



2026UT55

Ref: UTS/VR/23/0276

DECISION OF

Lord Young

Craigie Marwick FRICS

ON AN APPLICATION TO APPEAL

IN THE CASE OF

Connell Renewables Ltd,

per Gillespie MacAndrew

Appellant

- and -

Assessor For Highland & Western Isles Valuation Joint Board

Respondent

Land Tribunals Case Reference: LTS/VA/2020/0004

29 June 2026

Introduction

1. This appeal forms a further round of a long running dispute concerning the valuation of “run-of-river” hydro-electric schemes for non-domestic business rates. The appellant is the ratepayer for the Allt Mor Hydro Scheme, Garrogie, Whitebridge, Inverness. The respondent is the Assessor for the Highland & Western Isles Valuation Board. The respondent entered a net annual value of £46,000 on the valuation roll for Allt Mor effective from 1 April 2017. The appellant appealed the respondent’s 2017 re-valuation to the Highland & Western Isles Valuation Committee. The appeal was transferred to the Lands Tribunal for Scotland on 13 November 2019 on a joint application of the parties. The appeal was further transferred to the Upper Tribunal for Scotland under the Upper Tribunal for Scotland (Transfer of Valuation for Rating Appeal Functions of the Lands Tribunal for Scotland) Regulations 2023.
2. The item of plant under consideration is a length of underground pipe which runs from just below the collection chamber to the powerhouse. During the hearing, parties adopted their preferred terminology for this item of plant with the appellant using the term “penstock” and the respondent using the term “pipe-line”. As the terminology is important to the final determination, we will adopt the neutral term “headrace” for this item of plant. We have taken this term from the judgment relating to the much larger Glendoe hydro-scheme under consideration in *HM Revenue & Customs v SSE Generation Limited* 2023 UKSC 17, see paras [6] and the diagram at para [48].
3. The primary issue is whether the headrace and associated civil engineering works are rateable or not. If the headrace is rateable, it is now agreed that the net annual value of the subjects to be entered on the valuation roll is £25,000. If the headrace is

not rateable, the net annual value of the subjects is agreed to be £6,700. The answer to the primary issue depends on the answers to four legal sub-issues. The legal sub-issues are:-

- (i) Is the headrace part of the “lands and heritages” within s.42 of the Lands Valuation (Scotland) Act 1854 (“the 1854 Act”) by virtue of being heritable;
- (ii) Is the headrace, a “penstock” under class 1(g) of the Valuation for Rating (Plant & Machinery) (Scotland) Regulations 2000 (“the 2000 Regulations”);
- (iii) Is the headrace, a “pipe-line” under class 3(g) of the 2000 Regulations; and
- (iv) Is the headrace, a “conduit” under class 4 of the 2000 Regulations and is in the nature of a “structure”.

The Appeal Hearing

- 4. The Tribunal conducted a site visit of the Allt Mor site in advance of the hearing. The Tribunal was able to view the intake at the highest point and the powerhouse at the lowest point of the scheme. The headrace itself is buried underneath the hillside but the approximate route could be traced.
- 5. In advance of the hearing, parties lodged written statements, expert reports and rebuttal statements from their witnesses. Ultimately, the oral evidence led at the hearing was relatively brief and lasted less than one day. The appellant led evidence from (i) Alex Reading, who had been involved in the design, construction and commissioning of Allt Mor; (ii) Hugh Campbell, a chartered civil & structural engineer, (iii) Martin Foster, a director of CRF Hydro Power Limited; (iv) Kenny

Hunter, the principal in Hunter Hydro Services Limited which provides support for hydro-scheme operators; and (v) Calum Innes, a chartered surveyor and valuer. The respondent led evidence from (i) Gavin Oag, a chartered surveyor and Depute Assessor for Grampian Valuation Joint Board, and (ii) Frank Finlayson, a chartered surveyor who is the Assessor for the Highland and Western Isles Valuation Joint Board.

6. At the hearing, the respondent took issue with the evidence of Martin Foster on the basis that he was not an expert witness. Reference was made to Mr Foster's written statement which acknowledged that, as the operator of similar hydro-electric schemes, he had a financial interest in the outcome of the appeal. Senior counsel for the appellant readily acknowledged that Mr Foster was not an expert witness. In light of that concession, along with the fact that Mr Foster had no role in the construction or operation of the Allt Mor scheme, we have excluded Mr Foster's evidence from consideration.
7. The respondent also challenged the evidence of Alex Reading and Kenny Hunter on the basis of their previous involvement with the British Hydropower Association. It was suggested that their evidence was tainted by being lobbyists for that association which had provided financial support for legal challenges on similar issues in the past. For our part, we found their evidence broadly helpful in explaining the operation of this and similar hydro schemes. Their evidence was largely unchallenged on the practical workings of the scheme. We have not disregarded their evidence on the basis of perceived bias. Where their evidence, as with the evidence of others was of limited help, was when it strayed into personal views on the meaning of legislative words. The Tribunal did benefit from evidence on how the headrace is referred to within the hydro sector but beyond that, we did not derive much assistance from the individual opinions of the various witnesses led in this case. The critical issues for determination are questions of law.

8. A joint minute of agreed facts was before the Tribunal. We have reflected the important parts of the joint minute in our findings on the primary facts at paras [32] – [45] below. We have also made several additional findings of primary fact from the evidence led. There seemed to be no significant dispute on the primary facts in this appeal. For that reason, we will not lengthen this decision by attempting to summarise the witness statements and expert reports from the various witnesses.

Relevant Statutory Provisions.

9. Section 42 of the 1854 Act (as amended) contains the following definition of the expression “lands and heritages”,

“The following words and expressions, when used in this Act, shall in the construction thereof be interpreted as follows, except when the nature of the provision or the context of the Act shall exclude or be repugnant to such construction; (that is to say,) the expression “lands and heritages” shall extend to and include all lands, houses,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”
10. Regulation 2 of the 2000 Regulations provides,

“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.”
11. The schedule to the 2000 Regulations contains the following,

“CLASS 1

Plant and machinery (excluding plant and machinery with microgeneration capacity, excepted plant and machinery.....) specified in Table 1 belowwhich 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; or

(ii) (aa) the plant and machinery is that of a combined heat and power station

which is fully exempt or partly exempt within the meaning of paragraph

148(2) or, as the case may be, 148(3) of Schedule 6 to the Finance Act 2000;

(bb) the plant and machinery is within paragraphs (b), (c), (d) or (k) of Table 1 below; and

(cc) the power is at least in part electrical power;

TABLE 1

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

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.....

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;

(b) any part of any such item which does not form an integral part of such item as a building or structure or as being in the nature of a building or structure;

(ba) so much of any item as has microgeneration capacity;

TABLE 3

Flumes, conduits and ducts.

Foundations, settings....”

The Appellant’s submissions

12. The headrace comprises sections of pipe which run from below the collection or stilling chamber and terminate just above the spear valves at the powerhouse. Pipe sections are commonly used in hydro schemes although other options, such as tunnels, are possible. The thrust blocks and connected water stopper are accessories to the equipment. Critically, the evidence established that the headrace was an energy conversion system as opposed to a water delivery system. The headrace is constructed to convert potential energy into kinetic energy. The water is pressurised

due to the drop in height over the length of the headrace. The height differential between the intake and the turbine determines the pressure at which the water emerges at the spear valves.

13. The proper approach to construction of the 1854 Act and 2000 Regulations is to look at the critical words in their context (*R (O) v Secretary of State for the Home Department* [2023] AC 255, per Lord Hodge at para [29]). Subordinate legislation, as with primary legislation, requires a purposive interpretation having regard to both context and the historical background which gave rise to the legislation (*CG Fry & Son Ltd v Secretary of State for Housing, Communities and Local Government* [2025] UKSC 35, per Lord Sales at paras [43]-[49]). External aids may assist that task and, in the present case, advisory committee reports such as the Wood Committee Reports 1 (1993, Cm 2170) and 2 (1999, Cm 4283) can be considered (see *Iceland Foods Ltd v Berry* 2018 UKSC 15 per Lord Carnwath at para [7]; and *Tayside Assessor v Old Faskally Farming (No 1)* 2016 CSIH 8 per Lady Dorrian at para [15]).
14. The respondent's preliminary argument that the 2000 Regulations are not engaged is misconceived. Since 1 April 1995, the rating of plant and machinery depends on whether the particular item is listed in the relevant regulations. This radical change brought about in 1995 is reflected in *Armour on Valuation for Rating* at paras 7-07A and 7-37A. The old cases relating to questions of accession are now irrelevant. There is no basis for the preliminary question as proposed by the respondent. The Land Valuation Appeal Court in the *Old Faskally Farming* cases gave no hint that there was a preliminary question to be determined when sending those cases back for re-consideration. The 1995 and 2000 Regulations, which were based on the recommendations of the Wood Committee (Cmnd 2170) were intended to harmonise the rating of plant and machinery in Scotland with that in England. That aim would be nullified if plant and equipment in Scotland became subject to an additional qualification based on common law principles. The 2000 Regulations alone determined rateability of all plant and equipment "in or on the lands and heritages"

(emphasis added). None of the practice notes issued for valuers and different business sectors described a two-stage analysis for plant and machinery as now suggested by the respondent. Industry practice spoken to by Calum Innes confirms that rating for plant and machinery has been considered only by reference to the regulations.

15. Individual items listed within the 2000 Regulations are often referred to by a term used within a trade or sector for which expert evidence may assist (Ryde on Rating at para [754]). The evidence from witnesses working in the hydro-electric field establishes that penstock is a common term used for the headrace within hydro-electric schemes. Their evidence is supported by documentary references to penstock for the Allt Mor scheme and others. There are also references in legislation and case law which confirm this.
16. Examples of penstock being used to describe a pipe or tunnel which conveys water to the power generating apparatus in a hydro-scheme can be seen going back to, at least, 1922. The Engineers' Yearbook from 1995 identifies a penstock as the plant which conveys water to a powerhouse. Professor Tretton's review of small-scale hydro plant and machinery (2020) stated that "a pressurised pipe or "penstock" conveys the water from the intake chamber to the turbine". The British Hydropower Association's publication "UK Mini-Hydro Development" updated in 2024 refers to "a pressurise pipe or penstock" conveying water to the turbine. The Construction Method Statement for Allt Mor (February 2014) referred to the headrace as a "penstock" as can be seen by references within the statement to "buried penstocks", "penstock trenches" and "testing of penstocks". In a similar vein, a Construction Method Statement for remedial works at Keltneyburn Hydro Scheme in 2017 referred to replacement of a section of penstock by a new penstock. All of these documentary references were consistent with witness evidence that penstock is used in the hydro-power industry to refer to the headrace.

17. This meaning of penstock can also be seen in the *Glyn Rhonwy Pumped Storage Generating Station Order* 2017 (SI 2017 No 330) at schedule 1, part 2, para 5. In *RWE Npower Renewables Ltd v. J N Bentley Ltd* [2014] EWCA Civ 150 at paras [3] & [6], the court adopted the phrase “penstock pipeline” to describe the headrace through which water flowed from the upper reaches of the river to the turbines.
18. There is also a penstock valve within the scheme, but this is distinct from the headrace. Mr Finlayson is wrong to suggest that penstock in class 1(g) refers to a valve. He has formed that view by reference, in part, to the definition of penstock in BS 7775:2005 which is describing a type of valve which controls water flow, but BS7775:2005 is not concerned with hydro-schemes. The inclusion of “sluice gate” in class 1(g), which is a form of control valve, shows that “penstock” in class 1(g) is something other than a control valve.
19. The headrace is a penstock in terms of class 1(g) but it is excepted plant and machinery as it is used for the generation of power for the distribution to consumers.
20. In relation to class 3(g) and class 4, the appellant observed that the assessor in the *Old Faskally Farming* cases had conceded that the headrace was non-rateable. It was submitted that the identification of the headrace as an energy conversion system was critical. The headrace is not akin to a simple pipe-line or conduit which conveys water between two points. The function of the headrace is very different from the function of a pipe or conduit. The function or main use of the disputed item is an important consideration, (*Iceland Foods Ltd v Berry* [2018] UKSC 15 per Lord Carnwath at paras [37]-[38]). If the conveyance of water *per se* had been required, there would be no need to install underground pipes able to withstand high internal pressures. The headrace is specifically designed to ensure that potential energy is converted into kinetic energy.

21. While senior counsel for the appellant did not go so far as to suggest that a piece of plant which fell to be classified under one description in one class could never fall within a different descriptor in another class of the Regulations, he submitted that when looking at the function of the headrace in question it clearly fell to be viewed as a penstock, and not a pipe-line or conduit.
22. It is accepted that the test for assessing whether an item of plant is a structure or in the nature of a structure for class 4 purposes is that set out in *Cardiff Rating Authority and Cardiff Assessment Committee v. Guest Keen Baldwin's Iron and Steel Co Ltd* [1949] 1 KB 385.
23. The trench created for the installation of the headrace does not fall within any class. The temporary excavations were for the installation of a headrace which is not itself rateable for the reasons advanced.

The respondent's submission

24. The respondent submitted that the headrace is part of the heritage within the phrase "lands and heritages" in s.42 of the 1854 Act. There is no need to consider the 2000 Regulations if the item in question is already heritable. The definition of "lands and heritages" is wide, and the enumerated examples set out in section 42 are not conclusive to delimit the definition (Armour on Valuation for Rating at para 6.01). Although section 42 as originally enacted included "and all machinery fixed or attached to any lands or heritages", it remained possible for moveable property to become heritable by accession without reference to whether it was machinery "fixed or attached". In *Independent Television Authority v Assessor for Lanarkshire* 1968 SC 249 at pp258, 260 & 262-263, the court held that cables on a radio mast were heritable by accession to the mast under reference to the test for accession laid down in *Dowall v Miln* (1874) 1 R 1180. The court did not apply the "machinery fixed or attached" test within the 1854 definition.

25. The Wood Committee report (1993) at para 8.10(1) is consistent with this approach. Although the adoption of a prescribed list of plant and machinery was a major innovation in Scots law, there was no change to the fundamental principle that all “lands and heritages” require to be entered on the roll. The first question is whether the item under consideration falls to be viewed as part of the heritable land and, if it is, there is no need to consider the application of the 2000 Regulations.

26. The headrace is heritable *sua natura* or by accession. The headrace was constructed over a period of 6-12 months. It is buried underground over the whole length from the intake to the powerhouse. It is expected that the headrace will remain in the ground throughout the lifetime of the hydro-scheme which will be at least 50 years. The evidence is that the headrace cannot be removed without breaking it down into its component parts and damaging the components. A significant amount of work would be required to remove all or part of the headrace from underground. In particular, diversion of the watercourse would be required, and where the pipe-line passes underneath the public road, closure of the road would be mandated. It is positioned underground to minimise visual impact but also to protect the pipe-line from damage and frost. It has a substantial degree of permanence.

27. Pipes buried into the ground for conveying water or gas are recognised as being “lands and heritages”, (Armour on Valuation of Rating at paras 8-09 to 8-11). Alternatively, the headrace is heritable by accession to the land in accordance with the requirements for accession set out in *Dowall v Miln* (1874) 1 R 1180 per Lord Justice Clerk Moncrieff at p1182. The headrace is attached to the land and to the thrust blocks and powerhouse which are heritable. The headrace cannot be removed without breaking up the component parts, or without excavating the land. The pipe-line is essential to the use being made of this heritable land, namely the generation of electricity.

28. If the headrace falls to be viewed as part of the heritable land, its subsequent exclusion from any class under the 2000 Regulations has no effect. If an item is excluded from a particular class, it only means that the item is not prescribed as lands and heritage under that class. The exclusion from that class has no impact on an item which falls with the definition of “lands and heritages” by virtue of being heritable.
29. Alternatively, the headrace is brought within the “lands and heritages” definition by virtue of being a pipe-line under class 3(g) and/or a conduit under class 4, table 3. In closing submissions, senior counsel for the respondent did not dispute that the headrace could be described as a penstock in terms of class 1(g). But, he argued, that was of little moment since the sequential approach to the 2000 Regulations applied and it was caught by class 3(g) and/or class 4.
30. The oral and documentary evidence demonstrated that the headrace is commonly referred to as a pipe-line or pressurised pipe-line within the hydro power industry. Class 3 of the 2000 Regulations is generic and is not connected to any specific industry. Whether applying a natural meaning or any technical construction commonly used within the hydro-power industry, the headrace is a pipe-line or a system of pipes. The definition in class 3(g) only requires the function of the pipe-line to be “for the conveyance of anything” subject to certain exclusions which are not applicable in this case. The headrace conveys water from the intake chamber to the turbine. That is sufficient for class 3(g) to apply. The appellant’s description of the headrace as being an energy conversion system is extravagant. There are no moving parts to the headrace. Water flows into the top end of the headrace and emerges at the bottom due to gravity. In simple terms, water is conveyed from one place to another. It is the drop in height alone which results in the pressure at the bottom of the headrace.

31. Further, the headrace is a conduit in terms of class 4, and it is part of a structure. In *Lever Brothers Port Sunlight Ltd v Bright* 1962 RVR 70 at p72, the Lands Tribunal held that pipes carrying steam were not “conduits” but stated that the ordinary meaning of that term is for the conveyance of water or other liquids. The Oxford English Dictionary, 2nd edition, defines “conduit” as “an artificial channel or pipe for the conveyance of water or other liquids”. This fits with the other items listed at this part of Table 3. A “flume” is also a natural or artificial channel for the transportation of water or other materials albeit usually open to some extent, and a “duct” is a hollow channel for liquids or gases to pass through. It is also necessary for the headrace to be in the nature of a “structure”. A structure is something of substantial size constructed on land from component parts and intended to have a degree of permanence, (*Cardiff Rating Authority and Cardiff Assessment Committee v Guest Keen Baldwin’s Iron & Steel Co Ltd* (*supra* at pps 396-397 and 402-403). The headrace is a “structure”. It is constructed within the land and is intended to remain *in situ* for the lifetime of the hydro-power scheme. Class 4 also includes “foundations” and “settings”. The trench excavated is rateable. The civil engineering works follow the Tribunal’s decision on the pipe-line for the purposes of the split in the divisible balance (*Cowdenbeath Gas Co v Assessor for Fifeshire* 1924 SC 639 at pp647 and 648).

Decision

(i) Factual Findings

32. The Allt Mor Scheme is a run-of-river hydroelectric plant with a total installed generation capacity of 300kW constructed in 2015. It is typical of many similar schemes which were developed as a consequence of the UK Government’s Feed-in Tariff subsidy programme. The Feed-in Tariff incentivised development of renewable electricity generation from a range of technologies with an installed generation capacity of up to 5 megawatts. The terms “small hydro” or “small hydro schemes” typically relate to such schemes.

33. A run-of-river hydroelectric scheme requires a watercourse with a collection point high above the point of discharge. It also requires to be able to connect to the electricity grid network.
34. The Allt Mor Scheme has an intake within the watercourse high on the hillside. The intake is partially buried in the ground. SEPA direct how much water can be taken into the scheme to ensure that a minimum water flow remains in the watercourse. There is a small weir at the intake and an intake screen. A penstock valve operates between the intake screen and the collection chamber. The penstock valve is not directly above the headrace itself. A concrete collection chamber sits behind the intake. From the collection chamber water is directed into the headrace. The stored water in the collection chamber has potential energy due to gravity.
35. The headrace is a critical part of the scheme. No electricity can be generated if any part of the headrace is removed. The headrace is intended to remain in place for the life of the scheme. The differential in height between the intake and the turbine largely determines the pressure generated at the turbine.
36. The headrace is designed to be full of water at all times. Sensors communicate between the powerhouse and the collection chamber and thereby control the flow of water from the bottom of the headrace into the turbine. This ensures that the headrace remains full of a column of water. For maximum efficiency, air pockets should not enter the headrace.
37. The headrace comprises a series of sections of pipe which are jointed together. The pipes are made of high-performance polyethylene at the higher sections where the internal pressures within the headrace are correspondingly lower. There are three different types of polyethylene pipes used with reducing internal diameters (and increased wall thickness) as the headrace descends in altitude. The polyethylene pipes are fusion bonded. Closer to the powerhouse, the sections of pipe are made of ductile iron and can withstand greater pressure. The ductile iron pipes are joined

using a push on method involving a rubber gasket and a socket. Bolted flanges are used to join the polyethylene section to the ductile iron section.

38. The length of the headrace is 1.88km. The headrace is buried underground within an excavated trench. The Construction Method Statement specified a minimum depth of 0.9 metres. In practice, the headrace is buried at a depth of about 1.0-1.5 metres for its entire length from the intake to the powerhouse. The headrace is laid on “as dug” material which had been processed on site such that finer material is placed around the sections of pipe. The headrace crosses under a minor public road at a point above the powerhouse. The roads authority required to be satisfied as to the construction of the section of headrace underneath the roadway. At this point, the headrace is buried at a slightly greater depth with a layer of aggregate above it to ensure that it will be unaffected by loading from the road. The public road was closed for a few days during the construction period to enable the headrace to be laid.
39. Water stops have been placed at suitable intervals in the trench to protect the headrace from scarifying through the flow of ground water. The water stops comprise sandbags and dry mixed concrete. Thrust blocks constructed of concrete have been placed at points within the excavated trench beside the headrace to ensure its stability. Thrust blocks are required where the headrace changes direction. A thrust block at the powerhouse encloses the headrace entirely.
40. The powerhouse contains a turbine, a generator and necessary controls. As water descends through the headrace, the potential energy is converted into kinetic energy. Water emerges at the bottom of the headrace through spear valves with significant velocity. The pressurised water turns the blades on the turbine creating mechanical energy which is then converted into electrical energy by the generator. A transformer connects the generator’s output to the grid connection. The distribution network operator is in rateable occupation of the power grid.

41. The scheme has a tail race. The water discharged from the turbine returns to the watercourse via the tail race. The velocity of the water entering the tail race is much reduced from the velocity at the spear valves.
42. No significant repairs have been carried out on the Allt Mor headrace since construction. In general terms, such hydro schemes rarely require repair of the headrace. In the event of a failure at one location, it is normally possible to excavate a very limited section and replace the damaged section with a new segment. The headrace at Allt Mor is likely to remain *in situ* for many years as small scale hydro schemes tend to have long lifespans. If a large section of headrace required to be replaced or the headrace removed completely, this would be a significant engineering project involving many of the issues narrated in the construction method statement for the Keltneyburn Hydro Scheme. Excavation close to the public road would involve liaison with the roads' authority. Protection of the watercourse from contamination during working would be required.
43. Some leases provide for a headrace to be removed by the tenant at the expiry of the lease. Allt Mor is a landlord operator.
44. Within the hydro-electric industry, the terms penstock and pipe-line are used interchangeably to refer to the headrace.
45. The Assessor's method of valuation used to determine the net annual value/rateable value of the Subject was the Revenue Principle of valuation (Receipts and Expenditure Method). Depreciation is an allowable deduction on the tenant's assets. The accreditation type is feed in tariff (accredited within the period of 1 April 2015 to 31 March 2016). The Total Installed Generating Capacity is 0.3MW. The generation output is 693.6MWh. The average generation output of the Scheme over its initial three years of operation was 693.6 MWh. Accordingly, the actual load factor achieved by the Scheme in its initial three years of operation was 26.4% which is the correct load factor to apply to calculate the Generation Output. The adopted Generation Output for the Scheme is 693.6 MWh.

(ii) The first legal sub-issue

46. The respondent's preliminary argument is an ambitious one. We have been unable to detect any previous discussion of the argument in earlier authorities. It was not advanced on behalf of the Assessor engaged in the *Old Faskally Farming* cases. If the respondent's preliminary argument is correct, an item of plant or machinery which has become heritable applying common law principles will be rateable regardless of how that item is treated within the 2000 Regulations. It would mean that specific exemptions for sectors such as the microgeneration sector expressly carved out in the 2000 Regulations would be of no effect if the items within that sector were heritable applying common law principles. It would also, as the appellant stressed, cut across the primary reason for the change in 1995 which was to align the rating of plant and machinery in Scotland with the position in England. These are strong reasons to doubt the soundness of the respondent's preliminary argument.
47. There has been an evolution of the definition of "lands and heritages" since its first iteration in the 1854 Act. But since 1854, there has always been specific treatment of plant and machinery. The 1854 Act, as originally enacted, did not simply leave it to the common law to determine whether any item of machinery was part of the heritage and therefore rateable. Rather, the 1854 Act provided that machinery which was "fixed or attached to any lands or heritages" was included in the definition of "lands and heritages". Thus, the original definition dealt with the rateability of machinery by a specific extension as opposed to implication, and the statutory test mimicked the common law of accession.
48. Section 1 of the Lands Valuation (Scotland) Amendment Act 1902 added a proviso to the "lands and heritages" definition such that fixed machinery used within buildings operated for trade, business or manufacturing process but which could be removed from their place without necessitating the removal of any part of the building, fell outwith the definition of "lands and heritages". Once again, the rateability of machinery was governed by the express part of the definition and the statutory test

of the machinery being “attached or fixed” was qualified for certain premises. The position changed significantly in Scotland with effect from 1995 following the recommendations of the Wood Committee (no 1). Since 1995, an item of plant and machinery is rateable if it is listed within the relevant regulation.

49. The respondent’s argument relies on the headrace being considered as part of the heritage by the application of ordinary principles of land-ownership. In *Scottish Discount Co Ltd v Blin* 1985 SC 216, Lord President Emslie at p235 observed that rating cases are not concerned with rights of property but with the application of a statutory scheme which, at that time, drew a distinction between different categories of machinery which the common law would regard as fixed. In short, it is the construction of the statutory definition which determines rateability for plant and equipment.
50. The respondent’s argument, if correct, would give rise to the oddity that prior to 1995, there must have been two sequential versions of a fixtures test in play when applying s.42. The initial test by reference to common law principles to ask whether the item was part of the heritage. If the answer was no, there would be a second test of asking whether the item was “machinery fixed or attached” within the meaning of s.42 of the 1854 Act. Senior counsel for the respondent could not offer any clear rationale why Parliament would have opted to incorporate two such similar tests within the definition. It was suggested that there might be different policy considerations in play for the different tests of accession, but we were not offered any guidance on what those policy considerations might be.
51. We do not consider that the decision in *ITV v Assessor for Lanarkshire* assists the respondent’s argument. It is correct that each of the judicial opinions in that case referred to *dicta* from *Dowall v Miln* when deciding that the cables had acceded to the mast which was itself heritable. But it is going too far to suggest that the cables became heritable without reference to that part of the statutory test which asked whether the plant or machinery was “fixed or attached”. The classification of the cables was a subsidiary issue and each of the three judicial opinions contained a brief

paragraph dealing with this issue. There is nothing to suggest that the Court was doing anything other than deciding that the cables were “machinery fixed or attached to any lands or heritages” applying the statutory definition.

52. We agree with the appellant that the amendment to the definition in 1994, coupled with the lists set out in the 1995 and then the 2000 regulations, was to harmonise the treatment of plant and equipment within the UK. The respondent’s preliminary argument would cut across that aim. Subsequent amendments to the 2000 Regulations also indicate that the respondent’s argument is wrong. It cannot be correct that certain sectors who are to benefit from a specific exemption set out in the 2000 Regulations, are to be deprived of that exemption if the items under review would be regarded as heritable *sua natura* or by accession. We reject the respondent’s preliminary argument.

(iii) The second legal sub-issue

53. We agree with the appellant that penstock is a term commonly used within the hydro-electricity generation industry to refer to the headrace. This was the evidence of Alex Reading, Hugh Campbell and Kenny Hunter, all with many collective years of experience in the industry. Frank Finlayson was the only witness who gave evidence suggesting that penstock referred to a different item of plant, namely a valve or water gate. It may be significant that Mr Finlayson’s experience in the hydro-electricity generation field was less extensive than other witnesses. The Allt Mor scheme included a “penstock valve” but the evidence was that this was discrete from the headrace itself. It is significant that the term penstock was used when identifying the types of pipe within the specification for the Allt Mor scheme. The references which the appellant found within delegated legislation and other case law confirm that a headrace is commonly referred to as a penstock. Ultimately, we do not understand our conclusion on class 1(g) to be a controversial one. In his final submissions, senior counsel for respondent did not seek to persuade us that the headrace was not a “penstock” for the purposes of class 1(g).

54. We find that the headrace is a “penstock” within class 1(g) but that it is excluded from being rateable under class 1 as it is “excepted plant and machinery” being used mainly or the generation of power for distribution to consumers.

(iv) The third legal sub-issue

55. As the appellant noted during argument, it was conceded by the Assessor respondent in *Tayside Assessor v Old Faskally Farming (No 2)* 2019 CSIH 25 that the headrace was non-rateable. Lord Doherty observed at para [29] that whether the pipe-line (headrace) might fall under class 3(g) was raised in argument, but it was not a live issue before either the Committee or the Land Valuation Appeal Court. Although the headrace is not rateable under class 1, this Tribunal requires to consider whether it is rateable under any other class. This follows from the sequential approach emphasised by the Land Valuation Appeal Court in *Tayside Assessor v Old Faskally Farming (No 1)* 2016 CSIH 8. As Lord Doherty put it in *Tayside Assessor v Old Faskally Farming (No 2)* at para [30], a finding that an item of plant is non-rateable under class 1 does not stamp that item as non-rateable. The Woods Committee (No. 2) at para 5.35 observed that even if some items were excluded from rating as “tools of the trade” for class 1, some of those “tools of the trade” items would come back to be rateable under class 4.

56. In its note of argument, the appellant referred to the definition of pipe-line in class 3(g) as being a “limited” one. We would not describe the definition of pipe-line in class 3(g) in that way. To the contrary, it seems to us that the draftsman has started with a broad definition which follows, to some extent, the definition of pipe-line found in section 65 of the Pipe-Lines Act 1962. As with the definition in the 1962 Act, class 3(g) refers to “a pipe or a series of pipes for the conveyance of anything”. But class 3(g) is wider than the definition set out in the 1962 Act since, unlike that definition, there is no exclusion for pipelines carrying certain listed types of liquid or gas. During their evidence, Alex Reading and Hugh Campbell accepted that what they described as a penstock was also a pipe-line. In ordinary language, the headrace

is a series of pipes for the conveyance of water from the collection (stilling) chamber to the powerhouse.

57. The appellant's submission placed considerable emphasis on the function of the headrace being to convert potential energy into kinetic energy to drive the turbines. Hugh Campbell described the headrace as an "energy conversion system" rather than a "delivery system". We accept that the headrace does have the effect that water is channelled to the turbines and emerges at high velocity to drive the turbine. However, we are not satisfied that this takes the headrace out of the definition of pipe-line in para 3(g). The headrace is a series of pipes used for the conveyance of "anything", in this case, water under pressure. The conveyance of water is the fundamental role of the headrace because the water is the medium in which energy is present and then released at the turbine. Within the headrace, the energy has no tangible existence separate from the water itself. If the water does not flow through the headrace, there will be no kinetic energy to turn the turbine.
58. The appellant submitted that there was some significance in the fact that the term "penstock" appeared in class 1 alone and was not repeated, as some terms are, in classes 2-4. It was suggested that the draftsman intended the headrace to be dealt with solely under class 1. This would be a stronger argument if a technical term such as penstock was used to identify an item which was to be excluded from rating. In that event, we can see some merit in an argument that the same item should not be held to be included for rating by a more general description in another class. But that is not the position here. For the purposes of valuation in Scotland, penstock first appeared in class 1(g) in the 1994 Regulations which, as originally enacted, contained no excepted plant from class 1. Thus, from 1 April 1995 until the 2000 Regulations came into force, a penstock on a hydro scheme was listed as being rateable. Since 2001, there have been various defined sectors in which otherwise listed plant and machinery are "excepted plant and machinery" for class 1 purposes. To adopt the phrase used by Lady Dorrian in *Old Faskally (No 1)* at para [12], the "consumer exception" was introduced by the 2000 Regulations. Further "excepted plant and

machinery” includes some combined heat and power stations (see SSI 2001/115) and schemes classed as microgeneration capacity (see SSI 2008/360). Therefore, a penstock is identified in class 1(g) as being rateable, as are a pipe-line (class 3(g)) and a conduit (class 4). We do not consider it unusual for an item to be capable of being included for rating under more than one descriptor. We were not referred to any authority which indicated the contrary.

59. We asked parties during oral argument why the “consumer exception” in class 1 was not carried over into the other classes. In contrast, the microgeneration exception is expressly carried over into each class. Neither party was able to assist with understanding the different treatment of these similar sectors. But undoubtedly, the treatment is different and we must proceed on the basis that the Scottish Government has sought to differentiate between these generation sub-sectors when it comes to rating.

60. For these reasons, we find that this headrace is a pipe-line within the terms of class 3(g) and is therefore rateable. Foundations for the pipe-line are also rateable under class 3(g), and the civil engineering works involved in laying the pipe-line follow on from our decision on the headrace itself. Unlike the position with class 1, the consumer exception does not apply to class 3 so the headrace remains rateable.

(v) The fourth legal sub-issue

61. The respondent also submitted that the headrace fell to be assessed under class 4 as a “conduit”. The appellant’s distinction between an energy conversion system and a delivery system for moving water from one place to another was also advanced in relation to this issue. We also reject the appellant’s argument in relation to class 4. We agree with the respondent that the term “conduit” in class 4 refers to an artificial channel or pipe for the conveyance of liquids including water. That is how “conduit” was understood in *Lever Bros Port Sunlight v Bright* 1962 RVR 70 at p72. In *BP Refinery (Kent) Ltd v Walker* [1957] 2 QB 305, the Court of Appeal rejected the valuation

officer's argument that pipes which carried distilled fractions of oil within a topping unit were "conduits" with Lord Evershed at p323 and Lord Denning at pp 329-330 contrasting that with underground gas or oil pipes which would be "conduits". We conclude that the headrace is a conduit for much the same reason as it is a pipe-line under class 3(g). It is also a structure in that it has been built within the land from component parts and is substantial in size being 1.88km in length. The headrace is intended to be permanent for as long as the hydro scheme operates. We did not understand the appellant to take issue with the headrace being a "structure" if we concluded that it was a conduit.

62. We consider that the word "conduit" which appears in both class 1(g) and class 4 has a consistent meaning across those two classes. If "conduit" had only appeared in class 4, it might be argued that it refers to a channel used to protect electrical wiring but its inclusion in class 1(g) shows that it is concerned with the flow of water. In the context of class 1(g), it is a word of wider import than penstock and would include artificial channels which direct water into the intake. The tail race itself is also a conduit for both class 1(g) and class 4 as accepted by Calum Innes in his expert report at para 8.33. The draftsman has chosen to include penstock in class 1(g) alongside "conduit" to put beyond doubt that the headrace is – unless excepted by another provision-rateable.

Disposal

63. For the reasons set out in this decision, we refuse this appeal. We are conscious that the position of the respondent at the hearing was that the correct rateable value was £25,000 rather than the original valuation of £46,000. We shall allow parties three weeks from issuing this decision to agree the terms of any final order, which failing, we direct parties to lodge brief written submissions on the terms of the final order which they propose should be issued. We shall reserve all questions of expenses meantime.