LANDS VALUATION APPEAL COURT

[2019] CSIH 25
XA88/18

Lord Justice Clerk
Lord Malcolm
Lord Doherty

OPINION OF LADY DORRIAN, the LORD JUSTICE CLERK

in the Appeal

by

THE ASSESSOR FOR TAYSIDE VALUATION JOINT BOARD

Appellant

against

OLD FASKALLY FARMING CO LTD and OTHERS

Respondent

Appellant: Stuart QC; Clyde & Co (Scotland) LLP
Respondent: Clarke QC; Davidson Chalmers LLP

24 April 2019

[1] I have seen the opinion prepared by Lord Doherty, and I am in complete agreement with it. In an earlier appeal the committee had determined that the fact that certain plant and machinery was deemed non rateable under Class 1 meant that they did not require to consider that plant in relation to any other class. The court held that this was wrong and that a sequential approach was required. Plant might be non-rateable under Class 1 but yet be rateable under some other category. Specifically, for the purposes of the current appeal, items may be non-rateable under Class 1 but nevertheless be rateable under Class 4.

[2] The items which may be included in Class 4 are set out in tables 3 and 4. They include dams; fixed cranes and gantries; conduits and ducts; foundations; supports; turbines and generators; chambers and vessels; pits, beds and bays; and filters and separators. In each case the items are excepted if they are neither a building or structure nor in the nature of a building or structure. Accordingly, an item may be non-rateable in Class 1 but rateable in Class 4 on the basis that it is, or is in the nature of, a building or a structure.

[3] On their reconsideration of the case, the committee recognised that a sequential approach was required. They stated that they required to address whether individual components of the penstock, non-rateable under Class 1, might nevertheless be rateable under Class 4 as being, or being in the nature of, a building or structure. On that basis, they considered that the dams and intake chambers were rateable. This approach should have been followed through by examining the individual components of the pipeline, including the associated thrustblocks, reinforced floors, foundations and so on. However, the committee did not do that. Rather they considered the matter of rateability of these items to be determined solely by their assessment of what constituted a "pipeline". They considered that if they concluded that the "pipeline" included the associated civil engineering works, and the like, that was determinative of non-rateability, since parties were agreed that the "pipeline" was non-rateable. Such an approach failed to recognise the limit of the concession made by the assessor. The concession was only that the pipe itself was non-rateable; there remained a dispute as to all other components, which required that the committee examine these individually. The reasoning of the committee seems to have been (i) the parties agree that the "pipeline" is exempt; therefore (ii) if the committee consider that the "pipeline" is as defined by the ratepayers, it is exempt, and no examination of individual

components need be carried out. That this was their approach is clear from para 15 of their amended decision and reasons:

> "15. The Committee considers that the definition of a pipeline is crucial to its findings since both parties are agreed that pipelines are exempt from rating."

Accordingly, they considered the "pipeline" only as a single entity and did not consider whether any of the component parts were of a nature such as would fall within Class 4. For the reasons given in more detail by Lord Doherty I am of the view that this was an error in law. I have now had the opportunity to read the opinion of Lord Malcolm. I regret that I cannot agree with the interpretation of the committee's reasoning which is set out in paragraph 10 of that opinion. I therefore have the misfortune to disagree with your Lordship as to disposal of this appeal.

[4] As to the rateable split, I also agree with Lord Doherty. Given that the ratepayers argument that a rateable/non-rateable asset split of 25/75 per cent was appropriate reflected their position that the only rateable items were the land, wayleaves, water rights and the shell of the turbine house, I cannot understand how the same split can be justified when the committee considered that the rateable items extended further, and included the dams and intake chambers.

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OPINION OF LORD MALCOLM

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[5] The assessor's grounds of appeal contend that the committee's decision regarding the thrustblocks, civils, and tailraces is challengeable because (a) it did not follow the sequential approach to the regulations, and (b) in any event the decision was perverse. Whether an item of plant and machinery is a building, a structure, or in the nature of a building or a structure, are "substantially matters of fact" with which the court will be "extremely slow to interfere". An appeal can proceed on the basis that the decision is founded upon an error of law, but failing that, "if the conclusions were reasonably possible

conclusions on the facts and evidence" the court will accept them as final. "In large measure the questions involved are questions of degree; and, as such, essentially matters for the final determination of the fact-finding tribunals." The quotations are from the judgment of Lord Evershed MR in *BP Refinery (Kent) Limited* v *Walker* [1957] 2 QB 305, and are wholly consistent with the approach of the court north of the border to decisions of specialist tribunals.

> "… judges … ought not to assume the functions which by statute are conferred upon the assessor, and upon the local Court of review." (Lord Lee, *McJannet* v *Assessor for Stirling* (1882) 10 R 32 at page 33)

[6] As to the allegation of perversity, if otherwise correct in law, the committee was entitled to reach the decision that the thrustblocks, civils, etc were not in the nature of structures. The assessor did not treat the pipeline, as he defined it, as a structure or in the nature of a structure within the meaning of class 4, so it is understandable that the committee came to the same view in respect of its accessory parts. It is equally understandable that a separate and different view was taken as to the dams and intake chambers. Paragraph 13 of the assessor's note of argument states that thrustblocks, civils, etc are "eminently capable" of being rateable in terms of class 4. Such a proposition is not capable of supporting an allegation of perversity.

[7] More can be said for the contention that the committee failed to follow the required sequential approach to the regulations, not least since it has found favour with your Ladyship and your Lordship. It does involve the committee having failed to learn the lesson handed down in the court's first decision, something which I find difficult to countenance, particularly since it is apparent from the second stated case that the committee asked itself the correct questions. It addressed classes 2 and 3 - the challenges thereanent were not pressed at the appeal hearing. As to class 4, reference can be made to findings 17-20 at

page 11 of the second stated case. The powerhouses were rateable because they are buildings. The committee then asked itself – which component parts of the penstock (pipeline) are rateable under class 4 as being in the nature of buildings or structures? The only items in this category were at the head of the schemes, primarily the dams and intake chambers.

[8] Finding 22 has contributed to the uncertainty.

> "The committee also considered that the definition of a pipeline was crucial to its findings since both parties agreed that the pipeline is exempt from rating."

The background is that the assessor presented a receipts and expenditure scheme of valuation based on a rateable/non-rateable split analysis as to the costs incurred – see the assessor's production 11. It was explained that the pipelines, narrowly defined as the high specification pipes themselves, divorced from everything else which supported their operation, for example, the thrustblocks and civils, were treated as non-rateable; while the thrustblocks, etc fell on the other side of the line. No clear reason was given for singling out the pipes themselves in this way, nor for why the assessor's case was put forward on the basis that the pipelines, as so defined, were non-rateable in terms of the regulations. It followed that a pipeline seen as a whole, namely including the pipe itself and its associated elements, such as the thrustblocks, could not be treated as rateable as being in the nature of a structure, and no argument to that effect was presented. In *BP Refinery* Lord Denning observed (pages 329/330) that pipelines, including buried pipelines, were, or could be, in the nature of structures. However, given the assessor's somewhat convoluted approach to this aspect of the case, this issue did not arise for consideration. For myself, I can understand the importance given by the committee to the issue of the proper definition of the pipeline, or penstock as it was sometimes designed.

[9] The committee rejected the contention that the pipelines should be defined so narrowly.

> "The committee is persuaded by the view expressed by the expert witnesses and accepts the appellants' definition of a pipeline." (paragraph 18, page 17 of the second stated case)

The committee asked itself whether the thrustblocks (which include those under the floors of the powerhouses), civils and tailraces are part of the pipelines, answering in the affirmative. As to the thrustblocks, they are "an integral part of the pipeline which would otherwise not be able to perform its function …". (paragraph 17, page 17)

[10] The majority view of the court is that the committee's reasoning stopped there – the committee failing to address whether, nonetheless, these items were in the nature of structures in terms of class 4 of the regulations. It is also suggested that if the committee did address this issue, it nonetheless erred in that it proceeded on the basis that an integral part of a pipeline could never be rateable under class 4. However, in the overall context of the committee's explanation of what it was doing, I understand it to be saying that, unlike the dams and intake chambers, the thrustblocks, civils, etc were neither individually nor collectively in the nature of structures, but were accessory parts of the pipelines. Their integration into the pipelines, which the assessor was treating as non-rateable, was regarded as important in the committee's classification of the disputed items. This is supported by what is said at paragraphs 14 and 15 on page 17 of the second stated case.

> "14. The committee then considered what component parts of the penstock fall to be rateable under class 4 as being in the nature of buildings or structures and in particular what constitutes a pipeline.
>
> 15. The committee considers that the definition of a pipeline is crucial to its findings since both parties are agreed that pipelines are exempt from rating".

The implication may be that if the thrustblocks stood alone they might be treated differently. However, to my mind, it is reading too much into the decision and the reasoning to assume that the committee shut its mind to the possibility that something which is physically and functionally integrated with a pipeline could never be in the nature of a building or a structure. I can understand that some may disagree with the committee's views, as plainly the assessor does, but, if they amount to an error, it is an error of the kind local valuation committees are entitled to make (in the sense that it is not open to legal challenge), otherwise this court will see many more appeals against their decisions.

[11] Putting the matter in another way, the committee did follow the sequential approach to the classes in the regulations. It applied its mind to the question of the rateability under class 4 of the component parts of the schemes, including the thrustblocks, civils, etc. It identified only the powerhouses and the specified items at the head of the schemes as rateable plant and machinery in terms of class 4. These were reasonably possible conclusions on the facts and evidence. The disagreement is with the answer to the question, not the process; the answer being that the thrustblocks, etc are not rateable under class 4. If the committee erred, it is on a matter of fact, or perhaps of fact and degree, but not law. The result is that I would reject both grounds of appeal mentioned earlier.

[12] There remains the issue of the 25/75% split. The majority view is that, even if the committee acted properly in respect of its decision on the thrustblocks, etc, given its decision that the dams and intake chambers were rateable, 25% rateability must be too low.

[13] The parties were in dispute on (a) the proper approach to valuation (comparative versus receipts and expenditure), and (b) if receipts and expenditure was accepted, how much of the plant and machinery was rateable in terms of the regulations. The assessor proposed a "pragmatic" 50/50 split. The ratepayers argued that more or less all the plant

and machinery was non-rateable, but observed that if 25% of the plant and machinery was to be treated as rateable and this was applied to the assessor's valuation calculation (his production 11), the ultimate outcome would be similar to that based on their rental comparisons.

[14] In its first decision the committee adopted the comparative approach. However, it indicated that it was not attracted to the ratepayer's evidence on a 25/75% split given that there was no breakdown as to which items of plant and machinery were and were not rateable. The absence of such was unsurprising. The ratepayers did not purport to provide such a breakdown, nor assert that on a receipts and expenditure approach 25% rateability was the correct split. The point was presented simply in the context of it producing a result similar to the ratepayers' preferred approach. The ratepayers insisted that virtually none of the plant and machinery was rateable.

[15] Given the more recent rejection of the comparative approach, any relevance of the similarity between the evidence on comparisons and a 25/75% split falls away. Once the committee adopted the receipts and expenditure approach, the question of the proper split was no longer academic and a decision required to be made. Neither side led further evidence. The committee concluded that various items at the head of the schemes, principally the dams and intake chambers, were rateable. It rejected the assessor's evidence that other items should be treated as rateable. It is suggested that this means that necessarily the rateability element must be higher than 25%, and this because the ratepayer's evidence was the only evidence before the committee as to a 25/75% split, and must have proceeded on the basis that the dams and intake chambers were not rateable.

[16] In my respectful opinion this analysis is flawed. It assumes that the ratepayers' evidence as to a split was based on a reasoned breakdown of rateable and non-rateable plant

and machinery. It assumes that the committee has accepted evidence that, absent the dams and intake chambers, a rateability split of 25/75% is appropriate. To my mind, both assumptions are unfounded. The committee has now adopted a 25/75% split, but, so far as I can identify, there is no sound basis for the view that this involved, or should involve, adding the only rateable items of the schemes identified by the committee to the 25% rateability figure mentioned on behalf of the ratepayers.

[17] On the contrary, in the light of its second decision, I understand the committee to have carried out its own valuation exercise based upon its view as to an appropriate split taking into account its decision as to which items of plant and machinery are rateable and which are non-rateable. Reference can be made to finding 27 on page 12 and paragraphs 25/26 on page 18. This is a purely valuation decision which is within its jurisdiction, and with which the court cannot, or at any rate should not, interfere. It is true that the split is the same as that which the ratepayers' witness noted replicated the outcome of their comparisons based valuation, and this may explain why some of the language used by the committee has been interpreted in the manner proposed by your Lordship; but I remain of the view that it does not follow that the committee has failed to take into account that the dams and intake chambers are rateable.

[18] For these reasons I would refuse the appeal.

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Introduction

[19] The subjects of these appeals are six "run of the river" hydro-electric schemes. Five of the appeals (Old Faskally (Kinnaird Burn), Acharn, Tombuie, Camserney, and Monzie) are against the 2010 revaluation entries. The sixth (Keltneyburn) relates to a new entry made after the 2010 revaluation during the currency of that valuation roll. Before the valuation appeal committee ("the committee") the dispute between the parties in each case concerned

the extent to which plant and machinery was rateable and should be reflected in the valuation of the subjects.

The relevant statutory provisions

[20] Section 42 of the Lands Valuation (Scotland) Act 1854 (as amended) provides:

> **"42. Interpretation clause**
>
> .... the expression 'lands and heritages' shall extend to and include all lands, houses, shootings, and deer forests, fishings, woods, copse, and underwood from which revenue is actually derived, ferries, piers, harbours, quays, wharfs, docks, canals, railways, mines, minerals, quarries, coalworks, waterworks, limeworks, brickworks, ironworks, gasworks, factories, and all buildings and pertinents thereof, and such class or classes of plant or machinery in or on any lands and heritages as may be prescribed by the Secretary of State by regulations ..."

Reg 2 of, and the Schedule to, the Valuation for Rating (Plant and Machinery)(Scotland) Regulations 2000 (SSI 2000/58)(as amended) ("the 2000 Regulations") provide:

> "**2. Prescribed classes of plant and machinery**
>
> The classes of plant and machinery set out in the Schedule to these Regulations are hereby prescribed for the purposes of the definition of "lands and heritages" in section 42 of the Lands Valuation (Scotland) Act 1854.
>
> ...
>
> **SCHEDULE**
>
> **PRESCRIBED CLASSES OF PLANT AND MACHINERY**
>
> **CLASS 1**
>
> Plant and machinery (... excluding excepted plant and machinery) specified in Table 1 below (together with any of the appliances and structures accessory to such plant or machinery and specified in the List of Accessories set out below which is used or intended to be used mainly or exclusively in connection with the generation, storage, primary transformation of power or main transmission of power in or on the lands and heritages.
>
> In this Class–

(a) 'excepted plant and machinery' means plant and machinery on the lands and heritages used or intended to be used for generation, storage, transformation or transmission of power where either–

(i) the power is mainly or exclusively for distribution for sale to consumers; ...

...

TABLE 1

...

(g) Water wheels; water turbines; rams; governor engines; penstocks; spillways; surge tanks; conduits; flumes; sluice gates.

...

LIST OF ACCESSORIES

...

2. Any of the following plant and machinery which is used or intended to be used mainly or exclusively as part of or in connection with or as an accessory to any of the plant and machinery falling within Class 1 or 2:-

(a) foundations, settings, gantries, supports, platforms and stagings for plant and machinery;

...

(e) pipes, ducts, valves, traps, separators, filters, coolers, screens, purifying and other treatment apparatus, evaporators, tanks, exhaust boxes and silencers, washers, scrubbers, condensers, air heaters and air saturators;

...

CLASS 3

…

Except to the extent that they have microgeneration capacity, the following items:–

...

(g) a pipe-line, that is to say, a pipe or system of pipes for the conveyance of any thing, not being–

(i) a drain or sewer; or

(ii) a pipe-line which forms part of the equipment of, and is wholly situated within, relevant premises, together with any relevant equipment occupied with the pipe-line;...

...

'relevant equipment' means–

(i) foundations, supports, settings, chambers, manholes, pipe gantries, pipe bridges, conduits, pits and ducts;

...

CLASS 4

The items specified in Tables 3 and 4 below, except–

(a) any such item which is not, and is not in the nature of, a building or structure;

...

TABLE 3

...

Dams.

...

Flumes, conduits and ducts.

Foundations, settings, fixed gantries, supports, walkways, stairways, handrails, catwalks, stages, staithes and platforms.

...
Pits, beds and bays.

...

Turbines and generators.

...

TABLE 4

...

Chambers and vessels.

...

Filters and separators.

..."

The hearing

[21] At the hearing before the committee the ratepayers maintained that all of the plant and machinery at the subjects was non-rateable. Their position was that in each case the only lands and heritages were the site of the scheme, wayleaves (where they existed), water extraction rights, and the shell of the turbine house. Everything else, including the penstock, turbines, foundations (including the foundations of the turbine house), and civil engineering works, were non-rateable. While in their view Class 1, taken with the accessories listed in the Table of Accessories, was wide enough to include all of those items in some circumstances, in the case of each of the appeal subjects all of the relevant plant and machinery was excepted in terms of paragraph (a)(i). Since they were excepted from Class 1, it followed (the argument ran) that they could not be rateable by virtue of Classes 2, 3 or 4. As all that required to be valued was the site, water rights, any wayleaves, and the shell of the turbine house, it was not necessary to value the subjects on the revenue principle. There was rental evidence of lets of sites and water extraction rights, and the shells of the turbine houses could be valued by adding 10% to those rental values. The comparative principle could and should be used. On the other hand, if the subjects ought to be valued on the revenue principle approximately the same results as the ratepayers' comparative principle valuations could be obtained by treating 75% of the assets as non-rateable assets provided by the hypothetical tenant and 25% as rateable assets provided by the hypothetical landlord.

[22] The Assessor maintained that the subjects ought to be valued on the revenue principle, and that all similar subjects in Scotland had been valued on that basis. Such limited rental evidence as there was related only to site rents, or rents for water extraction,

or wayleaves, and did not reflect rateable plant and machinery. Moreover, in several cases the rents were between connected parties. At the time the entries were made in the roll the Assessor did not carry out a survey of each subject in order to determine the plant and machinery which was rateable. He proceeded on the basis that a reasonable approach would be to treat 50% of the assets of each scheme as being rateable and 50% of the assets as being non-rateable. That apportionment had been recommended by the Lanarkshire Assessor and it had been based on an analysis of development costs relating to two subjects, Twin Lochs and Glen Kinglas. The Lanarkshire Assessor had responsibility for entering electricity generation subjects in the valuation roll for South Lanarkshire in terms of articles 2 and 3 of the Non-Domestic Rating (Valuation of Utilities) (Scotland) Order 2005 where they would otherwise have been treated as justifying separate entries in two or more valuation rolls; and in practice he also took a lead role in providing guidance to Assessors on the valuation of other electricity generation subjects, and in the preparation of the SAA Public Utilities Committee Practice Note 3 on Valuation of Conventional Hydro-Electricity Generators (23 June 2011)). In the Twin Lochs and Glen Kinglas costs analysis turbines, generators and pipelines had been treated as non-rateable. Weirs and dams, thrust blocks, civil engineering works, turbine houses (including their foundations and chambers under them), and tail races had been treated as rateable. Both witnesses who gave evidence for the Assessor were of the view that treating 50% of the assets of a scheme as non-rateable was generous to the ratepayers, and that it could have been argued that a significantly higher proportion of the assets were rateable. The Assessor's position was that even if, contrary to his view, plant and machinery was not rateable under Class 1, much of it was rateable under the other classes, in particular under Class 4.

The committee's first decision

[23] The committee accepted the ratepayers' comparative principle valuations. In its view only the sites, wayleaves, water rights and the shells of the turbine houses were rateable. Everything else fell within the paragraph (a)(i) exception to Class 1. Since those assets were excepted from Class 1, that was determinative of their non-rateability. It was not necessary or appropriate to go on to consider whether any of them were rateable in terms of Classes 2, 3 or 4.

The first appeal

[24] In *Assessor for Tayside Valuation Joint Board* v *Old Faskally Farming Co Ltd* 2016 SC 447, 2016 SLT 333, [2016] RA 273, this court held that the committee erred in its interpretation of the 2000 Regulations. On a proper construction of the Regulations a sequential approach to Classes 1 to 4 was required. If plant and machinery was not lands and heritages under a particular class it was still necessary to consider whether it qualified as lands and heritages by virtue of any of the remaining classes. The court allowed the Assessor's appeals and remitted the cases to the committee to enable it to reconsider them using the correct approach.

[25] At paragraphs 3 and 4 of her opinion Lady Dorrian explained, under reference to the stated case, how the committee had approached matters:

> "[3] The committee's interpretation of the 2000 Regulations meant that, in general, the plant and machinery was not rateable. In reaching that conclusion the committee rejected the assessor's argument that all civil engineering works, including dams, intake chambers, supports, thrust blocks, ducts or chambers under a turbine and the like should all be treated as rateable for the purpose of the Regulations. In consequence the committee clearly considered that it was not necessary for them to examine in detail the extent to which the appeal subjects might differ from each other or from the comparator rental subjects. The committee summarised its approach as follows (para 52):

> 'If the plant and machinery is excluded from rating, all that remains to be valued is the rent for the land and the water extraction rights and the shell structure of the turbine building.'

The committee determined that the turbine building required to be assessed as a 'shell' for this purpose (para 63):

> 'The turbine building is a shell for rating purposes. Most of the plant and equipment and their accessories within the turbine building are non-rateable.'

Since it concluded that the turbine building was merely a shell, the committee accepted that its rateability should be assessed by applying a small uplift to the rental value of the subjects based on turnover. As to the remaining issue of the valuation of the right to extract water and the use of the land, the committee noted that these matters were included in the comparison evidence (para 51):

> 'In the rental comparisons provided by the respondents, all plant and machinery is excluded from value in fixing rents. The rent is for the right to extract water and for the use of the land.'

The committee considered that the comparison evidence showed a consistent average level of nine per cent of turnover for the value of the land and the water extraction rights. In each case they applied an upward adjustment of ten per cent of the rental figure to reflect the value of the turbine building.

[4] From this it will be seen that the proper approach to be taken to plant and machinery was central to the committee's whole approach, and in particular to the questions: (a) whether the assessor's approach should be rejected; (b) whether the comparison evidence was sufficient; and (c) whether the turbine station was effectively a shell..."

The committee's second decision

[26] As a result of the remit the committee reconvened. It reconsidered the evidence which it had heard, but it did not ask the parties to provide any further submissions. It adhered to its previous view that all of the plant and machinery fell within the description of "penstock" in Class 1, but that it was "excepted plant and machinery" in terms of paragraph (a)(i) and therefore was excluded from Class 1. It decided (i) that dams and intake chambers at each of the subjects were rateable in terms of Class 4; (ii) that, in light of the fact that some plant and machinery was rateable, valuation should be on the receipts and expenditure

(revenue) basis rather than the comparative basis; (iii) that the split between rateable and non-rateable assets should be 25%/75% rather than 50%/50%.

[27] The committee made *inter alia* the following findings in fact:

> "17. ... The Committee also accepted the evidence from the [ratepayers] that Classes 2 and 3 did not apply but, having re-examined Class 4, the Committee concluded that certain elements, whilst exempt from Class 1, required to be re-introduced under Class 4.
>
> ...
>
> 19. The Committee also accepted ... that any parts of the penstock which are deemed to be a building or structure or in the nature of a building or structure may fall to be rateable under Class 4. The [Assessor] and the [Ratepayers] agreed that the only building within the subjects, namely the turbine house, was rateable.
>
> 20. The Committee then considered what component parts of the penstock fall to be rateable under Class 4 as being in the nature of buildings and structures. The Committee considered that these items were at the head of the structure, located between the running water at the start of the pipeline, primarily dams and intake chambers.
>
> ...
>
> 22. The Committee also considered that the definition of a pipeline was crucial to its findings since both parties agreed that the pipeline is exempt from rating."

[28] In its amended decision and reasons the committee stated:

> "14. The Committee ... considered what component parts of the penstock fall to be rateable under Class 4 as being in the nature of buildings or structures and what in particular constitutes a pipeline.
>
> 15. The Committee considers that the definition of a pipeline is crucial to its findings since both parties are agreed that pipelines are exempt from rating.
>
> 16. The Assessors' evidence is that the pipeline is only the pipe itself and not the thrustblocks which support the pipe, or the tailrace, which is part of the pipe, or the civil engineering works carried out to produce the completed pipeline.
>
> 17. The Appellants' argument, as put forward by the expert witnesses, is that the pipeline includes the thrustblocks, civils and tailrace. The thrustblocks are considered an integral part of the pipeline which would otherwise not be able to perform its function as a pipeline for the purpose of carrying the water from start to finish.

> 18. The Committee is persuaded by the views expressed by the expert witnesses and accepts the Appellants' definition of a pipeline."

After noting the parties' different approaches to the appropriate split between rateable and non-rateable assets it continued:

> "25. The Committee has looked again at both approaches, and having accepted the Appellants' definition of a pipeline as being non rateable, the Committee concludes that a 25/75 rateable/non-rateable apportionment is a more reliable and appropriate split to use in the otherwise agreed scheme of valuation."

The second appeal

[29] The Assessor appealed against the committee's second decision on several grounds. Some of those grounds fell away during the course of the hearing before us, and in my view it is unnecessary to say much about them. The argument that the committee erred in law in concluding that the penstock started at the water intake and finished where the water returned to the river was one such ground. It had no practical significance, as Mr Stuart made clear that he was not maintaining that any plant and machinery was rateable by reason of Class 1. Similarly, the argument that the committee erred in concluding that there was no plant and machinery which fell within Classes 2 or 3 did not take Mr Stuart anywhere. While he indicated that there are small quantities of Class 2 service equipment in the turbine houses, he did not maintain that that would make any material difference to the valuations. Moreover, while before the committee the Assessor had suggested that the pipelines themselves might arguably be rateable under Class 3(g), the Twin Lochs/Glen Kinglas costs analysis upon which he founded treated pipelines as being non-rateable and that had been the basis of the rateable/non-rateable asset split adopted in the valuations. In those circumstances whether the pipeline itself and any associated "relevant equipment"

were lands and heritages in terms of class 3(g) was not a live issue before the committee, and it is not a live issue before us.

[30] The 2000 Regulations prescribe four classes of plant and machinery as lands and heritages. If an item of plant and machinery satisfies the requirements of one or other of the prescribed classes, it is lands and heritages. The approach is sequential and inclusive. An item which is not prescribed as lands and heritages by Class 1 may nonetheless be prescribed as lands and heritages by Class 2, or Class 3, or Class 4. Non-inclusion under one class does not stamp an item as non-rateable - it merely means that it is not prescribed as lands and heritages under that class.

[31] The central issue here is whether, and if so to what extent, the committee considered if items of plant and machinery were lands and heritages by virtue of Class 4.

[32] In my view it is clear that the committee considered whether the dams and intake chambers at the subjects fell within that class, and that it concluded that they did. However, in my opinion the committee did not go on to consider whether any of the other parts of the plant and machinery were rateable in terms of Class 4. It simply treated everything else (including thrustblocks, civils, foundations, most of the reinforced floor of the turbine houses, the chambers under that floor, and the tail races) as being part of the pipeline. It reasoned that none of it was lands and heritages because the parties were agreed that the pipeline was not rateable. In my view that was not a true reflection of the Assessor's position.

[33] It was, of course, fair to say that the Assessor's approach treated the pipeline itself as being non-rateable; but it was wrong to say that he accepted that the thrustblocks, civils, foundations, reinforced floors, chambers and tailraces were part of the pipeline and were non-rateable. On the contrary, his clear position was that all of those items were rateable.

Whether or not it was correct to characterise the pipeline in the broad way in which the committee did, it still required to consider whether any of the parts which the Assessor maintained were rateable were indeed lands and heritages by virtue of Class 4. The committee ought to have considered whether the disputed items fell within any of the relevant Class 4 descriptions (Flumes, conduits and ducts; or Foundations, settings, fixed gantries, supports, walkways, stairways, handrails, catwalks, stages, staithes and platforms; or Chambers and vessels; or Filters and separators); and, if so, whether the item was a building or structure or in the nature of a building or structure. Guidance on the latter question is provided in *Cardiff Rating Authority and Cardiff Assessment Committee* v *Guest Keen Baldwin's Iron and Steel Company Limited* [1949] 1 KB 385 ("*Cardiff Rating*") and *BP Refinery (Kent) Ltd* v *Walker (Valuation Officer)* [1957] 2 QB 305 ("*BP Refinery (Kent) Ltd").*

[34] In *Cardiff Rating* it was common ground that tilting furnaces on rollers came within the description "furnaces" in Class 4 (of the Schedule to Plant and Machinery (Valuation for Rating) Order 1927), and that overhead gas mains (which rested on, but were not attached to, steel vertical supports) came within "flues" and "flumes and conduits". The Court of Appeal held that the judge at first instance had misdirected himself in holding that they were not structures or in the nature of structures because they could be moved. It concluded that the tilting ovens and the overhead gas mains were both in the nature of structures. A structure and something in the nature of a structure were generally likely to be of substantial size and to have some degree of permanence in relation to the hereditament. In *BP Refinery (Kent) Ltd* a topping unit and a large and elaborate boiler at an oil refinery were not rateable as single entities under Classes 1 to 4, but component parts of each of them were held to be rateable under Class 4. In relation to the relevant components of the boiler Lord Evershed MR observed (at p. 326):

> "The items are, severally, parts of a plant which fall within the descriptions in class 4 and are structures or in the nature of structures. They are, therefore, individually rateable, although the plant as a single unit is not."

[35] In my opinion the committee failed to consider whether any of the component parts of what it held to be the pipeline were lands and heritages prescribed by Class 4.

[36] Even if, contrary to my view, the committee did consider whether those component parts were rateable in terms of Class 4, I would still be of the view that it misdirected itself. Its findings and its reasoning strongly suggest that it proceeded on the basis that the component parts could not be rateable under Class 4 if they were integrated with the pipeline (which it treated as being non-rateable). Rather than approach matters in the way which it did, the committee required to consider whether any of the component parts (i) fell within one or other of the relevant Class 4 categories; and (ii) were a building or structure or in the nature of a building or structure. Those requirements could be satisfied even if the committee took the view that the component parts were physically and functionally integrated with the pipeline. Satisfaction of the Class 4 requirements, and being physically and functionally integrated with the pipeline, are not mutually inconsistent states of affairs.

[37] In *BP Refinery (Kent) Ltd* Denning LJ noted that the boiler could not be rated as such, but he remarked (at p. 330):

> "But I see no reason why the several parts of a process boiler should not be rated under class 4. They are all structures or in the nature of structures, *and are not less so because they are attached to other structures which are not rateable*."

The words in italics represent my emphasis. A similar point was made by Jenkins J in *Cardiff Rating* (at p. 404) when he noted that foundations etc. in the Class 4 entry "include the foundations of non-rateable things". These observations recognise that something may be a structure or in the nature of a structure in its own right even though it may also be an integral component part of a larger item (which item may itself also be a structure or in the

nature of a structure). That is so even though the larger item may not be rateable as such. Foundations, for example, may be a component part of, or functionally integrated with, a non-rateable item, but they may still fall within the relevant Class 4 category and may still be a structure or in the nature of a structure.

[38] In my opinion the committee did not examine whether component parts of the pipeline were rateable by reason of Class 4. That was an error of law. If, contrary to my opinion, it did, I think it erred in law by proceeding on the basis that anything which was an integral part of the pipeline could not be rateable by virtue of Class 4.

[39] I turn then to consider the split which the committee arrived at. Of course, if when it comes to re-examine rateability of the component parts of the pipeline the committee finds that one (or more) of them is (are) rateable, that is likely to affect the rateable/non-rateable asset split. However, even if after that re-examination the committee were to conclude that none of the relevant items are rateable, in my view its 25%/75% split cannot stand. The basis upon which that split was put forward by the ratepayers' witnesses was that what was rateable was the land, wayleaves, water rights, and the shell of the turbine house, and that all other assets were non-rateable. The 25%/75% split was not a fall-back position involving acceptance that some items of plant and machinery which the Assessor maintained were rateable were indeed rateable. It was simply an alternative way of arriving at the same answer as the ratepayers' comparative principle valuations, but using the receipts and expenditure method. That was the only evidence before the committee which supported the 25%/75% split. However, the committee did not accept the premise upon which the ratepayers' evidence was based (i.e. that all of the plant and machinery other than the shell of the turbine house was non-rateable). It found that the dams and intake chambers were rateable. Accordingly, even if, contrary to my view, the committee properly considered

whether the relevant component parts were rateable, the rateable assets ought to be higher than 25% because that percentage reflects only the land, wayleaves, water rights, and the shell of the turbine house.

[40] The upshot is that a remit is necessary so that the committee can address correctly, with the benefit of the court's guidance, (i) the Class 4 rateability of each of the relevant component parts; and (ii) the appropriate rateable/non-rateable asset split.

[41] I am conscious that a very considerable period has elapsed since evidence was led before the committee. Finality is an important consideration. However, I also think it is important that these appeals are resolved correctly, and in my opinion a second remit to the committee is necessary in order to achieve that. The outcome of the appeals is likely to have a bearing not only on these subjects, but also on other cases where appeals have been lodged on the basis of a material change of circumstances (with the committees' decision here being founded on as a relevant decision (Local Government (Scotland) Act 1975, s. 3(4) and s. 37(1)). These cases may also be relied upon as a precedent in future appeals.

[42] Since preparing this opinion in draft I have had the advantage of reading your Lordship's opinion. I have the misfortune to find myself in respectful disagreement with it. I do not disagree with anything in paragraph [5]. Nor do I disagree with the proposition that the court should not interfere with a decision of a committee if it has not erred in law and if its decision is capable of being supported on the evidence. Where I part company is that in my opinion it is clear from the stated case that the committee has erred in law, for the reasons set out above. In particular, I am satisfied that the committee did not consider whether the component parts which it associated with the pipeline qualified as lands and heritages by virtue of Class 4.

Disposal

[43] I move the court to allow the Assessor's appeals to the extent described in this opinion; to remit the cases to the committee for it to reconsider the evidence in light of the court's decision, and to determine in each case (i) which, if any, parts of the plant and machinery from the end of the intake chamber to the end of the tailrace are rateable in terms of Class 4; (ii) the appropriate rateable/non-rateable asset split for each of the appeal subjects having regard to the rateability of dams, intake chambers, turbine houses and any other plant and machinery which it finds to be rateable in terms of Class 4.