UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2021] UKUT 308 (LC)
UTLC Case Numbers: LC-2021-18

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – PROCEDURE – whether a completion notice can specify a completion date that precedes the date of service

AN APPEAL AGAINST A DECISION OF THE VALUATION TRIBUNAL FOR ENGLAND

BETWEEN:

HERMES PROPERTY UNIT TRUST

Appellant

-and-

RICHIE ROBERTS
(VALUATION OFFICER)

Respondent

and

TRAFFORD COUNCIL

Interested Party

Re: Units 13-15,
Units 14-15 and Unit 18
Guinness Trading Estate,
Guinness Road,
Trafford Park,
Manchester M17 1SB

Judge Elizabeth Cooke
Determination on written representations

Mr Luke Wilcox for the appellant, instructed by CBRE Limited

The following cases are referred to in this decision:

Natt v Osman [2014] EWCA Civ 1520
North Somerset DC v Honda Motor Limited [2010] RA 285
Porter (VO) v Trustees of Gladman SIPPS [2011] UKUT 204 (LC)
SSHD v RM (Rwanda) [2018] EWCA Civ 2770
UKI (Kingsway) Limited v Westminster CC [2018] UKSC 67

Introduction

1. This is an appeal about business rates, from a decision of the Valuation Tribunal for England ("the VTE"). The only issue in the appeal is whether completion notices, served by a billing authority were invalid because they specified a completion date that preceded the date of service of the notice.

2. The appeal has been conducted under the Tribunal's written representations procedure, and I am grateful to Mr Luke Wilcox for his submissions for the appellant; both the respondent and the interested party have chosen not to participate in the appeal.

The factual background

3. The appellant owns three properties, Units 13-15, Units 14-15 and Unit 18, Guinness Trading Estate, Trafford Park. They form part of a larger building which was subject to extensive renovation starting in 2014, and were deleted from the rating list as a result. Completion notices dated 3 May 2016 were served, and they said:

> "It is the opinion of the council that the property could reasonably be expected to be completed by 3 May 2016."

4. It is not known how the notices were served, but it is not in dispute that they were received by the appellant on 9 May 2016. There were, incidentally, two completion notices, one relating to Units 13-15 and one to Unit 18; they have now been entered on the rating list as three hereditaments because one unit is separately let, and there is no dispute about that. The following entries were made:

> Units 13-15, rateable value £106,000 with effect from 3 May 2016
>
> Units 14 -15, rateable value £71,000 with effect from 15 May 2016
>
> Unit 18, rateable value £29,000 with effect from 3 May 2016

5. On 31 August proposals were served on the Valuation Officer in respect of each property, proposing the deletion of the relevant entry on the basis that the completion notices were invalid because they specified a completion date that preceded the date of service. The appeal to the VTE arose from those proposals

The legal background

6. Non-domestic rates are levied on hereditaments, and a building that is unfinished or is being renovated so that it cannot be occupied for the purpose for which it was designed is not a hereditament. Paragraph 66 of the Tribunal's decision in *Porter (VO) v Trustees of Gladman SIPPS* [2011] UKUT 204 (LC) states:

> "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 light of the purpose for which it is designed to be occupied… 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."

7. That procedure was created by section 46A of the Local Government Finance Act 1988. It provides that Schedule 4A shall have effect, and that where a completion notice is served and the building has not been completed on or before the date stated in the notice (or otherwise determined in accordance with that Schedule) it shall be deemed to have been completed. The procedure is applicable to new buildings, which are defined in section 46A(6) to include buildings that have been taken off the list during renovation, such as the appeal properties.

8. Therefore while the Valuation Office can enter a hereditament on the list on the basis that it is in fact complete, the completion notice procedure supplements that power by deeming it to be complete even if it is not.

9. Schedule 4A of the 1988 Act provides as follows:

> "1 (1) If it comes to the notice of a billing authority 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, the authority shall serve a notice under this paragraph on the owner of the building as soon as is reasonably practicable unless the valuation officer otherwise directs in writing.
>
> (2) If it comes to the notice of a billing authority that a new building in its areas has been completed, the authority may serve a notice under this paragraph on the owner of the building unless the valuation officer otherwise directs in writing.
>
> 2 (1) A completion notice shall specify the building to which it relates and state the day which the authority proposes as the completion day in relation to the building.
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> (2) Where at the time a completion notice is served it appears to the authority that the building to which the notice relates is not completed, the authority shall propose as the completion day such day, not later than 3 months from and including the day on which the notice is served, as the authority considers is a day by which the building can reasonably be expected to be completed.
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> (3) Where at the time a completion notice is served it appears to the authority that the building to which the notice relates is completed, the authority shall propose as the completion day the day on which the notice is served.
>
> …
>
> 4 (1) A person on whom a completion notice is served may appeal to a valuation tribunal against the notice on the ground that the building to which the notice relates has not been or, as the case may be, cannot reasonably be expected to be completed by the day stated in the notice."

10. The focus of this appeal is on paragraphs 2(2) and (3). Where the building is not yet complete,

> "the authority shall propose as the completion day such day, not later than 3 months from and including the day on which the notice is served".

11. Where a building has been completed,

> "the authority shall propose as the completion day the day on which the notice is served."

The VTE's decision

12. There is no provision in paragraph 2 of Schedule 4A for the authority to propose a completion date that precedes the date of service of the notice. If the building is already complete, the completion date is the date of service; if it is nearly there, the completion date must logically be later than that, and is to be a date not more than three months after service.

13. The appellant therefore argued before the VTE that the notices were invalid. Whether they were served when received, or served in the ordinary course of post, the completion date fell before the date of service.

14. The VTE took the view that although the notices did not comply with the requirements of the statute, there was substantial compliance, and no prejudice to the appellant, and therefore they were valid.

The appeal

The arguments for the appellant

15. Mr Wilcox relies upon the decision of the High Court in *North Somerset DC v Honda Motor Limited* [2010] RA 285. The issue was whether demand notices, required by the statute to be served by the billing authority "as soon as practicable" were invalid because they had not been served soon enough. Burnett J said at [43]:

> "… in any case concerning the consequences of a failure to comply with a statutory time limit, there are potentially two stages in the inquiry. The first is to ask …: did Parliament intend total invalidity to result from failure to comply with the statutory requirement? If the answer to that question is 'yes', then no further question arises. Yet if the answer is 'no' a further question arises: despite invalidity not being the inevitable consequence of a failure to comply with a statutory requirement, does it nonetheless have that consequence in the circumstances of the given case and, if so, on what basis? It is at this second stage that the concept of substantial compliance may yet have a bearing on the outcome. If a court has concluded at the first stage that total invalidity is not the outcome of a failure to comply with a statutory requirement, then it is unlikely at the second stage to conclude on the facts in the light of the statutory scheme that invalidity should be the consequence if there has been substantial, but not strict, compliance."

16. That analysis was approved in *SSHD v RM (Rwanda)* [2018] EWCA Civ 2770, albeit in a very different context, where Haddon-Cave LJ said at [25]:

> "I respectfully endorse and adopt Burnett J's two-stage approach which, in my view, is applicable in all administrative law cases where questions of statutory construction and validity arise. His two-stage and structured approach has the benefit of (a) giving appropriate primacy to the actual words used by Parliament and (b) ensuring, if necessary, careful consideration is given to the consequences of non-compliance when determining validity."

17. Mr Wilcox goes on to argue that this is a case that falls into the first category where Parliament intended invalidity to result from a failure to comply. He relies upon the use of the word "shall" in the statutory provision; on the precision of the requirement for completion notices, which leaves no element of judgment (in contrast to the "as soon as practicable" for demand notices); on the fact that completion notices enable a deeming effect, and give rise to a liability to rates on a counterfactual basis so that (he argues) there is no room for procedural laxity); and on the fact that a third party is also affected by the notice, namely the Valuation Office Agency, which requires certainty.

Discussion

18. I agree with Mr Wilcox that the correct analysis is that set out in *North Somerset DC v Honda*. That was a rating case; the analysis was approved in *SSHD v RM (Rwanda).* Importantly, it is consistent with what the Court of Appeal said in *Natt v Osman* [2014] EWCA Civ 1520

19. where the Chancellor of the High Court at [28] said this about compliance with statutory requirements:

> "… a distinction may be made between two broad categories: (1) those cases in which the decision of a public body is challenged, often involving administrative or public law and judicial review, or which concern procedural requirements for challenging a decision whether by litigation or some other process, and (2) those cases in which the statute confers a property or similar right on a private person and the issue is whether non-compliance with the statutory requirement precludes that person from acquiring the right in question.
>
> 29. [In] the first category, in accordance with the more recent interpretative approach, the courts have asked whether the statutory requirement can be fulfilled by substantial compliance and, if so, whether on the facts there has been substantial compliance even if not strict compliance."

20. He went on to say that in the second category, substantial compliance will not do. The present case falls into the first category, and the question "whether the statutory requirement can be fulfilled by substantial compliance" is the first of Burnett J's two questions in *North Somerset DC v Honda*.

21. So, what did Parliament intend?

22. I am not persuaded by the argument from the use of the word "shall", which begs the question; there is certainly a requirement, but the question is what happens if it is not complied with.

23. The reasons why I take the view that Parliament cannot have intended substantial compliance to be good enough in this context are that that would result both in uncertainty and in retrospectivity.

24. There is of course some uncertainty inherent in the date of service itself. As Mr Wilcox acknowledges, Lord Carnwath pointed this out in *UKI (Kingsway) Limited v Westminster CC* [2018] UKSC 67 at [43]:

> "some uncertainty … is inherent in the legislation, in which neither the methods of service, nor the dates of service in different circumstances, are exhaustively defined. The simple answer for the authority may be that, where the date of service is critical, it is able to choose a statutory method which eliminates or minimises the risk of the notice being rendered invalid by failure to specify the correct date of service. If it chooses a non-statutory method it must bear that risk. The risk of prejudice to the owner is limited, since outside the statutory grounds service depends on actual receipt by the intended recipient, and the time for appeal is also related to receipt."

25. But a far greater uncertainty arises if "substantial compliance" is good enough. What does "substantial" mean? In the present case, the time between the completion date and the date of service was at most 6 days. What about 10 days? Or a couple of months? It is not

acceptable for the validity of a notice which creates a liability to taxation on a counterfactual basis to be so uncertain.

26. Moreover, if the notices were valid then they provided for a completion date that was – whatever the date of service – in the past when the notice was served and (if different) when it was received. The completion notice procedure enables a building to be deemed to be complete when it is not. It would be startling if the billing authority could create a liability for tax on a basis that is both counterfactual and retrospective, and I take the view that on a proper reading of the statute a notice that purports to do so is invalid.

Conclusion

27. Accordingly the appeal succeeds and the properties should be deleted from the rating list, Units 13-15 and 18 with effect from 3 May 2016 and Units 14-15 with effect from 15 May 2016.

Upper Tribunal Judge Elizabeth Cooke

14 December 2021

Right of appeal

Any party to this case has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.