RA/59/2007

LANDS TRIBUNAL ACT 1949

RATING – valuation – value of lounges at Heathrow airport following events of 11 September 2001 in New York – claimed effects on passenger numbers and aircraft movements – whether matters physically manifest in locality – VT holding that they were though masked by other factors and reducing RVs – held VT wrong to conclude masked effects were manifest – Local Government Finance Act 1988 Sched 6 para 2(7)(d)

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

B Y

KAREN KENDRICK **Appellant**
(Valuation Officer)

Re: CIP Lounges at (1) Room 2026A,
Building 134, and
(2) Rooms 2711-2714,
Building 136,
Heathrow Airport,
Hounslow, Middlesex,
TW6 1JH

Before: The President

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 6 March 2009

Tim Buley instructed by Solicitor to HM Revenue and Customs for the appellant

The following case is referred to in this decision:

Chilton-Merryweather v Hunt [2008] RA 357

DECISION

1. This is an appeal by the valuation officer against a decision of the London (North West Valuation Tribunal allowing appeals by the ratepayer in respect of two hereditaments, each of which is a Commercially Important Passenger lounge at Heathrow Airport. The VT reduced the assessments by 10% to reflect the effects on the values of the hereditaments of the events of 11 September 2001 in New York. The VO says that it was wrong to do so. The ratepayer does not respond to the appeals.

2. The ratepayer, Servisair (UK) Ltd, is a company that operates aviation ground services at a number of airports. It is a market leader in the provision of common-use airport lounges throughout the UK and continental Europe. The hereditaments that it occupies at Heathrow are (a) Room 2026A, Second Floor, Building 134 (the Terminal 1 hereditament) and (b) Rooms 2711-2714, Second Floor, Building 136 (the Terminal 2 hereditament), each of which is provided for the use of passengers who are considered to be commercially important. The Terminal 1 hereditament was originally entered in the 2000 Rating List for Hillingdon at a rateable value of £182,000, and this was later altered to £161,000 RV with an effective date of 1 October 2000. The Terminal 2 hereditament was originally entered in the list at £198,000, and this was later altered to £175,000 with an effective date of 1 April 2001.

3. On 26 November 2001 the ratepayer's agent, Mr Christopher Marriott, made proposals to reduce the rateable values of each of the hereditaments. In one case he gave as his reasons for believing the list to be inaccurate:

> "The events on September 11th 2001 at the WTC in New York are a material change of circumstances, the effect of which is to cause a significant reduction in the rental value of this hereditament."

In the other case it was put slightly differently:

> "The events on September 11th 2001 at the WTC in New York are material change of circumstances which have significantly reduced the rateable value."

4. The statutory provisions that are called into consideration by these proposals are these. The principal provisions are those contained in paragraph 2(3)-(7) of Schedule 6 to the Local Government Finance Act 1988 (as amended), which provide as follows:

> "2.–(3) Where the rateable value is determined for the purposes of compiling a list the day by reference to which the determination is to be made is –
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> (a) the day on which the list must be compiled, or
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> (b) such day preceding that day as may be specified by the Secretary of State by order in relation to the list.
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> (4) Where the rateable value is determined with a view to making an alteration to a list which has been compiled (whether or not it is still in force) the day by reference to which the determination is to be made is –

(a) the day on which the list came into force, or

(b) if a day was specified under sub-paragraph (3)(b) above in relation to the list, the day so specified.

(5) Where the rateable value is determined for the purposes of compiling a list by reference to a day specified under sub-paragraph (3)(b) above, the matters mentioned in sub-paragraph (7) below shall be taken to be as they are assumed to be on the day on which the list must be compiled.

(6) Where the rateable value is determined with a view to making an alteration to a list which has been compiled (whether or not it is still in force) the matters mentioned in sub-paragraph (7) below shall be taken to be as they are assumed to be on the material day.

(6A) For the purposes of sub-paragraph (6) above the material day shall be such day as is determined in accordance with rules prescribed by regulations made by the Secretary of State.

(7) The matters are –

(a) matters affecting the physical state or physical enjoyment of the hereditament,

(b) the mode or category of occupation of the hereditament,

(c) the quantity of minerals or other substances in or extracted from the hereditament,

(cc) the quantity of refuse or waste material which is brought onto and permanently deposited on the hereditament,

(d) matters affecting the physical state of the locality in which the hereditament is situated or which, though not affecting the physical state of the locality, are nonetheless physically manifest there, and

(e) the use or occupation of other premises situated in the locality of the hereditament."

5. The day specified by the Secretary of State under sub-paragraph (3)(b) is 1 April 1998 (the "antecedent valuation date" or AVD): article 2 of the Rating Lists (Valuation Date) Order 1998. So for the purpose of compiling a list or making an alteration in a list that has been compiled rateable values are to be determined by reference to the AVD (subparagraphs (3) and (4)). But in respect of the paragraph (7) matters, for the purpose of compiling a list these are to be taken as they are on the day on which the list must be compiled (here 1 April 2000); and with a view to altering a list they are to be taken as they are on the material day (subparagraphs (5) and (6)). Under regulation 3(7)(a) of the Non-Domestic Rating (Material Day for List Alterations) Regulations 1992 the material day for these purposes is the date of the proposal, here, therefore, 26 November 2001

6. Under regulation 4A(1)(b) of the Non-Domestic Rating (Alteration of Lists and Appeals) Regulations 1993 a ratepayer may make a proposal to alter a list on the ground that the rateable value of a hereditament in the list is inaccurate "by reason of a material change in

circumstances which occurred on or after the day on which the list was compiled". Regulation 3 defines "material change of circumstances" as a change in any of the matters mentioned in paragraph 2(7) of Schedule 6 to the 1988 Act.

7. The appeals resulting from the two proposals were heard by the VT on 17 April 2007. In its decision of 16 August 2007 the VT recorded the cases advanced by the parties. The case for the ratepayer was in essence that, following the events of 11 September, passenger numbers in the appeal hereditaments and at the airport fell significantly, as did aircraft movements, to the extent that the reductions were discernible, so that the effects of the attacks were physically manifest in the locality within the meaning of paragraph 2(7)(d); and that, as a consequence, the rental value of the hereditaments was reduced. The case for the appellant was presented by Mr Marriott, and he called two valuation witness, Mr I Dewar of Wilks, Head & Eve and Mr R Guy of William Eve. The case for the VO was that the events of 11 September had resulted in an attitude shift on the part of air passengers, which was an economic factor that did not fall to be taken into account under paragraph 2(7); that in any event the reduction in passenger numbers and aircraft movements was not solely the result of this but was also the result of wider changes within the airline industry; and that in the AVD world rental values would have been unaffected as the reduction in passenger numbers and aircraft movements would not have been expected to persist. The case was presented by Mr P Bond of the VOA, and he called Mr J Martinig to give valuation evidence.

8. Each of the parties put forward contentions related to sub-sub-paragraphs (a), (b), (c), (d) and (e) of paragraph 2(7). Mr Tim Buley, who appears for the VO, says that the relevant provision for consideration is (d): "matters ... which, though not affecting the physical state of the locality, are nonetheless physically manifest there." I agree. The VT, correctly, accepted the VO's contention that the other sub-sub-paragraphs had no application. On (d) the VT said:

> "In terms of matters which, though not affecting the physical state of the locality, were nonetheless physically manifest there, the Tribunal notes the range of evidence presented by the appellant and his witnesses in respect of the changes in footfall in and around CIP Lounges and in long haul and transatlantic aircraft movements in the aftermath of 9/11.
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> The Tribunal also notes the respective parties' observations regarding the VOA's IA which sets out matters which may impress the hypothetical landlord and tenant as physically observable, and hence physically manifest, in the locality of the appeal properties, namely in this case pedestrian flow and aircraft movements.
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> While the Tribunal notes the Valuation Officer's evidence that aircraft movements and passengers numbers at Heathrow airport were not significantly different in the period following 9/11 in comparison with those either at 1 April 2000 or prior to September 2001, it considers that, having established that the appeal properties are, vacant and to let, CIP Lounges used by 'high value' air travellers, evidence in respect of this type of passenger and aircraft movement is of more relevance than that in respect of the general levels provided by the Valuation Officer.

Therefore, the Tribunal accepts the appellant's contention that the true impact of 9/11 on the appeal properties, as CIP Lounges, is likely to be masked within the wider statistics about all passenger numbers and all aircraft movements at Heathrow which include low cost and package airline travellers who would have little use for the high value accommodation provided within them.

To that extent, the Tribunal notes the evidence presented by the appellant and the witnesses regarding actual throughput changes at the CIP Lounges situated within the Heathrow terminals in the post 9/11 period, 2001-2004, namely that, in summary;

- Servisair had seen an average reduction of over 10% in passenger numbers using its lounge in Terminal 1,
- Servisair had seen an average reduction of 27% in passenger numbers using its lounge in Terminal 2,
- American Airlines had seen an average fall of 11.3% in passenger numbers using its CIP lounges at Heathrow between 2000 and 2001,
- United Airlines had seen year on year falls of 17% to 29% in passenger numbers using its Heathrow CIP lounges.

Further, the Tribunal also notes the evidence presented to it regarding reduced numbers of aircraft movements in respect of long haul flights to and from Heathrow in general, and in respect of Lufthansa, BMI and United Airlines in particular.

While the Tribunal is not convinced that all the items presented to it by the appellant and the witnesses regarding the abandonment of plans for expansion and upgrading etc in the wake of 9/11 would have been visible, and hence manifest, it is satisfied that these changes in 'high value' passenger numbers (footfall) and long haul aircraft movements would have been visible to the hypothetical landlord and tenant of the appeal properties, as even in the hypothetical world they would have both been closely connected to the airline industry.

Therefore, to some extent at least, the Tribunal accepts the contention that the effects of 9/11 on CIP lounges would have been observable or perceptible and so physically manifest in their locality.

In considering the fundamental question of whether the events of 9/11 in America could be a material change in circumstances at Heathrow airport, the Tribunal notes the Valuation Officer's contentions that the terrorist attacks led to a change in attitude by Americans in particular, but also other nationalities, to fly in general and also, more specifically in relation to the appeal properties, to undertake long haul and transatlantic travel. The Tribunal also notes the Valuation Officer's contention that such a change in attitude or fashion, like other purely economic changes, such as changes in the levels of interest rates or economic activities as a result of national or international economic growth or recession, only fell to be reflected in rating assessments at the time of a revaluation and not during the life of a list.

However, the Tribunal considers that the events of 9/11 were actual physical events and were not intangible or 'theoretical' events such as a change in interest rates, a change in attitude towards economic 'wellbeing' or a change in fashion. ....

> Therefore, it is the Tribunal's view that it is reasonable to suggest that the events of 9/11 were a material change in circumstances for an 'airside' CIP lounge, and that its impact was physically manifest at their respective locations."

9. The VT then went on to deal with the valuation consequences of this conclusion, and it said this:

> "While the Tribunal notes the range of evidence presented by the appellant and his witnesses regarding the changes in footfall, aircraft movements and other economic activity that followed 9/11, it also notes and accepts the Valuation Officer's contentions, supported by media articles and other statistical evidence, that the actual impact of 9/11 in isolation from other intangible factors on these CIP lounges would have been masked by the wider recession that was affecting the global economy around that time, and the particular trading difficulties being experienced by some of the users of the Servisair lounges, Swissair and Sabena, and one of the carriers quoted by one of the witnesses, United Airlines. The Tribunal accepts that global economic factors do not fall to be reflected in rating assessments in between lists, and that the difficulties of particular operators fall to be disregarded under the concept of the property being valued vacant and to let.
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> The Tribunal has had some difficulty in quantifying the impact on the appeal properties of 9/11, and that which falls to be stripped out as a result of non physical economic changes and the trading difficulties of particular carriers.
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> Having noted the respective parties' evidence regarding both the changes in activity at and around the appeal properties and the possible extent of the wider global recession and the wider difficulties of some of the carriers using CIP lounges at Heathrow at that time, on balance, the Tribunal considers that the adoption of an allowance of 10% to reflect the events of 9/11 on the appeal properties is fair and reasonable."

10. Mr Buley submits that even if it is right that the events of 11 September 2001 gave rise to a change in the attitudes of airline users, and hence to the level of footfall/amount of aeroplane movements, that does not mean that those events were themselves physically manifest in the locality of Heathrow. Rather, any physical changes came about only as a result of an intermediate change in the attitude of consumers. The physical events of 11 September 2001 are therefore irrelevant to the consideration of whether there was a physical change in the locality of the lounges. If there was a physical change, at all, it was simply the change in the number of airline movements or footfall. Its ultimate cause may help to identify the date from which any change took effect (in the absence of better evidence) but is irrelevant to whether a material change of circumstances took place.

11. Any change in attitudes among airline customers, Mr Buley says, is not a change either to the physical state of the locality, nor is it physically manifest in the locality (because it is not physical at all). Thus the only possible change in circumstances is a change in the actual numbers of people at Heathrow, or numbers of flights. As to a change in the number of flights, that is simply a consequence of reduced numbers of passengers. It is not causative of any reduction in the rateable value of the Lounges. More generally, however, the VT accepted the

evidence that any changes in these matters were masked, and not discernible. Any physical change, if it took place, must have been a change in the overall levels of footfall/aeroplane movements, and there was no evidence of this.

12. Mr Buley submits that the basis of the VT's decision is, in reality, confused, so that once the nature of that confusion becomes apparent, it can be seen that its conclusion was not open to it. The VT held that the events of 11 September 2001 were themselves physical events, but failed to consider whether they were in the locality. If they were not in the locality (which they plainly were not) then they could not in themselves give rise to a material change in circumstances. Instead of addressing this crucial question, the VT instead, having identified those events as "physical", went on to consider the quite separate question of whether there were economic effects arising from them.

13. Mr Buley says there is no possible candidate for a physical change to the locality of the lounges, because neither the events of 11 September 2001, nor any consequential change in attitudes, nor any change in the level of footfall or aeroplane movements, could amount to such a change. The only possible candidate for a change "physically manifest" in the locality is a change in the level of footfall, or in the number of aeroplane movements, because the events of 11 September 2001 were not in the locality, and any change in attitudes is not physical (and for completeness, was not in the locality). However, there was no evidence of a change in the level of footfall, or the number of aeroplane movements per se, and it follows, he says, that no material change in circumstances took place. In so far as there was any change in footfall per se at the time of the events of 11 September 2001, there is no reason to think that this would be perceived as anything more than a temporary blip, and hence no reason to think that it might have an effect on rateable value.

14. Before going on to consider these submissions it is right for me to note that there is Court of Appeal authority on the meaning and application of paragraph 2(7)(d). The case, *Chilton-Merryweather v Hunt* [2008] RA 357, was a council tax case that concerned the meaning of the words "any change in the physical state of the dwelling's locality" in section 24(10) of the Local Government Finance Act 1992 and "the physical state of the locality of the dwelling" in regulation 6(3) of the Council Tax (Situation and Valuation of Dwellings) Regulations 1992. In the course of his judgment Rix LJ (with whom Waller and Dyson LJ agreed) reviewed the history of the phrase, noting its earlier appearance in paragraph 2(7)(d) of the 1988 Act and observing (at paragraph 27) that sub-sub-paragraphs (a) and (d) were enactments of the decision of the Court of Appeal in *Addis Ltd v Clement (VO)* [1987] RA 1 (which had been reversed by the House of Lords: [1988] 1 WLR 301). Rix LJ contrasted the words in question, where they appeared in paragraph 2(7)(d) with the rest of the sub-sub-paragraph – the part of relevance in the present appeal. He said this:

> "41. Whereas I accept, as was common ground, that the expression 'physical state' could embrace traffic and its physical consequences such as noise and pollution, in context the emphasis on 'physical' state is intended to distinguish matters of physical fabric (and perhaps character, see paras 46 and 50 below) from matters of use, activity, enjoyment or occupation…"

15. Rix LJ then went on:

> "42. Secondly, this reading of the 1992 Act is strongly supported by the difference in language between its provisions and those of the 1988 Act, described above. In particular, Schedule 6, paragraph 2(7) of the 1988 Act distinguishes between both the 'physical state' and 'physical enjoyment' of the hereditament itself on the one hand, and on the other hand between 'the physical state of the locality' and other matters which are 'physically manifest' there without themselves affecting the physical state of the locality. Those matters would appear to include such matters as were discussed by the Court of Appeal in *Addis v. Clement*, such as 'alterations in economic conditions' which 'result in changes in the locality which are capable of being observed "on the ground" in the locality' (*per* Woolf LJ at 10). It is particularly to be noted that, even though paragraph 2(7) was intended to enact the decision in the Court of Appeal in *Addis v. Clement* (in preference to the decision in the House of Lords), it recognises that matters which may be 'physically manifest' may not in themselves thereby affect the physical state of the locality. That is to give the expression 'physical state of the locality' a deliberately narrow meaning, and one which I have sought to express above. It is difficult to think that that expression, applied in the valuation context in the 1988 Act, was not intended to have the same meaning where it appears in the 1992 Act."

16. In considering the case advanced on behalf of the appellant I need to start with the statutory provisions. Rateable values are to be determined as at the AVD (1 April 1998) in the light of the subparagraph (7) matters as they existed on the day of compilation of the list (1 April 2000) for the purpose of compilation and as they existed on the material day (26 November 2001) for the purpose of alteration. The initial question has to be, in the words of sub-paragraph (7)(d): what are the "matters which, though not affecting the physical state of the locality [in which the hereditament is situated], are nonetheless physically manifest there"? The VT appears to have treated as the matters for this purpose the events of 11 September, but clearly they could not be. They were a past happening, not matters that existed on the material day. While past events could not constitute matters for this purpose, I can see that the consequences of such events, if they endured at the material day, could be said to do so. Thus the attitude of air passengers to air travel as the result of the events of 11 September could, I am prepared to accept, qualify as a sub-paragraph (7)(d) matter, provided, of course, that it was physically manifest in the locality of the hereditament. This accords with the observation of Rix LJ in *Chilton-Merryweather v Hunt* that the matters in sub-paragraph (7)(d) would appear to include such matters as changes in economic conditions where the effects are observable "on the ground" in the locality.

17. The second question, assuming that the attitude of passengers to air travel is capable of being a subparagraph (7)(d) matter, is whether on the material day such attitude was physically manifest in the locality of the hereditaments. The VT's findings on this were that "changes in 'high value' passenger numbers (footfall) and long haul aircraft movements would have been visible to the hypothetical landlord and tenant of the appeal properties." (From the immediately preceding paragraphs of the decision it is clear that the reference to changes in high value passengers is to "the actual throughput changes at the CIP Lounges" in the period 2001-2004.) It is, I have to say, as a matter of impression extremely difficult to see how mere

observation of the movement of passengers in and about the lounges and aircraft movements at the airport could reveal anything about the factors that had caused the numbers to be as they were. The level of movements must inevitably be the outcome of a vast range of economic and other factors. Conclusions about particular factors could no doubt be reached from an expert study of the relevant data supported perhaps by market research, but the hypothetical landlord and tenant would not, one would have thought, seek to draw any conclusions from mere observation of passenger and aircraft movements. This indeed appears to be what the VT itself decided (and it is the VT's conclusions on the facts and not my own impressions that must be determinative). It said that it accepted the VO's contentions that "the actual impact of 9/11 in isolation from other intangible factors on these CIP lounges would have been masked by the wider recession that was affecting the global economy around that time, and the particular trading difficulties being experienced by some of the users of the Servisair lounges, Swissair and Sabena, and one of the carriers quoted by one of the witnesses, United Airlines."

18. The requirement in sub-paragraph (7)(d) is that the effects should be physically "manifest" in the locality. It seems to me a contradiction in terms to say that an effect is masked but that it is nonetheless manifest. The finding, which seems to me to be entirely plausible, that the effects of the events of 11 September would have been masked by other factors, is in terms in my judgment a conclusion that those particular effects were not physically manifest but were merely an undefinable contributor to the observed decline in movements. On this basis the VT was wrong to conclude that the rateable values should be reduced through the application of sub-paragraph (7)(d). It follows also that there was no material change of circumstances on which a successful proposal could have been founded.

19. The appeal must accordingly be allowed and the rateable values £161,000 in respect of the Terminal 1 hereditament and £175,000 in respect of the Terminal 2 hereditament must be restored.

Dated 16 March 2009

George Bartlett QC, President