



RA/56/2007

LANDS TRIBUNAL ACT 1949

RATING – composite hereditament – home working from ground floor front room – practice of Chinese medicine (acupuncture and herbalism) – window signage – advertisements – fitting out of room – whether medical practice commenced – appeal allowed – Local Government Finance Act 1988, s66(1)(a)

IN THE MATTER OF A NOTICE OF APPEAL

BETWEEN

DR YAN ZHOU

Appellant

and

**DENNIS PATRICK OSBORNE
(Valuation Officer)**

Respondent

**Re: 70 Lowlands Road
Harrow
Middlesex
HA1 3AN**

Before: A J Trott FRICS

**Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 14 July 2008**

The appellant in person

The respondent in person, with the permission of the Tribunal

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The following cases are referred to in this decision:

Fotheringham v Wood (VO) [1995] RA 315

Bell v Rycroft (VO) [2000] RA 103

Tully v Jorgensen (VO) [2003] RA 233

R v Melladew [1907] 1 KB 192

DECISION

1. Dr Yan Zhou is a practitioner of Chinese medicine. She lives in an Edwardian semi-detached house at 70 Lowlands Road, Harrow, Middlesex, HA1 3AN which is located in the Roxborough Park Conservation Area a short distance from Harrow town centre. She purchased the house in 1996 with the intention of establishing a medical practice in the ground floor front room. In March 1997 she applied for planning permission for “change of use: part of ground floor from dwelling house to a herb and acupuncture clinic with parking”. The planning officer recommended refusal of the application and wrote to Dr Zhou explaining the reasons on 14 May 1997. The parties do not agree whether planning permission was refused (Dr Zhou) or whether the application was withdrawn (the VO) but they do agree that planning permission was not granted.

2. Dr Zhou said that she was then advised by a council officer that she should commence her medical practice at a low profile and reapply for planning permission in 10 years time at which point she should be successful provided she “could show the evidence that something has happened since [the original application]”. So in 1997 she put up signs in her front window advertising “Chinese Herbal Medicine, Acupuncture, Master of Herbs” and giving a telephone number. She also prepared the room for use by putting in a desk and some small filing boxes. Despite the signage, she says that she did not conduct any business from the premises and that the front room was used for domestic purposes. Meanwhile she continued to be employed full time as a medical scientist at St Thomas’ Hospital (until 1999) and thereafter as a Chinese doctor for a company called Herbal Magic based at Leytonstone and Harlesden.

3. The signs and the basic preparation of the ground floor front room for medical use remained in place from 1997 until 2005. In March 2005 Doctor Zhou received a telephone call from Mr Don Kathriaratchi who wanted to arrange an inspection of the property. Dr Zhou mistakenly thought that Mr Kathriaratchi was a council employee who would be able to approve (in some unspecified way) her use of the front room for medical purposes. So over the next two days she reorganised the room for that use, erecting shelves upon which she placed herb storage jars, installing chairs and putting the desk into the centre of the room and removing a sofa, all the while hoping that Mr Kathriaratchi “would give me the green light”. In fact he was a referencer with the Valuation Office Agency who wanted to inspect and measure the property following a Valuation Office report. He visited the house on 18 March 2005.

4. Following Mr Kathriaratchi’s visit the VO altered the 2000 rating list to show a new composite entry with effect from 1 April 2004 (a date apparently suggested by Mr Kathriaratchi) at a rateable value of £1,575. The appeal property was described as “office and premises”. It was entered into the 2005 list under the same description and at the same rateable value. Dr Zhou was duly notified of these changes. On 13 December 2005 Dr Zhou made a proposal to alter the 2005 rating list, requesting that the effective date for the composite entry be changed to 1 January 2006. The VO considered the proposal to be invalid and served an invalidity notice on 3 January 2006. Dr Zhou submitted a fresh proposal on 23 January 2006 (again requesting that the effective date be changed to 1 January 2006) which the VO accepted as valid but not well founded. He subsequently referred it to the Valuation Tribunal as an appeal.

5. The VT heard the appeal on 7 December 2006 and issued its decision on 9 February 2007. It determined that the appeal property had been correctly entered as a composite hereditament in the 2005 rating list at a rateable value of £1,575 and confirmed the assessment. It also noted that the appeal before it referred only to the 2005 rating list and it was therefore unable to consider whether it was correct to enter the appeal property as a composite hereditament into the 2000 rating list with effect from 1 April 2004. Dr Zhou appealed to this Tribunal against the VT's decision on 6 March 2007. She made a further proposal on 10 April 2007 seeking the deletion of the entry in the 2005 rating list with effect from 1 April 2007 on the grounds that the property was no longer used for business purposes. The VO accepted the proposal as well founded and removed the entry from the 2005 rating list with effect from that date.

6. Sections 43(1) and 45(1) of the Local Government Finance Act 1988 make liability to the non-domestic rate dependent upon the hereditament being shown in the non-domestic rating list. Section 42(1) provides that only a hereditament that is a non-domestic hereditament falls to be included in that list. Section 64(8) defines a non-domestic hereditament as one consisting entirely of property which is not domestic or one that is a composite hereditament. Section 64(9) defines a hereditament as being a composite hereditament if part only of it consists of domestic property. "Domestic property" is defined under section 66 of the 1988 Act. Section 66(1)(a) provides that it includes property which "is used wholly for the purposes of living accommodation." The issue to be determined is whether the ground floor front room of the appeal property was used wholly for the purposes of living accommodation between 1 April 2005 and 1 January 2006, which is the date the appellant accepts as being the commencement of her business use. The burden of proof is on the appellant. The appellant has not challenged the rateable value of £1,575 in respect of the composite entry. The appeal before this Tribunal relates solely to the 2005 rating list and I have no jurisdiction to consider the inclusion of the appeal property as a composite hereditament within the 2000 list.

7. Dr Zhou said that she had not used the front room for non-domestic purposes before 1 January 2006. Once she realised her mistake about the identity of Mr Kathriaratchi and the purpose of his visit (following the alteration to the rating list) she removed the stencils on the window and covered up the other signs and used the room for domestic purposes. She entertained friends there, played cards, used the room for sleepover parties and installed a sofa bed.

8. In subsequent written submissions after the hearing (which both parties were invited by the Tribunal to make) Dr Zhou said that the practice of Chinese herbal medicine involved acupuncture, acupressure and herbal remedies. This required the provision of at least one treatment couch and screen and other related equipment such as a TDP (infrared) lamp, footbath basin, a wireless digital tens (transcutaneous electrical nerve stimulator) and an auto electric herbal steam. Hundreds of herbal preparations were required. Dr Zhou described these as essential equipment and products without which a practitioner of Chinese medicine cannot operate. None of this essential medical equipment was present at the appeal site when Mr Kathriaratchi inspected the property in March 2005. The other items such as the desk, shelves and herb jars which were present at that time "could be treated as decorations" compared to the other essentials referred to above.

9. The appellant stressed that throughout the period in question she had been a full time employee working 8 hours a day, six days a week away from her home. She had spent no time at all working as a medical practitioner at the appeal property. She also said that she had two telephone lines in her house, both of which were used for domestic purposes and neither of which was a dedicated business line.

10. Mr Dennis Patrick Osborne MRICS, the Valuation Officer, said that the front room had been used for non-domestic purposes. He relied upon three main arguments. Firstly, Dr Zhou admitted that she had placed signs in the window and had fitted out the room ready for its use as a medical consulting room as long ago as 1997, at the time of her original planning application. By the time of Mr Kathriaratchi's inspection in March 2005 the room had been fitted with shelves containing jars of herbs and contained a desk and chair, a waiting area with chairs and had a telephone/fax. The telephone number shown in the window was not the same as that given on the appellant's proposal form and Mr Osborne suspected that it was a separate business line. Secondly, the VO produced copies of two advertisements that he submitted had been placed by the appellant. The first was a hard copy of an entry in The Times Online Complementary Therapists Guide which listed Dr Zhou as a practising acupuncturist based at 70 Lowlands Road. This entry first appeared in January 2004. The second was a similar entry in Thompson Local in the section headed "Alternative and Complementary Medicine." Investigation showed that this entry first appeared on 26 February 2004. Thirdly, Mr Osborne said that although Dr Zhou said that she commenced the business use at the appeal property on 1 January 2006, nothing had happened on that date to make it rateable when it was not rateable before. Dr Zhou had not identified anything that had taken place to distinguish the domestic use of the room before that date with its admitted non-domestic use afterwards. The room contained no domestic furniture.

11. Dr Zhou denied that she had actively advertised in either Times Online or in Thompson Local. The so called advertisement in Times Online was in fact a list of all the members of the British Acupuncture Council. This had formed part of a Complementary Therapists Guide compiled by the Body and Soul section of The Times and published in January 2004. The information had been prepared by an organisation called Dr Foster. She submitted a copy of an article published in the Times on 12 June 2004 which reported the outcome of an independent review of Dr Foster's input to the guide following complaints about it from several practitioners. One of the conclusions of this review was that Dr Foster had not adequately identified the scope and aims of its survey to practitioners. Mr Osborne accepted in his written submissions after the hearing that a third party had prepared the Times Online guide.

12. The advertisement in Thompson Local resulted from an offer from that company to Dr Zhou of a free annual entry. She did not approach them, they approached her and she was prepared to accept free publicity. Mr Osborne later said that Thompson Local had confirmed to him that they do contact people offering a listing but they did not know whether such an offer had been made to Dr Zhou.

13. The VO relied upon case law to assist in the interpretation of the facts. In *Fotheringham v Wood (VO)* [1995] RA 315 the Tribunal, Mr P H Clarke FRICS, said at 322 that:

“In deciding whether or not property is domestic the test is whether it is used for the purpose of living accommodation.

The test is therefore to look at the appeal hereditament as a whole and ask the question: was it used wholly for the purpose of a living accommodation on the material day? The key word in these tests is ‘wholly’ because property must be used wholly for the purposes of living accommodation to be exempt from rates.”

In applying this test the Member said that it was necessary that the facts should be “considered as a cumulative whole”. The Tribunal found that the appeal hereditament was not wholly used for the purposes of living accommodation, one of the factors being the ratepayer’s advertisement of his accountancy practice in Yellow Pages and the use of a separate business telephone line.

14. The decision in *Fotheringham* was followed in *Bell v Rycroft (VO)* [2000] RA 103 in which the alteration and extension of a domestic garage to provide nursery space for childcare purposes was considered to be a significant non-domestic use sufficient to make the appeal hereditament a composite hereditament.

15. In *Tully v Jorgensen (VO)* [2003] RA 233 the President of the Tribunal considered both *Fotheringham* and *Bell* and confirmed that the question of whether the use of a hereditament is wholly for the purposes of living accommodation will always be one of fact and degree. Mr Osborne argued that the facts in the subject appeal showed that the front room was not used for living accommodation but was used instead for the practice of Chinese medicine.

16. Mr Osborne also relied upon *R v Melladew* [1907] 1 KB 192 to support his argument that if the front room of the appeal property was fully fitted out as an office and capable of its intended business use then it was not material whether clients visited the premises or not; it was still occupied for the purposes of that business. Collins MR said at 201:

“It is, I think, clear from a comparison of many authorities that the intention of the alleged occupier in respect of the hereditament is a governing factor in determining the question whether rateable occupancy has been established...

...the intention of the defendant here was as far as possible to avoid the semblance of occupation while carefully guarding the substance. He carefully retained the control, while his continuous intention was to utilise the premises for the purpose of his business whenever the opportunity offered.”

Conclusions

17. The appellant’s argument is not that the use of the front room of the appeal property for the practice of Chinese medicine is a use wholly for the purposes of living accommodation. She accepts that such a use is non-domestic. Her argument is that such a use did not commence until 1 January 2006 which she says in her proposal should be the effective date

under the 2005 list. She says that the limited works undertaken to the front room in anticipation of its future medical use did not take it outside the statutory definition of a domestic property. My decision therefore depends upon the establishment of the facts with regard to those works and the use made of the ground floor front room between 1 April 2005 and 1 January 2006 (any previous period of such use not being relevant to this appeal). The burden of proof is upon the appellant to show that the room was used wholly for the purposes of living accommodation.

18. The parties were unable to agree all of the relevant facts and I have therefore had to reach my conclusions on the limited evidence before me. I conclude the following:

- (1) The appellant intended to use the ground floor front room of the appeal property for the practice of Chinese medicine since she purchased it in 1996. She admits to having started such a business on 1 January 2006 but not before. There are no business accounts to corroborate the date upon which the business commenced.
- (2) She applied for planning permission in March 1997 for a change of use of part of the ground floor from a dwellinghouse to a herb and acupuncture clinic with parking. Planning permission was not granted at that time or subsequently, although it is not known whether the 1997 application was refused or withdrawn.
- (3) She put up signs in the ground floor front room in 1997 advertising the property for the purposes of acupuncture and Chinese herbal medicine. A telephone number was given. She intended that passing pedestrians should see these signs.
- (4) In March 2005 the appellant fitted shelves and loaded them with herb storage jars. The VO says that these were full, the appellant says that they were empty. It is not possible to determine the point from the single photograph (taken by Mr Kathriaratchi on 18 March 2005) provided in evidence. However, it can be seen that the jars are labelled.
- (5) The other business furniture contained in the front room as at March 2005 was a desk and chair, three other chairs (arranged in the bay of the window), a telephone and two small filing boxes.
- (6) No structural alterations were undertaken to the house to accommodate the proposed use.
- (7) Nobody was employed at the appeal property as a receptionist or a secretary to assist with the business. At all relevant times the appellant was in full time employment elsewhere as a medical scientist or Chinese doctor.
- (8) Dr Zhou received enquiries from time to time about her business “but not very often”.
- (9) The appellant did not advertise her practice in Times Online. She responded to an approach from Thompson Local for free publicity and was shown within that publication as a practitioner under her own name and at her home address for

two years from 2004 in the section marked Alternative and Complementary Medicine.

19. The appellant intended to commence the practice of Chinese medicine at the appeal property. But an intention is not sufficient to constitute occupancy for such a purpose without some overt act amounting to evidence of user. The placement of signs in the front window was such an overt act. It signalled to the world at large that the appeal property was in use for the purposes of Chinese herbal medicine. It appears that some people, albeit not many, acted upon this advertisement. However, Dr Zhou explained that the signs had only been placed in the window in order to create the impression of a business use following advice given to her (by an unidentified council officer) after the unsuccessful planning application in 1997. She said that she had been advised to “keep it [the medical use of the front room] at a low profile and reapply in ten years”. It seems likely that the reference to a ten year period was a reference to section 171B(3) of the Town and Country Planning Act 1990 which provides that no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach of planning control, but the appellant did not express it in those terms. Unlike *Melladew* there was no attempt to avoid the semblance of occupation while carefully guarding the substance. In fact, upon Dr Zhou’s evidence, the opposite was true; there was an overt semblance of occupation but no actual substance.

20. By fitting out the front room as a medical consulting room before Mr Kathriaratchi’s visit in March 2005 the appellant reinforced the semblance of business use inside the building. She intended that Mr Kathriaratchi should think that the front room was in use for the practice of Chinese medicine, believing him to be from the planning department. She succeeded. The installation of shelves, storage jars, a desk and chair, three other chairs and a telephone created the colourable impression of such a use, even though the more specialised equipment referred to by Dr Zhou had not been installed at the date of the visit. But the appellant vigorously denies actually having commenced her medical practice at that time. She says that nobody (apart from family members) was treated at the appeal property. The few enquirers about her services were referred to her other employment addresses. They were not seen at Lowlands Road. The front room continued to be used as living accommodation for a variety of purposes. There were no physical alterations to the building and no separate entrance to the front room was created. It remained an integral part of the semi-detached house. Nobody was employed there. There was no receptionist and no secretary. The window signs were taken down or covered up after Mr Kathriaratchi’s visit in March 2005.

21. The VO relies upon the existence of two external advertisements to support his case that the appeal property was in non-domestic use at 1 April 2005. I am satisfied that Dr Zhou did not knowingly advertise in Times Online. However, she knew about the advertisement in Thompson Local and accepted a free entry advertising her as a practitioner of complementary medicine at her home address. The same telephone number was used both in the window sign and the Thompson Local entry. This was not the same as the number shown on the appellant’s proposal form. The VO said that this gave the impression of a separate business line. The appellant denied this and I note that the telephone number used in the Times Online entry was the same as that given on the proposal form. This suggests that there was no clear demarcation between the use of the two lines for business and domestic purposes.

22. Mr Osborne correctly says that the appellant did not identify anything that changed between 31 December 2005 and 1 January 2006 so as to distinguish the activity in the front room between those dates. If the room was in non-domestic use on 1 January (as the appellant concedes in her proposal) then it was in non-domestic use the day before. Mr Osborne argued that the choice of 1 January 2006 as the commencement date was essentially arbitrary. He notes an apparent contradiction in the appellant's evidence when she says that the essential equipment required in order to practice Chinese medicine had still not been installed at the appeal property by 1 January 2006, the date on which Dr Zhou says she started such a practice. By this admission she appears to accept, contrary to her submissions, that such equipment is not a prerequisite to the operation of her business.

23. This highlights a general point. Dr Zhou admits to a lack of understanding of English culture and statutory procedure. She is not a native English speaker and, in my opinion, occasionally found it difficult to follow the proceedings and to express herself as adequately as she might have wished. I think from the evidence that, throughout the history of her ownership of the appeal property, she has acted in good faith upon the advice given to her by public officials. But her lack of complete understanding of the subject matter and language has led to some of her actions appearing confused, contradictory and, at times, against her self-interest. For instance, I am not convinced from the evidence that the appellant's choice of 1 January 2006 as the commencement date for her business was an informed one. It seems to have followed upon advice received from the Business Rates section of Harrow Council in September 2005 that (as reported by Dr Zhou in her oral evidence) she could start her business without planning permission. In my opinion such advice was more likely to have been to the effect that a business may still be liable to non-domestic rates even though the use does not have planning permission (a point made at the hearing by Mr Osborne). I agree with Mr Osborne that the start date appears to be arbitrary, but it does not necessarily follow that the business must have begun before that date. The evidence does not support that conclusion.

24. In weighing the evidence I have had regard to the President's comments in *Tully* that:

“17...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 be one of fact and degree...

22...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 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.”

I have considered the facts as a cumulative whole in the light of this guidance. I am satisfied that the purpose of the signage in the window and the limited fitting out of the front room was to create a colourable impression of business use. But, from the evidence before me, I conclude

that no patients were treated there and that the room continued to be used for domestic purposes as living accommodation. The furniture and fittings to be found in the room during the relevant period were not specialised and were commensurate with the use of the room as a normal domestic study. There is no doubt that the appellant wanted to use the property for non-domestic purposes, but on the balance of evidence, as a matter of fact and degree, I find that it was not so used. The entry in Thompson Local was not material and, in my opinion, any business use that may have been made of the room was *de minimis*. The appeal property therefore remained wholly in use as living accommodation and was thus domestic property for the purposes of the 1988 Act between 1 April 2005 and 1 January 2006.

25. In reaching this decision I have referred to the new evidence about the prerequisites of her practice that was introduced by Dr Zhou after the hearing. The VO has questioned the admissibility of such evidence given that Dr Zhou made no reference to it during the hearing, in the course of which the line of questioning from the VO gave the opportunity for it to be introduced. I have admitted it for three reasons. Firstly, I gave the appellant the opportunity to comment upon the case law relied upon by the VO, copies of which had not been made available to Dr Zhou before the hearing. Her reference to essential equipment (prerequisites) was placed in the context of her comments on *Melladew* and *Tully* and was therefore relevant to the further evidence that she was invited to give. Secondly, I have taken account of the factors referred to in paragraph 23 above and I think it likely that Dr Zhou may not have appreciated the implications of the line of questioning pursued by Mr Osborne. Thirdly, the appeal was conducted under the simplified procedure in which the hearing is informal and the strict rules of evidence do not apply (see Lands Tribunal Practice Direction 3.4). The VO was given the opportunity of commenting upon this new evidence but did so only to challenge its validity and not its substance.

26. I therefore allow the appeal. The entry shall be deleted from the 2005 list until the agreed effective date of 1 January 2006.

27. An award of costs is made only in exceptional circumstances where an appeal is heard under the simplified procedure. In my opinion there are no such circumstances in this appeal and neither party suggested at the hearing, or subsequently, that there were. I therefore make no order as to costs.

Dated 19 August 2008

A J Trott FRICS