LANDS VALUATION APPEAL COURT

[2022] CSIH 53
XA44/22 and XA43/22

Lord Justice Clerk
Lord Malcolm
Lord Doherty

OPINION OF LADY DORRIAN, the LORD JUSTICE CLERK

in the appeals

by

ASSESSOR FOR LOTHIAN

Appellant

against

(1) LLOYDS BANKING GROUP PLC and (2) BANK OF SCOTLAND PLC

Respondents

and

ASSESSOR FOR LOTHIAN

Appellant

against

SKY UK LTD

Respondent

Appellant: Graham Dunlop; Blacklocks Solicitors
Respondents: Burnet KC; Burness Paull LLP

29 November 2022

[1] I am in agreement with the opinion delivered by Lord Doherty. For the reasons he gives, I consider that the appeals should be refused.

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OPINION OF LORD MALCOLM

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Respondent

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29 November 2022

[2] For the reasons given by Lord Doherty, I agree that the appeals should be refused.

LANDS VALUATION APPEAL COURT

[2022] CSIH 53
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Lord Justice Clerk
Lord Malcolm
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OPINION OF LORD DOHERTY

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Introduction

[3] The issue in these appeals is whether the valuation appeal committee misdirected itself in holding that, following substantial damage due to vandalism and theft, two industrial subjects had only nominal net annual values.

The subjects

[4] At the 2017 revaluation the Assessor for Lothian made entries in the valuation roll for two neighbouring industrial subjects - Units 1A and 1B Baird Road, Livingston. Both were situated on an industrial estate. Unit 1A was an office and Unit 1B was a warehouse. The proprietors of the subjects were Lloyds Banking Group plc and the Bank of Scotland plc ("Lloyds"). The revaluation net annual values were £441,500 for Unit 1A and £288,500 for Unit 1B. Lloyds' revaluation appeals against those entries were settled with the net annual values being reduced to £393,500 for Unit 1A and £276,500 for Unit 1B.

[5] By November 2018 both units were unoccupied. In March and April 2019 they were broken into. They were badly damaged as a result of vandalism and theft.

[6] In May 2019 Lloyds marketed the subjects for sale as an "Extensive Commercial Development Site". The sale particulars envisaged that the purchaser would clear the site and redevelop it. On 13 September 2019 Lloyds sold the subjects to Sky UK Ltd ("Sky") for £1,300,000.

[7] On 30 August 2019 Sky applied for building warrant to demolish both buildings, which warrant was granted on 3 September 2019. Demolition began on 29 July 2020 and it was completed on 18 December 2020. With effect from 29 July 2020 the assessor altered the entries in the roll to "Premises under reconstruction" with net annual values of nil. On

completion of the demolition those entries were deleted. They were replaced by a single *unum quid* entry for "Ground" with a net annual value of £91,200.

The relevant statutory provisions

[8] Section 6 of the Valuation and Rating (Scotland) Act 1956 (as amended) provides:

> "**6 Ascertainment of gross annual value, net annual value and rateable value of lands and heritages.**
>
> (1) For the purpose of making up any valuation roll for the year 1961- 62 or any subsequent year the net annual value and the rateable value of any lands and heritages shall … be ascertained in accordance with the provisions of this section.
>
> …
>
> (8) … the net annual value of any lands and heritages shall be the rent at which the lands and heritages might reasonably be expected to let from year to year if no grassum or consideration other than the rent were payable in respect of the lease and if the tenant undertook to pay all rates and to bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the lands and heritages in a state to command that rent.
>
> …"

[9] At the times material to the present appeals sections 2(1), 3(2) and 3(4) of the Local Government (Scotland) Act 1975 (as amended) provided:

> "**2 Alterations to valuation roll which is in force**
>
> (1) Subject to subsection (2) below, the assessor for any valuation area shall, as respects that area, at any time while the valuation roll is in force, alter the roll—
>
> …
>
> (d) to give effect to any alteration in the value of any lands and heritages which is due to a material change of circumstances;
>
> …
>
> **3 Provisions supplementary to sections 1 and 2**
>
> …

> (2) The assessor for each valuation area shall send to each person who is a proprietor, tenant or occupier of lands and heritages which are included in the valuation roll a notice in the prescribed form setting forth the details of the relevant entry in the roll (including such an entry as is referred to in subsection (1) above other than an entry made under section 1(6)(e) or 2(1)(g) of this Act); and any such person, not being a person who has reached agreement with the assessor as mentioned in section 2(3) of this Act as to what should be done about the entry, if he considers himself aggrieved by the entry, may appeal to the valuation appeal committee for the area in which the lands and heritages are situated or may obtain redress without the necessity of such appeal by satisfying the assessor that he has a well founded ground of complaint.
>
> …
>
> (2A) Where a person becomes the proprietor, tenant or occupier of lands and heritages which are included in the valuation roll he shall thereupon have the same right of appeal under subsection (2) above as he would have had if there had been sent to him the notice referred to in that subsection.
>
> …
>
> (4) Without prejudice to subsection (2) above, the proprietor, tenant or occupier of lands and heritages which are included in the valuation roll may at any time while the roll is in force appeal against the relevant entry but only on the ground that there has been a material change of circumstances since the entry was made … and, 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."

[10] Lloyds lodged material change of circumstances appeals in terms of s 3(4) for the units, maintaining that they had nil or nominal values from 1 April 2019 due to their damaged state. As new proprietors Sky had the right to make a revaluation appeal and a s 3(4) appeal (s 2(2A)). In their revaluation appeals they argued that the units were a *unum quid*. In their material change of circumstances appeals they maintained that in their damaged state the units had only nominal values.

The appeal hearings

[11] The committee heard the Lloyds appeals and the Sky appeals on 14 October 2021. The Lloyds appeals were heard first. In the Sky appeals, the evidence was completed, but closing submissions were submitted in writing at a later date. The committee issued its decisions in all of the appeals on 5 November 2021. It allowed the Lloyds appeals. It held that there had been a material change of circumstances affecting the value of each subject, and that from 1 April 2019 each had only a nominal net annual value of £100. The committee rejected Sky's appeals that the units were a *unum quid*. It allowed Sky's material change of circumstances appeals, holding that each of the units had a nil value from 13 September 2019.

[12] In the Lloyds appeals the ratepayers lodged productions and led Mr Michael Rose MRICS as a witness. In the Sky appeals the ratepayers lodged productions and led Mr Derek Kidd MRICS as a witness. In each of the appeals the assessor lodged productions and led evidence from Mr Stuart Blyth MRICS. Mr Kidd and Mr Blyth had prepared witness statements which began with the customary declarations and undertakings made by witnesses giving skilled opinion evidence. Mr Rose did not lodge a witness statement. He explained that he was not giving skilled opinion evidence, but was merely taking the committee through the productions.

[13] The most significant of the productions were photographs showing the units in their damaged states. Mr Rose asked the committee to conclude from the photographs that the units had only nominal values. Mr Kidd gave opinion evidence to the effect that they had nil or nominal values. In his view the hypothetical tenant would not have paid a positive rent for either unit over and above the very substantial expenditure which would have been

needed to remedy the damage. Mr Blyth accepted that the damage to each of the units was a material change of circumstances affecting value. However, he maintained that, notwithstanding their condition and the remedial work which would have to be carried out, in each case the hypothetical tenant would have been prepared to pay a substantial positive rent. In support of his evidence he relied on comparison with other subjects in the valuation roll which had been damaged by vandalism and theft and whose net annual values had been reduced to reflect that damage. Making suitable adjustments for the nature of the damage here, the net annual value for Unit 1A ought to be £245,000 and the net annual value for Unit 1B ought to be £248,000.

The committee's findings

[14] The findings in fact in each stated case narrate in some detail the damage to each unit. The committee acknowledge that the external walls and roof of each units were structurally intact, although the structure of Unit 1B had been compromised by the removal of a roller shutter door. Although Unit 1A was the more badly affected and was in a dangerous condition, both units were very extensively damaged, and Unit 1B was not secure. The committee found (finding 12 in the Lloyds case and finding 16 in the Sky case):

> "That no potential tenant was likely to pay a rent to occupy and use the premises in the state in which they were left…"

[15] The committee explained that it did not find the comparisons which Mr Blyth founded upon to be helpful. They concerned smaller premises with less extensive damage which would cost less to reinstate. In the Sky appeals the committee preferred Mr Kidd's evidence to Mr Blyth's.

The appeals to this court

[16] Counsel for the assessor submitted that the committee had misdirected itself in law and that the court should allow the appeals. That would result in Unit 1A being in the roll as an office with a net annual value of £245,000 between 1 April 2019 and 29 July 2020, and Unit 1B being in the roll as a warehouse with a net annual value of £248,000 during the same period. There were two main grounds of appeal, which were interlinked, and a third subsidiary ground. The first ground was that the committee had focussed only on whether there could be valuable use of the units in their damaged state. The statutory hypothesis assumed the existence of a hypothetical tenant (*Telereal Trillium* v *Hewitt* [2019] 1 WLR 3262). What the committee ought to have considered was whether a hypothetical tenant would pay a positive rent over and above the repair costs because of the valuable use which might be enjoyed once the subjects were repaired. The second ground was that the subjects continued to have the essential characteristics of an office and a warehouse, and that the committee ought therefore to have concluded that they were capable of beneficial occupation (*Assessor for Tayside Joint Valuation Board* v *M* 2018 SC 106). It ought to have found that they had positive values because subjects which were capable of beneficial occupation must have a positive net annual value. The third ground arose only in the Sky cases. The committee appeared to have had regard to Sky's intention to demolish the subjects, which it ought not to have done, since that was an accidental feature rather than an essential characteristic of the subjects on the statutory hypothesis (Armour, *Valuation for Rating*, para 18-23; *Langlands* v *Assessor for Midlothian* 1962 SC 341, Lord Sorn at p 349). However, counsel indicated that even if this error was demonstrated, it would not suffice on its own to justify allowing the appeals: at least one of the other grounds would also have to be made good.

[17] Senior counsel for the ratepayers submitted that the appeals should be refused. The committee had not misdirected itself. Reading its findings and reasons fairly, it was clear that it had asked itself the correct question. The thrust of its decision was that the hypothetical tenant would not pay a positive rent in addition to paying for the necessary repairs. While a hypothetical tenant required to be assumed, there was no requirement to assume that he would be prepared to pay a positive rent over and above assuming responsibility for the repairing and other obligations. *Assessor for Tayside Joint Valuation Board* v *M* was not authority for the proposition that any subjects which retained their essential physical characteristics must be capable of beneficial occupation and must therefore have a positive net annual value. What the committee said about Sky's intention to demolish the units had not been material to its reasoning. Read fairly, the committee had merely been observing that Sky's real world intention to demolish had been consistent with the subjects not having more than nominal net annual values.

Decision and reasons

[18] Before the committee, and before this court, it was common ground that each of the subjects required to be valued in their actual state and according to their existing use, and that in terms of section 6(8) of the 1956 Act the hypothetical tenant undertook to pay all rates and to bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the lands and heritages in a state to command the hypothetical rent. Both parties also proceeded on the basis that the remedial work fell within the ambit of the hypothetical tenant's repairing obligation (*Assessor for Central Region* v *United Glass Ltd* 1981 SC 389; *Assessor for Glasgow* v *Ron Wood Greeting Cards* [2000] R A 271). It was not suggested that any of it was work which the hypothetical landlord required to carry out, either in order to fulfil

a common law obligation at the outset of the tenancy to provide subjects that are in a tenantable condition (Rankine, *Law of Leases in Scotland* (3rd ed), p 241; *Reid v Baird* (1876) 4 R 234; Rennie, *Leases*, para 26-31), or because it was in the nature of an extraordinary repair (Rankine, p 247; *Turner's Trustees v Steel* (1900) 2 F 2363; *House of Fraser Plc* v *Prudential Assurance Co Ltd* 1994 SLT 416; Rennie, *supra*, para 26-36).

[19] The hypothetical tenancy is assumed to be a tenancy "from year to year" with an expectation of continuance. It has been described as being a tenancy of indefinite duration though determinable by notice (see eg *Dawkins (Valuation Officer)* v *Ash Brothers and Heaton Ltd* [1969] 2 AC 366, Lord Wilberforce at pp 386E and 387H). The fact that subjects may not be usable for a period does not preclude their having a positive net annual value on the statutory hypothesis (see eg *Provincial Cinematograph Theatres Ltd* v *Assessor for Glasgow* 1925 SC 560; *Scottish Special Housing Association v Assessor for Strathclyde* 1986 SLT 421; *Assessor for Tayside Valuation Joint Board* v *M* 2018 SC 106, opinion of the court at para [16]). Similarly, where substantial repairs may have to be carried out by the hypothetical tenant before he may enjoy the use of subjects, the subjects may nevertheless have a positive net annual value if the period of expected use after the repairs is sufficient to make the payment of a positive rent worthwhile notwithstanding the repair costs. Whether that is so in any particular case will turn on the evidence, and it is likely to involve questions of fact and degree.

[20] In my opinion the first ground of appeal is not well founded. I am satisfied that on a fair reading of the committee's findings and reasons it asked itself the correct question. It was to be assumed that there would be a hypothetical tenant (*Telereal Trillium* v *Hewitt* [2019] 1 WLR 3262), but it did not necessarily follow that the hypothetical tenant would be prepared to pay a positive rent in addition to assuming the burden of the repairing and other obligations referred to in s 6(8). The thrust of the committee's decision was that the

hypothetical tenant would not pay a positive rent for either of the units in addition to meeting his other obligations. In my view that was a conclusion which it was open to the committee to reach on the evidence. Support for it was provided by the evidence of Mr Kidd and by the evidence of the very extensive damage which had been sustained. I do not think the absence of more detailed evidence about likely remedial costs and about the time it would take to carry out the works precluded the committee from making the decisions which it made. Of course, it would have been very helpful to the committee if there had been such evidence: but in view of the evidence which was led I do not think it was essential. All the indications were that remedial costs would be very substantial indeed for each of the units. In the case of Unit 1A Mr Kidd's evidence was that the costs were likely to be significantly higher than the assessor's proposed value. In each case it could reasonably be inferred from the nature and extent of the remedial works that they would be likely to take a considerable time to be carried out.

[21] The second ground of appeal may be dealt with even more shortly. It proceeds on the basis that *Assessor for Tayside Valuation Joint Board* v *M* is authority for the proposition that any subjects which retain their essential physical characteristics must be capable of beneficial occupation and must therefore have more than a nominal net annual value. That proposition is not well founded, and *Assessor for Tayside Valuation Joint Board* v *M* is not authority for it. Premises which retain their essential physical characteristics may be likely to be capable of beneficial occupation; but not all premises which are capable of beneficial occupation will have more than a nominal net annual value.

[22] The third ground of appeal was only advanced in the Sky appeals, and it was not put forward as a stand-alone ground. Since the first two grounds have not been made good, it follows that this ground cannot avail the assessor. In any case, I am not convinced that the

committee proceeded on the basis that the hypothetical landlord would demolish the units. Sky's intention to demolish in the near future was something accidental to the lands and heritages. It was not an essential characteristic of them whoever the owner and tenant might be. The position would have been different if a superior power had ordered that the subjects required to be demolished (*Dawkins (Valuation Officer)* v *Ash Brothers and Heaton Ltd,* Lord Pearce at p 382D-E). Reading its decision fairly and as a whole, I consider that the committee merely treated Sky's intention to demolish as an adminicle of evidence which tended to confirm the very extensive nature of the damage which the units had suffered.

The stated cases

[23] Two features of the stated cases merit further comment. The first is that in each case the committee added a short "Note for Clarification" to the statement of reasons which it had issued. The note elaborated upon those reasons. The second is that after the assessor's grounds of appeal and the ratepayers' answers to those grounds the committee inserted its own "Response of the Committee to the Grounds of Appeal." While counsel for the assessor took no issue with the inclusion of these Notes and Responses in the stated cases, I think it right to remind those responsible for preparing stated cases of the correct procedure.

[24] In my opinion it is not appropriate for a committee to incorporate in a stated case what are in effect its own answers to the grounds of appeal. There is no statutory basis for such answers. Rule 4 of Act of Sederunt (Valuation Appeal Rules Amendment) 1982 makes provision for the appellant lodging grounds of appeal and for the respondent lodging answers. Section 9 of the Valuation of Lands (Scotland) Act 1879 directs that a committee shall "set forth the grounds of appeal or complaint, and the replies thereto in such terms as shall be submitted to them by the parties". The grounds of appeal and the answers are

intended to give fair notice to the other party and to assist the committee in their drafting of the stated case (Armour, para 5-44). Neither rule 4 nor section 9 envisage the committee preparing answers or such answers being included in the stated case.

[25] Generally, the written statement of reasons which the committee has issued (regulation 18 of the Valuation Appeal Committee (Procedure in Appeals under the Valuation Acts) (Scotland) Regulations 1995) should speak for itself, without the need for elaboration or qualification. That statement ought to be reproduced as the reasons part of the stated case (Valuation and Rating (Scotland) Act 1956, s 14; *Whitbread plc* v *Assessor for Strathclyde Region, ("The Crooked Lum")*, Unreported, 31 March 1995, Lord Clyde at p 2); although parts of it which, for example, merely summarise submissions need not be included (*Grampian Assessor* v *CDS (Superstores International) Ltd* [2018] RA 333, Lord Doherty at para [29]; Armour, para 5-47). In general, it is not appropriate for a committee to seek to supplement its statement of reasons with an explanatory memorandum or the like (*Berwickshire Assessor* v *Murdoch and Others* [1969] RA 1, Lord Hunter at p 2). In the *Whitbread* case Lord Clyde observed (pp 3-4):

> "If it appears during the preparation of the case that the statement has a clerical error or misrepresents the thinking which the Committee actually had on a particular matter the proper course in my view would be for Committee to add a rider to the Statement of Reasons in the case setting out the substance of and the explanation for any alteration which they wish to bring before the notice of this court. But it should only be in exceptional cases that such an alteration would require to be noticed."

See also Armour, para 5-50.

Disposal

[26] I propose to your Ladyship in the Chair and your Lordship that the appeals be refused.