LANDS VALUATION APPEAL COURT, COURT OF SESSION

[2014] CSIH 40
XA126/13

Lord President
Lady Dorrian
Lord Malcolm

OPINION OF THE LORD PRESIDENT

in the Appeal

by

(1) THE ASSESSOR FOR TAYSIDE VALUATION JOINT BOARD
and
(2) THE ASSESSOR FOR GLASGOW CITY COUNCIL
Appellants;

against

(1) HUTCHISON 3G (UK) LIMITED; (2) ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED; (3) T-MOBILE (UK) LIMITED and (4) VODAFONE LIMITED
Respondents:

against

A decision of the Lands Tribunal for Scotland dated 18 April 2013

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For the assessors: R Smith QC, Dunlop; Simpson & Marwick
For the respondents: Haddow QC; Shepherd & Wedderburn

2 May 2014

Introduction

[1] This is an appeal by two of the assessors against an order of the Lands Tribunal. It arises from the contractual arrangements between the various parties

involved in the transmission system for mobile telephony. The appeal relates to the entries made in the respective valuation rolls at the 2005 Revaluation. In all of these entries the lands and heritages are described as "Telecommunications network." The central issue in these appeals relates to the cables, antennae and other pieces of equipment that are affixed by mobile phone networks to transmission masts that are not their own. At the 2005 Revaluation the assessors took a uniform approach on this question. In making the relevant entries, the assessors consolidated the multiplicity of the relevant sites within their respective valuation areas into a single entry for each network. Four test cases have been taken from each of the two valuation areas. The following is a typical entry taken from the 2005 Roll for Tayside:

Telecommunications network within Perth and Kinross District	T-Mobile (UK) Ltd	£424,000 NAV	£424,000 RV	Effective date 1/4/05

[2] The respondents appealed against all of these entries to the Lands Tribunal. By order dated 18 April 2013 the Tribunal upheld the appeals; but substituted different values from those for which the respondents contended. That is the order appealed against.

The contractual and onsite arrangements

[3] The respondents are all of the mobile phone networks that operate in these valuation areas. There is a great diversity of mast types and of ownership of the sites; but in general it can be said that in the typical case there are three parties with an interest in the mast, namely the site owner, the host and the sharer.

The site owner

[4] The party who owns the mast and/or the land on which it is erected is referred to as the site owner.

The host

[5] The mast is generally occupied and controlled by one of the networks. The party that occupies the mast and controls the operation of it is known as the host. The host is usually the tenant of the site owner. The host may be either one of the networks or an independent service provider. There is no dispute that the mast and the surrounding ground that is occupied by the host is a separate rateable subject.

The sharer

[6] It is normal practice for the host to allow a number of networks to use the mast by fixing their equipment to it. A network that uses the host's mast is referred to as the sharer. It is standard practice for the host to pass on to the site owner part of the payment that it receives from the sharer. This payment is known as a payaway. In the typical case the sharer erects a cabin or a small cabinet close to the mast and runs a cable from it to the mast. The cable is then attached to the mast and is connected to the sharer's aerial and other equipment.

[7] There is no dispute that the cabin or the cabinet is heritable and is a separate rateable subject. There is no dispute that the cable when it is attached to the mast and the aerial and other equipment to which it leads are heritable by accession. By reason of the Valuation for Rating (Plant and Machinery) (Scotland) Regulations 2000 (SSI No 56) the aerial is not rateable. What is not agreed is whether the sharer is in

rateable occupation of that part of the mast to which its cable and equipment are attached.

The agreements between host and sharer

[8] The form of the sharer's agreement with the host typically comprises three documents, namely; (1) a master site share agreement, (2) an agreed rate card and (3) a site specific agreement in the form of a site licence.

[9] The master site share agreement specifies and controls the rights of occupation enjoyed by the sharer. It specifies the equipment that the sharer may place on the host mast and sets out the conditions to be observed by the sharer regarding access, maintenance, health and safety and so on.

[10] The rate card outlines the fee paid by the sharer for the placing of equipment on the mast and for the occupation of the site with a cabin or cabinet.

[11] The site specific agreement is a licence setting out the contractual relationship between the host and the sharer on each individual site. The rights granted by it typically allow the sharer access to the mast to "install, inspect, maintain, operate, repair and renew" the agreed equipment on the mast. The site specific agreements in this case provided in various forms of words that there was no relationship of lease between the host and the sharer. The wording of one of the agreements serves as an example. In the Tower Share Agreement between Gridcom (UK) Ltd and Orange Personal Communications Services Ltd, clause 15.1 provides *inter alia*

> "The Operator (*sc* Orange) acknowledges that nothing in this Agreement shall confer on the Operator any right to exclusive occupation or use of or create a tenancy of or otherwise create any right or interest in any part of the Site at which the Equipment is located pursuant to this Agreement and the Operator undertakes and agrees that it will not make any claim in this respect and further acknowledges that the Company (*sc* Gridcom) may permit other

> Operators to share occupation of the Site on such terms as the Company shall in its absolute discretion determine."

Valuation and Rating (Scotland) Act 1956 (the 1956 Act)

Section 6A of the 1956 Act provides *inter alia* as follows:

> "(1) The [Scottish Ministers] may by order provide that, for all purposes of the Valuation Acts –
>
> (a) lands and heritages specified in the order which would apart from the order be treated as justifying separate entries in the valuation roll shall be treated as justifying only one such entry … "

The Non-Domestic Rating (Telecommunications and Canals) (Scotland) Order 1995 (the 1995 Order)

Article 2 of the Order provides *inter alia* as follows:

> "Any lands and heritages in Scotland which would (apart from this Order) be treated as justifying separate entries in the valuation roll shall be treated as justifying only one such entry if they are –
>
> (a) within a single new local government area;
>
> (b) occupied by or, if unoccupied, owned by the same person; and
>
> (c) occupied by posts, wires, fibres, cables, ducts, telephone kiosks, towers, masts, switching equipment, other equipment, or by servitudes or wayleaves (being property used for the monitoring, processing or transmission of communications or other signals for the provision of electronic communications services) … "

According to the Explanatory Notes to the Order -

> " … [article 2] makes provision for the treatment as a single valuation unit for non-domestic rating purposes of certain property in Scotland which would otherwise be treated as several such units. The property involved is certain telecommunications property (art 2) …"

The proceedings before the Lands Tribunal

[12] The Lands Tribunal was presented with six possible interpretations of the facts on various assumptions as to rateability and valuation methodology. The

decision as to the appropriate interpretation turned on the nature of the sharer's interest in the mast.

The nature of the sharer's right

[13] In its consideration of the nature of the sharer's right, the Tribunal was referred to cases relating to transmitters that came before this Court between 1967 and 1977 (*ITA* v *Ass for Lanarkshire* 1968 SC 249; *Ass for Aberdeenshire* v *Pye Telecommunications Ltd* 1973 SC 157; *Scottish Gas* v *Ass for Fife* LVAC 14 April 1977). This was its conclusion:

> "[218] In several of these cases, consideration of the differing methods of valuation - contractor's based on the cost of, in particular, the mast, or comparative, based on 'sharer's payments' – in a sense helps to focus the issue as between corporeal and incorporeal rights. At all events, we think it must be taken from these cases that the sharer's rights, viewed in isolation, do not themselves involve any rateable occupation of the mast. They do not comprise a separate incorporeal right which is itself heritable or rateable. Lord Avonside's minority view in *ITA* that they could amount to a wayleave has not found favour and the balance of authority appears to be against it. The right to share use of the mast appears wider than a right to lead pipes, cables or whatever across the land or subjects of a different character. (See also *Ass for Lothian* v *Lowland Leisure Ltd* 1990 SLT 353, at 357B-C; 358K-L; 359L-360A). We do not consider that the reference to "wayleaves" either in the 1995 Order, or in the course of consideration of the "Code" rights, adds to that argument."

The Tribunal recognised that in all of the cases except *ITA* v *Ass for Lanarkshire* there was no rateable occupation of land and buildings by the sharer. However, the Tribunal also considered that even where the ratepayers were in occupation of land or buildings, the question would remain whether the rights under consideration were really pertinents of the land and buildings (*John Menzies Ltd* v *Glasgow Ass*, 1937 SC 288; *Perth Magistrates* v *Ass for Perth and Kinross* 1937 SC 549).

[14] The Tribunal concluded that the mere fact that the sharer's agreement resulted in there being rateable occupation of land and buildings together with the right to fix equipment to the mast and to share the use of the mast was not necessarily sufficient to establish that the sharer was in rateable occupation of its section of the mast (*Ass for Lothian* v *Lowland Leisure Ltd*, *supra*, at p 358F and p 359D-E). Notwithstanding the sharer's occupation of land and buildings, its right to use the mast fell short of a heritable right and should be seen as a personal right that could not be characterised as a pertinent of the cabin or the cabinet. The Tribunal concluded that in *ITA* v *Ass for Lanarkshire* (*supra*), on which the assessors relied, the nature of the sharer's occupation was to be distinguished from that of the respondents on the facts and by reference to the respective agreements. It concluded that, contrary to the factual position in *ITA* v *Ass for Lanarkshire* (*supra*), the respondents' right to locate aerials on the host mast was the primary right from which the subsidiary right to erect a cabin or cabinet followed (para [232] of the Stated Case). In any event, the Tribunal doubted whether *ITA* v *Ass for Lanarkshire* (*supra*) laid down a general principle in the matter. It quoted with approval Lord Coulsfield's observation in *Ass for Lothian* v *Lowland Leisure Ltd (supra*)

> "… the *ITA* case was in my view exceptional and the facts of the present case are not comparable with those which were held to justify the application of the description 'pertinent' in the *ITA* case" (at p 360K- 361A).

The Tribunal therefore concluded that sharer's rights should be categorised as personal rather than heritable rights.

Valuation methodology

[15] The assessors suggested that even if sharer's rights were deemed not to be heritable, the Tribunal should nonetheless apply the rating hypothesis on the basis of

the sharers' payments since they were a better measure of the rental value of sites with masts. By contrast, the ratepayers preferred a 'hybrid' approach to valuation of their interest using the contractor's principle in respect of the masts, plant and machinery and the comparative principle in respect of the site.

[16] The Tribunal concluded that a valuation based on the sharer's payments ignored the real differences in the nature of the payments and involved speculation, which it could not accept, as to the reason for higher levels of payments. On that view it concluded that there was no part of the value appearing more than once in the roll so as to constitute double counting. However, it concluded that double counting would ensue if the sharers' rights were heritable and were included in the value.

Single entries

[17] The Tribunal considered that the wording in article 2 of the 1995 Order (*supra*) applied to the mast site, being subjects that were "to be treated as justifying only one such entry for each company in each valuation area." It considered that section 6A of the 1956 Act was similarly expressed. The Tribunal was also referred to the Explanatory Note to the Order. It concluded that the wording of article 2 unambiguously referred to the administrative matter of entries rather than the substantive matter of valuation. It provide for one entry relating to several units of valuation, not for one valuation as a *unum quid*.

Conclusions

[18] At various stages of the argument in this appeal the subject that is being valued has been described as the sharer's interest in the mast. In my opinion, that is an inaccuracy of expression. The Valuation Roll sets out the valuations of lands and

heritages (Local Government (Scotland) Act 1975, s 1). Lands and heritages are heritable subjects that are assessed on the basis of the hypothetical rent at which they could be let. In my view, the unit of valuation is not the contractual right of the sharer. It is that part of the mast that the sharer is allowed to occupy and the assemblage of cable and equipment, other than the aerial, that is affixed to the mast.

[19] This case has been prepared with admirable professionalism by the parties' counsel and solicitors. The Tribunal has dealt with the case at length and in detail. The written arguments in this appeal have included an extensive survey of the case law and have been of great value to the court. I intend no disrespect to the parties and their representatives when I say that in my opinion this case falls to be decided on a short and straightforward point, namely whether the respondents are in rateable occupation of the subjects to which I have referred.

[20] In deciding that question, we derive only limited help from the case law of this court relating to transmitters. We have to decide this case on the facts that the Tribunal has found.

[21] The assessors accept that if the sharer is not in rateable occupation of that part of the mast to which its cable and equipment are attached, the appeal must fail. The assessors contend that the sharer's right in the mast is a pertinent of the cabin or the cabinet, or is a wayleave over the mast (*ITA* v *Ass for Lanarkshire* 1968 SC 249); failing which they contend that it is a right of tenancy. On any of these interpretations of the sharer's right, the assessors contend that the sharer is in rateable occupation.

[22] On the essential facts that I have summarised, the central issue for the Tribunal was to define the nature of the sharer's right in relation to the mast. Although counsel for the assessors presented the lease argument as his fall-back

position, I consider that it is the primary question. If the relationship between the host and the sharer were to be that of landlord and tenant, the right *in rem* thereby conferred on the sharer in the relevant part of the mast would almost certainly put the sharer in rateable occupation of it (*Ass for Renfrewshire* v *Old Consort Co Ltd* 1960 SC 226, Lord Guest at p 241). But it is plain, in my opinion, that the agreement does not constitute a lease and is intended not to do so. In some of the present cases the contract expressly excludes that possibility. While that consideration is not decisive, the other terms of the contract clearly confirm it in each case. The host retains power to introduce other sharers to the mast and retains power at any time to compel any individual sharer to reposition its aerial and equipment to any other part of the mast at the host's discretion.

[23] On the facts, therefore, I consider that the only other possible interpretations of the sharer's right that would be favourable to the appellant's position would be that the right was a pertinent or a wayleave. The wayleave argument, in my view, is unsound. It is based on a suggestion of Lord Avonside in *Independent Television Authority* v *Ass for Lanarkshire* (*supra*) with which the other judges disagreed. In *Ass for Aberdeenshire* v *Pye Telecommunications Ltd* (*supra*) decided by the same three judges, Lord Avonside acknowledged that in the *Independent Television Authority* case, the primary and, as he said, "no doubt correct view" was that in that case the right to share the use of the mast was a pertinent of a building and that he alone had advanced as a secondary view that it might be described as wayleave (at p 168). In the *Pye Telecommunications* case this court sustained an appeal against the entries in the roll that described the subjects as "Wayleave Radio Transmitting Aerial and

Cable." It held that all references to a wayleave should be excluded from the roll and that the appropriate description of the subjects was "transmitting aerial and cable."

[24] In similar circumstances in the *Pye Telecommunications* case, this court distinguished the *Independent Television Authority* case on the basis that in the latter the BBC had a lease of land and buildings which were unquestionably heritable and that their right to hang cables from the mast could naturally be regarded as a pertinent of the heritable subjects (Lord Fraser at p 165). Counsel for the assessors argued that on the same reasoning the sharer's right in the mast was a pertinent of the tenancy of the cabin or cabinet. I am not convinced of that view. In my opinion, it puts matters the wrong way round. It is the use of the mast that necessitates the occupation of the cabin. On this point I agree with the conclusion of the Tribunal.

[25] But whether the respondent's right in each of these cases is a pertinential right seems to me to be irrelevant. The real question is whether the nature of the right is such that the respondents are in rateable occupation. The fact that the aerials and cable have become heritable by accession does not mean that the sharer is in rateable occupation of the relevant part of the mast (*Ass for Aberdeenshire* v *Pye Telecommunications Ltd*, *supra*, Lord Thomson at p 171). In the *Pye Telecommunications* case the court's decision on the facts was that the degree of control exercised by Pye, who owned the mast, over the aerials and cables of the individual users that were attached to it did not materially interfere with the individual user's enjoyment of them and therefore that paramount occupation of them lay with the user (Lord Fraser at p 165; Lord Thomson at p 171). That was a decision on the facts of that case.

[26] The question whether the sharer is in rateable occupation turns on the nature and the terms of the sharer's agreement and the *de facto* situation that is established in the evidence (*Magistrates of Perth* v *Ass for Perth* 1937 SC 549, Lord Fleming at p 545). On the facts of these cases, the Tribunal concluded that the sharer was not in rateable occupation. That was pre-eminently a decision for the Tribunal. It is not one with which this court should interfere unless it is contrary to the evidence, or is unsupported by any evidence or is perverse or irrational. It is not suggested that any of these considerations apply. My own view is that the sharer cannot be said to enjoy the exclusivity and paramount control that are essential to rateable occupation; and that the conclusion of the Tribunal on this point is correct. This case was much stronger for the respondents than the *Pye Telecommunications* case. The significant points in my view are that the sharer has no right to occupy any particular part of the mast, but has at most a licence to occupy a part of the mast at the pleasure and at the direction of the host; and that it can be made to reposition its cable and equipment whenever the host should so direct.

[27] The facts of this case indicate that the right of the sharer in respect of the cables and equipment is at best a licence to use such part of the mast as the host may, from time to time and in its uncontrolled discretion, direct. While there is not an exact analogy, I consider that the nature of the sharer's right is akin to that of the advertisers in *United Kingdom Advertising Co* v *Glasgow Bag Wash Laundry* (1926 SC 303), where a similar view was taken. In that case the contract gave the advertiser the use of a number of spaces within post offices to be selected in Glasgow. The advertiser had no exclusive right of possession of any part of any specific post office;

and the position of any advertisement, once displayed, could be changed without notice to the advertiser.

[28] I conclude therefore that while the sharer is in in rateable occupation of the cabin or the cabinet, the host remains in paramount, and therefore rateable, occupation of the mast.

Valuation methodology and double counting

[29] On the view that I have taken on the central question in this appeal, the questions of valuation methodology and possible double counting do not arise.

The entry in the Rolls

[30] The short issue on this topic is whether the consolidation of the entries into one in terms of article 2 of the 1995 Order requires the assessor to value all of the individual lands and heritages occupied by the ratepayer within the valuation area as a single unit of valuation; or should value each individually and enter the aggregate of the values in a single entry.

[31] In my opinion, article 2 does not enjoin the assessor to conduct a single valuation of all of the ratepayer's sites within the valuation area. The obvious and most satisfactory interpretation is that the consolidated entry should give an aggregate of the individual values. The purpose of the Order is not to prescribe a method of valuation. Its purpose is to permit the administratively convenient procedure of having one entry instead of having a multiplicity of single entries with modest valuations scattered throughout the Roll. It makes good practical sense to have a single entry. This is a familiar procedure with subjects such as bus shelters. The fact that the assessor has an existing power to do this does not in my view

necessitate our concluding that the conferment of the express power in the Order implies that, contrary to previous practice, a single value must now be arrived at on a *unum quid* basis. Since I consider that there is no ambiguity in the Order on this point, it is unnecessary for us to seek help from the Explanatory Notes (*Coventry and Solihull Waste Disposal Co Ltd* v *Russell (VO)* ([1999] 1 WLR 2093). The Tribunal was of the view that reference to the Notes in any event pointed to the same result. I agree.

Disposal

[32] On the view that I have reached I propose to your Ladyship and to your Lordship that we should refuse the appeal *simpliciter*. In effect therefore, the values decided upon by the Tribunal will take effect.

LANDS VALUATION APPEAL COURT, COURT OF SESSION

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Lord President
Lady Dorrian
Lord Malcolm

OPINION OF LADY DORRIAN

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(1) THE ASSESSOR FOR TAYSIDE VALUATION JOINT BOARD
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[33] I agree with the reasons given by your Lordship in the chair that the appeal should be refused and have nothing further to add.

LANDS VALUATION APPEAL COURT, COURT OF SESSION

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OPINION OF LORD MALCOLM

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[34] I am in full agreement with the disposal proposed by your Lordship in the chair, and that for the reasons given in your Lordship's opinion. There is nothing I would wish to add.