OUTER HOUSE, COURT OF SESSION

[2025] CSOH 75

P894/24

OPINION OF LORD LAKE

in Petition of

HEPTAGON PORTFOLIO ARBROATH LIMITED

Petitioner

for

Judicial Review of a decision dated 4 July 2024 to treat the petitioner as liable to pay non-domestic rates in respect of Units 03-05, 06, 07B, 09, 10 and 11 Abbeygate Centre, Arbroath

by

ANGUS COUNCIL

Respondent

Petitioner: Thomson KC, Tosh; Addleshaw Goddard LLP
Respondent: Upton; Anderson Strathern LLP

12 August 2025

[1] In Scotland, non-domestic rates are generally paid by the party in occupation of the premises to which they relate. This position can, however, be changed in an attempt to combat avoidance. The measures which regulate such changes are contained in the Non-Domestic Rates (Miscellaneous Anti-Avoidance Measures) (Scotland) Regulations 2023. The respondent, Angus Council, applied these regulations to assess the petitioner as liable for non-domestic rates in respect of properties in Arbroath. The council had previously given notice to the petitioner that it would be treated as liable to pay non-domestic rates.

The petitioner appealed and this was considered at a meeting of the council's Non-Domestic Rates Subcommittee of the Policy and Resources Committee on 20 June 2024. A report by the director of finance and a submission on behalf of the petitioner was available to the committee. At the meeting, it was decided that in terms of the regulations the council required to treat the petitioner as liable to pay non-domestic rates and this was intimated to the petitioner by means of a letter containing reasons dated 4 July 2024. The petitioner challenges the decision.

The legislation

[2] The powers in terms of which the regulations were made are contained in sections 37 to 40 in the Non-Domestic Rates (Scotland) Act 2020, the relevant parts of which are as follows:

> **"37 Anti-avoidance regulations**
>
> (1) The Scottish Ministers may by regulations ('anti-avoidance regulations') make such provision as they consider appropriate with a view to preventing or minimising advantages (see section 38) arising from non-domestic rates avoidance arrangements that are artificial (see sections 39 and 40).
>
> …
>
> **38 Meaning of 'advantage'**
>
> (1) An 'advantage', in relation to non-domestic rates, includes in particular—
> (a) avoidance of a possible assessment,
> (b) remission,
> (c) relief (or increased relief),
> (d) repayment (or increased repayment),
> (e) deferral of a payment or advancement of a repayment.
>
> (2) In determining whether a non-domestic rates avoidance arrangement has resulted in an advantage, regard may be had to the amount of non-domestic rates that would have been payable in the absence of the arrangement.

39 Non-domestic rates avoidance arrangements

(1) An arrangement (or series of arrangements) is a non-domestic rates avoidance arrangement if, having regard to all the circumstances, it would be reasonable to conclude that obtaining an advantage is the main purpose, or one of the main purposes, of the arrangement.

…

40 Meaning of 'artificial'

(1) A non-domestic rates avoidance arrangement is artificial if Condition A or B is met.

…

(3) Condition B is met if the arrangement lacks economic or commercial substance.

(4) Each of the following is an example of something which might indicate that a non-domestic rates avoidance arrangement lacks economic or commercial substance—

(a) the arrangement is carried out in a manner which would not normally be employed in reasonable business conduct,

(b) the legal characterisation of the steps in the arrangement is inconsistent with the legal substance of the arrangements as a whole,

(c) the arrangement includes elements which have the effect of offsetting or cancelling each other,

(d) transactions are circular in nature,

(e) the arrangement results in an advantage that is not reflected in the business risks undertaken.

(5) The examples given in subsection (4) are not exhaustive. …"

[3] The key provision in the regulations that determines when a party other than the occupier is to be treated as liable for non-domestic rates is regulation 4(2). It is in the following terms:

"(2) Subject to regulation 5(3), a local authority must treat the owner of lands and heritages as liable to pay non-domestic rates in respect of them where the local authority is satisfied, in all the circumstances, that the tenancy or other arrangement—

(a) has as its main purpose, or one of its main purposes, the gaining of an advantage within the meaning of section 38 of the 2020 Act, and

(b) is an artificial non-domestic rates avoidance arrangement within the meaning of sections 39 and 40 of the 2020 Act."

On first reading, this is quite straightforward but additional conditions and the definitions in the Act make it more complicated. In terms of regulation 4(4), the condition in paragraph (b) above may only be satisfied where the tenancy or other arrangement was entered into after 1 April 2023 and at least one of a number of specified circumstances applies. The one that is relevant for present purposes is as follows:

> "(a) the tenancy or other arrangement on the basis of which the lands and heritages are occupied is considered not to be on a commercial basis"

Regulation 4(6) then stipulates that for the tenancy or arrangement to be considered not to be on a commercial basis at least one of a number of specified circumstances must apply. The one that applies in the present circumstances is in sub paragraph (d):

> "(d) the rent charged for the lands and heritages is significantly below the level of rent which could reasonably have been obtained for the lands and heritages on the open market at the time the tenancy or other arrangement presented into"

[4] Combining the various requirements within paragraph 4(2) and the definitions in the Act which apply in the present circumstances means that the requirements that must be met for a local authority to be bound to assess a party other than the occupier as being liable to pay the rates are as follows:

There must be an arrangement:

(a) which has avoidance of a possible assessment as its main purpose, or one of its main purposes,

(b) (i) which lacks economic or commercial substance in that it has been carried out in a manner which would not normally be employed in reasonable business conduct, (ii) in respect of which it would be reasonable to conclude that avoidance of a possible assessment is its main purpose or one of its main purposes, and (iii) is not on a commercial basis in that the rent charged for the

> lands and heritage is significantly below the level of rent which could reasonably have been obtained for the lands and heritages on the open market at the time the tenancy or other arrangement was entered into.

The degree of repetition and overlap in the scheme that the respondent must apply is obvious.

Submissions for the petitioner

[5] The petitioner challenges the decision on each of paragraphs (a) and (b) in regulation 4(2). In relation to paragraph 4(2)(a), it was said that the respondent had failed to address the correct question in that they had not considered the subjective intention of each of the directors of the petitioner, its tenant and the sub tenant which is what was required by the wording of the regulation (*Inland Revenue Commissioners* v *Brebner* [1967] 2 AC 18, 27D and 30B and *JTI Acquisition Company (2011) Limited* v *HMRC* [2024] EWCA Civ 652, paragraphs 26 to 29). It was not permissible merely to consider the effect of a transaction or the motives for entering into it. It was also contended that the reasons given for the decision were inadequate in that they merely recited the statutory test and failed to identify any facts which supported that conclusion or to explain why it had been reached.

[6] In relation to paragraph 4(2)(b) and the requirement concerning the level of rent, it was contended that the respondent considered only whether a higher rent could have been achieved instead of the question posed in the regulations which was whether the rent was significantly below the level of rent which could reasonably have been obtained in the open market. In relation to this issue it was also argued that the decision was irrational in that the council had relied on rental figures which were not true comparators, had failed to take into account the criticisms that were made of the comparators and had failed to take into account

evidence from the petitioner that they had sought to let the property for a period of 2 years but had been unable to find a tenant. It was also said that the reasons given for this element of the decision were inadequate, that there had been no finding in fact as to the level of rent that could reasonably have been obtained and the decision did not indicate why the council has rejected the evidence for the petitioner that they had been unable to obtain a higher level of rent. Finally in relation to this matter, the petitioner argued that there had been unfairness in the way the decision was taken in that the evidence of the rental values was only disclosed to them 4 working days before the hearing despite the fact it must have been in the possession of the council for some time. It was claimed that, as a result of this, they had been unable to produce further evidence as to the level of rent which could reasonably have been obtained.

[7] In relation to the reasons for this part of the decision, the same argument was made as had been advanced in relation to sub paragraph (a): that the respondent had merely recited the statutorily prescribed conclusion and had not explained how it came to reach it. It had not explained the basis on which it concluded that obtaining an advantage was the main purpose or one of the main purposes of the arrangement. Finally, it was said the respondent had been wrong to conclude that the arrangement was artificial within the meaning of the Act. The reasons were inadequate in this regard as they, once again, merely recited the statutorily prescribed conclusion and did not indicate how it was reached or identify any facts which supported the finding.

Submissions for the respondent

[8] In relation to the test in regulation 4(2)(a), the respondent contended that the reasons are adequate but that, even if they were not, the decision should not be reduced unless the

court concludes that more detailed reasoning would have led to a different conclusion (*De Smith's Judicial Review* (9th ed, 2023), paragraph 9-154). The reasons stated informed the petitioner in broad terms as to why it had been unsuccessful and did not leave any genuine doubt about what had been decided. Also, if the reasons were inadequate, the correct remedy would be to order better reasons to be provided rather than reduction (*De Smith*, paragraph 9-151).

[9] In relation to the issue of how intention was to be judged, the council contended that it was not necessary to establish subjective intention (*Tchenguiz* v *Director of the Serious Fraud Office* [2013] EWHC 2297, paragraphs 48-49). To require that would be unworkable and the purpose of an arrangement was to be judged objectively by reference to the nature and context of what had been done. In relation to the petitioner's arguments of irrationality, it was argued that the conclusions reached by the committee were reasonable inferences from the facts that the committee found established. In particular, the fact that the rents passing were £1 per annum and that retail units nearby could get rents far in excess of that provided a basis for the conclusion as to the inadequacy of rents.

[10] In relation to the test in paragraph 4(2)(b), the respondent contended that the conclusion by the committee that the petitioner could charge a rent higher than £1 per annum was a finding of fact which was reasonable and which could not competently be reviewed. It was made on the basis of findings of fact which were for the respondent to make and which it would be incompetent to review on their merits. The committee had accepted the figures put forward in a table presented to the committee meeting as comparators and were entitled to do so. In relation to the question of whether the committee had directed themselves to the correct issue, it was accepted that the issue was whether the rent passing was significantly below the level of rent that could reasonably have

been obtained. It was submitted that it could be inferred that the committee had concluded that this test was met from the finding that the subjects could command higher rents and that there was a "gulf" between the rents passing and the ones that could be obtained in nearby premises that was "significant". The finding in fact that higher commercial rents were available was sufficient and it was not necessary for the council to make an express determination of what rent could be achieved as they need only be satisfied that such rent was greater than the one which had been achieved.

[11] In relation to irrationality, it was submitted that in view of the actual rents and the rents for comparable properties, it could not be said that the decision was one that met the very high test for an irrationality challenge. Reference was made to *Council of Civil Service Unions* v *Minister for the Civil Service* ([1985] AC 374). As to whether or not the other properties of which details were provided to the committee meeting were true comparators, that was an issue of fact which was for the respondent to determine and was not a matter on which the decision could or should be made by the court. The decision said that the committee had considered the petitioner's written and oral submissions and there was therefore no foundation for the claim that the petitioner's criticisms of the council's evidence had not been taken into account in the exercise of considering this issue.

[12] In relation to reasons, it was contended that an informed reader would not be left in any real or substantial doubt as to why the subcommittee had found the test was met. It was not necessary that reasons be provided in relation to every adminicle of evidence. Neither was the respondent obliged to state the sum that could have been obtained as rent for each of the premises. Finally, in relation to procedural unfairness, there was no procedural irregularity as the council had intimated their evidence timeously but, even if there had been, the right to object to it had been waived by the petitioner. Reference was made to

Clancy v *Caird* (2000 SC 441). The petitioner had not objected to the council's evidence at the hearing but had said they wished to submit additional documents. They had been able to do so.

Analysis and conclusion

[13] I shall approach the matter in the same way as the parties and consider each of the two requirements in paragraph 4(2) in turn. In relation to sub paragraph (a), the principal difference between the parties concerns whether, in determining intention, it is necessary to look at subjective intention or whether objective intention will suffice. In terms of the Court of Appeal decision in *JTI* and the decisions referred to in it, it is the subjective intention that ultimately matters. Although in *Tchenguiz*, Eder J had regard to objective intention, that was in the context of determining whether legal professional privilege attached to a communication. In doing so, he relied on Thanki, *The Law of Privilege* where, in turn, reliance is placed on the Court of Appeal decision in *Three Rivers District Council and Others* v *The Governor and Company of the Bank of England (No. 5)* [2003] QB 1556. That decision, however, says only that the issue of "dominant purpose of a communication is one that the court will decide having considered the relevant evidence (paragraph 35). This was in the context of a submission that the court was bound to accept the word of an employee of one of the parties as to whether the dominant purpose was obtaining legal advice. It is not surprising that the court rejected that submission and said that it was an issue for the court to decide on the basis of the evidence. That does not exclude, however, the task of the court being to decide on the basis of that evidence what the *subjective* intention had truly been. Intention is a state of mind and unless the court is to proceed only on the basis of the say-so of the relevant party, it will always be necessary to infer what their state of mind truly was

by reference to objective evidence. It follows from this that the petitioner is correct to say that it was subjective purpose that the committee were bound to consider and that it would not suffice to consider merely the effect of the arrangements but also that the committee would have to consider objective evidence in reaching their conclusion.

[14] The committee noted that, but for the tenancies, the petitioner would be liable for non-domestic rates. They also reached conclusions that the arrangements were not carried out in a manner which would normally be employed as reasonable business conduct and that the result is to confer an advantage that is not reflected in the business risks. These are sufficient bases on which to draw an inference as to the purpose or main purpose of the arrangements. This is not affected by the fact that the conclusions reached may relate to other parts of the statutory test. A finding may be relevant to more than one inference or lead to more than one conclusion and, as noted above, the statutory test has various overlapping requirements. This means that it cannot be said that the committee have directed themselves to the wrong test or have made a decision not supported by evidence. When the conclusion and the basis for it by means of inference are understood, it is apparent also that the reasons stated in the letter meet the test identified in *Wordie Property Co Ltd* v *Secretary of State* 1984 SLT 345. While the decision does recite the statutory test, it goes on to identify the factual conclusions noted above that were sufficient to lead to the inference that the test had been met.

[15] Turning to paragraph 4(2)(b) and the issue of the test to which the committee had directed themselves, although the letter refers to the rents of the properties not being "the best commercial rent available", as the respondent submitted, reading the letter as a whole, it describes the difference between the passing rent of £1 per annum and the comparators put forward by the council as a "gulf" that was "significant". I consider that the petitioner

seeks to subject the contents of the letter to unduly exacting scrutiny. The letter should be seen in its context. It is sent to parties who are presumed to know the background circumstances, it must be read in a straightforward manner, and the reasons it contains can be briefly stated (*South Buckinghamshire District Council* v *Porter* [2004] 1 WLR 1953). Taking that approach, it is reasonable to conclude on the basis of the decision letter that the committee had in mind the test set out in regulation 4(6)(d) that the rents were significantly below the rents that could have been obtained.

[16] As to the irrationality of the conclusion in respect of paragraph 4(2)(b), challenge of the decision on the basis of the quality of the comparators is not possible in a judicial review. It is for the council to reach a view on potential rents and in doing so they may have regard to any relevant evidence. While a party may consider that another property is not a good comparator for a number of reasons, the decision as to whether to rely on a comparator is for the council. The petitioner is, in effect, arguing that the council were "wrong" to rely on these particular comparators. For the court to substitute its own view as to the value of these comparators and the weight to be placed upon them would be reviewing the decision on its merits and that is not lawful. In making its decision, the council must take into account all relevant circumstances. The rents passing in respect of other properties are clearly matters capable of being a relevant consideration. The only basis on which this could become objectionable, was if it were said to be irrational to take into account a particular consideration. That has not been argued before me and I do not consider that it could be. The position is not changed by posing the challenge as being to the weight accorded to particular considerations. The decision remains for the council to make. It is not appropriate for this court to decide whether certain factors should be accorded more or less weight in reaching a decision.

[17] The contention that the council did not take into account the petitioner's criticism of the comparators is, in reality, another challenge to the reasons. It is said that because there is no specific mention of the challenge to the comparators and no explanation as to why the petitioner's criticisms were rejected, there must have been a failure to take them into account. That approach is inconsistent with the approach in the *South Buckinghamshire* case. A decision need not refer to every material consideration. It is enough that it refers to the conclusions reached in relation to the most important issues. That has been done here by the council and, as the decision states that higher rents could have been obtained, it is clear that they had regard to the evidence that was submitted by the council. It is also clear from the letter that they have considered some reasons why those properties may not be considered to be exact analogues of the petitioner's properties. In view of all this, it is not possible to proceed on the basis that this has been left out of account.

[18] The petitioner is correct to say that the council did not state the rent that could have been obtained but it was not incumbent upon them to do so. What they were required to do was to consider whether the rent passing was significantly below that which might be obtained, and that is what they have done.

[19] The way in which the hearing was conducted, and in particular the provision of evidence, was not such as to give rise to any unfairness. The petitioner was clearly aware that information had been provided by the council. They had an opportunity to respond and did in fact respond. They were aware prior to the hearing that the issue of what rents might be obtained in respect of the properties was one that arose. They would therefore be able in the lead up to the hearing to gather and prepare evidence to focus on that if they chose. The mere fact that the council had information relevant to this from an earlier point does not create an unfairness. I consider that the observations of Lord Sutherland in

Clancy v *Caird* at paragraph 14 are in point. Where a party has proceeded with a hearing in the awareness of some factor which they might have relied on to raise an objection, they should be taken to have passed from their right to object. If this were not the position, it would be possible for the party to conduct the hearing on the merits of their position and then, if the decision did not go in their favour, to get a second bite of the cherry by taking the objection at that stage. That is inconsistent with notions both of fairness and good administration.

[20] Finally, the same points as I have made above apply to the issue of whether or not the reasons given in the decision are adequate. The letter must be read as a whole in its proper context. The letter did not merely recite the statutorily prescribed conclusion. It referred to that as the appropriate test but then went on to make findings regarding a number of factual matters which were sufficient to give rise to the inference that the test in question was met.

Decision

[21] In view of the above, I sustain the third, fourth, fifth and sixth pleas-in-law for the respondent, repel the pleas-in-law for the petitioner and refuse the petition.