EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 28
P361/18

Lord Malcolm
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LORD DOHERTY

in the Reclaiming Motion

by

BRIAN PHILP

Petitioner and Reclaimer

against

THE HIGHLAND COUNCIL

Respondents

Petitioner and Reclaimer: Party
Respondents: Manson; Harper Macleod LLP

11 May 2021

Introduction

[1] The respondents are the rating authority for the Highland Council area. The petitioner and reclaimer ("the petitioner") was served by the respondents with a demand note for payment of rates of £1,536.87 in respect of a property at Fishery Pier, Kyle of Lochalsh. The demand note related to the period 1 April 2016 to 31 May 2016. During that period the property was entered in the valuation roll by the Assessor for Highland and the Western Isles Valuation Joint Board ("the Assessor") as a *unum quid* (one thing) with a

rateable value of £19,000 and with the petitioner entered as the owner and occupier. During the same period the assessment roll, which the respondents required to make up in terms of section 233 of the Local Government (Scotland) Act 1947 ("the 1947 Act"), showed the property having a net annual and rateable value of £19,000, and it showed the petitioner as the person liable for the payment of rates. Section 233(4) of the 1947 Act provides:

> "The production of the assessment roll shall be received as sufficient evidence of the making and validity of the rates therein mentioned."

[2] Following receipt of the demand note the petitioner appealed to the respondents in terms of section 238(1) of the 1947 Act on the ground that the rates levied in the demand note had been improperly charged. The appeal was heard by the respondents' Non-Domestic Rates Appeal Committee ("the Committee") on 11 October 2017. It was provided with correspondence and documents and it also considered oral submissions made by the parties. The essence of the petitioner's submission was that he had not been in rateable occupation of the property during the relevant period, and that someone else had been the rateable occupier of part of the property. The respondents' officer did not accept that. The officer also indicated that the respondents had consulted the Assessor as to whether the property had remained a *unum quid* during the relevant period; and that following investigation the Assessor had confirmed that in his view the entry in the valuation roll for that period was correct. At the end of the hearing the Committee adjourned to consider its decision. It reconvened later that day at which time it advised the petitioner of its unanimous decision that the grounds of appeal had not been substantiated and that the appeal was dismissed. The following day that decision was confirmed in writing by letter to the petitioner. On 17 October 2017 the petitioner wrote to the respondents requesting that he be provided with the chairman of the Committee's written decision explaining its basis.

The respondents replied by letter dated 24 October referring the petitioner to the terms of the letter of 12 October, and advised him that the decision had been unanimous. On 27 October the petitioner wrote to the respondents repeating the request which had been made in the letter of 17 October. On 7 November the respondents wrote to him referring to and repeating what had already been said in the letters of 12 and 24 October. The letter concluded:

> "I hope this clarifies the matter and enables you to understand the Committee's decision not to uphold your appeal. There is nothing further I can add to assist you."

On 9 November the petitioner wrote to the respondents requesting a meeting to discuss "the implications" of the decision. On 21 November the respondents replied indicating that they saw no value in a meeting. On 23 November the petitioner wrote a further letter seeking a meeting. On 5 December the respondents replied indicating that a meeting would serve no purpose. Despite this, the petitioner wrote to the respondents a further three times, on 13 December 2017, 16 January 2018 and 30 January 2018. In the final letter he expressed concerns about the constitution of the Committee. The respondents responded to those concerns by email on 2 February 2018.

The Judicial Review

[3] On 9 March 2018 the petitioner submitted the petition to the Petition Department and sought leave of a Lord Ordinary for it to proceed without it being signed by counsel or another person with a right of audience (Rule 4.2(5)). Leave was duly granted and thereafter the petitioner proceeded with the petition. On 12 April 2018 the Lord Ordinary pronounced an order for intimation and service of the petition, but an order for intimation and service was pronounced of new by the Lord Ordinary on 27 April 2018. The petition sought an

order ordaining the respondents to provide reasons for the decision. It also sought to challenge the decision on the basis that it was unfair that the appeal was heard by the respondents. The petitioner averred that the date on which the grounds giving rise to the petition first arose was 2 February 2018, the date of the final email from the respondents. He had a fall-back case (paragraphs 8A and 8B of the petition) that if the grounds of action arose on 11 October 2017 then the time for bringing the petition should be extended to the date it was presented. The respondents lodged answers in which they averred that the petition was time-barred in terms of s 27A of the Court of Session Act 1988 because if grounds for review existed then they arose on 11 October 2017. They averred that there was no basis for the three month period being extended. They also averred that permission to proceed ought not to be granted because there was no real prospect of success (Court of Session Act 1988, section 27B). By lodging answers in those terms the respondents made it clear that they wished to participate at the permission stage (Rule 58.6(1)). In those circumstances one might have expected that the court would fix an oral hearing to determine the time-bar and permission issues, since Rule 58.7(1) envisages that issues of time-bar are determined at the permission stage. It seems, however, that that was not done, and on 18 July 2018 the Lord Ordinary simply granted permission to proceed having considered the papers. The interlocutor did not deal with the time-bar issue.

The substantive hearing and the Lord Ordinary's decision

[4] At the substantive hearing the petitioner maintained:

(i) that the petition had been presented within three months of the grounds for review arising, failing which that there were good reasons to extend the three month period;

(ii) that it was inherently unfair that the right of appeal should be to the respondents rather than to an independent and impartial tribunal, and that the decision was vitiated by inherent partiality/bias; and

(iii) that the respondents were in breach of a duty to give adequate reasons for the decision.

[5] The Lord Ordinary dismissed the petition. He upheld the respondents' plea of time-bar. He reasoned (paragraph [17]) that, *prima facie*, the three month period ran from 11 or 12 October 2017; that there were no averments in the petition invoking the equitable jurisdiction to extend that period and "that no arguments in relation to this matter were properly put before the court by the petitioner". He was satisfied that "there is no basis upon which the court could exercise its equitable jurisdiction to waive, or modify the time limits", and that "the petitioner was in any event at the time of the decision complained of aware of a potential remedy by way of judicial review and that such remedy required to be invoked by way of a petition to the court within a three month time limit of the decision". He concluded "These are, in my view, telling factors against the petitioner".

[6] In the Lord Ordinary's opinion the short answer to issue (ii) was that in terms of section 238 of the 1947 Act the respondents had been both authorised and bound to determine the appeal. So far as issue (iii) was concerned, he agreed with the respondents that in the particular circumstances there had been no duty to give reasons.

Grounds of appeal and subsequent procedure

[7] The petitioner has reclaimed (appealed) the Lord Ordinary's decision. The parties have agreed to dispense with an oral hearing. The matter has been dealt with by reference to the written submissions and other material lodged by the parties.

[8] The petitioner has three grounds of appeal. None of those grounds challenges the Lord Ordinary's conclusion that it was not incumbent upon the Committee to provide reasons for its decision.

[9] The first ground of appeal advances an argument which was not raised before the Lord Ordinary, *viz.* that the Committee was not competently constituted and had no jurisdiction to hear the appeal. The second ground of appeal is that the Lord Ordinary erred in stating (at paragraph [17] of his Note) that the petitioner had no averments seeking to invoke the equitable jurisdiction. The third ground of appeal is that the Lord Ordinary erred in stating that the petitioner had no averments of bias or apparent bias on the part of the Committee.

[10] At a procedural hearing on 21 January 2021 the court allowed the petitioner to amend the petition to add the following declarator to the remedies sought:

> "(1A) declare that by the terms of section 56(1) of the Local Government (Scotland) Act 1973 a local authority cannot establish a committee for the discharge of their functions other than subject to an express provision contained in the Local Government (Scotland) Act 1973 or any Act passed after that Act and that by the terms of section 56(8) of the Local Government (Scotland) Act 1973 any enactment, except one mentioned in subsection (9), which contains any provision which empowers or requires local authorities or any class of local authorities to establish committees for any purpose, ceased to have effect. Then to declare that a committee expressly established by a requirement of the Local Government (Scotland) Act 1947 is therefore an unlawfully established entity without jurisdiction."

Section 238 of the 1947 Act and section 56 of the Local Government (Scotland) Act 1973

[11] Section 238 of the 1947 Act provides:

> "**238 Appeals against rates.**
>
> (1) In respect of each rate levied by them every rating authority shall fix a date on or before which any person may lodge with the officer of the authority designated for the purpose an appeal against the rates claimed from him on the ground that he is being improperly charged, and another date on which the appeals shall be heard by the rating authority or a committee thereof.

(2) The demand note shall contain a notice of the date by which appeals may be lodged and state the name or designation and the address of the officer with whom appeals may be lodged, and if the date for the hearing of appeals is not notified in the demand note, notice in writing thereof shall be given on behalf of the authority to the persons appealing.

(3) Every rating authority may if they think fit make rules with respect to the lodging and hearing of appeals under this section, so however that such rules shall not be inconsistent with the provisions of this part of this Act."

[12] Section 56 of the 1973 Act states:

"**56.— Arrangements for discharge of functions by local authorities.**

(1) Subject to any express provision contained in this Act or any Act passed after this Act, a local authority may arrange for the discharge of any of their functions by a committee of the authority, a sub-committee, an officer of the authority or by any other local authority in Scotland.

(2) Where by virtue of this section any function of a local authority may be discharged by any committee or sub-committee of theirs, then, unless the local authority otherwise direct—

(a) the committee may arrange for the discharge of any of those functions by a sub-committee or an officer of the authority; and

(b) the sub-committee, whether assigned the discharge of functions by the authority or by a committee, may arrange for the discharge of any such functions by an officer of the authority.

…

(8) Any enactment, except one mentioned in subsection (9) below, which contains any provision—

(a) which empowers or requires local authorities or any class of local authorities to establish committees (including joint committees) for any purpose or enables a Minister to make an instrument establishing committees of local authorities for any purpose, or empowering or requiring a local authority or any class of local authorities to establish committees for any purpose; …

…

shall, to the extent that it makes any such provision, cease to have effect.

…"

Section 238(1) of the 1947 Act is not one of the provisions listed in subsection (9).

The petitioner's written submissions

[13] The petitioner's principal submission is that when section 56 of the 1973 Act came into force section 238 of the 1947 Act ceased to have any force or effect. Any power the respondents had to appoint a committee was conferred by section 56, not by section 238(1) of the 1947 Act. Accordingly, the respondents' purported appointment of the Committee was incompetent and its proceedings are a nullity.

[14] The petitioner's second submission is that the Lord Ordinary had been wrong to hold that there were no averments in the petition seeking an equitable extension of the three month period for bringing the petition. Paragraphs 8A and 8B of the petition contained such averments. On the basis of those averments the Lord Ordinary ought to have extended the three month period if he considered that an extension was necessary.

[15] The petitioner's third submission is that the Lord Ordinary erred in stating that the petitioner had no averments of bias or apparent bias. It is clear from his pleadings that he complains that since the respondents were the rating authority, and the appeal was against a demand note issued by them, they could not be an impartial tribunal.

The respondents' written submissions

[16] The respondents submit that the time-bar ground of appeal is ill-founded. The Lord Ordinary had been correct to find that the date on which the grounds giving rise to the application arose was 11 October 2017, not 2 February 2018. The nub of the petitioner's fall-back position was that the three month period should be extended to the date the petition

was lodged because the petitioner had asked the respondents for further reasons for the decision and had then asked to meet to discuss the implications for the petitioner of the decision. Those were not good reasons for extending the three month period. It had been plain from the respondents' letters of 24 October and 7 November 2017 that they did not intend to provide additional reasons.

[17] The remaining two grounds of appeal ought to be considered together. Both grounds proceed on the basis of a fundamental misunderstanding of the statutory position. Section 238(1) of the 1947 Act is the provision which provides a right of appeal against demands for rates. In terms thereof the rating authority or a committee of the authority had been obliged to hear and determine the petitioner's appeal. That is what had happened here. The respondents would have been in breach of the obligations which Parliament imposed upon them had they failed to hear and determine it in accordance with section 238(1). Section 56 of the 1973 Act applies to local authorities. It does not apply to rating authorities. In any case, section 238(1) has not been repealed (expressly or impliedly) or modified by section 56 of the 1973 Act. The only repeal of part of section 238 which the 1973 Act effected (by section 122 and paragraph 10 of Schedule 9) was the repeal of section 238(4). The purpose of section 56 was to broaden the powers of local authorities to arrange their business in such ways as they saw fit, not to narrow local authorities' powers in that regard. Section 238(1) continues to have full force and effect. The petitioner's complaint of bias is in effect a complaint that the appeal procedure provided by Parliament is unfair.

Decision and reasons

[18] We find it convenient to consider the time-bar ground of appeal first. We agree with the petitioner that it was incorrect for the Lord Ordinary to state that his pleadings do not seek to invoke the court's equitable discretion to extend the three month period. We think that on a fair reading of them paragraphs 8A and 8B of the petition did just that. Accordingly, we think it right that the court reconsiders the time-bar issue of new.

[19] In our view the Lord Ordinary was correct to find that the three month period began on 11 or 12 October 2017. The essence of the argument for extending the period is that the petitioner asked the respondent to provide further reasons for the decision. However, it seems to us that by the time of the third letter from the respondents on 7 November 2017 it was very plain that they did not propose to elaborate upon the terms of the decision. We are not persuaded that the petitioner's request for a meeting to discuss "the implications" of the decision ought to excuse his failure to present a petition timeously. Moreover, by 5 December 2017 it ought to have been clear to him that the respondents saw no reason to agree to a meeting. Yet it was not until 9 March 2018 that the petitioner submitted the petition to the Petition Department and sought leave for it to proceed without it being signed by counsel or another person with a right of audience. In the whole circumstances we are not persuaded that it would be equitable to accede to the petitioner's request for the extension which he requires.

[20] We observe that in our opinion the issue of time-bar ought to have been determined one way or another at the permission stage. That is the procedure which Rule 58.7(1) envisages. The respondents had raised the time-bar issue at that stage and it is not their fault that the Lord Ordinary did not deal with it then.

[21] It follows that the petition is time-barred and that the reclaiming motion should be refused. However, we think it right to give our views on the remaining grounds of appeal.

[22] We agree with the respondents that the remaining grounds of appeal fall to be considered together. In our opinion both grounds are misconceived.

[23] Section 238(1) of the 1947 Act makes provision for an appeal by a ratepayer on the ground that he is being improperly charged rates. The appeal is to be heard by the rating authority or a committee thereof. That is the right of appeal which Parliament has provided. The petitioner exercised that right when he lodged his appeal with the rating authority in accordance with section 238(1).

[24] Section 238(1) was not repealed (expressly or impliedly) by section 56 of the 1973 Act. In our opinion that is clear on an ordinary reading of section 56. It is also plain that during the period since section 56 was commenced Parliament, the courts, and legal commentators have proceeded on the basis that section 238(1) has not been repealed. Thus, for example, in 1984 Parliament legislated to amend section 238(1) (Rating and Valuation (Amendment) (Scotland) Act 1984, section 21 and paragraph 6 of Schedule 2). In *Coalburn Miners' Welfare and Charitable Society* v *Strathclyde Regional Council* 1995 SLT 950 the petitioners sought judicial review of a decision of a committee of a rating authority which determined an appeal under section 238(1) (see p 951B). The petitioners were unsuccessful, but for present purposes the case's significance is that the court must have proceeded on the basis that the committee was empowered by section 238(1) to hear and determine the appeal. An example of a recent legal commentary which discusses the section 238(1) right of appeal may be found in the *Stair Memorial Encyclopaedia, Local Government (Reissue)*, paragraph 464.

[25] Nor in our opinion did section 56 of the 1973 Act modify section 238(1). On a proper construction of section 56(8) we are not persuaded that any part of section 238(1) falls within the ambit of section 56(8). It follows that we do not accept that the words "or a committee thereof" or any other part of section 238(1) ceased to have effect when section 56 came into force. Nor, for the same reason, do we consider that the power to appoint a committee to hear appeals which section 238(1) impliedly confers upon a rating authority ceased to have effect on that date. Even if, contrary to our view, that implied power ceased to have effect when section 56 came into force, we do not think it would assist the petitioner. On that hypothesis the respondents were empowered by section 56(1) to appoint the Committee, and there would have been no good reason for the court to conclude that the Committee had not been validly appointed: *omnia praesumuntur rite et solemniter acta esse* (all things are presumed to have been done correctly and solemnly).

[26] We agree with the respondents that the petitioner's complaint of bias is in effect no more than a complaint about the appeal procedure provided by Parliament. It adds nothing of substance to the petitioner's first ground of appeal. The respondents had no choice in the matter. It cannot be said that they acted unlawfully in complying with primary legislation.

Disposal

[27] We shall refuse the reclaiming motion and adhere to the interlocutor of the Lord Ordinary. We reserve meantime all questions of expenses.