



DECISION OF

Sheriff Komorowski

**ON THE APPEAL
IN THE CASE OF**

The Assessor for Dunbartonshire and Argyll & Bute Valuation Joint Board

Appellant

- and -

Mrs Rena O'Neill

Respondent

FTS Case Reference: FTS/LTC/CT/23/00284

27 May 2025

The appeal is DISMISSED.

REASONS FOR DECISION

[1] A council taxpayer questioned the valuation of a home she was about to move into. Her proposal for a different valuation was made prematurely, eight days before she became resident there. But the Assessor did not question the validity of the proposal at the time, only raising this over four years later, after the Assessor had disagreed with the proposal and the taxpayer had appealed. The Tribunal took the view, essentially as a matter of equity and pragmatism, that it



would consider the question of value anyway. It answered this question in favour of the Assessor and dismissed the taxpayer's appeal.

[2] Despite this success, the Assessor sought and was granted permission to appeal to the Upper Tribunal to impugn the First-tier Tribunal having entertained the council taxpayer's appeal at all. The Assessor says that the tribunal should not have assessed the question of value but simply rejected the taxpayer's appeal as following from an invalid proposal.

[3] As the Assessor's appeal to the Upper Tribunal is not against a "decision" of the First-tier Tribunal, in the proper sense of it being against a decision of any operative effect on the rights adjudicated upon in these proceedings, I dismiss the Assessor's appeal.

The procedural history before the First-Tier Tribunal hearing

[4] On 18 March 2019, the taxpayer proposed that the valuation of her home be altered. On 20 February 2020, she informed the Assessor she was going to move next door. On 28 February, she moved home. The Assessor characterised the taxpayer's intimation of 20 February 2020 as a second proposal regarding her new home and disagreed with both proposals. Appeals then proceeded to the First-tier Tribunal regarding both old and new homes.

The decision of the First-tier Tribunal

[5] On 2 December 2024, the First-tier Tribunal for Scotland (Local Taxation Chamber) (Ms G King, Mr R Milligan) issued a document entitled:

"Decision ... on an appeal under Regulation 15(4) of the Council Tax Alteration of Lists and Appeals (Scotland) Regulations 1993, in relation to a disagreement as to a proposed alteration of the Council Tax List".



[6] In a section entitled “PRELIMINARY MATTER”, the Tribunal discussed the Assessor’s contention that the appeal for the new home was invalid but “decided ... it would be contrary to the rules of natural justice to strike the appeal out” (para. 13).

[7] In the final section of that document, entitled “TRIBUNAL DECISION”, after finding that both homes were appropriately listed in council tax band G (and not F as proposed by the taxpayer), the tribunal concluded:

“The appeals are therefore dismissed.” (para. 31).

This was a “performative utterance”; it both described the action and performed it (J. Austin, *How to do things with words*, (1962, Oxford University Press), p. 4 *et seq*).

The grant of permission to appeal to the Upper Tribunal

[8] On 6 January 2025, the First-tier Tribunal for Scotland (Local Taxation Chamber) (Ms J Taylor) granted the Assessor permission to appeal against the “Decision dated 2nd December 2024” (para. 5), which it described as being one that “determined that the ... Council Tax Banding Proposal was valid”, noting also that “Even though the Tribunal made this determination they dismissed the Appeal.” (para. 1).

The Assessor’s submissions

[9] Given that the taxpayer’s appeals had been dismissed, I made an order requiring the Assessor to address in written submissions whether the appeal to the Upper Tribunal was incompetent (*Secretary of State for Work and Pensions v. Robertson* [2015] CSIH 82, 2016 SC 725), and



in any event whether it ought to be dismissed as academic (*R v. Secretary of State for the Home Department ex parte Salem* [1999] 1 AC 450).

[10] The Assessor submitted that the appeal by the Assessor to this tribunal was valid because:

- a. Appeals against decisions of the First-tier Tribunal can be on subsidiary or preliminary matters.
- b. In any event, the decision to entertain the appeal was causally linked to the decision to refuse the appeal on its merits; there could not have been a decision on the merits unless the appeal was treated as valid.
- c. The Assessor sought a different disposal; a dismissal of the appeal as invalid was distinct from a dismissal of the appeal based on its lack of substantive merit.

[11] The Assessor further submitted that the appeal was not academic, as the outcome would have an impact not only on this Assessor but on assessors throughout Scotland. The Assessor contended, in any event, that it would be in the public interest to authoritatively decide whether a tribunal has any power to entertain a premature proposal on valuation. An assessor had a particular interest given the implications that the result for or treatment of one tax or ratepayer might have as to the treatment of others (*Assessor for Central Scotland v. British Railways Board* 2018 CSIH 82, 2019 SC 222 at para. 25; *Belhaven Brewery Co. Ltd. v. Assessor for Highland & Western Isles* [2008] CSIH 3, 2008 SC 288, para. 16).

No submissions from the taxpayer; No Upper Tribunal hearing

[12] I did not seek submissions from the taxpayer. The proceedings before the Upper Tribunal are, from her perspective at least, entirely academic.



[13] I have proceeded to a decision without a hearing as I consider that the Assessor has had ample opportunity to address the question I am deciding, by means of written submissions alone.

Interlocutory, &c., decisions might be appealable

[14] I proceed on the hypothesis that the decisions that might be appealed against from the First-tier Tribunal to the Upper Tribunal include preliminary or subsidiary decisions.

[15] The Inner House in *Sheltered Housing Management Ltd. v. Jack* [2008] CSIH 58, 2009 SC 119, para. 27, thought that the term “decision” in the Tribunals and Inquiries Act 1992, section 11, could encompass subsidiary decisions, such as might be appealed against, though the court did not express a concluded view.

Appealable decisions consist of operative acts

[16] However, it is not the nature (preliminary, subsidiary, interlocutory or otherwise) of any decision that puts in doubt the competency of any appeal against it. Rather, it is whether there has been any decision at all.

[17] In *Robertson, supra*, the court stated the following proposition, derived from a similar *dictum* in *Jack, supra*, that:

“the ‘decision’ is the decision of the suit by the tribunal, the operative act which, by exercise of its jurisdiction, it resolves the issues before it.” (para. 44)



The choice to entertain the appeal was not separable from the decision dismissing it

[18] In this case, there was no discrete decision constituting an operative act to entertain the appeal. There was just one operative act, which was to dismiss the appeal. The determination to entertain the appeal was not the subject of a separate decision.

[19] Had the tribunal dealt with the question of validity of the proposal at a separate hearing then its determination might arguably be construed as an interlocutory decision against which there was a right of appeal to the Upper Tribunal. It would then be a decision as to an aspect of the suit (whether there was a valid suit) which the tribunal resolved by an operative act, that is by assigning further procedure rather than bringing the case to an end there and then.

[20] But the question of whether to entertain the appeal was dealt with at the same hearing and reflected in the same deliverance of the tribunal. There was no operative act to entertain the appeal; at the point the determination to entertain the appeal was formally communicated, the appeal was at the same time by the same means dismissed. Accordingly, the Assessor's dissatisfaction is not with the decision, because there was only one decision, which was to dismiss the appeal. The Assessor's dissatisfaction is not with the decision but with the reasons for it.

[21] In the absence of the Assessor submitting that this makes any difference to the rights or duties of the Assessor or the taxpayer in respect of the residence in question, I do not accept that a dismissal due to lack of competent proposal or dismissal due to lack of substantive merit are different outcomes. The valuation list looks just the same after either kind of dismissal. The council tax due is exactly the same.



[22] I note the Inner House in *Robertson, supra*, accepted that there might be “winner’s appeals” (para. 45), though the court did not give examples of what they might be. Perhaps the court had in mind those situations where not all kinds of success are equal in their effects. In ordinary civil court litigation, there is an important distinction between proceedings decided in the defender’s favour by means of decree of dismissal or by decree of absolvitor, the former leaving open the possibility of further proceedings about the same claim whilst the latter absolves the defender from that claim. But it is not said by the Assessor that there is any parallel distinction here. In any event, if there was, dismissal of the appeal on its merits would be the more conclusive and more attractive outcome for the Assessor. Accordingly, there is “not ... anything whatsoever wrong with the decision in the sense of the operative act” (*Robertson*, para. 48).

[23] Similarly, the decision to dismiss is not one that “truly arises from the decision in the sense of there being a sufficient causal connection” (*Robertson*, para. 45). Obviously, the decision to entertain the appeal did not lead to the appeal being dismissed. It led to the merits being evaluated, but that affected the justification (*i.e.* the reasoning) for the decision, it did not affect what the decision was (*viz.* to dismiss the appeal).

[24] In reality, this is rather a lot of words to state what is obvious. The tribunal decided to dismiss the appeal resulting in the valuation list remaining as it was. Given that the Assessor got exactly what was wanted, the Assessor has nothing to appeal against.

[25] The Court of Appeal of England & Wales has taken a different approach in similar circumstances. *Secretary of State for Work & Pensions v. Morina* [2007] EWCA Civ 749, [2007] 1 WLR 3033 concerned a situation directly analogous to the instant appeal. The Secretary of State sought



to appeal against decisions of the Social Security Commissioner who had held that the tribunal had jurisdiction to entertain the appeals but who also determined that both appeals should fail on their substantive merits. The Secretary of State was permitted to impugn the Commissioner's determination that he had jurisdiction, despite having prevailed on the merits. The court held that the Commissioner lacked jurisdiction in both cases. Maurice Kay LJ (Sir Anthony Clark MR and Arden LJ concurring) found "force" in the Secretary of State's argument which he said "involved ingenuity ... in the decision ... being represented as, in reality, two decisions" (para. 10).

[26] If I were to follow the same logic as the Court of Appeal, I would be bound to hold that the Assessor's appeal was competent. However, the Court of Appeal did not approach the matter on the basis that a 'decision' entailed an operative act. I must follow the approach developed by the Inner House rather than that of the appellate court for south of the border. In any event, the Court of Appeal's discussion of this point was brief and conclusory. Lord Carswell in *McE v. Prison Service of Northern Ireland* [2009] UKHL 15, [2009] 1 AC 908 appeared to find the reasoning in *Morina* less than compelling, reserving his opinion on whether it ought to be followed in appeals in criminal matters (para. 77).

In any event, it is not in the public interest for the Upper Tribunal to entertain this appeal

[27] If I had been persuaded that the Assessor, as a matter of form, was appealing against the decision, I would then have to decide whether nonetheless the lack of consequence for the subject matter of these proceedings meant that the appeal to the Upper Tribunal ought not to be entertained. In that event, I would have decided there was no public interest in hearing the appeal.



[28] The Assessor submitted that the appeal is not truly academic as it would affect other cases. But it is in the nature of an academic litigation that it is pursued, not because of any consequence for the subject matter of proceedings, but only because the outcome might affect other cases. The appeal to this tribunal is academic in the sense that what the Upper Tribunal does on this appeal will make no difference whatsoever for this taxpayer or the listing of this residence.

[29] Whilst there are several judicial decisions involving detailed discussion of whether a particular academic case ought to be entertained, there appears to be only limited exposition of a system of principles. I venture to suggest the following comments.

[30] To entertain academic proceedings is an exceptional course given, at least, the following two considerations:

- a. A live practical dispute ensures there is an antagonist with an interest in resisting the argument being put forward. For an academic case, this could be achieved by indemnifying the opponent (*Hutcheson v. Popdog Ltd* [2011] EWCA Civ 1580, [2012] 1 WLR 783), or by appointing an *amicus* (*Robertson, supra*). But any provision for a contradictor, certainly where a public authority seeks to litigate the question, would entail an additional cost to the public by one route or another.
- b. That the point is of general importance is not sufficient justification as, given that importance, one can expect it to arise in other cases where determination of it will have some consequence for the parties to that other case.

[31] Exceptional circumstances justifying hearing an appeal might be where the issue will arise again but not in a manner that likely can be fully determined whilst it remains live (*R (L) v. Devon*

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County Council, [2021] EWCA Civ 358, paras. 38(iii), 51, 56). Such cases might be described as “capable of repetition, yet evading review” (Supreme Court of the United States of America: *Southern Pacific Terminal Co. v. Interstate Commerce Commission* (1911) 219 US 498, p. 515).

[32] Otherwise, this might be appropriate to allow review of a judicial decision where waiting for another occasion to determine the issue at a more senior level will cause difficulties given the likely influence of the decision meantime. The decision might likely be influential by reason of the position in the appellate hierarchy of the deciding court or tribunal, or because the case was intended by the court or tribunal as a vehicle to give guidance (*e.g. BO (Extension of time for appealing) Nigeria* [2006] UKAIT 00035), or had been treated by parties as a test or lead case with corresponding investment of effort and resources.

[33] Valuation for business rates might constitute a special class. An assessor cannot adopt differing methodologies or valuation principles on an *ad hoc* basis, but rather must endeavour to apply a consistent and coherent scheme, which might benefit some ratepayers and disfavour others. As a matter of propriety, the Assessor might regard an unchallenged tribunal decision, albeit at first instance, as a directive as to the appropriate approach in other cases. Given the impact of other determinations, not just from the value arrived at, but on the method used to arrive at a value, it is perhaps not a typical adversarial litigation but rather poses, to some extent, a “polycentric problem”, where each valuation represents a thread in a spider web, so that pulling on one thread alters the web entire (L. Fuller, *The Forms and Limits of Adjudication*, (1978) 92 Harv. L. Rev. 353, pp. 394-395). That, I think, explains the Lands Valuation Appeal Court’s comments as

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to an assessor's interest in questions of value and fairness between ratepayers (*British Railways Board, supra; Belhaven Brewery Co. Ltd., supra*).

[34] None of this applies to the case at hand. The decision was by a first-instance tribunal. The tribunal did not consider it was giving authoritative guidance for other tribunals, nor did either party treat this as a case to test when premature or otherwise defective proposals might nevertheless result in competent appeals. Rather, the tribunal came to a pragmatic view without any citation of authority or principle being made to it, or by it. There is no reason to think other tribunals will consider themselves bound or otherwise constrained by this decision. The question arising is not one of valuation methodology. The question can be more authoritatively determined in the course of another appeal.

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*

Sheriff Komorowski
Member of the Upper Tribunal for Scotland