

- *Atos v Fylde Borough Council* [2020] EWHC 647 (QB) (Saini J)
- Serco house
  - Head lease: Atos (October 2016)
    - Further sublets
  - April 2015 – March 2017, series of entries. Some parts not occupied by Atos (§17)
- Held: Serco not in rateable occupation. Rates paid unlawfully. Entitled to refund under 1989 C&E Regs, Reg 9.
- Not held: what defences might be available. (§97).



- Long-established case-law.
- Essential ingredient of rating. *Part* occupation = *no* occupation = *no* rates liability as occupier.
- Repeatedly endorsed by Parliament (LGFA 1988, GRA 1967)

The nuts and bolts of the claim (2): the C&E Regulation

▪ C&E Regs 1989, key provision:

(4) If there has been an overpayment in respect of any liability of the ratepayer under this Part, the amount overpaid for which such other provision as is mentioned in paragraph (1)(c) is not made—

(a) shall be repaid if the ratepayer so requires, or

(b) in any other case shall (as the charging authority determines) either be repaid or be credited against any subsequent liability of the ratepayer to pay anything to it by way of non-domestic rate.

The nuts and bolts of the claim (3)  
Common law vs Statute

▪ common law claim: *Woolwich Equitable Building Society v IRS* [1993] AC 70

- D enriched
- C's expense
- Unjust to retain

▪ *Lone v Hounslow London Borough Council* [2019] EWCA Civ 2206, §56 (statutory scheme to recover overpaid Council Tax precluded common law claims for those sums)

(1) "The Counterfactual"

- Vodafone Ltd v OFCOM [2020] EWCA Civ 183 (Vos C): do not consider the counterfactual.
- What if the Rating List had been appropriately modified?
- What if ratepayer is 'owner' of whole hereditament even though not 'occupier'?

Defences?

(2) Misrep

- R v Tower Hamlets, ex parte Chetnik Developments [1988] AC 858 (Lord Bridge)
- Extreme example: fraudulent misrepresentation
- Could consider less extreme examples: confirmation of information held as part of a 'check'?
- However, *Chetnik* arguably distinguishable. Contrast C&E Regs, Reg 9(4) and s. 9 1967 Act.

Defences?  
(3) passing on

- Leases may provide for payment of rates from sub-tenant to head tenant.
- Is this legally relevant?
- *Generally*, seeks to reverse unlawful gains.
- *Specifically*, 'unjust enrichment' defence in tax confined to "EU" situations.

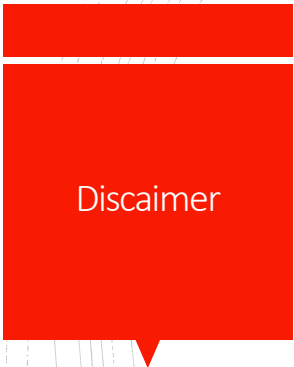
Tactical considerations

- Choice of procedure: magistrates, JR, declaration, *Atos*
- Intentional overpayment – a risky strategy
- And see observations of High Court in *R (PHE) v Harlow DC* [2021] EWHC 909 (Admin)



Any questions...

cain.ormondroyd@ftbchambers.co.uk



Disclaimer

**DISCLAIMER NOTICE:** This presentation including answers given in any question and answer session (“the presentation”) and this accompanying paper are intended for general purposes only and should not be viewed as a comprehensive summary of the subject matters covered. Nothing said in the presentation or contained in this paper constitutes legal or other professional advice and no warranty is given or liability accepted for the contents of the presentation or the accompanying paper. Neither Cain Ormondroyd nor Francis Taylor Building will accept responsibility for any loss suffered as a consequence of reliance on information contained in the presentation or paper. We are happy to provide specific legal advice by way of formal instructions.



Francis Taylor Building

## ***Ricketts (VO) v Cyxtera [2021] UKUT 265:***

### ***When is a hereditament complete?***

**Hugh Flanagan - Francis Taylor Building**

**February 2022**

Francis Taylor Building Inner Temple London EC4Y 7BY DX: 402 LDE T 020 7353 8415 F 020 7353 7622 E clerks@ftbchambers.co.uk www.ftbchambers.co.uk



Francis Taylor Building

## **Background**

- Two data centres in Slough – converted warehouses
- ‘White space’ into which cages and servers of customers are fitted
- Plus ancillary office space and facilities
- Co-location model. Also owner occupier and wholesale.

Francis Taylor Building Inner Temple London EC4Y 7BY DX: 402 LDE T 020 7353 8415 F 020 7353 7622 E clerks@ftbchambers.co.uk www.ftbchambers.co.uk

**ftb**  
Francis Taylor Building



Francis Taylor Building Inner Temple London EC4Y 7BY DX: 402 LDE T 020 7353 8415 F 020 7353 7622 E clerks@ftb.eu.com www.ftb.eu.com

**ftb**  
Francis Taylor Building

**Law**

***Porter (VO) v Trustees of Gladman SIPPS [2011] RA 337***

**“66. ... 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. 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.”**

Francis Taylor Building Inner Temple London EC4Y 7BY DX: 402 LDE T 020 7353 8415 F 020 7353 7622 E clerks@ftb.eu.com www.ftb.eu.com





Francis Taylor Building

- ***Aviva Investors Property Developments Ltd v Whitby (VO)*** [2014] RA 61
- ***Post Office v Nottingham City Council*** [1976] 1 WLR 624 (CA):
 

“a broader and common sense test must be applied. I think the test is: as a matter of fact and degree, is, or will the building, as a building, be ready for occupation, or capable of occupation, for the purpose for which it is intended.”


Francis Taylor Building Inner Temple London EC4Y 7BY DX: 402 LDE T 020 7353 8415 F 020 7353 7622 E clerks@ftb.eu.com www.ftb.eu.com



Francis Taylor Building

- “The vital distinction, I think, is between the time when the building is **ready for occupation as a building**, and the subsequent **installation in it of equipment or furniture** which is necessary for its use for the purpose for which it is intended.”
- Capable of occupation does not mean capable of **immediate use** for its intended purpose
- Unnecessary “to introduce into this context the highly technical problems of when **articles brought on to land do or do not become part of the freehold**”.


Francis Taylor Building Inner Temple London EC4Y 7BY DX: 402 LDE T 020 7353 8415 F 020 7353 7622 E clerks@ftb.eu.com www.ftb.eu.com

  
Francis Taylor Building


---

### Completion notices

- S.46A and Sch 4A LGFA 88
- Billing authority may serve CN in respect of completed building, or which can reasonably be expected to be completed within three months
- Effect of CN is new building deemed to have been completed on the date specified in the notice
- VO cannot serve a completion notice, nor can the VO require a billing authority to serve a completion notice
- BA practices vary




Francis Taylor Building Inner Temple London EC4Y 7BY DX: 402 LDE T 020 7353 8415 F 020 7353 7622 E clerks@ftb.eu.com www.ftb.eu.com

  
Francis Taylor Building

## Outcome

---

- **VTE:**
  - **Not ready for occupation until servers installed**
- **UT:**
  - **Ready for occupation when became white space**
  - **Focus on ratepayer's occupation, not customer end user**



Francis Taylor Building Inner Temple London EC4Y 7BY DX: 402 LDE T 020 7353 8415 F 020 7353 7622 E clerks@ftb.eu.com www.ftb.eu.com



Francis Taylor Building

- **Discussion**

- **Ready for occupation will be very fact specific**
- **Cat A / Cat B problematic concepts**
- **Beware of treating *Porter* like statute**
- **CoA broader test**



Francis Taylor Building Inner Temple London EC4Y 7BY DX: 402 LDE T 020 7353 8415 F 020 7353 7622 E clerks@ftb.eu.com www.ftb.eu.com



Francis Taylor Building

**[hugh.flanagan@ftbchambers.co.uk](mailto:hugh.flanagan@ftbchambers.co.uk)**

DISCLAIMER NOTICE: This presentation including answers given in any question and answer session ("the presentation") and this accompanying paper are intended for general purposes only and should not be viewed as a comprehensive summary of the subject matters covered. Nothing said in the presentation or contained in this paper constitutes legal or other professional advice and no warranty is given or liability accepted for the contents of the presentation or the accompanying paper. Neither the authors nor Francis Taylor Building will accept responsibility for any loss suffered as a consequence of reliance on information contained in the presentation or paper. We are happy to provide specific legal advice by way of formal instructions.



Francis Taylor Building Inner Temple London EC4Y 7BY DX: 402 LDE T 020 7353 8415 F 020 7353 7622 E clerks@ftb.eu.com www.ftb.eu.com