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Insights

EMPTY PROPERTY RATES IN ENGLAND; NO MORE GUARDING THE GUARDIANS?

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A tax on failure

The two taxes in England on the occupation of property are non-domestic rating (business rates) and, for domestic rating, council tax. Pre COVID, business rates yielded £30bn and council tax £36bn annually. Rates are payable on business premises whether occupied or empty. For some general comments on empty property rates (a tax on failure) see my article "Empty property rates in England; how can a business mitigate its liability?" posted on 24 November 2020.

Affected ratepayers look to mitigate their liabilities to empty property rates. The devolved administrations of the UK are developing their own rules to restrict mitigation. This note provides comments for England.

Yes, you can

In England, you can mitigate your liability for business rates using a variety of techniques. This note looks at the use of *property guardians*.

Property guardians

Empty buildings may need security. Live-in "guardians" can provide that service. There are providers of guardian services who will find people to move into empty business premises and live there. These arrangements should also produce a saving of business rates.

How does that work?

There are three categories of property for the purpose of tax liability:

(1) Domestic: Property that is used wholly for the purposes of living accommodation, and/or property that is not occupied but it appears that when next in use, it will be domestic (and note that property may be "wholly" used for a particular purpose, even if not all of it is so used). Domestic property is liable to Council Tax.

(2) Non-domestic: Property that that does not have any living accommodation. Unless exempt, non-domestic property will liable to be assessed for non-domestic rating.

(3) Composite: Where a property is partly used for domestic purposes, and partly used for non-domestic purposes, it is a "composite" and appears in both the non-domestic rating list and the Council Tax valuation list. A property may be a "composite" if, notwithstanding its mixed domestic and non-domestic use, it is nevertheless a single unit. Examples of composite hereditaments include live-work units, owner-occupied flats above shops, and public houses with resident landlords where the same person is in rateable occupation of the whole property for both non-domestic and domestic purposes. The rateable value for a composite is an amount equal to the rent, which "would reasonably be attributable to the non-domestic use of property". Council tax should be the cheaper option.

Arrangements

In a pending case, the owner of a vacant office building, earmarked for redevelopment, agreed with a provider that they would install 32 guardians to provide a robust level of protection. The owner gave the provider a licence to occupy the building and the provider granted licences to the individual guardians to occupy a part of the building.

The area over which each guardian was granted rights was referred to as the "living space", meaning the area designated as available for occupation from time to time, which could be varied by the provider. In practice the living space extended to the whole of the building excluding the plant rooms. The guardians could occupy the living space and share it with the others. A guardian had no right to exclusive occupation of any part of the living space and could be required to move to a different room. All those permitted to occupy the building were entitled to share the whole of the living space and they were to agree amongst themselves how it was to be shared, but each guardian would have a room of their own.

How to tax the premises

In 2019, the Upper Tribunal held that the guardians' individual rooms were separate units and the relevant occupier was not the owner of the building but the individual guardian whose temporary home it was. The rooms were used wholly for the purposes of living accommodation and the guardians were not liable for rates but were liable for council tax. The building was not a composite because there was no single occupier of the domestic and non-domestic space.

That outcome suited the owner and disappointed the local authority responsible for collections, who appealed the Upper Tribunal's decision.

Appeal

The Court of Appeal gave judgment[1] last week.

The outcome was bad news for the ratepayer, good news for the local authority responsible for collecting the rates. The Court held that the terms of the contract between the ratepayer (owner of the building) and the guardians provider and between the guardians provider and each guardian were decisive. What those contracts showed was that the purposes of the guardians and of the building owner were complementary and mutually reinforcing. The provider company engaged guardians as their means of providing services to the building owner, who was otherwise liable for the empty property rates. This meant that the relevant question to ask is whether the building owner has retained general control of the building? On the facts of this case, the owner remained in general control and that was enough to leave the owner with liability for empty property rates.

What to look for

If you want to use guardians to protect your property and also achieve a saving on empty property rates, ask the provider:

- *Have you reviewed your contracts terms since 4 December 2020?*
- *What changes have you made?*
- *Can you the provider stop me, the owner, from entering the premises in any circumstances?*
- *Do you have any right to occupy the premises?*

If the answers are "yes" you may be able to achieve a saving.

If any of the answers are "no" ask the provider to disclose its legal advice.

(Unless you simply wish to safeguard your property and a rates saving would be a bonus).

Endnote

[1] London Borough of Southwark v (1) Ludgate House Limited and (2) Mr Andrew Ricketts (Valuation Officer) [2020] EWCA Civ 1637

This insight was originally authored by Roger Cohen.

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