LANDS VALUATION APPEAL COURT

[2018] CSIH 82
XA57/18

Lord Justice Clerk
Lord Malcolm
Lord Doherty

OPINION OF LADY DORRIAN, the LORD JUSTICE CLERK

in the Appeal

by

ASSESSOR FOR CENTRAL SCOTLAND JOINT VALUATION BOARD

Appellant

against

BRITISH WATERWAYS BOARD (SCOTLAND) (operating as SCOTTISH CANALS)

Respondent

Appellant: Gill; Wright Johnston and MacKenzie LLP
Respondent: Dunlop; Morton Fraser LLP

11 December 2018

[1] The subject of this appeal is the entry in the valuation roll for the ratepayer's canal undertaking within the Falkirk area ("the subjects"). At the 2010 revaluation the ratepayer did not appeal against the entry. However, in August 2015 it lodged a running roll appeal in terms of section 2(1)(f) and section 3(4) of the Local Government (Scotland) Act 1975. Section 2 of that Act provides:

> "(1) Subject to subsection (2) below, the assessor for any valuation area shall, as respects that area, at any time while the valuation roll is in force, alter the roll –

…

(f) to correct any error of measurement, survey or classification or any clerical or arithmetical error in any entry therein;".

Section 3(4) provides:

> "Without prejudice to subsection (2) above, the proprietor, tenant or occupier of lands and heritages which are included in the valuation roll may appeal against the relevant entry but only on the ground that there has been a material change of circumstances since the entry was made or that there is such an error in the entry as is referred to in section 2(1)(f) of this Act; ..."

[2] The subjects had been entered in the 2005 valuation roll at a net annual value ("NAV") of £41,739 which valuation the Committee found had been based on the knowledge, skill and judgement of the assessor. A revaluation appeal against that entry was lodged, and, with sundry similar appeals in Scotland, was sisted to await the outcome of many like appeals proceeding in England and Wales. At the time of the 2010 revaluation, those appeals had not yet been determined. At the 2010 revaluation the assessor, again using his own knowledge, skill and judgement, applied a 20% uplift to the NAV at which the subjects had been assessed in 2005. This resulted in an NAV of £50,000.

[3] At the 2010 revaluation numerous revaluation appeals were lodged in respect of other canal subjects. In 2013, a negotiated settlement was achieved in respect of all of the 2005 and 2010 appeals. It was agreed that the steady state of repair allowance in respect of those canal undertaking entries should be 42% for the 2005 valuation, and 45% for the 2010 valuation. These allowances were applied by the assessor to all cases in which there had been revaluation appeals against the 2005 or the 2010 entries. As a result the 2005 NAV for the subjects was reduced to an agreed figure of £24,200. However, since the 2010 roll entry for the subjects had not been appealed its NAV was not altered.

[4] In the ratepayer's appeal to the Committee it was maintained that the entry in the 2010 roll was one which contained an error of measurement to which section 2(1)(f) of the Local Government (Scotland) Act 1975 applied, and that the entry required to be altered by the assessor. The 2010 entry had not correctly allowed for a steady state of repair allowance of 45%, this being an "empirically verifiable matter". A 45% reduction should be applied to the initial 2005 NAV of £50,000, resulting in an NAV of £27,500.

[5] In relation to the altered entry for the subjects in the 2005 roll, the Committee found in fact that "The basis of that reduction was an agreement between the Assessor and the agents as a result of a discussion where judgement was being applied on both sides and a figure reached by negotiation." Notwithstanding that an alteration to the £50,000 NAV in the 2010 entry would have been made in 2013 had there been a timeous revaluation appeal, the Committee did not accept that it followed that there had been an error of measurement in terms of section 2(1)(f).

[6] However, the Committee noted that by 2013 it was known that the corrected 2005 valuation was £24,200 NAV. It reasoned that it had been an arithmetical or clerical error for the assessor to take a starting point of £41,739 NAV rather than £24,200 NAV. It was to the latter figure the uplift of 20% should have been applied. In consequence the Committee ordered that the NAV in the entry should be altered from £50,000 to £29,040.

[7] Before this court the Committee's decision was attacked on three grounds. The first was procedural unfairness, it being argued that it decided the case on an argument of its own devising which had formed no part of the submissions before it. The assessor had had no opportunity to address the Committee on that argument. He had had no reason to anticipate that the Committee might take the course that it did. Fairness had required that

the Committee raise the issue with the Assessor and give him an opportunity to answer it. The failure to do so was a breach of the principles of natural justice.

[8] In any case the Committee had failed to recognise that, like an alteration to give effect to a material change of circumstances affecting value, an alteration to give effect to an error of the kind to which section 2(1)(f) relates is an exception to the general rule that changes in the value of subjects are given effect to at the revaluation. The scope of "error appeals" is restricted to empirically verifiable matters of objectively ascertainable fact or measurement. Matters of judgement, opinion or law could not constitute such an error. Further, to qualify for the purposes of the section the alleged error must have pre-dated the making of the entry or caused the entry to be made, neither of which was the case here (*Trustees of the National Gallery of Scotland* v *Assessor for Lothian* 2011 SC 277).

[9] As noted below, before this court counsel for the ratepayer did not support the Committee's reasoning that there was either an arithmetical or a clerical error. In my view, this illustrates the danger of error and injustice where there has been procedural unfairness. In general a Committee should confine itself to dealing with the submissions which have been made. In this case the only argument advanced for the ratepayer was rejected by the Committee. That should have been an end of the matter. It was not appropriate for the Committee to proceed upon an argument of its own devising without canvassing it with the parties. Had the Committee canvassed the point, it would have had the benefit of the parties' submissions. It seems very likely that it would have become obvious to it that no question of a clerical or arithmetical error did in fact arise. The way in which the Committee proceeded offended against natural justice. However, I agree with Lord Doherty that, as counsel for the ratepayer concedes that there was no clerical or arithmetical error, the problem which the procedural unfairness gave rise to is no longer a live issue.

[10] At the hearing before this court counsel for the ratepayer sought to argue that the Committee had been wrong to reject the ratepayer's contention that there had been an error of measurement. I do not consider that the court should allow such an argument to be presented at this late stage.

[11] In *Watson & Philip Plc* v *Assessor for Grampian Region* 1996 SLT 247, Lord Cullen observed:

> "... where a respondent to an appeal … intends to renew a contention which might have provided a ground for a decision in his favour but has been rejected by the Committee, it is essential that fair notice should be given of such an intention in his answers to the Grounds of Appeal. "

In the present case there was no cross-appeal. More importantly, the answers to the grounds of appeal provide no indication that any aspect of the Committee's decision is challenged by the ratepayer. The ratepayer's Note of Argument simply invited the court (a) to conclude that the Committee had not erred, and (b) to refuse the appeal. There was no notice to the Committee, or the court, or the assessor that the respondent proposed to challenge a material part of the Committee's decision.

[12] I also agree with Lord Malcolm and Lord Doherty that the merits of the proposed ground of challenge are ill-founded for the reasons set out in their opinions.

[13] In the whole circumstances I am not persuaded that it would be in accordance with the interests of justice that the ratepayer should now be permitted to change tack. Since that was the only basis upon which counsel for the ratepayer submitted that the appeal could be resisted, it follows that the assessor's appeal must succeed.

[14] For these reasons I move your Lordships to allow the assessor's appeal.

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Lord Justice Clerk
Lord Malcolm
Lord Doherty

OPINION OF LORD MALCOLM

in the appeal

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[15] I agree with your Ladyship in the chair that if the Valuation Appeal Committee intended to address the issue of a clerical or arithmetical error, before doing so basic fairness required it to seek the submissions of the parties. I also agree that proper practice requires a respondent to make it clear that an adverse decision made by the committee is being challenged. In any event I agree with the submission for the assessor that this was a challenge by the ratepayer on a matter of valuation, and which, on any view, fell outside the scope of section 2(1)(f) of the Local Government (Scotland) Act 1995.

[16] It is understandable that the committee might have had sympathy for the ratepayer. Had there been an appeal against the 2010 entry, all would have been well. (The only explanation given for its absence was a reference to it being "due to an administrative matter".) The committee rightly rejected the ratepayer's submission that an error of measurement within the meaning of section 2(1)(f) had caused the entry in 2010. However, it erred when deciding that a failure to alter the 2010 valuation in line with the allowance agreed across the UK in 2013 amounted to a clerical or arithmetical error in the entry. At most, the events in 2013 demonstrated that a different view had been agreed on a matter of valuation. To proceed upon the basis of either the ratepayer's challenge or the committee's decision would, to quote paragraph 32 of Lord Justice Clerk Gill's opinion in *National Gallery Trustees* v *Lothian Assessor* 2011 SC 277, "subvert the whole system of quinquennial valuation." Contrary to the guidance in that decision it would widen the scope of a claim under section 2(1)(f) to include differences on matters of professional opinion and valuation judgement while the roll is in force. It follows that I agree that the assessor's appeal should be allowed.

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OPINION OF LORD DOHERTY

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[17] I have had the considerable advantage of reading drafts of your Ladyship's and your Lordship's opinions. I agree with both opinions and with the proposed disposal.

[18] Before the Committee the ratepayer's only argument was that the entry for the subjects in the 2010 valuation roll ought to be altered on the ground that there had been an error of measurement. The Committee rejected that argument but decided that it would allow the appeal on a basis which had not been argued for, namely, that there was a clerical or arithmetical error in the entry.

[19] In my opinion the Committee fell into serious procedural error when it took that course. Generally, a Committee's duty is to decide an appeal on the basis of the material put before it. It should be very hesitant to posit an argument which has not been advanced by one or other of the parties, and even more hesitant to hold that such an argument is decisive. Often there may be very good reasons why the argument in question was not advanced by either of the parties. That has proved to be the case in the present appeal.

[20] If, however, exceptionally, a Committee forms a provisional view that an argument (or an authority which it seems may have a decisive bearing on the case) appears to have been overlooked, the appropriate course is for the Committee to alert the parties to the issue, and to seek their views as to any further procedure which may be necessary in order to deal with it.

[21] The course which the Committee followed here departed from the basic rules of natural justice. Counsel for the assessor addressed the argument which the agent for the ratepayer had advanced to the Committee. He was given no notice of the proposition that there was a clerical or arithmetical error in the entry. He was given no opportunity to refute that proposition.

[22] Sometimes a breach of natural justice can be "cured" on appeal. The test is whether at the end of the appeal proceedings the party complaining of the breach still has a legitimate complaint (*Calvin* v *Carr* [1980] AC 574). I suspect that here, unless he could have shown that the evidence he would have led and the findings he would have asked the Committee to make would have been different in some material respect, by the end of the appeal before this court the assessor would no longer have had such a complaint. He would have had adequate opportunity to address the Committee's reasoning.

[23] I use the conditional tense because, as it turns out, in the present case the question is academic. In a wise exercise of his discretion, counsel for the ratepayer did not support the Committee's proposition that there is a clerical or arithmetical error in the entry. In my opinion it is plain that the facts relied upon by the Committee do not support its conclusion that there was any error of that nature. There was no error made in copying or writing, or any other relevant clerical mistake: and there was no arithmetical mistake made by the assessor or any person who provided him with relevant information (see *National Gallery Trs* v *Lothian Assessor, supra,* Lord Justice-Clerk Gill at para 31 and Lord Hardie at para 38; *Armour, Valuation for Rating*, para 3-39).

[24] Nevertheless, counsel sought the court's leave to argue that the Committee had erred in rejecting the ratepayer's submission that there was an error of measurement in the entry in the roll.

[25] Where a party is dissatisfied with a Committee's decision he may appeal against it by seeking a stated case (Lands Valuation (Scotland) Act 1879, section 7). He does that by lodging grounds of appeal with the clerk to the Committee within 14 days after the date on which the statement of reasons for the decision has been issued to him (Act of Sederunt (Valuation Appeal Rules Amendment) 1982, rule 4(1)). The respondent has 14 days to lodge answers to those grounds of appeal (rule 4(2)). If both parties are dissatisfied with the Committee's decision, but for different reasons, the prudent course is for each party to appeal the decision by lodging grounds of appeal in compliance with the statutory requirements. The most obvious example of such dual dissatisfaction is the case where there has been divided success before the Committee and each party wishes to insist that it ought to have been entirely successful. On the other hand, if a party's position is that the Committee reached the correct result but for the wrong reasons, it is understandable that it

does not prosecute an appeal, because it is content with the end result. (The perspective of an assessor where the correct result has been reached for the wrong reasons may be different. Even though the end result is satisfactory, he or she may wish to challenge its erroneous basis in order to avoid it being relied upon in other cases). However, if in resisting the other party's appeal a respondent wishes to attack the correctness of a material aspect of the Committee's decision, it must give fair notice of that challenge in its answers to the grounds of appeal. As Lord Cullen observed in *Watson & Philip Plc* v *Assessor for Grampian Region, supra,* at p. 249E:

> "The practical importance of this is obvious. If this is done the Secretary to the Committee knows from the outset to what matters the drafting of the stated case and adjustments proposed by the parties should be directed. It also obviates any potential difficulty at the hearing of the appeal before this Court."

[26] Here, the ratepayer's answers to the grounds of appeal did not challenge the Committee's rejection of the error of measurement argument. If the ratepayer wished to contest that (very material) part of the decision its answers should have made that clear. If that had been done the Committee would have been alerted to the proposed challenge, and the facts relating to that aspect of its decision might well have been more fully stated. Moreover, the challenge was not even foreshadowed in the note of argument which the ratepayer lodged with the court in advance of the hearing. Had it been, it would not have cured the failure to give notice to the Committee; but the court and counsel for the assessor would at least have had the opportunity to consider the argument in advance of the hearing of the appeal. Here the argument emerged mid-way through counsel for the ratepayer's oral submissions, after counsel for the assessor had completed his submissions.

[27] In my opinion these are not auspicious circumstances for the court to exercise its discretion to allow the ratepayer to pursue a ground not stated in its answers to the grounds

of appeal. The interests of the assessor, and the public interest in the efficient, orderly and fair disposal of appeals, seem to me to point the other way.

[28] I am fortified in that conclusion because I am satisfied that the ratepayer's proposed argument is not well founded.

[29] The Committee found in fact (i) that the assessor's starting point for the 2010 NAV was the NAV of £41,739 for the subjects in the 2005 roll entry; (ii) that that NAV was the product of a valuation exercise which involved the application of knowledge, skill and judgement by the assessor, and that at the time of the entry being made there was no other basis upon which the assessor could have proceeded; (iii) that when the assessor came to value the subjects for the 2010 revaluation his professional opinion and judgement was that between the 2003 and 2008 tone dates values of lands and heritages had generally gone up; and that an uplift of 20% from the 2005 NAV was fair and reasonable for canal subjects, resulting in an NAV of £50,000 (rounded down from £50,087).

[30] It was also common ground that in 2013, following negotiations at a national level, assessors and ratepayers had agreed that where the 2005 or 2010 entries for canal subjects had been appealed the values should be arrived at on a receipts and expenditure basis, with the application of a steady state of repair allowance of 42% for the 2005 appeals and 45% for the 2010 appeals. Since an appeal had been lodged against the 2005 revaluation entry for the appeal subjects, that entry was altered to reflect the agreed settlement figure of £24,200 NAV.

[31] Counsel for the ratepayer submitted that the 2013 agreement showed that there had been an error in each of the 2005 and 2010 NAVs for the appeal subjects. The agreement and its content were empirically verifiable matters of fact. The 2005 NAV had been put right, but

the 2010 NAV had not. Accordingly there remained an uncorrected error of measurement in that NAV.

[32] I disagree. It seems to me that the appeals settlement agreement was the culmination of negotiations which involved the exercise of opinion and judgement by both sides in light of all the relevant material available to them nationally by 2013. More particularly, the same observation applies to the agreement reached as to the steady state of repair allowances which should be applied. Neither of those matters was an objectively ascertainable fact at the date of the revaluation. The fact that different valuation conclusions were reached in the appeal negotiations on the basis of fuller evidence does not show that there was an error of measurement at the time the assessor carried out his valuation for the 2010 revaluation (or indeed at the time of the 2005 revaluation).

[33] The ratepayer's argument effectively came to this. The assessor's valuation method used the wrong starting point (i.e. with hindsight he ought to have used a 2005 NAV of £24,200 rather than £41,739); or, alternatively, that he ought to have valued the subjects on a different (i.e. receipts and expenditure) basis and should have applied a steady state of repair allowance of 45%.

[34] In my opinion, putting the matter that way helps to elucidate that there was no mistake by the assessor in any exercise of measurement which he carried out in the process of preparation and compilation of the NAV which he included in the entry in the roll. Nor in my view has it been shown that in arriving at his valuation he relied upon an erroneous measurement provided to him by the ratepayer or a third party.

[35] In truth, the ratepayer's real grievance is that the assessor ought to have adopted a different valuation approach. Such a challenge could of course have been advanced in a

revaluation appeal, had one been lodged. However, section 2(1)(f) affords much more limited scope for alteration of the roll.

[36] In the whole circumstances I am not persuaded that the interests of justice require that the ratepayer should be permitted to advance the argument which its counsel proposed to make. Since that argument was the only basis upon which the appeal was resisted, I agree with your Ladyship and your Lordship that the appeal should be allowed.