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*Judgment: approved by the court for handing down
(subject to editorial corrections)**

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

Between:

MID ULSTER DISTRICT COUNCIL

Appellant;

-v-

DEPARTMENT OF THE ENVIRONMENT

Respondent.

Before: Morgan LCJ, Stephens LJ and Treacy LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal against the dismissal by Colton J of the appellant council's judicial review of the determination by the Department of Environment ("DoE") of the rate support grant ("RSG") payable to it for the financial year 2015/2016. Both parties agree that in order to determine the amount of RSG it is necessary to apply a conversion factor to the capital value penny rate product for domestic properties to make it comparable to the NAV penny rate product for non-domestic properties. The issue is whether to use an individual conversion factor specific to each council or an average conversion factor as was used by the DoE. The learned trial judge concluded that either approach could have been adopted and that it was a matter for the discretion of the DoE to determine which approach to follow. Both parties submit that the learned trial judge was in error in taking that approach and that the issue should be determined one way or the other as a matter of statutory construction. Mr Oldham QC appeared on behalf of the appellant and Mr Hanna QC and Ms McMahon appeared for the respondent. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] Prior to 1997 all domestic and non-domestic hereditaments were valued on the basis of their net annual value ("NAV") which was defined as the rent for which, one year with another, the hereditament might be reasonably expected to let. The Rates (Northern Ireland) Order 1977 ("the 1977 Order") provided for the levy of a uniform amount of rates in the pound to be set by each council on every hereditament's rateable value. A revaluation of non-domestic, but not domestic, hereditaments took effect in 1997. Since then councils have struck two separate rates, domestic and non-domestic. That was necessary in order to avoid any unfairness to the owners of non-domestic hereditaments. If, as a result of the revaluation, such hereditaments were assessed as doubling in value the fixing of a single rate would have placed a substantially increased burden on those hereditaments. Regulations were, therefore, introduced to ensure that the rate levied on domestic hereditaments was increased in the same proportion as the increase, as a result of the revaluation, of non-domestic hereditaments in each council area. A similar process occurred in 2001. It is important to note that the increase in value as a result of the revaluation of non-domestic hereditaments was not uniform throughout Northern Ireland. If in council area A the value of such hereditaments doubled the increase in rateable burden for domestic properties also doubled. If the increase in value of non-domestic hereditaments was threefold in council area B the same threefold increase in rateable burden was imposed on domestic properties in that council area despite the fact that the domestic properties may both have appeared in the valuation list at the same value. The underlying assumptions, therefore, were that the increase in the value of domestic hereditaments was proportionately the same as the increase in value of non-domestic hereditaments for rate collection purposes and that increases in the value of hereditaments were not the same in different council areas.

[3] In 2005 Land and Property Services ("LPS") embarked on a revaluation of domestic hereditaments in Northern Ireland. In a departure from previous practice the valuation was conducted on a capital rather than a rental basis. It, therefore, became necessary to introduce a statutory basis for the equitable distribution of the rate burden between domestic hereditaments assessed at a capital value and non-domestic hereditaments which were still valued on NAV.

[4] Article 6 of the 1977 Order was amended to provide that different regional and district rates might be made and levied on the rateable net annual values of hereditaments and the rateable capital values of hereditaments in accordance with prescribed rules. The Rates (Making and Levying of Different Rates) Regulations (Northern Ireland) 2006 ("the 2006 Regulations") provided: -

"Making and levying of different rates

2. In respect of the year ending on 31st March 2008 and each subsequent year, different regional and district rates may be made and levied on –

- (a) the rateable net annual values of hereditaments; and
- (b) the rateable capital values of hereditaments.

3.—(1) In respect of the year ending on 31st March 2008 and each subsequent year, a capital value district rate shall be made by a district council in accordance with the formula $A = B \times C$ where—

- A is the capital value district rate;
- B is the net annual value district rate made by that council; and
- C is the conversion factor for that council as set out in the Schedule

(2) In this regulation—

‘capital value district rate’, in relation to a district council, means a district rate made by that council on the rateable capital values of hereditaments in the district;

‘net annual value district rate’, in relation to a district council, means a district rate made by that council on the rateable net annual values of hereditaments in the district.”

[5] The Schedule provided different conversion factors for each council. The note to the Regulations described their effect as follows: –

"From 1 April 2007 rates of dwelling houses, private garages and private storage premises and the private dwelling part of premises used partly for that purpose ("domestic premises") will be levied on the basis of rateable capital values. Rates on all other premises will be levied on the basis of rateable net annual values. These Regulations –

- (a) enable different rates to be made and levied on the rateable net annual values of premises and the rateable capital values of premises (regulation 2);
- (b) prescribe a formula whereby a capital value district rate made by a district council is linked to the net annual value district rate made by

that council; the formula ensures that the division of the district rate burden between domestic premises and non-domestic premises, before the general grant from the Department of Environment is taken into account, will not change as a result of the 2003 revaluation of non-domestic premises and as a result of the introduction of capital valuation for domestic premises (regulation 3);”

[6] There was no detailed analysis of the mechanism by which the conversion factors were calculated in the papers before the court but it seems clear that there were two relevant factors. The first was a factor to ensure that a capital value could be moderated so as to reflect an equivalent rental value. Since that calculation reflected the rental equivalent of a capital sum the factor must have been constant for all of the councils in Northern Ireland. The differences in the conversion factors arose primarily if not solely because of the calculation necessary to reflect the different growth rates in the values of the non-domestic sectors in each district council. The reflection of the growth rate was to ensure that the balance between the valuation of the domestic and non-domestic sectors remained as it had been since 1976. In other words the rate burden on the domestic sector was calculated on the basis that the percentage increase in value of the hereditaments in the domestic sector was the same as the percentage increase in value of the hereditaments in the non-domestic sector in each council area or vice versa.

[7] This review of the background has so far only looked at the income generated by councils through the imposition of a rate levy. Councils also historically received money (“General Exchequer Grant”) directly from local government pursuant to the Local Government (Northern Ireland) Order 1972 consisting of: -

- (a) a derating element, to compensate for the loss of rate income due to the statutory derating of certain properties; and
- (b) a resources element, to provide additional finance to those district councils whose total rateable value, per head of population, fell below a standard determined by the Department.

Those provisions left a significant area of discretion to the Department in the mechanisms for the determination of the entitlement to the grant. The total amount of resources grant was fixed as part of the public spending round and the monies available distributed to the councils by the Department. In this appeal the issue is about the distribution of the available sum. The total amount of support grant will remain the same.

[8] Article 4 of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 2002 provided the DoE with a regulation making power allowing it to make a formula for the distribution of the resources element of the general grant.

The DoE exercised that power in the Local Government (General Grant) Regulations (Northern Ireland) 2003 ("the 2003 Regulations"), using a "wealth minus needs" formula designed to ascertain a district council's requirement for funding support relative to other districts. Linked to these Regulations were the Rates Regulations (Northern Ireland) 2007 ("the 2007 Regulations") which explained how an element of the "wealth minus needs" formula was to be calculated, namely the products of the rates of one penny in the pound i.e. gross penny rate product ("GPRP").

[9] The term "rates support grant" ("RSG") was first used in section 27 of the Local Government Finance Act (Northern Ireland) 2011, which imposed a duty on the DoE to make a rates support grant, the amount of which was to be determined in accordance with Regulations. These were the Local Government (Rates Support Grant) Regulations (Northern Ireland) 2011 ("the 2011 Regulations"), the Regulations with which this case is directly concerned, which replaced the 2003 Regulations but repeated the formula used in those Regulations.

[10] The 2011 Regulations require the Department to determine the amount of RSG payable to a council in accordance with the formula prescribed in Schedule 1. Paragraph 1 of Schedule 1 states that the council's wealth means a share of the Northern Ireland gross penny product, as calculated in accordance with the Schedule and a council's needs means its share of the Northern Ireland population. The calculation of needs is not in issue in this litigation.

[11] Paragraph 2 of Schedule 1 provides that where the ratio of the council's gross penny rate product to the Northern Ireland gross penny rate product is less than the ratio of the council's home population to the Northern Ireland home population the difference constitutes a negative variance. RSG is payable to all councils with negative variances in proportion to the extent of such variances.

[12] As previously indicated it is necessary to turn to the 2007 Regulations in order to determine the GPRP. Regulation 6 provides that "the products of the rates of one penny in the pound for the district of the council for that year shall be ascertained in accordance with Schedule 1 or 2". Schedule 1 deals with the determination of the product of a capital value rate of one penny in the pound and Schedule 2 provides for the determination of the product of a NAV rate of one penny in the pound. The use of the plural in Regulation 6 reflects the fact that the GPRP is the product or sum of the rate in respect of domestic and non-domestic hereditaments. Leaving aside any adjustments which are not material to this application Schedule 1 provides that the product of a capital value rate of one penny in the pound in any district for any year shall be determined by dividing the gross rate income from each hereditament by the total of the pence in the pound of the capital value rates made for the year. A similar approach is taken in respect of the calculation of the product of a NAV rate.

The issue

[13] The Regulations make no provision for a conversion factor in the determination of the GPRP. The capital values of the domestic properties are clearly assessed on a different basis from the NAV product for non-domestic properties and the result is that the sum produced from the capital values from an estimated penny product of domestic hereditament is 70 times greater than the sum produced from non-domestic hereditaments. Both parties agree that to add the capital values product to the NAV product undermines the purpose of the legislation which was to give appropriate weight to the influence of both products in the assessment of the wealth of the district council. Both parties agree that a conversion factor has to be applied to the capital values the effect of which would be to produce a figure for domestic hereditaments that was approximately twice that for non-domestic hereditaments. The dispute concerns whether the conversion factor applied to the capital value in each council should be the individual conversion factor set out in the 2006 Regulations as contended for by the appellant or an average of the Northern Ireland conversion factors as submitted by the respondent.

Submissions

[14] In 1997/98 and 1998/99 the General Exchequer Grant was calculated on the basis of individual council specific conversion factors. These were, of course, the first years in which it was deemed necessary to provide for the distinction between capital values and NAV. The DoE concluded that this approach to the conversion factor was incorrect and clawed back amounts which had been overpaid. Some councils instituted proceedings in relation to the clawbacks but none of those proceedings were brought to trial and the DoE successfully recovered the overpayments. Thereafter the DoE applied an average conversion factor in the determination of General Exchequer Grant and subsequently RSG. Local government arrangements changed in 2015 with the establishment of a reduced number of new councils. The appellant council is newly formed and the appeal is concerned with the first assessment of RSG in respect of it.

[15] These proceedings have led to the disclosure of a long-running difference of view between the Land and Property Services ("LPS") Division of the Department of Finance and the Rating Policy Division of the DoE. It appears that in 2011 LPS was of the view that there was no statutory basis for the use of an average conversion factor and they contended for individual conversion factors as set out in the 2006 Regulations. That difference of view appears to have continued until the end of 2015. In an affidavit sworn in November 2015 Mr McClure, who is the head of Rating Policy Division in the Department of Finance, stated that his Department was now neutral on the issue.

[16] There are three points made by the appellant in support of its case. First, Article 34 (1) of the 1977 Order provides: –

"The Department shall, in respect of each year, pay to each district council in accordance with regulations a sum equal to the product of the district rate made by the council for the year."

Regulation 5 of the 2007 Regulations govern this payment and provides for the determination of the sums payable to a district council in respect of any year as being equal to the products of the rates made by that council for the year, such products to be ascertained in accordance with Schedule 1 or 2 of the Regulations. It is common case that the sum payable by the Department equates to the district rate income of each council. It follows that a conversion factor is used in the determination of the capital value rate and that it is the specific factor which is provided for each council district in the 2006 Regulations.

[17] As set out in paragraph 12 above precisely the same formulation is used in Regulation 6 of the 2007 Regulations in using the gross rate income to calculate the products of the rate of one penny in the pound for the purpose of the assessment of the resources element of the RSG. It is submitted, therefore, that it is the individual conversion factor which must be used in that case also.

[18] Secondly, Paragraph 3 of Schedule 1 to the 2007 Regulations provides that gross rate income in respect of capital values for any district for any year shall be ascertained by calculating the gross liability of the hereditaments to rates for the year, leaving aside various adjustments which the parties agree are not material. It follows, therefore, that the gross rate income requires the application of an individual conversion factor.

[19] Paragraph 2 of Schedule 1 provides that the product of a capital value rate of one penny in the pound in any district for any year shall be determined by dividing the gross rate income from each hereditament in the capital value list by the total of the pence in the pound of the capital value rates made for the year. This also leaves out of account certain adjustments which again the parties agree are not material. The calculation of gross rate income, therefore, also requires the application of the individual conversion factor in that case also.

[20] The third point made by the appellant is that the purpose of the 2011 Act and the 2007 Regulations is to provide for RSG to those councils which relative to others have less rate income to meet the demands on them. The respondent contends that the description of the purpose of the statutory scheme presupposes the outcome although it is an approach which is consistent with the first two points.

[21] The respondent starts from the proposition that the total amount of RSG available for distribution among eligible councils each year is determined in advance by the respondent as part of the public expenditure process and can vary from year to year. The statutory formula makes provision for its distribution among eligible councils. The general purpose is to make provision for the distribution of grant among those eligible district councils whose needs relative to those of other councils

are deemed to exceed their wealth relative to those of other councils. The respondent's position is that wealth is measured by reference to rating list property valuations and not by reference to the rating income of a council.

[22] Support for this submission can be found in Regulation 6 of the 2007 Regulations which requires that the product of the rate of one penny in the pound for both non-domestic and domestic properties has to be calculated in order to determine the gross penny rate product. In both cases the calculation effectively amounts to 1% of the valuation list and the respondent relies on this to show that wealth is measured by reference to rating list property valuations.

[23] The respondent also notes that the formula for wealth requires an individual council's gross penny rate product to be expressed as a percentage of the Northern Ireland gross penny rate product. It is submitted that as a matter of common sense such a comparison cannot be achieved unless in each case the penny rate product is measured in the same way. That, therefore, supports the use of an average conversion factor in each case.

[24] It is further submitted that council specific conversion factors are designed to maintain a balance within the district area between non-domestic and domestic properties. They have no role in respect of comparisons with other councils. It is submitted that they serve a fundamentally different purpose and are unsuitable for the comparison exercise.

Consideration

[25] Both parties contend that the conversion factor must be applied to the penny rate product for capital values in order to calculate the GPRP. The circumstances in which meaning is to be implied into a statute are considered at section 9.5 of *Bennion on Statutory Interpretation* 7th Edition. The meaning to be attributed to an enactment consists not just of what is expressed, but also what may properly be implied. The general principle is that the legal meaning of an enactment includes what is necessarily or properly implied (Chorlton v Lings (1868) LR4CP 374).

[26] The calculation of the GPRP is designed to reflect the wealth of each district council. In the absence of a conversion factor the product of the domestic and non-domestic penny rate products will add a capital value to a rental value. It is plainly proper that wealth and comparative wealth should be assessed by rendering the units of value comparable. Any other approach is likely to produce a distorted outcome. We accept, therefore, that the GPRP must be assessed by converting either the capital values to NAV or vice versa.

[27] Turning then to the submissions of the appellant we accept that the calculation of GPRP for capital values in Schedule 1 to the 2007 Regulations requires the assessment of the gross rate income for any district. Leaving aside adjustments which all parties accepted were not material the gross rate income consists of the capital valuation list multiplied by the capital rate. The capital rate, of course, is

determined by applying the individual conversion factor to the NAV. The GPRP, however, leaving aside adjustments, requires that product to be divided by the capital rate set. In effect, therefore, the individual conversion factor is cancelled out and the outcome reflects the valuation list.

[28] In light of that analysis we do not accept that Regulation 5 of the 2007 Regulations is of decisive assistance in the interpretation of the appropriate conversion factor. Regulation 5 is concerned with gross rate income. We recognise that the individual conversion factor is used in calculating that figure but that cannot determine the approach in respect of the calculation of GPRP. The argument on Regulation 6 also centres on the reference to gross rate income and for the same reasons cannot be decisive.

[29] The respondent places considerable emphasis on the fact that it follows from the analysis set out above that, leaving aside adjustments, where two councils have the same rateable capital valuation that portion of the GPRP in respect of each council will be the same. The respondent contends, therefore, that the wealth of each council's capital value is the same. If there is to be a conversion it is submitted that the conversion has to respect that starting position. It is accepted, however, that there is nothing in either the Regulations or the statutory background which points towards such a mechanism although the respondent contends that this is a case in which there is no mechanism for the outcome contended for by the appellant either.

[30] The question in this case is how one approaches the issue of change in value of domestic hereditaments. It is common case that in respect of rate collection the Regulations make detailed provision for the application of a conversion factor in each district council area to ensure that the rate of increase in the value of non-domestic hereditaments is mirrored by an equivalent increase in domestic values. The effect of the revaluation itself is to demonstrate that the rate of increase in value of non-domestic properties has not been the same in different council areas.

[31] There is no empirical evidence to suggest that the rate of increase in domestic values is the same as the increase in non-domestic values. On the other hand the underlying premise in the approach taken by the respondent is that the increase in value of domestic properties is broadly uniform throughout Northern Ireland. For that reason it is contended that the value of properties bearing the same value in the valuation list are the same. There is again, however, no empirical evidence to suggest that such an assumption is well founded. In our view it cannot be said, therefore, that either approach is preferable. It may well be that either approach was open to the DoE as a matter of policy but the issue in this case is what the Regulations actually require.

[32] Having decided at paragraph [26] above that the domestic or non-domestic values had to be converted to make a sensible estimation of wealth the next step is to imply a conversion factor to one or other than is necessary and proper. To do that the starting point is to look at the statutory context. The 2006 Regulations contain a

mechanism for the correlation of domestic and non-domestic values within each district council area. That mechanism applies a conversion factor to the capital values to achieve the correlation. There is no other conversion mechanism within the statutory background and in our view it follows that it is proper to imply a conversion factor to domestic values.

[33] The next step is to identify from the statutory background the factor to be applied. The 2006 Regulations contain the only factors within the statutory background. Each factor is designed to attribute to capital values within each district council area growth in value at the same rate as the non-domestic revaluation. The underlying statutory assumption, therefore, is that increases in value occur at different rates in different council areas for domestic and non-domestic properties. We consider that such a proposition is as valid as the assumption that increases in domestic properties occur at a uniform rate throughout Northern Ireland.

[34] The respondent contends that to apply the individual factors is to distort the value of domestic hereditaments but that submission depends upon the proposition that value increases uniformly. It also follows that if values are increasing at different rates the wealth of districts is also increasing at different rates. Once one accepts the validity of the approach to increases in valuation for the purposes of rate collection the argument that properties in different council areas with the same valuation ought to be treated similarly no longer has any purchase.

[35] We consider, therefore, that the statutory background establishes that it is proper to imply into the calculation of each council's wealth for the purposes of the 2011 Regulations the conversion factor to the capital values of each district council area set out in the Schedule to the 2006 Regulations.

Conclusion

[36] We have concluded:

- (a) that it is necessary and proper to imply into the Local Government (Rates Support Grant) Regulations (Northern Ireland) 2011 a conversion factor to the capital rateable values for the purpose of determining each council's wealth;
- (b) that there is little assistance to be gained in the ascertainment of the correct conversion factor from Regulations 5 and 6 of the Rates Regulations (Northern Ireland) 2007;
- (c) that the appellant's position essentially follows from the implication that domestic capital values in any district council area increase at broadly the same rate as non-domestic NAVs;

- (d) that the respondent's position reflects the assumption that domestic capital values in Northern Ireland increase at a uniform rate;
- (e) that each position is tenable as a matter of policy in determining wealth for the purpose of the 2011 Regulations;
- (f) that the statutory background provides the key to the appropriate conversion factor; and
- (g) that the appellant's position is reflected in that background and is to be preferred.

[37] The appeal is allowed.