



LANDS VALUATION APPEAL COURT

[2017] CSIH 71
XA47/17

Lord Malcolm
Lord Glennie
Lord Doherty

OPINION OF LORD MALCOLM

in the appeal

by

FIFE COUNCIL ASSESSOR

Appellant

against

HALL CONSTRUCTION SERVICES LTD

Respondent

Appellant: O'Rourke QC; Clyde & Co (Scotland) LLP
Respondent: Gill; Morton Fraser

22 November 2017

[1] I have had the advantage of reading a draft of Lord Doherty's judgment. I agree with it, and with the proposed disposal of this appeal. I add only a few words of my own.

[2] Counsel for the appellant described the "key issue" as follows: should fluctuations in the output of a mine be characterised as part of the "ebb and flow" of an industrial activity? As posed, the question answers itself. The difficulty for the appellant is that the exhaustion of recoverable reserves is a different thing from a fluctuation in output. This is so even if there remains a stockpile of coal which, over a period of months, is used for

ongoing processing and sale. Cessation of extraction is a circumstance far removed from the realms of market forces, commercial decisions, and similar factors which may influence the annual output from a mine.

[3] The Valuation Appeal Committee adopted the phraseology used in *Scammell v Assessor for Highland and Western Isles Valuation Joint Board*, 1997 GWD 29-1495, in stating:

“It is hard to imagine a more significant or fundamental change than a mine which has been exhausted of its minerals or coal. Such subjects would be totally undesirable to the hypothetical tenant, particularly where obligations to restore the ground were involved.”

[4] It was contended that there can be no material change of circumstances until coal stops passing the weighbridge. In my opinion there is no warrant for such a restrictive approach to the statutory test in section 3(4) of the Local Government (Scotland) Act 1975. I would also reject the submission that a foreseeable or expected event cannot qualify. A number of previous decisions were cited on behalf of the appellant, but it is axiomatic that each case must be judged upon its own facts and circumstances. Thus, for example, in *Anstruther’s Trustees v Assessor for Lanarkshire* 1927 SC 435 it was held that a national strike which prevented the winning of coal from a mine did not justify a departure from the adopted method of valuation. In contrast to a national strike, or the impact of market and economic forces, the present case is a clear instance of a significant change in the fundamental nature of the subjects under valuation. The change had a major impact upon their value to a hypothetical tenant. In my opinion the committee were correct to reject the appellant’s equiparation of the cessation of extraction with the “ebb and flow” discussed in cases such as *Assessor for Glasgow v Schuh Limited* 2012 SLT 904.

[5] The committee addressed the statutory test and applied it to the appropriate facts. I can identify no proper basis upon which this court should interfere with their decision.



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OPINION OF LORD GLENNIE

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[6] I have had the advantage of reading in draft the judgments to be delivered by Lord Doherty and by your Lordship in the chair. I agree with both of them. There is nothing I can usefully add.



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Introduction

[7] The single issue in this appeal is whether a material change of circumstances affecting value occurred when an opencast coal mine became exhausted. The valuation appeal committee found that it did. The assessor has appealed against the committee's decision.

The Facts

[8] At the 2010 revaluation the assessor made an entry “Minerals” in the valuation roll for subjects at Earlseat Extension Open Cast Coal Site, Kirkcaldy. Since the net annual value and rateable value were both £25,000, it may reasonably be inferred that no minerals were being extracted at that time, and that the value represented plant, equipment and buildings on the site. On 31 March 2014 the assessor served a valuation notice advising that he was making an alteration to the entry in the roll, and that the new net annual value and rateable value were £516,000 and £276,000 respectively with effect from 1 April 2013. The alteration was in respect of a material change of circumstances affecting value in terms of section 2(1)(d) of the Local Government (Scotland) Act 1975 (“the 1975 Act”), *viz* coal extraction had begun. The respondent appealed against the altered values. Following negotiation the appeal was settled on the basis of an agreed net annual value of £336,000 and an agreed rateable value of £186,000. The assessor altered the roll to give effect to that agreement (s2(3) of the 1975 Act). The agreed net annual value was reached using the valuation method recommended in SAA Practice Note No 7. £300,000 of the £336,000 net annual value was arrived at by applying a royalty rate of £2 per tonne to an estimated average annual output of 150,000 tonnes. The remaining £36,000 represented the annual value of the plant, machinery and buildings at the site.

[9] Coal extraction at the subjects ceased on 21 April 2015 when reserves were exhausted. The total tonnage which had been extracted before exhaustion was 261,057.62 tonnes. Of that quantity, 247,948.47 tonnes had been sold and had been exported from the site by 21 April 2015. The remaining 13,100 tonnes were stockpiled awaiting washing, processing and sale. 578.94 tonnes were sold in July 2015. Washing of coal was completed by September 2015. 3,694.62 tonnes were sold in December 2015, 4,489.22 tonnes

in January 2016, and the final 4,346.37 tonnes in February 2016. The last coal left the subjects on 29 February 2016.

[10] The respondent appealed against the entry in the roll on the basis that a material change of circumstances occurred on 21 April 2015 when extraction ceased. It also appealed on the basis that a further material change of circumstances occurred on 29 February 2016 when the last stockpiled coal left the site. The second appeal was settled by agreement, with the roll being altered to show a net annual value and rateable value of £36,000 (the annual value of the plant, machinery and buildings on the site) with effect from 29 February 2016. The first appeal proceeded to a hearing before the valuation appeal committee.

[11] In terms of its lease with the landlord the respondent paid a ground rent. It also paid royalties, namely an advance royalty per tonne extracted and a further royalty when coal was exported from the site. While coal was being extracted by far the more substantial part of the royalties paid was the advance royalties. When extraction ceased, liability for further advance royalties also ceased. Consequently, between 21 April 2015 and 29 February 2016 the actual rent paid by the respondent to the landlord was much lower than the rent paid while extraction was underway.

[12] In terms of paragraph 7 of a Statement of Agreed Facts entered into by the parties they agreed:

“7. In the event that the Valuation Appeal Committee finds that a material change of circumstances has occurred at the Site with effect from 21 April 2015, the appropriate rateable value is £49,000.”

The Relevant Statutory Provisions

[13] Sections 2(1)(d), 2(2), 3(4) and 37(1) of the 1975 Act provide:

“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.

...

(4) Without prejudice to subsection (2) above, the proprietor, tenant or occupier of lands and heritages ... which are included in the valuation roll may appeal against the relevant entry but only on the ground that there has been a material change of circumstances since the entry was made ...”

The Committee’s Decision

[14] The committee upheld the respondent’s appeal that a material change of circumstances affecting value occurred on 21 April 2015 when coal reserves were exhausted. In its view the exhaustion of coal reserves, and the consequences of that exhaustion, represented a significant and fundamental change. They were not a mere fluctuation in the output from the mine.

Submissions for the Appellant

[15] Senior counsel for the appellant submitted that the committee had erred in law in determining that a material change of circumstances affecting value had occurred on 21 April 2015. While coal reserves had become exhausted on that date, the subjects had continued to be used until 29 February 2016. The last 13,100 tonnes of coal which had been extracted before the mine became exhausted had been stockpiled and processed on the subjects prior to its sale and despatch. It was the date coal was weighed and left the site

which was important, not the date it was extracted from the ground. There could be no material change of circumstances until all export of coal from the site ceased. Since that had not occurred until 29 February 2016, that was the date of the material change. A mere fall in output was not a material change (*Assessor for Dunbartonshire v Cloybank Minerals Ltd* 1958 SC 587 (“*Cloybank*”); *Scammell v Assessor for Highland and Western Isles Valuation Joint Board* (unreported other than by way of a digest in 1997 GWD 29-1495), 8 July 1997 (“*Scammell*”).

The fact that the volume of coal leaving the site and the royalties paid both dropped substantially after 21 April 2015 was simply part of the ebb and flow of a dynamic industry (*Assessor for Glasgow v Schuh Ltd* 2012 SLT 903, [2012] RA 245; *Schuh Ltd v Assessor for Glasgow* 2014 SLT 184; *Tesco Stores Ltd v Fife Council Assessor* 2016 SLT 1260, [2017] RA 83).

Since the subjects had been valued on the basis of estimated average annual output, that took account of the fact that output might be higher in some years and lower in others. If exhaustion was treated as being a material change there was a risk that some of a mine’s output would be left out of account in arriving at net annual value. In a case which predated the material change of circumstances provisions, *Anstruther’s Trustees v Assessor for Lanarkshire* 1927 SC 435 (“*Anstruther’s Trs*”), the fact that there was no output from a mine for several months during the general strike had not led to a reduction in the annual value of the mine. In an even earlier case, *Hurll v Assessor for Glasgow* 1917 SC 494 (“*Hurll*”), the court had reduced a value by almost half because a blaes heap was exhausted before the middle of the valuation year; but that case should be treated with great caution. The lease had terminated six weeks after the exhaustion of the blaes. Lord Johnston’s dissent was more persuasive than the opinions of the majority.

Submissions for the Respondent

[16] Counsel for the respondent submitted that the committee had been correct to hold that there had been a material change of circumstances affecting value on 21 April 2015. The exhaustion of coal reserves, with the resultant drastic reduction in both output and royalties thereafter, was a very clear material change of circumstances. Of course, some commercial activity had continued, but it had been on a much reduced scale for the purposes of processing and disposing of a small residual stockpile of coal. The vastly reduced yield from the site had not been just a fluctuation in output. It was not merely part of the ebb and flow of a dynamic industry. A better analogy was perhaps the permanent extinction of a grouse population on an estate (a possible example of a material change suggested by Lord Gill in *Scammell*, at page 4). Here there had been a fundamental change which had caused the reduction in output - the exhaustion of reserves (cf *Armour on Valuation for Rating* (5th ed), para 20-33). There had been no such change in the appeals considered in *Cloybank*. In each of those appeals there had been a mere change in output which by itself was not a material change. The cases prior to the introduction of the material change of circumstances provisions were of limited assistance. However, *Hurll* was a case where the exhaustion of reserves during the year of assessment was an important matter which the court determined had a significant effect on the annual value. By contrast, in *Anstruther's Trs* the cessation of output was merely temporary. There was no question of the subjects having been undervalued here. On the contrary, they had been valued on the basis of an estimated average annual output which considerably exceeded actual output.

Decision and Reasons

[17] A mine is a wasting asset. The removal of minerals changes the lands and heritages.

However, it is well established that the incremental reduction of mineral reserves while normal output continues is a corollary of the subjects being exploited as a mine: it is not a material change of circumstances affecting value (cf *Cloybank*, per Lord Sorn at pp595-596, Lord Guest at p598).

[18] It is also settled that ordinarily a variation in the output of a mine will not constitute a material change of circumstances affecting value within the meaning of section 3(4). Such variations will usually fall to be treated as being the sort of temporary fluctuations which are part and parcel of mining (*Cloybank*). The same approach generally applies to other subjects which are valued by reference to output (*Scammell*). Likewise, with retail subjects, changes which are a consequence of the ordinary ebb and flow of the market between revaluations, as opposed to extraordinary or exceptional factors, are not material changes of circumstances affecting value (*Assessor for Glasgow v Schuh Ltd; Schuh Ltd v Assessor for Glasgow; Tesco Stores Ltd v Fife Council Assessor*). However, where it can be shown that a drop in output is not temporary, and that it is attributable to extraordinary or exceptional factors, such as a fundamental change in the subjects, the position is likely to be different.

[19] The *Cloybank* case involved consideration of the provisions of the Valuation and Rating (Scotland) Act 1956 ("the 1956 Act") relating to material change of circumstances. However, since the definition of material change of circumstances in section 9(7) of the 1956 Act was substantially the same as the current definition in section 37(1) of the 1975 Act (apart from amendments effected by section 20 of the Rating and Valuation Amendment (Scotland) Act 1984 ("the 1984 Act")), *Cloybank* continues to provide guidance. Initially, section 37(1) repeated the definition which had appeared in section 9(7) of the 1956 Act. The 1984 Act removed a number of qualifications to the definition, including the qualification that a material change of circumstances did not include a change in the rent of the lands and

heritages or of any other lands and heritages. In *Cloybank* Lord Sorn noted (p596) that that qualification precluded the court from considering whether a change in the amount of royalties constituted a material change of circumstances. There is now no such qualification.

[20] Each of the judges in *Cloybank* emphasised that a *mere* variation in output, unconnected to any other significant factor, was not a material change of circumstances.

Lord Patrick observed (at p594):

“ ... in cases where annual value is determined by the annual production from the subjects, such as valuations of subjects on the revenue principle and valuations of minerals, a mere rise or fall in that production is not a material change of circumstances within the meaning of the statute.”

Lord Sorn opined (at p595):

“The question for us then, is whether a change in output, taken by itself, is a material change of circumstances affecting the value of the subjects within the meaning of the Act ...”

He continued (at p596):

“In all the cases before us the situation is the same. Apart from variation in output, nothing has changed since the subjects were valued in 1956. Apart from that variation, it is not suggested that anything else has taken place in relation to the subjects which could be described as a change of circumstances affecting their value. In that situation I am not prepared to hold that a mere change in output unconnected with any other change which might be put forward as a change of circumstances, itself constitutes a change of circumstances within the meaning of the Act. It may be a ‘happening’ which, owing to the method of valuation employed, affects value but the Act does not say that there has to be revision on every occasion when value is affected, and, in making revision dependent on a change of circumstances in relation to the subjects, it seems to me that more was envisaged than a mere variation in the commercial productivity of the subjects.”

Similarly, Lord Guest noted (at p599):

“In my view, despite the wide terms of section 9(7), a material change of circumstances does not cover a variation in the amount of royalties accruing from the quarry whether actual or assumed. Different considerations might apply if this variation was coupled with some other material change of circumstances which could competently be brought within the terms of section 9(7). But a mere variation by itself does not, in my opinion, amount to a material change of circumstances within the meaning of section 9(7) ...”

[21] Both *Anstruther's Trs* and *Hurll* pre-date the first statutory provisions relating to material change of circumstances. Neither case has any direct bearing upon the issue in the present case. In *Anstruther's Trs* the inability of a mine to operate for a number of months during the valuation year was treated as a temporary circumstance which did not reduce the annual value of the subjects. In *Hurll*, on the other hand, the court held that the exhaustion of a mine less than halfway through the valuation year was a factor which should result in reduced annual value for that year. Lord Johnston dissented, but, for my part, I do not find his reasoning persuasive. Part of the justification for his dissent involved positing (p506) a mine which was not in fact exhausted when a lease terminated during the valuation year. That was very different from the facts in *Hurll* (or the facts in the present case). It is worthy of note that *Hurll* was cited, without any hint of disapproval, by each of the judges in *Cloybank* (see in particular, Lord Patrick at p592).

[22] In my opinion the change which occurred on 21 April 2015 was not the beginning of a fluctuation in output. It was not a mere temporary cessation of extraction (cf *Anstruther's Trs*). It was not an ebb in output which would, or could, be followed by increased output. The change was much more fundamental. Lands and heritages which had formerly had mineral strata which could be exploited were transformed into subjects which had no such strata. The facts are at least as exemplary of a fundamental change as the examples posited by Lord Gill in *Scammell* (at p4). The site continued to be used for a period while coal already extracted was processed and sold, but coal despatched from the site, and the royalties paid to the landlord, were greatly diminished by comparison with the period before 21 April 2015. The royalty element of the valuation had been calculated using an estimated annual output of 150,000 tonnes. That equates to 12,500 tonnes per month. The

average actual output between 1 April 2013 and 21 April 2015 was in fact just over 10,000 tonnes per month. The average actual output (of stockpiled coal despatched from the site) during the period between 21 April 2015 and 29 February 2016 was about 1,300 tonnes per month - just over 10 per cent of the estimated output and about 13 per cent of the pre-21 April 2015 actual output.

[23] I am not persuaded that the committee erred in law. On the facts they were entitled to hold that a material change of circumstances affecting value occurred on 21 April 2015. I go further. In my opinion, they were correct to find that such a material change had taken place. The complete exhaustion of extractable coal reserves was the cause of the loss of output from the subjects, and of the consequential drop in royalties. The primary existing use of the subjects had been as a mine, with ancillary uses for stockpiling and processing the extracted coal. The exhaustion of coal reserves was an extraordinary and fundamental change. The primary, and most valuable, aspect of the existing use of the subjects ceased. The ancillary uses continued for a period, but the value of the subjects when used only in those ways was much less than their previous value. In my view that is indisputable. The rateable value of £49,000 agreed in paragraph 7 of the Statement of Agreed Facts reflects that.

[24] Finally, I am wholly unconvinced by the suggestion that the upshot of the committee's decision is that the subjects may have been undervalued. Total actual output while the mine was operated was 261,057.62 tonnes, whereas the effect of the committee's decision being upheld is that the subjects have been valued as if the total output had been 309,475 tonnes (*viz* on the basis of average annual output of 150,000 per annum for the 2 years 10 months between 1 April 2013 and 29 February 2016).

Disposal

[25] I propose to your Lordships that the appeal is refused. The consequence is that the assessor should give effect to the committee's decision. The entry in the roll for the period 21 April 2015 until 29 February 2016 should be altered by reducing the net annual value from £336,000 to £62,000 and by reducing the rateable value from £186,000 to £49,000.