RA/22/2001

LANDS TRIBUNAL ACT 1949

RATING – rateable property – composite premises – non-domestic premises – employed person using bedroom at home for full-time office work – Local Government Finance Act 1988 s 66(1)(a) – held house used wholly for purposes of living accommodation, therefore not rateable

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LONDON (SOUTH WEST) VALUATION TRIBUNAL

BETWEEN **EILEEN AND MICHAEL TULLY** **Appellants**

and

MARK JORGENSEN **Respondent**
(Valuation Officer)

Re: Office
46 Arundel Avenue
Morden
Surrey SM4 4DX

Before: The President

Sitting at 48/49 Chancery Lane, London WC2A 1JR
on 7 July 2003

Daniel Kolinsky instructed by Russell Jones & Walker for the appellants
Timothy Mould instructed by Solicitor of Inland Revenue for the respondent

The following cases are referred to in this decision:

Fotheringham v Wood (VO) [1995] RA 315
Bell v Rycroft (VO) [2000] RA 103
Gasus Dosier v Holland (1995) 20 EHRR 403
O'Kelly v Davey (VO) [1996] RA 238

The following further cases were cited in argument:

R v A [2002] 1 AC 45
Wandsworth LBC v Michalak [2003] 1 WLR 617
Darby v Sweden (1990) 13 EHRR 774
McShane v United Kingdom (2002) 35 EHRR 23
Thlimmenos v Greece (2000) 31 EHRR 411
Halliday (VO) v Priory Hospital Group [2001] RA 355

DECISION

1. Mrs Eileen Tully, who lives with her husband at 46 Arundel Avenue, Morden, Surrey, works at home in her employment as a Project/Business Analyst and Work Centre Co-ordinator in the Inland Revenue's Business and Management Services Division (Self-Assessment and Network Support Centre). She works at home because, having a back injury, she is physically unfit to travel daily to work. The room she uses is the rear bedroom on the first floor of this three-bedroom semi-detached house. Some months after starting to work at home Mrs Tully wrote to the District Valuer, Wimbledon Valuation Office, seeking an alteration in the council tax banding of the house on the ground that the rear bedroom could no longer be used as a bedroom because it had become an office. Mr Jorgensen, the valuation officer, agreed with her. He altered the valuation list entry from band E to band D. But he also altered the rating list by including the house as a composite hereditament described as "office" at a rateable value of £550. The result was that Mr and Mrs Tully became liable to pay more in council tax and rates than they had been paying in council tax on the higher band.

2. Mrs Tully made a proposal to delete the entry from the list (the 1995 list); and she also made a proposal to delete it from the 2000 list, which by then had come into force. The London (South West) Valuation Tribunal dismissed the appeals arising from these proposals. In this Tribunal Mr Daniel Kolinsky advances two arguments. His principal contention is that on the facts Mrs Tully's use of the room for working is not such as to require that it be rated. Secondly, and in the event that that first contention were to fail, he says that to apply the statutory provisions so that there would be a liability to rates in such a case as this has a discriminatory effect on disabled people contrary to article 14 of the European Convention on Human Rights, read together with article 1 of the first protocol; and they should accordingly be construed in a way that avoids this effect.

3. There is no dispute on the relevant primary facts, which are contained in an agreed statement of facts. 46 Arundel Avenue is a two storey semi-detached house constructed in the inter-war years in a street of similar houses some 750 metres from the commercial centre of Morden. It is owned by the appellants, who at all material times have occupied it as their family home. When the council tax valuation list for Merton London Borough Council was compiled on 1 April 1993 the house was shown in the list as a dwelling which was not a composite hereditament within section 3(3) of the Local Government Finance Act 1992. The valuation list showed the house in Band E (which relates to a range of values, as at 1 April 1991, of £88,001 to £120,000).

4. The Inland Revenue has employed Mrs Tully since 1970, currently in the position I have already referred to. In August 1990 Mrs Tully suffered a fracture to the base of her spine and was off work for 9 months. She returned to work in May 1991 and continued in full-time employment until November 1997, when she suffered an acute flare-up, which caused her to be off work from then until December 1998. At the end of that period, notwithstanding many months of hospital treatment, Mrs Tully remained physically unfit to travel to work. Her consultant advised that she could resume working only if she was permitted to work at home. The Inland Revenue agreed to allow her to work at home, in accordance with its duty to make

reasonable adjustments under the Disability Discrimination Act 1995, to enable her to continue working. However, it was also agreed, on health and safety grounds, that business meetings could not be held at the house. Instead they have been held at the Inland Revenue offices in London.

5. Mrs Tully began working at home from the beginning of 1999. But for the arrangements between her and her employer she would not work at home during normal office hours. In order to enable her to work at home, Mrs Tully's employer provided her with certain equipment, namely a desk, computer, printer, telephone/fax and a storage cabinet. But for the arrangements for home-working made between Mrs Tully and her employer, she would not have been provided with this equipment. The equipment was placed in the room, which had previously been used as a study and guestroom and for domestic chores.

6. On 8 September 1999 Mrs Tully wrote to the District Valuer, Wimbledon Valuation Office (the respondent's predecessor in office). The letter was treated as a proposal for a reduction in the banding of the appeal hereditament. It also caused the respondent's predecessor and his staff to investigate whether the room ought to be treated as non-domestic property. Following an inspection of the appeal property a member of the Wimbledon Valuation Office in September 1999 –

(a) on 28 March 2000 the respondent altered the valuation list entry for the appeal property with effect from 4 January 1999 by reducing its valuation banding from band E to band D and by adding an indication to show that the dwelling was a dwelling to which section 3(3) of the 1992 Act (composite hereditaments) applied;

(b) on 30 March 2000 the respondent altered the 1995 rating list with effect from 4 January 1999 by including the appeal property as a composite hereditament described as "Office" with an assessment of £550 Rateable Value; and

(c) on 14 July 2000 the respondent altered the 2000 rating list with effect from 1 April 2000 by including a similar entry for the appeal property as a composite hereditament.

The rateable value of £550 shown in each rating list relates solely to the value of the room. No issue as to value arises in this appeal, although it is an issue in appeals arising from other proposals which have not yet been listed for hearing by the Valuation Tribunal. On 8 May 2000 Mrs Tully wrote to the respondent to object to his decision to include the appeal property in the 1995 List as a composite hereditament and forwarded a proposal challenging the alteration made on 30 March 2000.

7. On 23 January 2001, a little over a month before the hearing by the valuation tribunal of appeals against the proposals for the deletion of the entry, the respondent visited the appeal property and viewed the accommodation in Mrs Tully's presence. At that date the room contained the following furniture and equipment:-

(a) a three-drawer moveable pedestal cabinet containing private papers in two drawers and office consumables in the top drawer;

(b) a Hewlett-Packard printer standing on top of the three-drawer pedestal cabinet;

(c) a table supporting a row of books (the latter associated with a private course of study);

(d) an L-shaped work station with fax, telephone, lap-top computer and monitor;

(e) a two-drawer cabinet and a three-drawer cabinet both filled with work material.

(f) a four-shelf cupboard with sliding, lockable doors and a row of roll-out suspended files;

(g) a wall-mounted notice board used for display of Revenue information; and

(h) a chair.

Mrs Tully's employer provided all the equipment apart from the table and books described at (c) above. The room also contains a built-in airing cupboard with hot water cylinder, which at the date of inspection contained various domestic items. An adjoining cupboard contained hanging clothes, domestic cleaning materials and a vacuum cleaner, with Christmas decorations stored in a further cupboard above.

8. The room continues to be used for storage of household items, for ironing, and as a private study by Mrs Tully and her husband. However, Mrs Tully's employer has stipulated that, before the room can be used by other members of Mrs Tully's family, the Revenue's computer must be logged-off and all Revenue papers locked away. No structural work or adaptation was carried out to enable Mrs Tully to work in the room. No permanent fixtures or fittings have been added to, or removed from, the appeal property or the room in order to enable Mrs Tully to work in the room. Mrs Tully does not employ any staff who work in the room. Mrs Tully uses the room to perform work which she would ordinarily perform in a Revenue office, but for the arrangements made with her employer allowing her to work at home, for between 20 and 36 hours a week for approximately 44 weeks a year. She does not receive any business callers in the room or elsewhere in the appeal property. Her business meetings are conducted in Inland Revenue offices in London.

9. Mr Tully's employer has agreed to re-imburse any amount she may become liable to pay for non-domestic rates (less any saving in council tax resulting from the reclassification of the appeal property as a composite hereditament) until such time as the property is no longer used for the performance of her official duties, on the basis that this constitutes a reasonable adjustment within the terms of the Disability Discrimination Act 1995, given that Mrs Tully is a disabled person working at home. Mrs Tully's employer also pays the charges for the dedicated telephone lines made available for use in connection with the performance of her official duties. Mrs Tully's employer does not pay any rent to Mr and Mrs Tully for Mrs Tully's use of the room for her official duties.

10. Under the 1988 Act property is not rateable if it is domestic property. Sections 43(1) and 45(1) make liability to the non-domestic rate dependent on the hereditament being shown in the non-domestic rating list. Under section 42(1) only a hereditament that is a non-domestic hereditament falls to be included in the list. Under section 64(8) a hereditament is non-domestic if it consists entirely of property which is not domestic or if it is a composite hereditament; and under section 68(9) a hereditament is composite if part only of it consists

of domestic property. "Domestic property" is defined in section 66. Subsection (1) of that section (as amended) provides:

> "(1) Subject to subsections (2), (2B) and (2E) below, property is domestic if –
>
> (a) it is used wholly for the purposes of living accommodation…"

11. The appellants' house, as I have said, was entered in the rating lists as a composite hereditament under the description of "Office". The question that arises is whether the house is used wholly for the purposes of living accommodation within section 66(1) or whether the use that Mrs Tully makes of the first-floor rear bedroom takes it outside this provision.

12. Mr Kolinsky referred to two cases in which these provisions have been considered by the Lands Tribunal, *Fotheringham v Wood (VO)* [1995] RA 315 and *Bell v Rycroft (VO)* [2000] RA 103. He placed reliance on dicta in the first of these decisions. In that case the appellant operated an accountancy business from the detached house that he occupied as his home. There was a separate dedicated telephone line and number. The business had no other premises and was listed in Yellow Pages. Two rooms on the ground floor of the house contained domestic and office furniture, and the use of these was shared between business use and other hobby and pastime uses. A part time secretary was employed at the house and an accountancy student was employed also. The Member (Mr P H Clark FRICS) held that on the facts the house was not wholly used for the purposes of living accommodation. In the course of his decision he noted that the then current Practice Note said that where there was a non-domestic use that was insignificant (and the suggested test was where the use did not prevent the accommodation "from being used for domestic purposes at any time") the property remained domestic. The Member accepted this guidance as a common sense working approach. He said that, by importing a de minimis rule to allow insignificant non domestic use without raising rates liability, the definition of domestic property could be applied sensibly to the varied circumstances of everyday life. The Practice Note referred to *Fotheringham* has been replaced, and Mr Kolinsky drew attention to the following passage in the current Practice Note at paragraph 3.4

> "In the case of the home business, it is often the case that it in its infancy, the business run from home will not give rise to rateability. At one extreme, the self employed painter or plumber who stores tools in the house, and writes up his books on the kitchen table in the evening will not give rise to a separate business assessment; under the 1988 Act rules, such a situation would not give rise to a separate rateable hereditament. However, as the business expands, and a part of the premises is separately identifiable for purely business purposes, perhaps ideally separately built or converted from part of the domestic premises, then rate liability may arise."

Mr Kolinsky drew particular attention to the last sentence.

13. In support of his contention that 46 Arundel Avenue was domestic property as defined, Mr Kolinsky said that the following features of the property and its use were particularly to be noted. No structural adaptation has taken place at the property or to the room. The elements of the room which are used by Mrs Tully to work in are in no way separately

identifiable from the remainder room or the house. By contrast they remain part of a coherent family home and are in fact used and are capable of being used for purely domestic purposes at all material times. There is no equipment or furniture present which is inconsistent with or incompatible with domestic use. Nothing that is in the room would be out of place in an ordinary domestic study. No staff are employed in the room or the house. No meetings take place in the room or the house. There are no outward manifestations of a separate business entity operating in the house – no sign or logo on the door, no listing in the yellow pages. In this respect, Mr Kolinsky said, the fact that Mrs Tully is an employee rather than a sole trader must be material. No discrete business entity is separately identifiable. If it were, the relevant business identity would be that of her employer, the Inland Revenue, not Mrs Tully. This fact demonstrated that the present case simply did not fit with the concept of a composite hereditament. What the VO described as an office use was in reality the transitory use of space in a room which remains an integral part of a functioning family home where others can and do use both the room and the many of the particular elements in the room such as the desk for domestic tasks and where on certain occasions the room will be reformulated to make space for a spare bed.

14. Mr Kolinsky also pointed out that section 67(5) of the 1988 Act provides that for the purpose of deciding the extent (if any) to which a hereditament consists of domestic property on a particular day the state of affairs existing immediately before the day ends shall be treated as having existed throughout the day. At the end of the day in the first floor rear room of 46 Arundel Avenue, Mr Kolinsky said, Mrs Tully would have packed away her work and stopped working. Someone entering the room would simply observe a room that was comparable with a domestic study. Mr or Mrs Tully might be using the room as a study unrelated to work or one of them might be ironing. A guest could be sleeping on a fold-out bed. So, applying section 67(5), the state of affairs existing at the end of the day would be that of a domestic use of the room.

15. For the VO Mr Timothy Mould submitted that it was plainly not the case that the house was property that was used wholly for the purpose of living accommodation within the meaning of section 66(1). The house was used in part as a place of work, to perform tasks which would typically form part of an employee's daily duties as the employee sat at a desk in an office at his or her place employment. The part in question was readily identifiable: it was the room that was used by Mrs Tully to work in. That conclusion on the facts was entirely consistent with this decisions in *Fotheringham v Wood (VO)* and *Bell v Rycroft (VO)*.

16. Mr Mould accepted that a person who worked at home for a short time in the course of a week would not, for the time that he was so working, be using the property for a purpose other than that of living accommodation. It was, he said, a matter of fact and degree, but a person who worked full-time in a particular room at home was not using the property wholly for the purpose of living accommodation.

17. In my view Mr Mould was quite right to accept as he did that a person, in working at home, could be using his house for the purposes of living accommodation. Residential property in which an occupier works avoids being rated not simply where the use for the purposes of work can be regarded as de minimis but also where such use is properly to be viewed as use for the purposes of living accommodation. The purposes of living

accommodation are plainly not confined to the satisfaction of the basic bodily needs of the persons residing in the property. Recreation and leisure facilities, for instance, are provided as part of the living accommodation. If there is a separate room for such a purpose, a television room or a billiard room for instance, the house does not cease on that account to be used wholly for the purposes of living accommodation. The position may well be the same, it seems to me, where a person works at home. Many people do work at home, both the self-employed and the employed. Professional writers, for example, have always usually done much of their writing at home. The word-processor and the internet and e-mail have enabled increasing numbers of people to work at home where previously they would have had to go every day to an office elsewhere. Where a person working at home uses accommodation, furniture and equipment of the kinds that are commonly to be found in domestic property, such use will in general, in my judgment, constitute use for the purposes of living accommodation. Rateability may, however, arise if the accommodation is adapted so as to lose its domestic character or where equipment of a non-domestic sort is used to a significant extent. Similarly, if employees or clients come to the premises, this may constitute a use going outside the ambit of use for the purposes of living accommodation. The question will always will be one of fact and degree.

18. The two cases decided by this Tribunal, *Fotheringham v Wood (VO)* and *Bell v Rycroft (VO)*, illustrate circumstances in which the features of the occupier's use of his or her home for the purposes of work were such as to give rise to rateability. In the first case a part-time secretary and an accountancy student were employed by the appellant at the premises, and clients, albeit in small number, visited the premises to deliver and collect papers and for consultations. In *Bell v Rycroft* the appellant carried on the business of a child-care nursery at home. A garage had been altered and extended to accommodate the use, and it was fitted, furnished and staffed for the use. Planning permission for it had been obtained. The present case, by contrast, involves a use that, in my judgment, does not take the hereditament outside section 66(1)(a). The room used is part of the ordinary accommodation of this semi-detached house. It has not been structurally altered to accommodate Mrs Tully's use of it. The furniture and equipment that she uses might be found in any domestic study. No one visits her at the premises in connection with her work. She holds meetings elsewhere. The use that she makes of the room, in my view, is use for the purposes of living accommodation. I see no significance in the fact that she is employed rather than self-employed and that all her work, apart from meetings, is carried on there. Nor is the fact that the room is capable of being used and is in fact used for other domestic functions decisive, although it serves to emphasise that the room is part of the ordinary domestic accommodation of the household.

19. This conclusion is sufficient to determine the appeal in the appellants' favour. I would add that Mr Kolinsky's reliance on section 67(5) is in my view misconceived. Liability to the non-domestic rate under section 43(1) is a daily liability that arises where the ratepayer is in occupation on a particular day. But for him to be rateable his occupation must possess the ingredients of rateable occupation, including that of permanence: see Ryde on Rating paragraph B[214]-[224]. Similarly where section 67(5) refers to the state of affairs existing immediately before the day ends it is not requiring that attention be confined to the particular activities being carried on at a precise moment in time. What has to be considered is the use of the property with all its features, and all that section 67(5) does is to identify the material time by reference to which any change in the use of the property is to be related.

20. Mr Kolinsky also advanced submissions based on the Human Rights Act 1998. In view of the conclusion I have set out above, it is unnecessary for me to do more than to note the basis of those submissions and the response to them. It is not necessary for me to reach a conclusion on them, and I do not do so. Mr Kolinsky based his contentions on article 1 of the First Protocol European Convention on Human Rights (right to the peaceful of enjoyment of possessions) and article 14 of the Convention (enjoyment of rights without discrimination). If Mrs Tully had to pay rates on her house by reason of the fact that she was constrained to work there by reason of her disability, she would be disadvantaged by comparison with other employees of the Inland Revenue and with other individuals who had the choice of whether or not to work at home. Applying section 3 of the 1998 Act the Tribunal ought read and give effect to the provisions of the 1988 Act so as to produce a result that would avoid this effect. In particular paragraph 16(1)(a) of Schedule 5 to the 1988 Act, which confers exemption on property used wholly for the provision of facilities for keeping persons who are disabled suitably occupied, should be construed so as to cover the situation where a disabled person is working at home under arrangements made by her employer under the Disability Discrimination Act 1995.

21. Mr Mould's response was to point out that the case fell within the field of public taxation, within which the European Court had held that the Government should enjoy a wide margin of appreciation (in *Gasus Dosier v Holland* (1995) 20 EHRR 403) and that Parliament had acted positively by enacting paragraph 16 of Schedule 5 to the 1988 Act so as to confer exemption from rates on property used by disabled persons. Paragraph 16(1)(a) did not extend to property provided for paid employment, as the Tribunal in *O'Kelly v Davey (VO)* [1996] RA 238 had determined, and in view of the approach to be adopted to legislation on public taxation it was unnecessary to give the provision the extended meaning for which Mr Kolinsky contended. Moreover, said Mr Mould, section 49 of the Act gave power to the billing authority to reduce the amount that any person was liable to pay in order to avoid hardship, but no question of invoking this provision arose since Mrs Tully's employers were reimbursing her for the additional liability she would sustain as a result of the rating of the property.

22. Finally I would add this. There must be very large numbers of homes in the country in which those living there do some or all of their work, unvisited by employees or clients or business associates, in rooms that have not been structurally adapted, and without any outward indication that someone is working in the property. It would, I think, be a consequence of the VO's contentions that many such homes would be potentially rateable. In order to discover who is working at home and to what extent and in what accommodation would require investigation on a very considerable scale. Unless such investigations were carried out the incidence of rating in such circumstances would be haphazard, and injustice would arise as a result. With the approach that I have described above/, on the other hand, the problems involved in identifying rateable property would be much less. Where a business at the premises is advertised or if planning permission is sought for building operations or a business use the valuation office may well be alerted and can take steps accordingly. Where there are no such indications, the probability is, it seems to me, that, if work is being done there, it will be the sort of work that falls within the scope of use of the property for the purposes of living accommodation.

23. The appeal is allowed, and the entry must be deleted from the rating list. The parties are invited to make submissions on costs and a letter relating to this accompanies this decision. The decision will take effect when but not until the question of costs has been determined.

Dated 4 August 2003

George Bartlett QC, President

ADDENDUM ON COSTS

24. I have received written submissions on costs. The appellants ask for their costs of the appeal. The respondent does not resist this. Accordingly the respondent must pay the appellants' costs of the appeal, such costs if not agreed to be the subject of a detailed assessment by the Registrar on the standard basis.

Dated 16 September 2003

George Bartlett QC, President