**Case Name:** *RAD Phase 1 Type B Property Company No 1 Ltd v London Borough of Newham* Appeal Number 5750M263955/284N (25 November 2019)

**Topic:** Completion notice - validity

**Full case:** Not yet available

**Summary:** A completion notice issued by a billing authority was quashed as the subject building could not be considered complete (i.e. capable of occupation) at the expiry of 3 months from the date of the notice

**Commentary:** Under schedule 4A to the Local Government Finance Act 1988, a billing authority is required to serve a completion notice on the owner as soon as reasonably practicable (unless the VO otherwise directs) if it comes to the authority's notice that the work remaining to be done on a new building in its area is such that the building can reasonably be expected to be completed within 3 months. "Completed" in this context is generally understood as enabling occupation following completion of Category B works (which are bespoke works undertaken to meet the tenant's specific requirements after completion of Category A works, being the basic landlord's finish).

It is market practice for Cat B works on commercial office buildings to be commissioned and undertaken only once a tenant has been identified and bound into an agreement for lease, to avoid the landlord incurring unnecessary and costly expenditure at a stage when the tenant's requirements are unknown.

In this case (involving a building in the Royal Albert Docks development in East London) no tenant had been found by the time the completion notice was served on 26 June 2019, although practical completion of the Cat A works had been achieved on 11 April 2019. The notice stated a completion day of 25 September 2019 (at the limit of the 3 month period referred to above), which the appellant argued was clearly unachievable in the absence of a tenant. Although there was some doubt expressed by the clerk as to the tribunal's jurisdiction, it was agreed between the barristers at the hearing that the appeal would proceed on the basis that the only matter for the panel to determine was the correct completion day.

The clerk also advised the panel that if it found that the remaining works could not be completed within 3 months, the only option was for it to quash the notice rather than determine a date later than 3 months (the authority for this advice being a Lands Tribunal decision from 2006). The parties' barristers disagreed with this advice, pointing out that the 2006 case had been decided under the simplified procedure (with limited scope for argument) and that there was no reference in that case to a specific power for the VTE to quash a completion notice. The panel was invited to determine the completion day based on the evidence presented at the hearing.

It was agreed between the parties that the time period for the fitting out works to render a building capable of rateable occupation commences on practical completion to Cat A specification (11 April 2019 in this case), as confirmed by the Court of Appeal in Graylaw Investments Ltd v Ipswich Borough Council [1978]. However, at practical completion no

tenant had been found and the customary works carried out after practical completion (partitioning, cabling, small power and kitchen facilities) were held over – that remained the case when the completion notice was served, referring to a completion day of 25 September 2019 (just over 5 months from practical completion).

The appellant argued that a period of just over 5 months was insufficient for completion of fitting out to Cat B and supported this by reference to comparable buildings elsewhere (where a period of 15 months was typical). The extended period was due in part to the need to stagger occupation of multi-occupied buildings (which applied to the subject building) to avoid contractor conflict, leading to sequential fitting out works floor by floor. In addition, the standard of fitout has a material impact on the time required for its completion, a higher-quality fitout taking appreciably longer (an aspect that cannot be determined until a tenant had been found).

Although the respondent challenged the appellant's estimate of 15 months for the Cat B fitout, it was unable to produce any comparable evidence in support of a shorter period and the panel noted that the expert witness for the authority had not inspected the building, nor were the authority's inspector's report and photos made available.

The VTE panel delivered a reasoned decision, the main points of which were:

- The reference in para 9 (1) of Schedule 4A to a building being "substantially complete" was confirmed in an 1987 House of Lords decision (London Merchant Securities plc and Trendworthy Two Ltd v Islington Borough Council) as relevant only to determining the date when the relevant building is complete apart from customary work of fitting out. If it is not known (as in the case before the panel) at the date of the hearing against a completion notice what fitting out work is intended, the proper test is to ask what work would "probably" be carried out as a matter of custom and practice. In the present case the parties had agreed (and the VTE had accepted) that substantial completion for rating purposes had occurred on practical completion of the building, on the basis that the Cat A works had been completed;
- In an earlier Court of Appeal decision (JLG Investments Ltd v Sandwell District Council [1977]) it was held that in calculating the period reasonably required for carrying out the work under paragraph 9 the court could not allow for the time taken to find a tenant;
- In the Trendworthy Two judgement the House of Lords also confirmed that defects in the building work which needed to be dealt with before fitting out could be taken into account in calculating the period reasonably required to achieve completion, but no such time can be allowed for preparatory and design works for the fitout;
- Thus the necessary assumption underlying the calculation of the time period needed for completion to be achieved (as confirmed by the House of Lords in 1987) is that the contractors remain on site after completion of the Cat A works and are engaged to carry out the Cat B works, without allowance for finding a tenant or identifying its fitout requirements.

The period of just over 5 months allowed by the billing authority when specifying in its completion notice a completion date of 25 September 2019 was determined by the VTE, on the balance of probabilities, to be insufficient. It was persuaded by the appellant's argument based on comparable properties (although it was not known how much time had been spent on preparatory work) and the fact that the nature and timescale of Cat B works at the subject building could only be ascertained once a tenant had been found. This latter point prevented the VTE from accepting the appellant's argument that a period of 15 months for the Cat B work would be appropriate.

The billing authority had not helped its case by agreeing a longer fitting out period for smaller buildings on the same development, which had reached substantial completion by 11 April 2019 but for which completion was agreed to be 31 October 2019.

As referred to above, the tribunal considered itself bound by the 2006 Lands Tribunal decision and, accordingly, had no alternative but to quash the completion notice. It made clear that when serving a completion notice the billing authority must have a reasonable belief that completion would be achieved within 3 months. Its position was that it is not for the tribunal to determine a period beyond 3 months of substantial completion in circumstances where a completion notice has been served prematurely (see below for commentary on this point).

It is now open for the billing authority to serve a new completion notice, when it is satisfied that it has a reasonable belief as to completion of the Cat B works within 3 months of service of the notice.

As a tenant will not be allowed to carry out fitting out works until it has an entitlement to occupation (under an agreement for lease or lease) this will necessarily mean that enquiries made by the billing authority of the landlord as to the scope and timing of the fitout need to be shared with the tenant, whose input will be required as the party liable for payment.

It should be noted that this decision is not an endorsement of rates mitigation by means of holding off carrying out Cat B works until a tenant is found, on the basis that liability for empty rates in a new (or substantially-altered building, where it has previously been deleted from the list) will only commence for the landlord once the Cat B works are completed. The world was different in 1987, when the House of Lords dicta included the statement by Lord Bridge "I doubt if [speculative developers] devote much of their ingenuity or energy to devising schemes to ensure that, if they cannot let the property, they will escape liability for the unoccupied rate". Following the imposition of 100% empty rates in 2008, developers who cannot find tenants (due, for example, to a change in market demand for space for reasons entirely unforeseeable when the decision to develop was taken) are bound to seek ways to limit their liability for rates and the challenge of completion notices will become commonplace in difficult economic conditions. However, para 9 of Schedule 4A is clearly intended by Parliament to counter rate avoidance (as stated by Lord Bridge in his reference to the equivalent para 9 of Schedule 1 to the General Rate Act 1967).

It is questionable if the VTE was correct in saying that it could not determine a completion date later than the 3 months referred to in the notice. Had a tenant been found by the time

the notice was served (specifying a completion date 3 months hence) so that the scope of the Cat B works was ascertainable the VTE may have found itself able to determine a later date. The billing authority is under an obligation in para 1 of Schedule 4A to act reasonably in serving the notice and where the work is likely (due to its quality or scope) to take longer than 3 months the authority may decide to postpone service until actual commencement of the fitout, at the earliest.

This billing authority dilemma may need to be addressed by an amendment to para 9 of Schedule 4A, but any proposed changes will need to include changes to the empty rate 100% levy if speculative development in disadvantaged areas of the country is not to be curtailed.

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