LANDS VALUATION APPEAL COURT, COURT OF SESSION

[2018] CSIH 15
XA73/17

Lord Justice Clerk
Lord Malcolm
Lord Doherty

OPINION OF LADY DORRIAN, the LORD JUSTICE CLERK

in the Appeal

by

THE ASSESSOR FOR GRAMPIAN

Appellant

against

ANDERSON, ANDERSON AND BROWN LLP AND OTHERS

Respondents

Appellant: Gill; Solicitor to Glasgow City Council
Respondent: Stuart QC; Brodies LLP

15 March 2018

Introduction

[1] These appeals in relation to numerous office premises in the city of Aberdeen proceeded before the Valuation Appeal Committee ("VAC") on the argument that there had been a material change of circumstances ("MCC") brought about by an exceptional downturn in the economy of the North East of Scotland. The ratepayers sought a reduction of 20% for the year from 1 April 2015 and a reduction from 1 April 2016 of 40%. The VAC rejected the claims in respect of the first period, but concluded that there had been an MCC

for the later period, and applied a reduction of 16.5%. The assessor has appealed against the latter decision, the ratepayers against the finding that the reduction was limited to 16.5%.

[2] Section 37 of the Local Government (Scotland) Act 1975 ("the Act") defines an MCC as meaning "in relation to any lands and heritages a change of circumstances affecting their value". It is not enough for there simply to have been a change of circumstances – to be material the change of circumstances must be shown to have affected the value of the subjects. Both parties recognised that a distinction requires to be made between changes resulting from the normal fluctuations or variations which may occur from time to time in any business venture, or general fluctuations in the economy, which do not constitute an MCC; and those which result from some abnormal economic crisis which do. The key distinction is between the normal processes of change and those resulting from some abnormal or unusual situation (*Assessor for Glasgow* v *Schuh* 2012 SLT 903 (*"Schuh 1")*, the Lord Justice Clerk (Gill), paras 30-34). The onus of establishing that there has been a change of circumstances affecting value rests on the party so asserting.

The Committee's decision

[3] In giving its reasons, the VAC explained that it had regard to the questions identified in *Schuh 1* (para 36) as relevant to an appeal such as this, namely whether there had been a material fall in rental values since the entries were made; if so, what caused it; whether the cause(s) constituted a material change of circumstances; and if multiple causes, to what extent the fall in value was caused by the material change of circumstances.

[4] On the question whether there had been a fall in rental values, the VAC considered that there was weak evidence to show a "dip in rental values" during 2015, but that the evidence was "sufficiently robust" to conclude that there had then been a significant

reduction in rental value from 2016, "in some few cases to figures below those at the tone date of 1 April 2008." It rejected the assessor's argument that rents would in general have to have fallen below tone value before an MCC based on a general fall in rental values could be made out, "especially as the fall was claimed to have taken place in these cases seven and eight years after the date when the tone value was set".

[5] On the basis of an analysis comparing the average proportion of new built as to established office premises available between the years 2008 – 2016 with that in 2016, the VAC concluded that an increase in the availability of newly built offices (which would not have constituted an MCC) was not a factor contributing to the drop in values. Rather, the cause of the fall in rental values was an economic downturn in the oil and gas industry which had affected all sectors of industry in the Aberdeen area and was such an extra-ordinary and exceptional economic crisis for the North East as to amount to an MCC.

[6] The VAC considered that the 2016 rental figures had to be adjusted to the value which would have applied at tone date. Rejecting the ratepayers' suggestion that the RPI might be used to do so, it proceeded to use figures said to have been extrapolated from the evidence given for the assessor. By means which are difficult to discern, from this they concluded that there had been a drop of 16.5% since tone date.

The assessor's appeal

[7] Before noting the basis upon which the VAC's decision was challenged by the assessor, it is perhaps worth noting that there were several respects in which senior counsel for the ratepayers indicated that he could not support the VAC's reasoning. In the first place, it was accepted that the methodology used to calculate the fall in values, under reference to the spread sheets, was obscure and could not be defended. The VAC also

appeared, in the selection of the figure of 16.5%, to have adjusted for inflation, which was inappropriate. If the court accepted that the VAC had been entitled to conclude that there had been a fall in value, then, unless the cross-appeal succeeded, the case should be remitted to the VAC to reassess the quantum of that fall. The methodology of determining whether the fall in rental values was in any way attributable to an oversupply of new office space, by comparing average availability of new and existing premises, was also flawed and could not be supported. The fact that a period of time had passed since the tone levels were set had been irrelevant.

[8] These concessions were well made. I agree with the written submissions for the assessor that the reasons given for reaching the conclusion that there had been a 16.5% drop in value, and the documents provided by the VAC in support thereof, lack the necessary clarity and transparency to explain either the methodology or the basis for it. The assessor lodged notes trying to make sense of the documents, and the VAC's approach, but of course much of this was speculation. Even with this assistance, from an informed source, we were unable to understand the approach taken, see where the figures had come from, or find a reasonable basis for saying that such an approach was a tenable or reasonable one.

Submissions for the Assessor

[9] The central argument upon which the appeal proceeded was that an MCC based on a generalised fall in rental values could only succeed where a fall below tone level was established. The remaining grounds of appeal, including the argument that any fall was simply part of the ebb and flow of business, and the ratepayers' cross-appeal, arise for determination only if the appellant's primary argument is not well-founded.

[10] Counsel advanced three preliminary points in support of his written submissions. First, that an MCC appeal based on a general fall in rental values, such as this, is of an inherently different nature from one based on changes specific to subjects or a group of subjects, and must be analysed differently. Second, that the starting point for consideration of this type of MCC must be rental evidence. It was not a case of "common sense", nor was it appropriate to apply an index adjustment to determine whether there had been a fall in rental values. In this case, the rental evidence showed a relatively straightforward picture, showing that rental values generally remained above tone level. Third, that having accepted that primary rental evidence, the committee discarded that straightforward picture and proceeded on a selective and unfounded use of the evidence to reach the conclusion that an MCC had been established.

[11] At each stage of the analysis they carried out under reference to *Schuh 1*, para 36, the VAC erred in law. In particular, at "stage 1" of that analysis, they had erred in rejecting the assessor's argument as to the need for a fall below tone level.

[12] An MCC is defined in section 37(1) of the 1975 Act, as "in relation to any lands and heritages a change of circumstances affecting their value". The "value" referred to is, by necessary implication, the value on the valuation roll. Before an MCC could be established, it was necessary to show that the current rental value of the subjects was lower than that entered on the valuation roll for them.

[13] In *Assessor for Dunbartonshire and Argyll & Bute* v *Akram and Ali* [2012] SC 235, the Lord Justice Clerk (Gill), in his preliminary discussion of general principles, explained (para 6):

> "An essential feature of the system is that a value entered in the roll remains fixed for the duration of the roll unless during its currency there should be a material change of circumstances affecting that value."

In an appeal based on an MCC, the value which must be affected is the value entered in the roll which, otherwise, remains fixed for the duration of the roll. It was an error to read that case as requiring an adjustment to current values to demonstrate an MCC. An adjustment was permissible only after an MCC had been established in order to ensure that a common valuation base was maintained during the currency of the roll.

[14] The assessor's argument was also supported by other provisions of the 1975Act. In section 3(4), the right of appeal is tied explicitly to the making of the particular entry. It is a right to "appeal against the relevant entry" on the basis that "there has been a [MCC] since the entry was made". Any appeal is against the value entered in the roll, which will reflect the tone date value.

[15] Section 2(1)(d) requires the assessor to alter the roll "to give effect to any alteration in the value of any lands and heritages which is due to a material change of circumstances". There would be no need to do so if the alteration did not result in a lower value than that already on the roll.

[16] Any other reading of section 37(1) would undermine the whole basis of quinquennial revaluations, as explained by the Lord President at para 22 of *Schuh Limited* v *Assessor for Glasgow* 2014 SLT 184 ("*Schuh 2"):*

> "If every downward fluctuation, whatever the cause, constituted a material change of circumstances, the whole basis of quinquennial revaluation would be undermined. The quinquennium would consist of an endless series of material change appeals relating to all kinds of lands and heritages."

Each revaluation resets values to a common base which remains constant until the next revaluation. The result of the VAC's decision would be a series of mini, downwards only, revaluations on the occasion of each downward fluctuation in the rental market, wholly contrary to principle.

[17] Furthermore, the decision creates obvious injustice. The current rental values are greater than the values appearing on the valuation roll, yet the Committee has awarded a further benefit by reducing the values on the roll.

[18] The VAC's adjustment of rental values to find equivalent tone date values was misconceived. An MCC appeal is concerned with falls in value from the tone date in absolute terms. Backdating to tone value was appropriate only in new entry appeals, the correct approach being illustrated by Lord Hodge in *Scottish Natural Heritage* v *Highland & Western Isles Assessor* [2010] RA 63 (para18):

> "Where an assessor relies on rents which are fixed sometime after the tone date, it is necessary for him to be able to justify the adjustment back to tone date, such as by evidence of the movement of the market in the relevant period."

[19] In an MCC appeal, founded on the occurrence of a general decrease in rental values the only question is whether the market had moved: no backdating adjustment can coherently be made. The VAC were correct to reject the suggestion that the RPI should be applied to the rental values to backdate to tone date, but there was no basis for the approach they adopted. There is no evidential basis for assuming that the average fall from peak had occurred at tone date, an assumption which simply proves its own premise.

[20] The finding that the downturn in the oil industry was an exceptional and extraordinary "single event ….albeit that its effects took time to percolate down" is contradictory. A "percolating" event is part of the ebb and flow of business. The assessor accepted that there were significant structural changes ongoing in the oil industry, which were at least in part a reflection of the recent changes in the oil price and which had had some consequential effects on the economy of the Aberdeen area. However, the assessor had provided further evidence, as greater context for both the oil industry data and the overall economy of the area. The committee appeared to accept the assessor's evidence

about the wider economy but gave no reason for preferring the evidence for the ratepayers, save that it was "favourably impressed" by the witness's evidence.

[21] The case of *Lothian Assessor* v *H & M Hennes & Mauritz UK Limited* 2010 SC 753, relied upon by the committee for its adoption of "common sense" is not relevant, having been made in the context of manifest physical changes. Where abstract change is relied upon, evidence of change in value must still be supplied. In any event, the matters referred to were not matters of proved facts to which common sense could properly be applied.

[22] Counsel also advanced several procedural points, which, with his main submissions, were elaborated upon in the written Note of Argument.

Submissions for the ratepayers

[23] The ratepayers' argument in essence was as follows:

a) Comparing net effective rents in 2014 with those in 2015 and 2016 showed that there had been a drop in rental value during these periods, which averaged out to a figure of 20% from1 April 2015 and 40% from 1 April 2016.

b) This was "a change affecting…value" of the subjects, and thus a "material change of circumstances" for the purposes of section 37(1) of the Act of 1975.

c) The change was caused by the downturn in the oil industry in 2014, the effects of which were felt with increasing force in 2015 and 2016. The *punctum temporis* from which to calculate the fall was that downturn. The change was one which had occurred "since the entry was made". Thus this was a material change of circumstances which met the terms of section 3(4) of the Act.

d) In their calculations the ratepayers took no account of the admitted fact that by 2014 rents had risen to a peak range of £250-£350 from a tone range of £185-£275.

e) Equally, the fact that the general levels of rents in 2015 and 2016 did not drop below tone levels was not relevant. The drop during 2015/2016 from the peak levels of 2014 was nevertheless a change in value since the entries were made.

f) Before the VAC, the argument was that to identify the sums which should be entered in the roll as the NAV/RV for the subjects the general rental levels for 2015 and 2016 should be reduced by the RPI. In submissions before the court, the argument was simply that one should (i) identify the percentage level of the fall in rental since 2014; and (ii) apply that percentage drop to the tone figures, on the hypothesis that the MCC had occurred at that date. Since the VAC had erred in its method of calculating that fall, the matter should be remitted for their consideration, unless the cross appeal succeeded.

g) Even if the effect on value could not be precisely assessed, the appeal should still succeed on the basis of the proviso to section 3(4) since the MCC has materially reduced the extent to which beneficial occupation of the subjects can be enjoyed.

[24] Advancing these arguments, senior counsel submitted that the result of a successful appeal under section 3(4) would be that the rateable value would be reduced. Some clarification as to what must be established to bring about such a reduction could be found in the proviso to section 3(4), with its reference to a material reduction in "the extent to which beneficial occupation of the lands and heritages can be enjoyed". Occupation is "beneficial" if it is capable of yielding a net annual value, i.e. capable of yielding a rent on the statutory hypothesis (*Lothian Assessor* v *The Ministry of Defence* [2009] CSIH 89, paras. [14] and [15]).

[25] Accordingly, in an appeal under section 3(4) one is concerned with an effect on the rental value of the lands in question. The relevant period depended upon the start and end

points at which the MCC was claimed to have taken effect; the relevant fall is that from the actual market level at the nominated start date. It is necessary to look at the actual market rents at the time of the MCC, and establish whether from that point the rents have fallen. If that is proven, the annual value will require to be altered. That is achieved by applying the proportion of fall in rent between 2014 and 2016 to the annual value with effect from the date when the effect was experienced. If there had been a reduction of 40% from 2014, one applies reduction of 40% to the tone value, proceeding on the assumption that the MCC occurred at tone date. One is effectively valuing the subjects on the hypothesis that the MCC had occurred at the tone date. That was how a common base was maintained (*Assessor for Dunbartonshire and Argyll & Bute* v *Akram and Ali (supra)*, LJC (Gill) at para 8; see, also, *Fyfe* v *Fife Assessor (supra),* LJC (Gill) at para 31).

[26] It was irrelevant whether the MCC related to physical disturbance to the subjects or some economic event. In either case, the reduction in the annual value would be based on the effect on rental values, without reference to whether the latter had fallen below tone as a result. In *Assessor for Lothian* v *H & M Hennes & Mauritz UK Ltd* 2010 SC 753, it appears to have been accepted that the disruptive effect of tram works in Edinburgh city centre had had an effect on the rental value of retail premises affected by the works without any discussion as to whether rental values had fallen below tone as a result and no hard evidence of any such fall.

Cross-Appeal for the Ratepayers

[27] The only valuation evidence in respect of the appeals was from the ratepayers, suggesting a 40% fall from 1 April 2016. The only criticism of the ratepayers' valuation evidence was that it was "too small to be a reliable basis for comparison purposes". That

criticism was unjustified where there was only a slight difference between these valuations and those of the assessor. The VAC should have accepted the suggested fall of 40% and reduced the RV accordingly (*Argos Distributors Ltd* v *Assessor for Fife* 2011 SC 272). The submissions were elaborated on in the written submissions, which also dealt with the assessor's other grounds of appeal.

Decision and analysis

[28] In a case in which it is argued that an MCC has resulted in a fall in rental values, the correct approach for the VAC to take was identified in *Schuh 1*, para 36, by the Lord Justice Clerk (Gill), namely to address the following questions:

> "(1) whether there had been a material fall in rental values in the relevant [subjects] since the entries appealed against were made in the roll; (2) if so, what caused it; (3) whether the cause, or any of the causes, constituted a material change of circumstances within the meaning of s.3(4); and (4) if one or more of the causes constituted a material change of circumstances and another or others did not, to what extent the fall in value was caused by the material change of circumstances. "

[29] The first question which requires to be addressed is thus whether there had been a fall in rental values since the entries were made. It was common ground, and it is clear from the evidence, that while there was a fall in the general levels of office rents between 2014 and 2016, the resultant levels were not lower than the tone levels.

[30] A critical question arising is thus whether counsel for the assessor was correct to submit that in a case based on an alleged general fall in rental levels an MCC could not be established unless the evidence showed that the resultant levels were below tone levels. If so, the appeal would have to succeed, since, as the ratepayers accepted, there was no such evidence before the VAC.

[31] In my view this issue turns on what is to be understood by the word "value" in the phrase "a change of circumstances affecting their value" in section 37(1). For the

respondents it was argued that this simply meant affecting market rental value at any given time during the quinquennium. Where there had been a fall in value in consequence of an extraordinary event capable of constituting a change of circumstances, one assessed the proportion of the fall from the occurrence of that event, or at least from the date when the consequences of the event were demonstrated. That the rental value in absolute terms remained above tone level, and had fallen only from a much higher peak did not alter the fact that a change of circumstances had affected the value of the subjects.

[32] I am unable to accept that argument, accepting rather the submission for the assessor that in this context "value" means the annual value at which the subjects have been entered in the roll. In my view such an interpretation is the only one consistent with the principles upon which our system of valuation for rating is based.

[33] In relation to subjects included on the valuation roll, section 3(4) provides a means of appeal only "against the relevant entry". An MCC provides grounds for such an appeal only if the MCC has occurred "since the entry was made". The only value contained in the entry is the annual value of each property. The correct interpretation of section 3(4) is that in an appeal of this kind it must be demonstrated that the annual value in the roll is no longer accurate because there has been a change of circumstances making it incorrect or invalid.

[34] In a case where the MCC is based on a change to the physical nature of the premises, or of the locality, the figure may be inaccurate because the premises or locality were fundamentally different from those upon which the NAV/RV had been assessed. However, where the claimed effect on value is predicated entirely on the assertion of a general fall in rental levels, this will only render the entry in the roll open to challenge if the fall has generally taken rental values below the values set at tone. Even then, an appeal will only succeed if what has caused the fall is something beyond the normal ebb and flow of

business. Where general levels of rents have risen significantly above tone, then fallen back to levels which are not below tone, it is hard to see why the change is a material change of circumstances affecting value; or that the entry in the roll, reflecting the tone valuation, is incorrect. The VAC's function is to see that the correct value is entered in the roll (*Schuh 1,* para 55), and in my view it can only entertain an appeal based on a generalised fall in rental values where the circumstances are such as may suggest that the entry is incorrect.
As the Lord President (Gill) said in *Schuh 2* (para 22):

> "The system of quinquennial revaluation is based on the principle that subjects entered in the roll at a revaluation will remain at the same value until the next revaluation, unless a material change of circumstances occurs in the interim. In reality, the rental values of commercial subjects of all kinds may fluctuate constantly throughout the quinquennium."

[35] This is well understood, having been referred to also in *Schuh 1.* The NAV/RV is fixed in the knowledge that there will be such fluctuations in the market which may take the rental value above, or below, the rate set at tone. Such variations will be taken into account and reflected in the next revaluation. That is why only changes resulting from exceptional circumstances can constitute an MCC enabling the roll to be altered before then.

[36] It appears to me that this interpretation is entirely in keeping with the cases to which we were referred. For example, in *Akram,* the Lord Justice Clerk (Gill) said (emphasis added) that: "An essential feature of the system is that a value entered in the roll remains fixed for the duration of the roll unless during its currency there should be a material change of circumstances affecting <u>that</u> value." It is made clear in para 20 that what is being considered in an MCC case of this kind is whether there has been a change "affecting the NAV". In the *Schuh* cases the argument was that the rental values had fallen below tone (see *Schuh* 1, para 7 at p. 905D). The committee's finding in that case was that new lettings were at levels "well below" tone (see para 17 at p.906F and para 23). The datum which was used

was the tone level, not some subsequent higher level. In *Argos* the datum point from which the claimed fall was calculated was not from a "peak" rental but from tone level (paras 5-7). The nature of the appeal was described by the Lord Justice Clerk (Gill) (para 1) as "an appeal against the rateable values entered in the roll". In *Assessor for Fife* v *Ruggi* 1960 RICS 51 (No 32) at 57, quoted in *Armour* at para 3.18, Lord Patrick noted that in that case what required to be proved was "that the subjects …would possess an altered value to that which they possessed at Whitsunday 1956" (i.e. the date the entry appealed against was made).

[37] The primary argument for the ratepayers relied heavily on the proviso to section 3(4) as an aid to construing what is meant by "value" in section 37(1). However, the proper construction of the definition in section 37(1) cannot be determined in this way. The definition must be capable of application equally to any part of the Act where an MCC is referred to. It must also be capable of application whatever the basis of valuation which is at issue. It is, for example, difficult to see how the ratepayers' interpretation could be applied to sections 2(1)(d); 2(1A); or 2(2)(c) of the Act.

[38] The argument for the ratepayers appears to be self-contradictory: on the one hand arguing that a fall below tone level did not require to be established, yet at the same time accepting that the result of a successful appeal would have to be a reduction in the rateable value, which could only be achieved by applying the proportion of the fall from peak to the tone figure, on the assumption that such a percentage fall would have been equally applicable at tone date. That latter exercise is only necessary because the basic argument is flawed. It is an unwarranted and erroneous exercise to achieve a reduction in the roll by extrapolating a recent fall in actual rental values back in time to the tone date and by this means alone establishing an MCC. For the reasons more fully given by Lord Malcolm at paras 51 and 52 of his concurring opinion this is an illegitimate approach.

[39] Senior counsel for the ratepayers also relied on the proviso in section 3(4) to argue that even if the extent of the diminution in value could not precisely be ascertained, the appeal could succeed on the basis that there had been an MCC which had materially reduced the extent to which beneficial occupation of the subjects could be enjoyed. The proviso states:

> "notwithstanding the definition of 'material change of circumstances' as set out in section 37(1) of this Act, if in an appeal under this subsection on the ground of a material change of circumstances it is proved that there has been a change of circumstances which has materially reduced the extent to which beneficial occupation of the lands and heritages can be enjoyed, the appeal shall not be refused by reason only that the change of circumstances has not been proved to have affected the value of the lands and heritages to any specific extent."

[40] However, in my view the proviso has no application in a case in which the basis of the appeal is a general fall in rental values. The case of *H&M* does not assist the ratepayers in this regard. First, that case was not based on an argument that there had been a general fall in rental values, rather it was based on changes in the physical nature of the locality in which the premises were situated. It was a clear case of an argument that the beneficial enjoyment of the premises had been affected. Second, there was ample evidence of the severe degradation of the local shopping environment, together with evidence as to the extent to which footfall had diminished (para 12). Third, it was a case in which it was recognised that there would be difficulty in obtaining rental evidence; and where neither turnover nor sales would provide a satisfactory assessment of the extent to which beneficial occupation had been affected (para 18). Fourth, in *Lothian Assessor v Ministry of Defence*, where a reduction was sought in respect of office premises on the basis that an allowance of a reduction had been given by the assessor to shops and licensed premises in consequence of the tram works, the court said that the logic which suggested that such a reduction might be appropriate for shops and pubs did not apply to offices (para 18):

> "An allowance of that nature was a logical response to the disruptive effect on businesses that supplied goods and services to the public and whose turnover was dependent to a great extent on footfall. It was reasonable to assume that businesses of that nature would sustain a direct impact on their turnover which would affect net annual value on the statutory hypothesis… But the logic of that allowance does not necessarily apply to office premises."

[41] In fact, it is clear that in a case based entirely on a generalised fall in rental values, evidence relating to rental values is essential. In *Akram* the Lord Justice Clerk stated (para 20):

> "Where an appeal is based on an alleged material change of circumstances affecting the net annual value of the subjects… the best evidence is evidence of actual rents."

[42] The appeal in *Tesco Stores Limited* v *Fife Assessor* 2011 SC 316 foundered because such evidence was not presented. The argument that this was a situation where the VAC were entitled, even as a cross-check, to rely on "common sense" is untenable. *H&M* was a case where clear evidence had been led of severe degradation of the subjects' environment and reduction in footfall. Those were established matters of fact from which one could draw the common sense conclusion that the beneficial enjoyment of the property had been adversely affected. The point was that

> "If a ratepayer can lead evidence of facts from which a reasonable committee could deduce that an amenity loss has caused a material change of circumstances, which, as a matter of common sense, would affect value then he has done enough …"

(Lord Kingarth, para 19, quoting from *Assessor for Lothian Region* v *Wilson* 1979 SC 341).

[43] Lord Clarke said that a committee was not "expected to abandon common sense and rationality when faced with proved facts and invited to reach deductions from them". Relying on unproven, unquantified, anecdotal evidence, as the VAC did in its "cross check" is quite a different exercise from using common sense to draw reasonable or obvious inferences or deductions from established matters of fact.

[44] For the reasons given above, I am satisfied that a change "affecting the value" of the subjects must be a change affecting the value as it appears in the roll. There being no evidence that the value has dropped below that level, the other questions arising need not be addressed. The assessor's appeals must succeed and the ratepayers' cross-appeals must fail.

[45] However, there is a further matter upon which I think it right to comment. The way in which the stated case was presented was highly unsatisfactory. Acknowledging that the precise detail of a stated case depends on the circumstances of the case, the procedure to be adopted is clearly set out in *Armour* para 5.47, where much other helpful guidance is available to those required to state the case. At para 5.47 it is noted that the case stated should contain a full and plain statement of:

(i) the facts as found by the tribunal;

(ii) the grounds of appeal and replies thereto;

(iii) the decision reached;

(iv) the reasons for the decision; and

if the evidence has been recorded, a certified transcript should be appended to the case.

[46] The findings in fact were sparse, and difficult to follow. Beyond stating that certain documents bearing to provide rental evidence – sometimes contradictory, the findings made no reference to what the VAC found established from the rental evidence, save the conclusion, based on their own methodology that there had been a fall of 16.5%. I have already referred (para 8) to the lack of clarity and transparency in relation to the methodology. Again, clear guidance is given in *Armour* to assist those requiring to prepare a stated case. At para 5.48 it is noted that it is inappropriate to require reference to extraneous material to ascertain what finding has been made. In *Scammell* v *Assessor for Highland and Western Isles Valuation Joint Board* 1997 GWD 29-1495, Lord Gill stated:

> "….it is unhelpful for the committee to make findings in fact referentially ... the correct approach … is for the committee to use its best judgement to extract from this material such facts as it accepts and considers to be relevant to the issues raised …"

[47] If facts are founded upon in the grounds of decision those facts must be included in the findings of fact and not appear only in the grounds of decision (*Armour* 5-49; *Assessor for Edinburgh* v *Hertz Rent-a-Car* [1968] RA 735). Although it is customary to include some detail of the submissions made, it is not appropriate to include those submissions *verbatim* or at length, even when they have been presented to the VAC in written form. In the present case, the whole of the written submissions, some 30 or so pages, was simply incorporated wholesale into the stated case.

Disposal

[48] I propose to your Lordships that the assessor's appeals should be allowed and the ratepayers' cross-appeals should be refused.

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OPINION OF LORD MALCOLM

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Respondent

Appellant: Gill; Solicitor to Glasgow City Council
Respondent: Stuart QC; Brodies LLP

15 March 2018

[49] I have had the considerable advantage of reading a draft of the opinion of your Ladyship in the chair. I agree with it and with the proposed disposal of these appeals. I wish to add a few observations of my own.

[50] None of the ratepayers rely upon anything specific to the subjects or to their respective localities. It is accepted that current rental values have not fallen below the entries in the valuation roll. This is because, before the recent downturn, there was a prolonged post tone date period of rental growth. Thus, to illustrate the ratepayers'

argument, if the tone date valuation was £100,000, then a sustained increase in values over a period of years to £200,000, followed by a sharp decrease to £150,000, it is said that the fall was a material change of circumstances in that it affected the value of the subjects. It is then contended that the recent fall has to be extrapolated back in time to the tone date, on the thinking that, there having been a material change of circumstances caused by the recent difficulties experienced in an important sector of the regional economy, there requires to be a fresh valuation at the tone date carried out on the assumption that such difficulties were experienced by 2008. Only in this way do the ratepayers and the valuation appeal committee reach the position that the current entries in the roll should be reduced.

[51] In support of the submission, reference was made to the opinion of the then Lord Justice Clerk, Lord Gill, in paragraph 8 of *Assessor for Dunbartonshire and Argyll & Bute* v *Akram and Another* 2012 SC 235:

> "It is of critical importance that the values in the roll should be consistent with one another. Therefore, when a material change of circumstances has been proved, the revised value must be adjusted to the tone of the roll; that is to say, revised to the value that would have applied at the tone date. In this way a common valuation base is maintained throughout the currency of the roll."

These observations presupposed that a material change of circumstances had been established. Typically that will have been a change in the circumstances of the subjects themselves, or in the locality, which reduce their value. As with new entries, it would be inappropriate to register such subjects in the roll at the current valuation. Given the new state of affairs, they would require to be treated in the same way as any similar subjects already on the roll, hence the need to adjust the value back to the tone date. In this way the integrity of the roll is maintained from revaluation to revaluation.

[52] Reverting to the circumstances of the present appeals, there is no justification for carrying out a tone date valuation on an assumption that the causes of the recent fall in

rental values occurred in 2008. For obvious reasons, no subjects were entered in the roll on such a basis, thus the rationale for the exercise described in paragraph 8 of *Akram* does not arise. The matter might be explained by identifying what I suggest is a fallacy in the committee's thinking. The exercise of adjusting values back to the tone date presupposes an established material change of circumstances. However, here the material change of circumstances was achieved only by virtue of the adjustment itself. Without it, the current rental values are not lower than the annual values in the roll. As a necessary minimum (though not sufficient in itself) for a successful material change of circumstances appeal based upon a general fall in rental values, in my view it must be shown that the current value has fallen below that entered in the roll for the appeal subjects. Failing that, there can be no proper basis for a reduction. In the present context "material" means a change of circumstances such as would justify an alteration in the roll. In respect of each of the office premises involved, their current values are not lower than the annual values in the roll. It follows that there has been no material change of circumstances in terms of section 3(4) of the Act. Nothing has happened since the current roll was created which would justify an alteration in the entries.

[53] The ratepayers' argument is predicated upon the recent downturn being a material change of circumstances in terms of section 37(1). It provides that the phrase means "in relation to any lands and heritages a change of circumstances affecting their value …". Section 3(4) allows an appeal against an entry in the valuation roll on the ground of a material change of circumstances since the entry was made. The focus is on the continuing validity or otherwise of the entry in the roll. The definition in section 37(1) is to be seen in that context. Here the fact remains that, notwithstanding fluctuations in rental values, the

annual values in the roll cannot be categorised as excessive for the subjects as at the date of the committee's deliberations.

[54] It is of significance that the appeal is not based upon any alteration in the subjects, nor in their use, nor in the occupiers' beneficial enjoyment of them. Where there has been an important change in such respects, then, whatever the current rental value might be in comparison with the roll, it can be accepted that the original valuation must be revisited, and this because of the alteration in the subjects being valued. If material, the new situation demonstrates that the entry in the roll is no longer appropriate. In the present case, the only proven impact of the fall in the oil price is on rental values, so the question is; has there been a material change in that regard since the entry was made as would support an appeal under section 3(4)? The answer to that question, when applied to the premises in issue, is no.

[55] I do not suggest that a fall in values below the entries would, of itself, justify a reduction; the ordinary ebb and flow of economic activity is insufficient. Something abnormal, significant, or fundamental is required. However, where the movements up and down of general rental levels have not caused rents to fall below the net annual values in the roll, how can it be demonstrated that the movement has been a change in circumstances such as would support a reduction in the ratepayers' liabilities?

[56] Recently this court cautioned against the view that any fall in rental value constitutes a material change of circumstances.

> "If every downward fluctuation, whatever the cause, constituted a material change of circumstances, the whole basis of quinquennial revaluation would be undermined. The quinquennium would consist of an endless series of material change appeals relating to all kinds of lands and heritages." *Schuh Ltd* v *The Assessor for Glasgow* 2014 SLT 184, Lord President Gill at paragraph 22.

While the court has from time to time allowed that factors such as an abnormal economic crisis might be relevant, in general one would be looking for changes of circumstances in the subjects or their immediate locality. By way of an example, in *Argos Distributors Ltd* v *The Assessor for Fife* 2011 SC 272 occupiers of shops in the Mercat Centre, Kirkcaldy successfully appealed on the ground that the economic recession was reflected in, amongst other things, the number of vacant units in the Centre, and thus created a material change of circumstances. Finally, it can be noted that counsel for the ratepayers was unable to point to any precedent for a successful material change of circumstances appeal based on an economic downturn when current rental values were not lower than the net annual values entered in the roll. I do not find this surprising. It reinforces my impression that the committee were led into the error described earlier in this opinion.

LANDS VALUATION APPEAL COURT, COURT OF SESSION

[2018] CSIH 15
XA73/17

Lord Justice Clerk
Lord Malcolm
Lord Doherty

OPINION OF LORD DOHERTY

in the Appeal

by

THE ASSESSOR FOR GRAMPIAN

Appellant

against

ANDERSON, ANDERSON AND BROWN LLP AND OTHERS

Respondent

Appellant: Gill; Solicitor to Glasgow City Council
Respondent: Stuart QC; Brodies LLP

15 March 2018

[57] I have had the advantage of reading in draft the opinions of your Ladyship in the chair and your Lordship. I agree with them and with the proposed disposal.

[58] In order to succeed the ratepayers had to demonstrate that a material change of circumstances affecting value had occurred since the relevant entries were made in the roll. The values which had to be affected were the annual values entered in the roll for the subjects. I was perplexed by Mr Stuart's initial resistance to that elementary proposition.

[59] On an ordinary reading of the definition of "material change of circumstances" in s 37(1) of the 1975 Act, the "value" which must be affected by the change is the annual value entered in the roll. The word "value" has been used in other provisions of the Act (eg s 1(6)(c), s 2(1)(d) and s 3(4)) where it is clear, in my opinion, that it has the same meaning as in s 37(1). The statutory context is a frozen roll between revaluations, and a material change of circumstances affecting value is one of a limited number of situations where the entry in the roll for a subject may be altered. The annual value in the roll is the datum against which one assesses whether there has been a material change of circumstances affecting value since the entry was made. The point is so rudimentary that it is perhaps unsurprising that there has been little discussion of it in previous cases. However, it has been touched upon both in cases dealing with the 1975 Act and in cases governed by the 1975 Act's statutory predecessors. All the indications appear to me to be one way.

[60] In *Assessor for Fife* v *Ruggi* 1960 RICS 51 a shop was entered in the roll at the 1954/55 revaluation. Subsequently, the ratepayer took over the tenancy and he was entered as tenant in the roll. Later, he appealed on the ground of a material change of circumstances said to have occurred in June 1957. At p 57 Lord Patrick observed:

> "… (U)nder the Valuation Acts it falls upon someone to demonstrate that there has been a fall in value. The problem then is to show that the subjects would have a different value and a lesser value in the hands of anyone who might come to be the tenant … to that aspect – and it is the true aspect of valuation under the Valuation Acts – the tenant has not addressed himself at all, and has adduced no evidence upon which the committee could affirm that the subjects in question in the hands of a hypothetical tenant in general would possess an altered value to that which they possessed at Whitsunday 1956."

[61] In *Myles and Another* v *Dundee Assessor* 1967 RCIS 53 an entry had been made in the roll for an office at the revaluation in 1961. The ratepayer claimed that a material change of circumstances affecting value had occurred in 1964. The suggested material change was that

the future demolition of the appeal subjects had become imminent and certain.

Lord Kilbrandon opined (at p 56):

> "Allowing that to be a material change of circumstances, however, it is necessary to go further and to show that this material change affects the value of the subjects, that is to say, that it is a change which would make a hypothetical tenant offer and a hypothetical landlord accept a rent lower than the rent at which the office was valued in 1961."

Lord Avonside concluded (at p 57) "The appellants have thus failed to show a fall in value post-1961 …".

[62] In *Fife Assessor* v *Guthrie* 1969 RICS 167 a shop was entered in the roll at the 1966-67 revaluation. In 1967-68 the ratepayer appealed, maintaining that a material change of circumstances affecting value had occurred since the entry was made. He relied upon suggested reduced turnover following demolition of nearby houses. Lord Hunter stated (at p 170):

> "In my opinion, having regard to the findings, that evidence formed no basis upon which the Committee could properly affirm that the subjects of appeal in the hands of a hypothetical tenant in general would possess an altered value to that which they possessed as at Whitsunday 1966."

[63] In *Assessor for Fife* v *Baxter* 1970 RICS 137 a petrol filling station was entered in the roll at the 1966/67 revaluation. In 1969/70 the ratepayer appealed, maintaining that a material change of circumstances affecting value had occurred since the entry was made. He relied upon suggested reduced turnover after the road upon which the subjects were located was upgraded to a dual carriageway. Lord Hunter opined (at p 142 and at p 143):

> "…(I)t would appear that the Committee did not address their minds at all to the question whether the value of the subjects, in the sense in which the word 'value' is used in the valuation statutes, had been affected by a change of circumstances … (I)n the absence of evidence showing that the value, in the sense of the Lands Valuation Acts, of the subjects of appeal had been affected by the conversion of the road into a dual carriageway with central reservation, I am unable to see how the Committee could have reached a finding along the lines of the gloss put by counsel for the ratepayers on finding 2."

[64] In *Assessor for Lanarkshire* v *Macdonald & Others* 1973 SLT (Notes) 83 the ratepayers were the occupiers of two houses. Both appealed against the entries in the roll, maintaining that a material change of circumstances affecting value had occurred since they were made at the 1971 revaluation because an obnoxious smell from a nearby farm was said to have worsened. Lord Fraser observed (at p 83):

> "The appeal for the assessor before us was based …upon the general ground of principle that there was no evidence before the committee as to the effect, if any, of the obnoxious smell on the annual value of the subjects. There is an express statement to that effect in finding (8) in the case. Counsel for the assessor said that, standing that finding, the committee were not entitled to make the finding that they did. In my opinion we have no alternative but to accept that submission for the assessor."

The passages in *Akram* and *Schuh 1* to which your Ladyship refers are to similar effect.

[65] Where a ratepayer maintains that there has been a material change of circumstances affecting value because of a fall in the general level of rents, it is necessary to show that the new level is lower than the level which is reflected in the annual value in the roll. The latter level is the yardstick against which one determines whether such a material change of circumstances affecting value has occurred. Thus, where rental levels have merely fallen from higher rental peaks reached during the course of the quinquennium but have not fallen below the tone level, there will not have been a fall in the general levels of rents since the entry was made in the roll.

[66] In the present appeals, so far as affect on value was concerned, the critical issue on which battle was joined before the committee was whether a relevant drop in the general levels of rents for offices had been demonstrated. There was no suggestion that any of the appeal subjects were not in the same state as they had been when the relevant entry was made in the roll. Nor was it maintained that the state of the locality of the subjects (in any of

the respects described in s 15(1)(b) of the Local Government (Scotland) Act 1966) had materially changed since the tone date or since the entry was made in the roll. Mr Rogan's primary position was that a fall in the general level of rents from the peak rental levels reached in 2014 was a material change of circumstances affecting value. In his view it was unnecessary to show that the level to which rents fell was less than the tone level used to arrive at the annual value in the roll. Alternatively, if it was necessary to show a fall in rents to below tone value levels, that was achieved by discounting the 2015 and 2016 rents to the tone date using RPI.

[67] Mr Rogan's primary case was obviously flawed. A significant drop in general rental levels from their 2014 peak was not in itself a material change of circumstances affecting value. In fact, it is plain that even by 2016 general rental levels for offices had not fallen below tone levels. On the face of things therefore, there was no material change of circumstances affecting value.

[68] Mr Rogan's backdating exercise using RPI was also unsound. It was rejected by the committee, and before this court Mr Stuart did not support it. In my opinion he was right not to. Where a suggested material change of circumstances is a fall in general rental levels, it is the actual rental level at the time of the suggested material change which is relevant and which should be compared with the rental level upon which the value in the roll has been based. Backdating in such circumstances is wrong in principle.

[69] Since it was for the ratepayers to establish the occurrence of a material change of circumstances affecting value, and both of Mr Rogan's suggested approaches were unsound, one might have expected the committee simply to refuse the appeals. Somewhat surprisingly, they did not. On the basis of an exercise of their own they decided that there had been a material change of circumstances affecting value, and that the affect on value had

been a reduction of general rental levels to 16.5% below tone levels, with effect from 1 April 2016. It was common ground that, notwithstanding the committee's statement of reasons and the further supplementary reasons which they added when they prepared the stated case, this aspect of their decision is obscure and unintelligible.

[70] Mr Stuart did not seek to justify what the committee had done. He attempted, however, to support the decision on grounds different from those articulated by the committee. Thus, for example, he submitted (relying on the proviso to s 3(4) of the 1975 Act) that it was not necessary for the ratepayers to prove that the values of the appeal subjects had been affected to any specific extent. The committee were entitled to conclude that the extent to which the ratepayers' beneficial occupation of the appeal subjects could be enjoyed had been materially reduced. There are at least two problems with that submission. First, it was not what the committee did. On the contrary, the exercise which they carried out was the basis for concluding that there had been a material change of circumstances affecting value, and was also the source of their assessment of the measure of the affect on value. Second, on the evidence and the findings there is no basis for concluding that there was any reduction in the extent to which beneficial occupation of the subjects could be enjoyed. In relation to the other grounds upon which Mr Stuart relied, it suffices to say that in my opinion none of them assist the ratepayers, and none of them were in fact the basis of the committee's decision.

[71] The short point in these appeals is that it was not open to the committee to do what they did. The exercise which they conducted formed the crux of their decision. It was the foundation for finding that there had been a fall in general rental levels below the tone levels. In those circumstances there is no proper basis for a remit of the appeals to the committee to reconsider whether there had been such a fall, and if so, its extent. The

decision simply cannot stand. It was for the ratepayers to prove that a material change of circumstances affecting value had occurred. They failed to establish that.

[72] It follows that it is unnecessary to consider the other grounds of appeal which the assessor advanced. Moreover, in light of the way that the issues were focussed before the committee and before this court, it is also unnecessary to opine upon the proper construction and application of s.15 of the 1966 Act. In my view it is preferable that any such guidance awaits a case where it is essential to the decision and where the relevant issues have been fully canvassed.

[73] In *Assessor for Grampian* v *CDS (Superstores International) Limited* [2018] CSIH 13, at paras 27-29, I commented on the unsatisfactory form and content of the stated case. In the present appeals the form and content of the stated case were also unsatisfactory. The submissions of the parties were set out at inordinate length. They extended to 31 pages. The intelligibility of the stated case suffered because the gist of each party's submissions was not clearly and succinctly summarised.

[74] By contrast, the findings in fact were brief, extending to just under four pages. Contrary to the clear guidance given by the court in *Scammell* v *Assessor for Highland and Western Isles Valuation Joint Board* 1997 GWD 29-1495 (which guidance is reproduced in *Armour*, para 5-48), several of the findings required reference to extraneous material in order to understand them. In a further unwelcome departure from normal practice, at the end of the case a series of questions for the court were posed.

[75] Once again, it may be helpful to remind committees of the customary form and content of a stated case in an appeal to the Lands Valuation Appeal Court from a decision of a committee. The case normally begins by narrating the date and place of the meeting of the committee and by setting out the entry (or entries) in the valuation roll which the ratepayer

appealed against. That is usually followed by a sentence setting out what it was in the entry that the ratepayer sought should be changed (eg "The appellant craved that the assessor should have valued the subjects at £x NAV/RV."). The next paragraph should set out the representation for each party, and the witnesses which each led. The productions lodged by each party are then listed. Next come the findings in fact. After the findings in fact, the contentions for each party should be summarised. Each summary ought to be brief. It should outline the essence of the party's submissions and it should note any authorities which were referred to. It ought to be rare for the summary of a party's contentions to take up more than a page or two, and often less than a page is likely to suffice. After the contentions, the committee's decision, and then their reasons, are stated. Finally, the grounds of appeal to the court and the answers thereto are set out.