value and in this case, there was no hereditament.

27. Although the outstanding fit out works were minimal, Mr Kolinsky argued that that was sufficient for this appeal to succeed. It was clear from Paragraph 66 of the Upper Tribunal's judgment in *Porter (VO) v Trustees of Gladman SIPPS* [2011] RA 33 that this was the case:

> The authorities, in our judgment, establish the following. A building is only a hereditament if it is ready for occupation, and whether it is ready for occupation is to be assessed in the light of the purpose for which it is designed to be occupied. If the building lacks features which will have to be provided before it can be occupied for that purpose and when provided will form part of the occupied hereditament and form the basis of its valuation it does not constitute a hereditament and so does not fall to be shown in the rating list. There is in consequence no scope for including in the list a building which is nearly, even very nearly, ready for occupation unless the completion notice procedure has been followed.

28. In *Gladman Sipps*, the speculative development related to offices effectively fitted out to Category A specification awaiting tenant's final fit out to Category B before they could have been occupied. A later case, also heard by the Upper Tribunal, was more akin to the appeal before me. In *Aviva v Whitby (VO)* [2013] UT 0430 (LC) the warehouses lacked small power distribution and other features which were considered to be essential before the warehouses could be considered complete. In allowing the appeals, in that case, the Upper Tribunal reiterated what it stated in its earlier judgment in, *Porter v Trustees of Gladman SIPPS* [2011] RA 33 in paragraph 89;

> In conclusion we would reiterate what the Upper Tribunal said in paragraph 66 of Porter, namely that the issues which have arisen in these cases would have been avoided, if each of the billing authorities had served completion notices at the time the units reached practical completion. There is simply no need for disputes of this kind when the statutory scheme provides a reliable method of deeming a new building to be complete and capable of being entered in the rating list. If the views expressed by Mrs Whitby in her letter of 1 August 2008, and by Mr Mills in his evidence to the VT, had been properly considered in the light of the Tribunal's observations in paragraph 66 of Porter, the time and expense incurred in connection with these appeals could readily have been avoided.

29. Although there were more outstanding works to be undertaken in *Aviva*, in comparison to the appeal property, the absence of small power in the warehouse area was held to be an essential feature that needed to there before the warehouses could be considered complete.

30. Mr Alford did not dispute what the authorities said but argued that small power was akin to equipment and therefore did not form part of the building. He was therefore not talking about fit out but customised trade process. He was convinced that the appeal property was one hundred per cent complete. Whilst he accepted that it was a new entry, this was only for administration purposes, because in reality he saw it as a reinstatement of an existing hereditament.

31. I could not accept Mr Alford’s argument that small power was akin to equipment. Equipment to me was what you plug in to the small power. The simplest way to look at it was to consider a house. If the builder did not install small power to the living areas would the buyer consider the house complete if they had nothing to plug their television set or refrigerator into, the answer would be obviously not. In the case of a warehouse, whilst you could in theory store some items in it, as it had four walls and a roof, it could not really be used for the purposes of what it was built for. Modern warehouses often used automated robotic or computer systems to store large amounts of goods. They needed to be able to regularly manage small or large orders and frequent shipping. Small power distribution was therefore a necessary prerequisite before the incoming tenant could move in. Without small power the warehouse area would be of no use to a logistics tenant and therefore it was not ready for occupation.

32. It was also clear from the Upper Tribunal’s judgment in *Aviva* that the absence of small power was classed as fit out and not equipment.

33. Mr Alford made the point that when a tenant vacates a warehouse, the landlord normally requires it to remove its bespoke wiring. I had no doubt that this was true. In the same way, that an outgoing tenant of an office would normally be required to remove its category B fit out, partitions and the like, to return it to category A. This was to allow the landlord greater flexibility when it came to trying to re-let the property. It would also allow the incoming tenant to have a blank canvass upon which to draw its requirements. What I would not expect though was that the vacation of a tenant, even one taking its customised fit out with it, would automatically result in the hereditament being deleted from the list. As I tried to explain in *Aviva Investors v Bunyan (VO)* [2022] VTE CHG100345300, whenever a tenant vacated a property, inevitably it left behind some wear and tear or repair issues that required the landlord’s attention, before the property could be re-let. This was where the statutory assumptions usually became engaged because one of the statutory assumptions was that the landlord would undertake the necessary repairs, so that the property was in a reasonable state of repair to enable the property to be re-let, unless those works were uneconomic for them to undertake. As a corollary, unless you had a situation like the Supreme Court faced in *Newbigin (VO) v Monk* [2017] UKSC, where the nature of works was so substantial that the hereditament had ceased to exist, minor defects were assumed to be remedied under the rating hypothesis, in readiness for a re-letting.

34. The problem, as highlighted by this case, was if a Valuation Officer deleted an entry, the hereditament to which that entry related then ceased to exist. The fact that the average person in the street passing it would consider that the warehouse continued to exist, because it was still standing, was neither here nor there, whilst the owner benefitted rightly or wrongly from a rates holiday. Even if the outgoing tenanted stripped out and took his wiring and plug sockets with him, I would expect the property to remain shown in the Rating List. However, if

the Valuation Officer decides to remove the entry from the Rating List, the deleted entry cannot be reinstated without a completion notice or until the new tenant moves in. To the outside world this may appear nonsensical but that was what the statutory provisions required and the authorities, referred to above which were binding on me, had shown how the law should be applied in case like this. One learned judge described the rating environment as like being in cloud cuckoo land. In *China Light & Power Ltd v Commissioner of Rating and Valuation* [1995] 2 HKC, Godfrey JA stated;

> This court is concerned, in these appeals, with questions of rating. The world of rating appears, to one unfamiliar with the arcane, to be cloud cuckoo land, a world of virtual unreality from which real cuckoos are excluded (although it seems that permission to land will be granted to a real cuckoo flying in from the real world if it can demonstrate that its presence in cloud cuckoo land is essential not merely accidental: see Dawkins (VO) v Ash Brothers & Heaton Ltd *[1969] ACC 366*. A valuation for rating purposes must be based on hypothetical, not real, facts. Nevertheless, the authorities establish that such a valuation is itself to be treated as a matter of fact, impeachable only if the person responsible for the valuation has fallen into some error of law in arriving at it. In the absence of error of law, this court is not entitled to interfere with the valuation.

35. Admittedly, I was not concerned with valuation matters, in the present appeal, only whether or not a hereditament existed. Nevertheless, if I tried to explain to a member of the public why the appeal warehouse could not be rated, they probably would think I had flown in from cloud cuckoo land.

36. Not one to throw in the towel, without a fight, Mr Alford argued with some force that I should take a broader and commonsense approach and referred to me to two authorities *Andrew Ricketts (VO) v Cyxtera Technology Ltd* [2021] UKUT 0265 (LC) and *Post Office v Nottingham City Council* [1976] 1 WLR 624. I did not find either of these authorities helpful. They were decided on completely different facts. In *Cyxtera,* the appeal property was a data centre. The VTE had determined that white space should not form part of the hereditament. The Upper Tribunal took a different view. The UT found that the respondent was in rateable occupation of the whole building. Although the data halls within the building were available for use by its customers, the latter were not in rateable occupation. The respondent operated, actively maintained, and constantly customised white space for customers or de-customised it if customers moved on. The respondent’s arguments that the white space had to be customised before it was rateable was seen as a red herring, since the respondent’s beneficial occupation of the space was all that mattered.

37. The Post Office case related to a completion notice and for the purposes of determining a completion date, it was held that, when the property would be ready for occupation or capable of occupation for the purpose it was built, no allowance needed to be made for the installation of the ratepayer’s equipment or furniture. This authority and others was reviewed by the Upper Tribunal in its judgment in *Gladman Sipps.* I note that electrical wiring was missing, when the completion notice was served, and time was allowed for its completion. In the case before me, some electrical cabling was also missing, so if a completion notice was served time would need to be allowed for its installation. Without it the warehouse was not complete or ready for occupation.

38. This case was peculiar on its facts. It was clear to me that on the material day 4 September 2022, when the Valuation Officer reinstated the appeal property’s entry into the Rating List,

that the appeal property was not complete nor was it ready for occupation for the purposes for which it was built. The majority of the warehouse space lacked small power which was considered essential by the Upper Tribunal in *Aviva.* The authorities were against the Valuation Officer's position.

39. It may appear unfair that the ratepayer is sitting on a property that is almost ready for occupation once a tenant is found and is not liable for any rates. However, almost ready is not complete. Prior to 26 December 2023, there was a lacuna in the legislation which prevented the billing authority serving a completion notice in a case like this. That gap has now been plugged. Until a completion notice was served or the property becomes occupied, the ratepayer will continue to enjoy a rates holiday on this property. I accept that this may appear to be a ridiculous situation and unfair to other ratepayers and the billing authority but I can only apply the law as it is, not how I think it should be. As I have already said, the authorities are binding and have left me no room for manoeuvre.

Disposal

40. In view of the foregoing, the appeal is allowed and the entry must be deleted.

Order

41. Under the provisions of regulation 38(4) of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009, the Valuation Tribunal for England orders the Valuation Officer to delete the appeal property's entry from the Rating List with effect from 4 September 2022.

42. Under regulation 38(9), the Valuation Officer must comply with this order within two weeks of the date of its making.

Refund of appeal fees

43. As the grounds of the appeal have been made out, a refund of the fee paid will now be arranged (Regulation 13E of the NDR Alteration of Lists & Appeals (England) Regs) provided there is no review of the Tribunal's decision. The refund will take around six weeks to process.

President

Date issued to parties: 11 July 2024

Right of further appeal

Any party who is aggrieved by the Tribunal's decision, and who appeared or was represented at the hearing, has the right of appeal to the Upper Tribunal (Lands Chamber). Any such appeal should be made within four weeks of the date of this decision notice.