

SCOTLAND / JUDGMENT

Russo or Rae v Russo [2011] ScotCS CSOH_167 (14 October 2011)

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[2011] ScotCS CSOH_167 [New search] [Help] OUTER HOUSE, COURT OF SESSION [2011] CSOH
167 P179/11 OPINION OF LORD PENTLAND in the Petition of (FIRST) CARLA RUSSO or
RAE, and (SECOND) ADRIAN RUSSO, qua Executors-Dative of the late ROSINA RUSSO
Petitioners; For Judicial Review of certain acts and omissions of the Assessor of the
Lanarkshire Valuation Joint Board ----- ____ Petitioners: Party Litigants
Respondent: Stuart, Q. C., Brodies LLP 14 October 2011

[1] The Petitioners are the executors of their grandmother, the late Mrs Rosina Russo, who died on 7 August 1987 . In the present proceedings they represented themselves, their submissions being advanced (orally and in writing) by the Second Petitioner on behalf of them both. The Petitioners were confirmed as executors to Mrs Russo's estate by the Sheriff at Hamilton on 7 June 2006 . The explanation for the long delay in confirmation being granted lies in a history of protracted disputes amongst certain members of the Russo family; the details of these disputes are not important for present purposes (they are the subject of averment in Statement 1 of the adjusted Petition). The Respondent is the assessor of the Lanarkshire Valuation Joint Board.

[2] As originally presented, the Petition sought judicial review of the Respondent's assessments, for the purposes of the 2005 rating revaluation, of the rateable values of certain properties owned by Mrs Russo's estate in Main Street, Uddingston and of his consequential decisions to issue Revaluation Notices and make entries in the Valuation Roll reflecting his valuations. The Petitioners craved reduction of the Revaluation Notices and of the relative entries in the Valuation Roll, together with an order directing the Respondent to reconsider and reassess the valuations. Following a First Hearing on the Petition and Answers, at which I heard detailed submissions on behalf of the Respondent, I allowed the Petitioners to adjust the Petition in certain specified respects, under and in terms of Rule of Court 59.2(b)(v). By the time when the case came before me again for a Continued First Hearing, both parties had

substantially adjusted their pleadings. The Petitioners' adjustments extended significantly beyond the scope of those permitted by my interlocutor of 18 March 2011, but making allowance for the fact that the Petitioners appear as party litigants, I am prepared to consider the whole of their expanded case. It was not suggested on behalf of the Respondent that he was prejudiced by the extent of the Petitioners' adjustments. By their adjusted pleadings the Petitioners now sought judicial review of what they referred to in the Petition as the Respondent's decision to maintain his entries in the Valuation Roll and not to revise, reconsider or re-assess the rateable values in the Revaluation Notices in the light of the findings made by a Valuation Appeal Committee on 1 December 2009 and the position taken up by the Respondent before that Committee. The Petitioners also asked for an order directing the Respondent to reconsider and re-assess the Revaluation Notices. In the event that such an order could not competently be pronounced, the Petitioners sought reduction of the Revaluation Notices and Valuation Roll entries. The Petitioners also craved declarator that, in maintaining his entries whilst the 2005 Valuation Roll was in force and failing to revise, reconsider or re-assess the rateable values pertaining to the properties, the Respondent had acted unfairly, contrary to natural justice, with manifest unreasonableness, ultra vires and oppressively.

- [3] The circumstances which are material for the purposes of the Petition may be summarised as follows. The late Mrs Russo's estate comprised inter alia shops and flats situated at numbers 22, 26/28 (a single unit at the time of her death), 34 and 36 Main Street, Uddingston, Lanarkshire. For the purposes of the 2005 revaluation, the Respondent's officials inspected the properties. Numbers 22, 26/28 and 36 were unoccupied. It is averred by the Respondent that his officials do not require to gain entry to properties at every revaluation in order to value them. Each of the properties was valued according to the comparative basis of valuation. The Respondent explains in his Answers that all the properties situated at numbers 22-56 High Street, Uddingston were treated as a single block for valuation purposes. The Zone A rent rate per square metre for the block was £155 per square metre compared with £190 per square metre at the previous revaluation. This rate reflected inter alia the passing rents within the block, including the rents for numbers 32 and
34. It also reflected a deterioration in the state of repair of the block and the amount of empty property in the block, primarily that owned by Mrs Russo's estate. The net annual value and rateable value in respect of number 22 was assessed at £4,300; in respect of number 26/28 the assessment was £8,000; in respect of number 34 the assessment was £2,050 and in respect of number 36 the assessment was £4,550. All the properties were entered in the new Valuation Roll (which came into force on 1 April 2005) with the executors of Mrs Rosina Russo shown as the proprietors. Revaluation notices indicating these proposed figures were issued by the Respondent on 31 March 2005; they were addressed to the executors of Mrs Rosina Russo and sent to the properties, with the exception of the notice relating to number 36, which was sent to a firm of solicitors known to have a historic connection with Mrs Russo's estate. The notices explained the procedure and time limits for lodging an appeal

against the values stated.

- [4] The Petitioners aver that they were unable to gain access to the properties after they had been confirmed as executors until 12 March 2007 . On 3 March 2009 they appealed against the entries in the Valuation Roll for each of the properties. Ultimately the appeals proceeded only in respect of numbers 22, 34 and 36. The sole ground of appeal in each case was that there had been a material change of circumstances affecting the values of the properties; an appeal on this ground may be taken at any time up to a date six months after the Valuation Roll has ceased to be in force (see section 3(4) and (4A) of the Local Government (Scotland) Act 1975 ("the 1975 Act")). In support of the appeals the Petitioners contended that since the revaluation date, the condition of the properties had significantly deteriorated for a number of reasons, including fire damage, fouling by pigeons and vermin, vandalism, water penetration and a general lack of maintenance over a sustained period of time. The Respondent opposed the appeals on the basis that there had been no material change in the condition of the properties since 2005. By decision dated 1 December 2009 the Valuation Appeal Committee dismissed the appeals. In its Statement of Reasons the Committee said that it was of the view that the Respondent had valued the properties on the basis of their physical state as at 1 January 2005 . It noted that no appeal had been lodged against the revaluation. The Committee considered that the properties had been in a poor state of repair as at 1 January 2005 . On the evidence the Committee was not persuaded that the condition of the properties had deteriorated materially in the period between 1 January 2005 and 31 March 2009 . Following the dismissal of their appeals, the Petitioners required the Committee to state a case for appeal against their decision to the Court of Session, but they later decided not to proceed with the appeal.
- [5] In the present proceedings the Petitioners' principal line of argument was that the only inference which could properly be drawn from the decision of the Valuation Appeal Committee and from the Respondent's position before the Committee, was that the properties had been in a derelict condition at the time of the 2005 revaluation. On the assumption that the properties were derelict in 2005 the Respondent's valuations could not possibly be justified. No hypothetical tenant would have rented the properties for the values stated in the Revaluation Notices. It was said that the Respondent had, in effect, conceded that the properties were derelict in 2005. The Respondent remained bound by that concession. He could not be allowed to act inconsistently. In these circumstances, the Respondent was obliged to reconsider his 2005 valuations in the light of the outcome of the Valuation Appeal Committee and the position he had himself adopted before it. This he had failed to do. His failure in this respect was unreasonable, unfair and ultra vires . In these exceptional circumstances, judicial review should be granted and the Respondent should be ordained to reconsider and re-assess the Revaluation Notices. Failing such an order being granted, the Revaluation Notices and the relative entries in the Valuation Roll should be reduced. The Court should declare that the Respondent, in maintaining his entries whilst the 2005 Valuation Roll was in force, had acted unfairly, contrary to natural justice and, as it was put by the Petitioners, with manifest unreasonableness et separatim ultra vires and

oppressively.

[6] In my opinion, the Petitioners' case is fundamentally misconceived for a number of reasons.

[7] The first difficulty for the Petitioners is that in the present proceedings they are, in effect, inviting the Court of Session to hold that the valuations placed on the properties by the Respondent in 2005 were excessive. It is settled law that the Court of Session has no jurisdiction to review valuations entered in the Valuation Roll on the ground that they are too high. In *Magistrates of Glasgow v Hall* 1887 14 R. 319 Lord President Inglis said (at page 329) that the Court was bound to take an entry in the Valuation Roll as conclusive evidence of what was the gross rent or annual value of the lands and heritages in question. The other members of the Court (Lords Mure, Shand and Adam) agreed. In *Moss' Empires v Assessor for Glasgow* 1916 S. C. 1 it was reiterated that the Court of Session had no jurisdiction to act as a Valuation Court or as a Valuation Appeal Court and could not determine the annual value of lands and heritages in Scotland. That was not to say, however, that the Court was not empowered to set aside an incompetent or illegal valuation made by an Assessor in excess of the power committed to him by statute (see Lord Kinnear at page 6). In the present case the Petitioners aver in Statement 14 of the adjusted Petition that the 2005 valuations were "flawed and over-assessed"; that no hypothetical tenant would have paid rent for the properties at the levels assessed; and that the Respondent's valuations exceed the minimal rateable value of £1,700, below which no rates fell to be paid. It is thus clear, as it seems to me, that the Petitioners are seeking to persuade this Court that the 2005 valuations were too high. Moreover, the Petitioners' argument that the Respondent behaved perversely and unreasonably in not reconsidering the 2005 valuations necessarily involves the assertion that those valuations were too high. In my opinion, this Court cannot determine any question relating to such matters since they are, properly understood, issues of valuation.

[8] Secondly, the relevant legislation confers various rights of appeal against the level of the Respondent's valuations, but no appeals were ever lodged by anyone on the ground that the 2005 valuations were excessively high (except for an appeal by the tenant of number 32, which was later withdrawn); as I have explained, the only appeals taken by the Petitioners relied on an alleged change in circumstances affecting the values of certain of the properties. In the circumstances, judicial review is not, in my opinion, available to the Petitioners. The Revaluation Notices were (correctly) addressed to the executors of the late Mrs Russo. There is no challenge to the fact that they were validly served. The notices set out in clear terms the rights of appeal and the applicable time limits. The executors had been entered in the Valuation Roll as proprietors for some considerable time before 2005; there had been three revaluations since Mrs Russo's death in 1987. The Petitioners had not been confirmed as executors at the time the Revaluation Notices were served in 2005, but Statement 1 of the Petition explains that they considered themselves to hold office as executors from at least about

1998. They aver that following their father's death in March 1998 his appointment as executor-dative automatically transferred to the Petitioners. It seems to me that the law must proceed on the basis that there were executors managing the estate at all material times and that they could have appealed under section 3(2) of the 1975 Act (and in compliance with the Valuation Timetable (Scotland) Order 1995) to the Valuation Appeal Committee on the ground that they considered the valuations to be excessive. No appeal was taken, however. In any event, upon being confirmed as executors in 2006, the Petitioners had the right to appeal against the amount of the valuations in their capacity as new proprietors under section 3(2A) of the 1975 Act, but they did not exercise this right. Even as late as 2007 when the Petitioners aver that they first gained access to the properties, they could have taken such appeals and asked the Valuation Appeal Committee to waive compliance with the six month time limit in the exercise of its discretion. They failed so to do, however. Moreover, at any time during the currency of the 2005 Valuation Roll (i.e. until 31 March 2010) the Petitioners could have appealed against the entries on the ground that there had been an error of measurement, survey or classification (see section 3(4) of the 1975 Act read with section 2(1)(f) thereof). The Petitioners could have advanced such an argument in the alternative in the proceedings before the Valuation Appeal Committee in 2009. Again, they did not take up this right of appeal. Finally, the Petitioners could have sought to invoke section 20 of the Local Government (Financial Provisions) (Scotland) Act 1963, which provides that where it is shown to the satisfaction of the rating authority that rates have been paid by reason of an error of fact, they shall be repaid. On the hypothesis advanced by the Petitioners that the valuations are erroneous because the properties were derelict at the time they were valued in 2005, they would have been entitled to seek to reclaim any rates paid. They could still seek to do in respect of any rates paid since section 20 applies even where the Valuation Roll has ceased to be in force. In *Dante v Assessor for Ayr* 1922 S. C. 109 the Inner House held that where a ratepayer had failed to exhaust his statutory rights of appeal against an entry in the Valuation Roll he could not be allowed to bring an action in the Court of Session challenging the entry unless the decision to make the entry could be shown to be ultra vires . The same view was taken by the Second Division in *British Railways Board v Glasgow Corporation* 1976 S. C. 224. In the present case the Petitioners do not say that the decisions to make the entries in the Valuation Roll were ultra vires . In my view, the position is that the Petitioners are attempting to obtain from this Court a ruling to the effect that the 2005 valuations were excessive. That is a complaint which they (or whoever was exercising office as an executor) were entitled to make under the various statutory appeal procedures to which I have referred. Having failed to take advantage of the avenues of redress provided for by statute, they cannot now seek to achieve the same outcome by judicial review. On this ground I consider the Petition to be incompetent.

[9] Even if the Petition is not incompetent it is, in my opinion, unfounded on its merits. The Petitioners now aver in the adjusted Petition that the Respondent was bound to reconsider the valuations in the light of what happened at the Valuation Appeal Committee. From this it

is clear that the Petitioners accept that the valuations were lawfully made. In my opinion, there is no basis for the argument that the Respondent became subject to a duty to reconsider them. He was never asked to do so at any time before the present proceedings were begun. Moreover, I do not see why one should infer from the Valuation Appeal Committee's decision that the 2005 valuations were in some sense perverse or unreasonable or ultra vires at the time when they were made. It does not follow from the decision taken by that Committee or from the position adopted on behalf of the Respondent before the Committee that the Respondent acted unlawfully when he made the 2005 valuations. It is clear from the authorities to which I have already referred that in order to succeed in this Court the Petitioners would have to show that the 2005 valuations were not merely too high, but that, in making them, the Respondent had acted in some sense ultra vires. In my view, there is no ground on which such a finding could properly be made in the circumstances of the present case. For these reasons, I consider the Petition to be unfounded.

- [10] In my opinion, there is another fundamental difficulty for the Petitioners in seeking to have the entries in the Valuation Roll changed. Section 2(1) of the 1975 Act allows the Respondent to alter the Valuation Roll on certain specified grounds only. As already explained, the Petitioners relied before the Valuation Appeal Committee exclusively on the ground relating to alteration in value due to a material change of circumstances (section 2(1)(d)). The Committee having rejected that contention, there was no basis on which the entries in the Valuation Roll could have been changed as at December 2009. Even if the Petitioners had succeeded before the Valuation Appeal Committee, the resultant alteration in the Valuation Roll would only have taken effect from 1 April 2009, being the beginning of the year in which the alteration would have been made (see section 2(2)(c) of the 1975 Act). By that time, according to the Petitioners' own averments in Statement 4, the properties had already been refurbished and were in a suitable condition to be let. So any valuation which the Respondent could properly have placed upon the properties in 2009 could not have been lower than those he had given to the properties in 2005. There would have been no basis for altering the entries in the Valuation Roll in these circumstances.
- [11] It should also be recalled that the Petitioners chose not to proceed with their appeals in relation to numbers 26 and 28 Main Street. So there is no finding of the Valuation Appeal Committee in respect of the condition of those properties on which the Petitioners could now seek to rely.
- [12] In Statement 15 of the adjusted Petition the Petitioners aver that esto the Court is not empowered or it is not competent to order the Respondent to reconsider the Revaluation Notices, the Notices and the relative entries in the 2005 Valuation Roll should be reduced on the ground of "exceptional and mitigating circumstances". There is a serious conceptual difficulty with this remedy in the terms in which it is now sought since, if granted, it would leave no entries in the 2005 Valuation Roll for the various properties. That would be an absurd state of affairs. In any event, I do not consider that there are any exceptional or mitigating circumstances sufficient to justify reduction of the 2005 Revaluation Notices or

the relative entries in the Valuation Roll. I shall deal with the Petitioner's various contentions in turn.

- i. For the reasons I have already sought to explain, the findings made by the Valuation Appeal Committee do not infer that the 2005 valuations were perverse or in any sense ultra vires . ii. What the Petitioners describe as the "void" in the appointment of a confirmed executor seems to me to be of no moment. As I have already explained, the Petitioners could have appealed against the 2005 valuations on the ground that they were too high after they were themselves confirmed as executors in June 2006, but they elected not to do so. iii. The Petitioners say that they did not gain access to the properties until March 2007 because Armando Russo, who was removed from office as an executor, refused to hand over the keys. Eventually in March 2007, according to the Petitioners' averments, they broke into the properties. They do not explain why they did not do so at an earlier stage following their confirmation the previous year. The Petitioners then aver that the Respondent has acted inconsistently and duplicitously because his counsel put to the Second Petitioner at the Valuation Appeal Committee that he had not been in the properties until March 2007. I do not understand such a suggestion to have been made in the context that the Petitioners were not in a position to exercise rights of appeal before that date. The context was rather that the Petitioners were not qualified to give evidence about the condition of the properties before that date. That seems to me to have been a legitimate line of questioning. I do not agree that it now gives rise to any inconsistency or duplicity on the Respondent's part. The Petitioners next go on in Statement 15 to make lengthy averments based on the issuing of a valuation notice by the Respondent on 4 December 2008 . These averments are not easy to follow, but they appear to me to be based on a number of misconceptions. It is important to appreciate that the notice referred to related to number 28 Main Street , which had by then been separated from number 26 and accordingly constituted a separate entity for the purposes of valuation. That notice was, as it seems to me, quite properly issued in view of the separation of the property into two units. It showed the proprietors as the executors of the late Mrs Rosina Russo "per Adrian Russo" - i.e. the Second Petitioner. By this stage the Respondent had obviously become aware that the Second Petitioner was acting as an executor. In their averments the Petitioners criticise the Respondent for not having issued similar notices for the other properties. This criticism is misconceived. There was no reason for further notices to be issued in regard to any of the other properties. The Petitioners appealed on 3 March 2009 against the valuation for number 28 as well as for the other properties. In response to the appeals the Respondent wrote to the Petitioners pointing out that, in the case of numbers 34 and 36 Main Street , appeals were only competent on the grounds set out in section 3 of the 1975 Act and that the appeals in respect of those properties did not appear to the Respondent to be competent. As regards numbers 26 and 28 Main Street the Respondent replied to the appeals in different terms. He acknowledged receipt of the appeals and offered to discuss the points raised. He did not contend that the appeals were incompetent. None of the steps taken by the Respondent in dealing with any of the appeals seems to me to have been in any sense irregular or misleading; indeed all that he did was, I think, entirely fair

and appropriate. As I have already explained, the Petitioners chose not to proceed with their appeals in relation to numbers 26 and 28. iv. In the circumstances, there is no substance in any of the complaints advanced by the Petitioners in Statement 15 of the Petition.

- [13] A further difficulty with the Petitioners' approach arises from the fact that the 2005 Valuation Roll is no longer in force. So it is difficult to understand how the entries which were at one time contained in that Roll could now be reduced.
- [14] In Statement 16 the Petitioners advance an esto case to the effect that if the Petition is held to be incompetent it should be remitted to proceed as an Ordinary Action for reduction or, to quote the averments, "in the exercise of the Court's Outer House Nobile Officium ". I do not consider that it would be competent or appropriate to make any such order.
- [15] Statement 17, which was added by adjustment, contains a claim for damages advanced as an alternative to reduction. The amount claimed is the total rates liability assessed in respect of the various properties for the period between 2006 and
2009. It seems to me that this claim is misconceived. It proceeds on the assumption that no rates at all have ever been due to be paid in respect of the various properties. That does not seem to me to be an assumption that can legitimately be made. The claim also appears to proceed on the assumption that the Petitioners have, in fact, paid the whole of the rates for the properties. Otherwise they could have suffered no loss. There is, however, no averment that anything has ever been paid.
- [16] In his oral submissions at the Continued First Hearing the Second Petitioner made certain criticisms of the conduct of matters by the Respondent's Senior Counsel. These appeared to me to be unfounded and, in any event, to have no bearing on the issues in the case.
- [17] Finally, I should deal with the Respondent's argument that the Petition has, in any event, been brought too late. He maintained that it should, at least, have been brought within a reasonable time after the decision of the Valuation Appeal Committee became final, following the Petitioners' decision not to proceed with the appeal by Stated Case. The Committee issued the Stated Case on 1 July 2010 . The appeal fell when the Petitioners failed to lodge the Stated Case in the Court of Session within a period of two weeks after the date of issue (Rule 9 of the Act of Sederunt (Valuation Appeal Rules Amendment) 1982). The Petition was not presented until February 2011. The Petitioners offered no satisfactory explanation for the delay in commencing the present proceedings after they resolved not to proceed with the appeal against the decision of the Valuation Appeal Committee. In the circumstances, it seems to be that they must be inferred to have acquiesced in the finality of the decision of the Valuation Appeal Committee upholding the 2005 valuations. Accordingly, I consider that the Petition is barred by mora , taciturnity and acquiescence.

- [18] I should record that, in his submissions, the Second Petitioner referred to certain authorities: Taylor , Constitutional and Administrative Law (2 nd edition, page 129); and various passages from O'Neill, Judicial Review in Scotland . I did not find these to be of any assistance in the circumstances of the present case.
- [19] At the end of the day the Petitioners' submissions came to be that the Respondent was under what he described as a duty of total autonomy to ensure that the entries in the Valuation Roll were correct. It was said that in the exceptional circumstances of the present case, he had failed to fulfil that duty. In my opinion, these propositions are unsound and must be rejected.
- [20] For these various reasons, I shall sustain the Respondent's first to fourth pleas-in-law, repel the Petitioners' pleas and refuse the Petition. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2011/2011CSOH167.html>

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Prepared on 28 October 2026 · Esheria