TOP 20 WAYS

TO REDUCE YOUR EMPTY PROPERTY BUSINESS RATES LIABILITY

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Since this guide was originally written there have been several judgements of the Courts and in this update to the 2016 version, those judgements are examined to reveal current thoughts in this area of non-domestic rating.

Of course nothing set out should be taken as advice and should the reader have any queries or requirements in this area please contact one of the team.

First some words of comfort to those seeking to mitigate the cost of empty rates liability. The Courts have said on a number of occasions that there is no moral dimension to this subject and that ratepayers should pay neither more nor less than the law requires.

The Government has promised to look at the non-domestic rating system in England & Wales but whilst waiting for political will to resolve matters, there are realistic opportunities for ratepayers to reduce their business rates liability.

Here we have a step-by-step guide on no less than 20 strategic options available to you that go beyond simply appealing the level of Rateable Value.

So who exactly is liable to pay rates on empty properties?

The person liable to pay rates on empty property is the “property owner” deemed the person entitled to possession of the property. This includes the landlord or a tenant who has vacated the property but is unable to surrender the lease or find an assignee.

What empty non-domestic properties are rateable?

The liability for rates on empty properties applies to Non-Domestic buildings and any land used for the purpose of that building. Therefore land is not subject to an empty property rates charge.

Case law has established that the property must be capable of beneficial occupation and if this is not the case it may be removed from the Rating List.

In addition certain reliefs are also available under the Regulations depending on the level of Rateable Value or the type of occupier.

Is the property beyond economic repair?

A property is assumed to be in repair despite its actual condition unless those repairs are considered to be uneconomic. Therefore it may not be possible to reduce the level of rates liability simply because a property is in a poor state of repair.

Works of repair must be distinguished from works of renewal or improvement. Repair is not improvement but it denotes the idea of making good any damage leaving the premises, as far as possible, as though it had not been damaged.

Works of renewal fall outside the repair assumption and cannot be ignored. Where renewal works are required it may be possible to take those works into account when setting the Rateable Value. The Supreme Court confirmed a three stage approach for ascertaining what constitutes "repair" rather than "renewal":

1. Whether the alterations go to the whole or substantially the whole of the structure or only to a subsidiary part.

2. Whether the effect of the alterations is to produce a building of a wholly different character from that which is being let.

3. What is the cost of the works in relation to the previous value of the building and what is their effect on the value and life span of the building?

The tests may be applied separately or concurrently, in light of the nature and age of the property. It is a question of fact and degree in all cases whether the works are properly classified as repairs, renewals or improvements.

Likewise, what is economically reasonable and therefore assumed to have taken place depends on the particular circumstances. If the repairs are considered to be uneconomic the state of repair maybe a relevant consideration when setting the Rateable Value.

The Supreme Court confirmed the approach set out in the Court of Appeal in **Newbigin (VO) v SJ & J Monk [2015]**. In the Court of Appeal Lewison L J set out three questions:

1. **Is the hereditament in a reasonable state of repair capable of beneficial occupation?**

2. **If not, can the works which are required to put the property into a state of reasonable repair properly be described as repairs? (the repairs question) and**

3. **Would a reasonable landlord consider the repairs to be economic? (the economic question).**

If the answer to the first question is no that is an end to the matter the property should be deleted from the Rating List or reduced to Rateable Value £0. This has recently been confirmed by the Upper Tribunal Lands Chamber; see **Jackson (VO) v Canary Wharf Ltd [2019] UKUT 0136 (LC)**.

If there is a scheme of works underway that scheme may also lead to the conclusion that the Rateable Value should be reduced to £0 see; **Barber (VO) v CEREP III TW SARL (2015) UKUT 021 (LC)**.

Rates Relief for Empty Non-Domestic Property - Exempt Properties

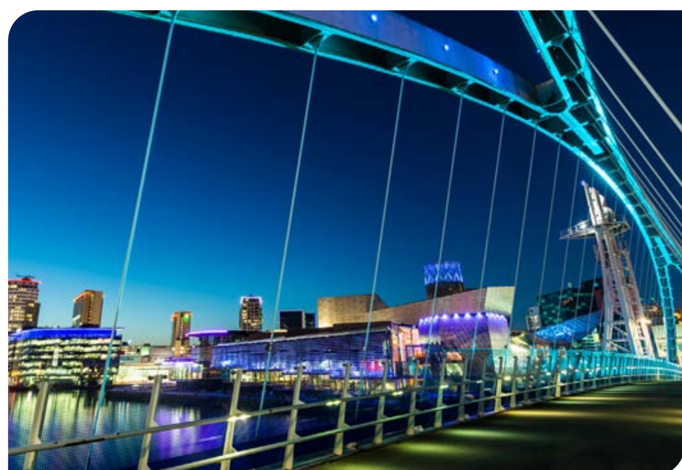
The regulations provide that the following types of empty Non-Domestic property are exempt from rates (either indefinitely or for a fixed period):

- Commercial property, such as shops and offices: 100% relief for a continuous period of three months only.
- Industrial and warehouse property: 100% relief for a continuous period of six months only.

> Changes of ownership do not trigger a fresh three/six month's exemption because the exemption applies to the property, not the person paying the rates.

Short term occupation of the property (of less than six weeks) by, for example, a tenant or licensee during the three month period will be ignored.

The three month period and the empty property rates exemption will continue to run during that period of short term occupation. This rule prevents owners from gaining additional periods of rates exemption by establishing an immaterial letting. If the property is let or occupied for a period of more than six weeks, the rates exemption will end at the start of that period, but, crucially, when the property becomes vacant again, a new exemption period can be claimed.



Other Exemptions Include:

- **Prohibited by Law** - Where the owner is prohibited by law from occupying it or allowing it to be occupied. For example, where there is a breach of the fire safety regulations and a Prohibition Notice is served or where the property is closed due to a Prohibition Order for health and safety reasons.
- **Listed Buildings** - Including property that forms only part of a listed property.
- **Below Minimum Threshold** - Empty property with a Rateable Value below the minimum threshold which is currently set at Rateable Value £2,900.
- **Personal Representative** - Empty property whose owner is entitled to possession in his capacity as a personal representative.
- **Trustee -** Empty property owned by a person entitled to possession in his capacity as trustee under a deed of arrangement.
- **Bankruptcy Order -** Empty property owned by individuals subject to a bankruptcy order.
- **Winding-up Order -** Empty Property owned by a company subject to a winding up order.
- **Administration -** Empty property owned by a company in administration. However, an administrator is liable to pay business rates where property is being used; such as where a company in administration continues to trade from the property.
- **Liquidation -** Empty Property whose owner is in 'Member's Voluntary Liquidation' is exempt from empty rates. See High Court decision **'Secretary of State for Business, Energy and Industrial Strategy v PAG Asset Preservation Ltd [2019] EWHC 2890' & Court of Appeal decision in 'Rossendale Borough Council and Wigan Council v Hurstwood Properties Ltd and Property Alliance Group Ltd (2019) EWCA Civ 364'.**

Zero Rating

A further exemption, in effect, was introduced by the Rating (Empty Properties) Act 2007, which provides for property to be "zero rated" where the property is empty and the property owner is a:

- **Charity -** Exemption will apply if it appears that when the property is re-occupied it will be wholly or mainly used for charitable purposes (whether of that charity, or that of other charities).

- **Community Amateur Sports Club (CASC) -** Exemption will apply where it appears that when the property is re-occupied it will be wholly or mainly used for the purposes of that CASC (or for the purposes of that and another CASC).

Discretionary Relief Partial Occupation

The Billing Authority has discretion to grant relief in certain situations (S.44a Local Government Finance Act 1988); such as when a property is partly occupied, the property owner may apply via the Billing Authority to have an informal split of assessment to reflect the occupied and unoccupied areas. This applies where the situation is temporary in nature for example a temporary downturn in production.

Measures to Minimise Business Rates Liability on Empty Property

The rates exemption available for unoccupied shops, offices and industrial property is only temporary. Therefore property owners may try to minimise liability for business rates by adopting the measures set out below.

Short Term Lets

If the property is re-occupied for a minimum of six weeks, this allows the owner to claim a further period of exemption (three months for retail, or six months for industrial) when the property becomes vacant again.

Therefore the use of genuine short-term lettings that even apply to part of the property may be a useful way of reducing liability. For example, an owner may grant a licence or contracted out lease for the occupation of a shop over the Christmas period. See **Makro Properties Ltd and Makro Self Service Wholesalers Ltd vs. Nuneaton & Bedworth BC [2012]** and **R (Principled Offsite Logistics Limited) v Trafford Council [2018] EWHC 1687 (Admin)**.

Occupation by Charities

Charities qualify for 80% mandatory business rates relief. This may be increased by up to 100% at the discretion of a Billing Authority. The same applies to educational and religious occupations. An owner may consider a letting to such an organisation on a licence or lease to substantially reduce the cost of non-domestic rates.

In order that charitable relief can apply the property must be used "wholly or mainly" for the charitable objects of the charity in occupation. This is an area that attracts attention see: **Sheffield City Council v Kenya Aid Programme [2013] EWHC 54 (Admin), Public Safety Charitable Trust v Milton Keynes Council [2013] EWHC 1237 (Admin) and South Kesteven DC v Digital Pipeline Ltd [2016} EWHC 101 (Admin)**. From these authorities a three stage approach is clear:

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1. Is the property being wholly or mainly used for charitable activity; and

2. It is a matter of fact that the occupation is being used for charitable purposes; it does not matter that the occupation could have been organised more effectively so that only part of the property could have been used; and

3. If the landlord lets the premises to a charity he is no longer the ratepayer and it is immaterial that the purpose of the arrangement is to reduce or avoid the payment of non-domestic rates.

But take care. In My Community Space v Ipswich BC [2018] EWHC 3313 (Admin) the charity failed to persuade the court that the use was genuinely for charitable purposes and non-domestic rates bills for the full charge were confirmed.

Occupation by Property Guardians

A recent of Court of Appeal case : **London Borough of Southwark v Ludgate House Ltd & Anor [2020] EWCA Civ 1637** looked at the Property Guardianship approach to empty rates mitigation.

The Court of Appeal held that an office building occupied by property guardians pending redevelopment, remained a single hereditament for rating purposes. The Court ruled that The Upper Tribunal had been incorrect to determine that the guardians in occupation of individual rooms were in rateable occupation and liable to pay council tax. The decision means that the Property Guardian approach to mitigation has become a difficult approach to maintain without a significant adjustment to the amount of control the landlord retains in any such arrangement. Any such adjustments may lead to potential legal issues around the landlord-tenant relationship and security of tenure. This significant Court Of Appeal decision brings a shade of grey to the previously relatively simple, flexible processes involved with schemes of this type.

Delay Completion of New Property

A new property will become liable for rates from the date of its completion. Developers may therefore try to delay completion of new properties until they have identified tenants or purchasers, and they are close to exchange.

If the Billing Authority becomes aware that a property is not yet complete but it could reasonably be completed within three months, it must serve a Completion Notice as soon as reasonably practicable unless the VOA otherwise directs. The completion date shall be no later than three months from the date on which the notice is served.

> The three month time period should not be confused with the three month exemption period in the 2008 Regulations.

The two run consecutively, so there could be six months from service of the completion notice during which business rates will not be payable.

Works Actioned after the Property is Completed

Certain works are customarily carried out after the property is substantially complete. It is common for shops or offices to be only completed to a shell state to allow tenants to complete to their own specification. If the Billing Authority considers that a property is substantially complete, apart from such works, it can serve a Completion Notice. In setting the completion date, the Billing Authority must allow a reasonable time for the customary works to be carried out.

Appeal

If a Completion Notice is served and the property owner does not appeal against it, the Valuation Office Agency will insert an entry in the Rating List valuing the property as if it was complete. If the property owner disagrees with the completion date they can negotiate a different completion date with the Billing Authority.

Alternatively, the property owner can appeal to the Valuation Tribunal on the grounds that the property cannot reasonably be expected to be completed by the date stated in the Notice. The property owner must appeal within four weeks of receiving the Completion Notice.

Properties Incapable of Beneficial Occupation

Fire or Flood

Where a property (or part) becomes incapable of beneficial occupation owing to a factor such as fire, flood, storm or explosion, the Valuation Office Agency can remove the property (or part) from the Rating List. However, for the property to be removed, the effect needs to be severe. Properties suffering simply from smoke damage, that merely require redecoration, would not qualify.

Programme of Alteration & Modernisation

A property can be removed from the Rating List if it cannot be occupied due to ongoing alterations and modernisation which will produce a different property from the existing one. It can only be removed once the works begin and at the point that it passes the tests set out above. When the work is complete, the property will then be entered back in the Rating List with a revised Rateable Value.

Insubstantial works would not justify deletion from the Rating List, such as installing new shop fit or light refurbishment works, but it may be possible to obtain discretionary relief from the Billing Authority.

Redevelopment & Demolition

Properties that are demolished are no longer rateable. The Valuation Office Agency will remove them from the Rating List from the date that a scheme of works commences. If properties are due for redevelopment they may similarly be removed from the Rating List as set out above.

Owners might bring forward redevelopment programmes to avoid paying rates. The Valuation Office Agency will check that the scheme is genuine, rather than merely a device to avoid paying rates. They may require proof that planning permission exists for redevelopment or demolition and that the scheme has commenced. But these requests are immaterial to the question of fact; is the property capable of beneficial occupation; see **Jackson (VO) v Canary Wharf Ltd [2019] UKUT 0136 (LC)**.

Constructive Vandalism

Constructive vandalism (or "soft stripping") occurs when a property owner removes partitioning, suspended ceilings, lighting, heating or a combination of other services without any intention to carry out further works of alteration or demolition. The owner then argues that the property is not capable of beneficial occupation and that the works required to put the property into repair are uneconomic.

A ratepayer who is considering "constructive vandalism" would need to balance any potential savings in rates against the cost of putting the property beyond economic repair, and the cost of the additional works that would be required if he subsequently wished to let or occupy the property. This course of action is resisted by the Valuation Office Agency but prospects for a successful outcome have improved with **Jackson (VO) v Canary Wharf Ltd [2019] UKUT 0136 (LC)**.

No Demand & Over-Supply

Where there is no demand for a property, it will command no annual rent and it may be removed from the Rating List or subject to a reduced Rateable Value. The key here is the valuation date for the relevant Rating List as considerations have to be made at that date. The valuation date for the 2017 Rating List is 1 April 2015. The Valuation date for the new 2021 Rating List is 1 April 2019. In determining whether there is any demand, the Valuation Office Agency will consider:

- Whether there are similar properties in the locality that are occupied at the valuation date and whether there is evidence of demand; and
- Whether the lack of demand is due to over-supply or due merely to the owner's actions.

If there is over-supply the basic premise is that increased supply weakens rental value and in addition high vacancy has a potentially adverse effect on the remaining occupiers. In some areas retailers are currently renegotiating rents and this underlines the argument. Vacancy is a relevant valuation factor.

For appeals to be successful a change will have to be shown in the use or occupation of other premises situated in the locality of the subject property.

There are a number of precedents of retailing locations which have received allowances due to the level of vacancy. New shopping centres can be granted a pioneering allowance to reflect the level of occupancy when first opened. In the office sector there are also precedents in the City of London and Thames Valley where reductions in Rateable Value have been granted due to over-supply.

Consideration can be given for:

- Any deterioration in the value of a location due to the level of vacant units in the area – e.g.: if half of the shops in a shopping centre are vacant then this will be likely to reduce footfall and the value of those units still trading.
- Any deterioration in value of a location due to changes in the retailers present in the area – e.g., if certain mainstream retailers vacate their premises and are replaced by less popular retailers then this could reduce the value of a location.
- Any deterioration in value caused by the "oversupply" of retail units in an area – e.g.: if half of the units in a centre are vacant then this would change the balance of supply and demand which would potentially lead to a reduction in rental value.

Where over-supply is demonstrable it may be possible to secure a reduction in the level of Rateable Value due to this material fact.

But vacancy in itself or apparent lack of demand see: **Telereal Trillium (Respondent) v Hewitt (Valuation Officer) (Appellant) [2019] UKSC 23**. In that case the Court said that it will be very rare that the evidence really does show that there is no demand at all for a property where there are comparable properties in the locality that are let.

IT'S OUR PEOPLE THAT MAKE US DIFFERENT

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