SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 16
XA73/19

Lord Justice Clerk
Lord Malcolm
Lord Doherty

OPINION OF THE COURT

delivered by LORD DOHERTY

in the Appeal

by

ASSESSOR FOR LOTHIAN VALUATION JOINT BOARD

Appellant

against

MARK McLAUGHLIN

Respondent

Appellant: Gill; TLT Solicitors

22 April 2020

Introduction

[1] This is a council tax appeal to the Court of Session on a point of law in terms of s 82(4) of the Local Government Finance Act 1992 ("the 1992 Act") from a decision of the Lothian Valuation Appeal Committee ("the Committee"). The appellant is the Assessor for Lothian Valuation Joint Board ("the Assessor"). The respondent and his wife are the joint proprietors of a ground floor flat at Stanwell Street, Edinburgh ("the appeal subjects"). The

issue raised by the appeal is how affordable housing units which are subject to "golden share" provisions ought to be valued for council tax purposes.

Background

[2] In November 2016 the respondent and his wife purchased the appeal subjects from the developer, Persimmon Homes Limited ("Persimmon"), at a price of £129,600. They took entry on 24 November 2016 and they became registered proprietors on 11 January 2017.

[3] The appeal subjects form part of a development of 49 new houses and flats built on a site of 0.78 hectares at Silverfields ("the Agreement Subjects"). In order to obtain planning permission for the development Persimmon "in its capacity as heritable proprietors of the Agreement Subjects (who and whose successors as proprietors of the Agreement Subjects are hereinafter referred to as "the Proprietors")" entered into a Minute of Agreement ("the Agreement") with the City of Edinburgh Council ("the Council") pursuant to s 75 of the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act").

[4] Section 75 (as amended by the Planning etc. (Scotland) Act 2006) provides:

> "75 Planning obligations
>
> (1) A person may, in respect of land in the district of a planning authority—
>
> (a) by agreement with that authority, or
>
> (b) unilaterally,
>
> enter into an obligation (referred to in this section and in sections 75A to 75C as a *"planning obligation")* restricting or regulating the development or use of the land, either permanently or during such period as may be specified in the instrument by which the obligation is entered into (referred to in this section and in those sections as the *"relevant instrument")*.
>
> (2) Without prejudice to the generality of subsection (1), the reference in that subsection to restricting or regulating the development or use of land includes—

> (a) requiring operations or activities specified in the relevant instrument to be carried out in, on, under or over the land, or
>
> (b) requiring the land to be used in a way so specified.
>
> ...
>
> (5) A relevant instrument to which the owner of the land is party may be recorded in the Register of Sasines or, as the case may be, registered in the Land Register of Scotland; and if the instrument is so recorded or registered then the planning obligation is (unless the instrument provides that only the person entering into that obligation is to be bound by it) enforceable at the instance of the planning authority—
>
> (a) against the owner of the land in so far as the obligation comprises a requirement mentioned in subsection (2) or (3)(b), and
> (b) against—
>
> (i) the owner or tenant of the land, or
>
> (ii) any other person having the use of the land,
>
> in so far as the obligation comprises any other requirement.
>
> ... "

[5] The Agreement is registered in the Land Register of Scotland. It is set out in the Burdens section of the registered title of the appeal subjects (as Burden 6). In terms of the Agreement it was agreed that 11 of the housing units on the site would be Affordable Housing Units and that the remaining 38 would be Open Market Housing Units. It was also agreed that the obligations undertaken by the Proprietors in the Agreement shall be enforceable by the Council as planning authority and roads authority against the Proprietors and any persons deriving title to the Agreement Subjects or any part thereof from the Proprietors.

The "golden share" provisions

[6] Clause 1.1 of the Agreement contains the following definitions:

"...

'Affordable Housing Unit' means a Housing Unit where the individual owners of such whilst bearing to own a 100% share of the unit owns a part agreed share with the remaining share secured by the terms of this Agreement to the party who granted the first Disposition of the unit in question independently of any other Housing Unit to an owner for the purposes of residential occupation;

....

'Housing Unit' means any property among the body of forty nine (49) units within the Agreement Subjects ...
...

"Open Market Housing Unit" means one or more (as appropriate) of the thirty eight (38) Housing Units and which are not Affordable Housing Units;

..."

Clause 9 provides:

"9 On-Site Affordable
...

9.2.3 The provisions of the Schedule shall apply to the delivery of the Affordable Housing Units."

The Schedule provides:

"In this Schedule, the words and expressions shall have the meanings ascribed to them in the foregoing Agreement and the following meanings:

'the Criteria' means either (i) a current tenant or an individual who is registered on the housing waiting list of the Council, Midlothian Council, West Lothian Council or East Lothian Council or a Registered Social Landlord within the Lothians or a person with a connection with the Lothians either through employment, family or cultural networks, and who (a) can provide evidence that the maximum amount that they could afford to pay for the property (through maximum borrowing capacity added to residual savings) is a sum less than the open market value of the property..., and (b) holds a capital sum not exceeding the Maximum Residual Savings, or such other criteria as approved by the Council from time to time;

'Eligible Purchaser' means (i) a person who satisfies the Criteria, or (ii) a person who is otherwise approved by the Council and who shall occupy the Affordable Housing Unit as his only permanent home;

'the Market Price' means the sum to be determined by the Proprietors of an Affordable Housing Unit at the commencement of the Marketing Period acting reasonably, such sum to be consistent with the market price of similar Open Market Dwellings marketed on the Development;

'Maximum Residual Savings' means a sum after the purchase of an Affordable Housing Unit not exceeding SIX THOUSAND POUNDS (£6,000) or such other sum as approved by the Council either generally or in any particular case;

'Open Market Dwelling' means a Housing Unit which can be sold on the open market;

'Open Market Value' means the price which reasonably be obtained on the open market for the relevant Affordable Housing Unit at the date of the proposed sale, assuming a willing buyer and willing sellers;

'the Sale Price' means the sum, to be calculated on the date the property is marketed for sale, which equals 80% of the Market Price;"

1. Subject to the terms of this Schedule, no Affordable Housing Unit shall be occupied in all time coming other than by an Eligible Purchaser or a widow or widower of such a person, and any resident dependant...

2. The Proprietors shall have a period of one year and one day in which to (a) market the Affordable Housing Units to Eligible Purchasers at the Sale Price and (b) conclude missives with a Council-approved Eligible Purchaser at the Sale Price. The said period of one year and one day shall be referred to as "the Marketing Period"...

3. If the proprietors (*sic*) have not concluded missives with a Council-approved Eligible Purchaser at the Sale Price at the end of the Marketing Period... (the Proprietors being obliged to use their best endeavours to facilitate conclusion of the missives), then it shall cease to be an Affordable Housing Unit and, with effect from the expiry of the Marketing Period, the Proprietors will be entitled to sell the Affordable Housing Unit as an Open Market Dwelling...

4. Save as hereinafter provided, an Affordable Housing Unit ... purchased by an Eligible Person (*sic*) pursuant to the process in clause 2 hereof shall not subsequently be sold, assigned, transferred or disposed of at a price exceeding a price approved by the Council (hereinafter referred to as "the Approved Maximum Disposal Price") and then only to an Eligible Purchaser. Any person wishing to re-sell, assign transfer or otherwise dispose of an Affordable Housing Unit ... shall write ... inviting the Council to fix the Approved Maximum Disposal Price. The Council shall ... fix the Approved Maximum Disposal Price with reference to matters including a valuation of a similar Open Market Dwelling by an RCIS-accredited valuer or the District Valuer. The Approved Maximum Disposal Price shall be 80% of the value of a similar Open Market Dwelling situated within the Development.

...

6. A heritable creditor who exercises any power of sale or takes any enforcement action in terms of a standard security over an Affordable Housing Unit, shall be entitled to market the Affordable Housing Unit to the majority of the local Edinburgh Market ... for a period of one year and one day at the discount price, meaning at a figure equal to or below the Approved Maximum Disposal Price. In the event that this marketing period fails to produce a buyer, a creditor shall then become entitled to proceed to sell the Affordable Housing Unit as an Open Market Dwelling. Any Affordable Housing Unit sold in these circumstances shall cease be discharged from the terms of this Agreement."

[7] The appeal subjects are an Affordable Housing Unit. The respondent and his wife were Eligible Purchasers. The price they paid was 80% of the value of similar Open Market Dwellings situated within the Silverfields development.

The entry in the valuation list

[8] Under the scheme in Part II of the 1992 Act the Assessor required to enter the appeal subjects in the valuation list and assign a valuation band to them. Section 86, as amended, provides:

"(1) In order to enable him to compile a valuation list for his area under section 84 above, a local assessor shall, in accordance with the provisions of this Part, carry out a valuation of such of the dwellings in his area as he considers necessary or expedient for the purpose of determining which of the valuation bands mentioned in section 74(2) above applies to each dwelling in his area.

(2) The valuation shall be carried out by reference to 1 April 1991 and on such assumptions and in accordance with such principles as may be prescribed.

(3) Where it appears to a local assessor that, having regard to the assumptions and principles mentioned in subsection (2) above, and to any directions given under subsection (5) below, a dwelling falls clearly within a particular valuation band, he need not carry out an individual valuation of that dwelling. ..."

[9] Regulation 2(1) of the Council Tax (Valuation of Dwellings) (Scotland) Regulations 1992 (as amended)("the 1992 Regulations") provides that for the purposes of valuations under section 86(2) of the 1992 Act:

"the value of any dwelling shall be taken to be the amount which the dwelling might reasonably have been expected to realise if it had been sold in the open market by a willing seller on 1 April 1991, having applied the assumptions mentioned in paragraph (2) below ...".

[10] The following assumptions are stated in reg 2(2):

"(a) that the sale was with vacant possession;

(b) that the dwelling was sold free from any heritable security;

(c) that the size and layout of the dwelling, and the physical state of its locality, were the same as at the time when the valuation of the dwelling is made or, in the case of a valuation carried out in connection with a proposal for the alteration of a valuation list, as at the date from which that alteration would have effect;

(d) that the dwelling was in a state of reasonable repair;

(e) in the case of a dwelling the owner or occupier of which is entitled to use common parts, that those parts were in a like state of repair and the purchaser would be liable to contribute towards the cost of keeping them in such a state;

(f) in the case of a dwelling which contains fixtures to which paragraph (4) below applies, that the fixtures were not included in the dwelling;

(g) that the use of the dwelling would be permanently restricted to use as a private dwelling; and

(h) that the dwelling had no development value other than value attributable to permitted development".

[11] The Assessor listed the appeal subjects in the valuation list as being in Band D (values exceeding £45,000 but not exceeding £58,000) with effect from 9 December 2016. In April 2017 the respondent submitted a proposal in terms of reg 5(1)(b) and 5(5) of the Council Tax (Alterations of Lists and Appeals)(Scotland) Regulations 1993 ("the 1993 Regulations") that because of the golden share restrictions the valuation band should be Band C (values exceeding £35,000 but not exceeding £45,000) with effect from 9 December 2016. The Assessor did not agree with that proposal. He referred the disagreement to the Committee as an appeal (reg 15(1) of the 1993 Regulations).

The hearing before the Committee

[12] The respondent appeared before the Committee on his own behalf. He gave evidence. He accepted that the appropriate band would be Band D if the golden share provisions were to be disregarded when valuing the subjects. He maintained however that they ought to be taken into account, and that if they were the appropriate band was Band C.

[13] Before the Committee the Assessor was represented by counsel, Mr Gill. Mrs Ashlie Fraser, a chartered surveyor and one of the Assessor's Divisional Valuers, gave evidence. She observed that the golden share restrictions would not necessarily last for ever because the Agreement provided that in some circumstances an Affordable Housing Unit could become an Open Market Dwelling. Be that as it may, her interpretation of reg 2 was that the golden share restrictions required to be ignored when valuing the dwelling. With council house sales at a discount, the discount had been ignored. Such dwellings had been valued by reference to open market sales of comparable dwellings; or where there were no such sales, by reference to the District Valuer's valuation before the discount was applied. Here, comparing the appeal subjects with similar dwellings in the development their open market value at the time of purchase had been £162,000 rather than £129,600. Their floor area is 74.96 m^2. Sales at around the tone date (1 April 1991) of comparable ground floor dwellings at Easter Warriston and Sheriff Park supported a Band D listing. In Mrs Fraser's view the appeal subjects were at the very top of Band D. While the primary basis of her valuation relied on open market sales of comparable properties at around 1 April 1991 ("the tone date"), she had also carried out a secondary check using the uplift in sales prices at Easter Warriston and Sheriff Park between the tone date and 2015/2016. One of the larger (79.6 m^2) flats at Easter Warriston sold in November 2015 for £165,000, which was 2.66 times the

average sale price achieved for that flat type at around the tone date. One of the smaller (67.7 m^2) flats at Easter Warriston sold in September 2016 for £150,000, which was 2.5 times the average sale price achieved for that flat type at around the tone date. Two of the 62.6 m^2 flats at Sheriff Park sold in March and August 2016 for £132,000 and £140,000, making the average of the 2 sales prices £136,000 which was 2.91 times the average sale price achieved for that flat size at around the tone date. One of the 63.7 m^2 flats at Sheriff Park sold in December 2016 for £146,000, which was 3.21 times the average sale price achieved for that flat size at around the tone date. Mrs Fraser averaged the uplift figures of 2.66, 2.5, 2.91 and 3.21 to arrive at an average uplift of 2.82. Using that to work back from the open market value (£162,000) of the appeal subjects in November 2015 to the tone date resulted in a figure of £57,477 (near the top of Band D). Even if, contrary to her view, it was right to take account of the golden share restrictions, if one worked back from the appeal subjects' discounted price of £129,600 to the tone date using the uplift factors, the appeal subjects would still be in Band D. If the average uplift of 2.82 was used the resultant figure was £45,957. Using the uplift of 2.5 it was £51,840. Only by using uplifts of 3.21 or 2.91 would one arrive at figures in Band C (£40,374 and £44,536).

[14] Mr Gill referred the Committee to *Assessor for Grampian* v *Brownlie* 2003 SC 245 ("*Brownlie*"). In that case the court had decided that a planning restriction on use which affected the value of a dwelling was not to be disregarded when the assessor came to value it. He submitted that the golden share restrictions were of a completely different nature from the restriction in *Brownlie* because they were on acquisition rather than on occupancy or use. They were restrictions on price which did not affect the underlying value of the dwelling. The *Brownlie* restriction was not concerned with who could acquire the dwelling, only who could occupy it. What was relevant here was the underlying open market value.

That approach was consistent with the way that council houses which had been sold at a discount had been valued for council tax. He added that, in any case, an Affordable Housing Unit might not have that character forever. If it was not sold within the Marketing Period of a year and a day, either on first sale or subsequently on the exercise by a heritable creditor of a power of sale, it would become an Open Market Dwelling. The restriction was potentially only a temporary restriction on the price at which the dwelling might be sold. That was different from the *Brownlie* restriction which was perpetual. Mindful of his duty in a case involving a party appellant, Mr Gill drew the Committee's attention to counter-arguments to the Assessor's position. The principal counter-argument was to the effect that *Brownlie* was in point and that its application ought to lead to the golden share restrictions in the present case being taken into account. Here, as in *Brownlie*, the restrictions were planning obligations which ran with the land. In both cases only an identified category of persons could occupy the dwelling: in *Brownlie* it had to be a person mainly employed on the farm, and here it had to be an Eligible Purchaser occupying the dwelling as his only permanent home.

The Committee's decision

[15] The Committee decided that in valuing the subjects the golden share restrictions had to be taken into account. They affected the subjects.

> " ...(T)he restriction on selling at 80% maximum of open market value removed the reality of an unrestricted open market sale and ... therefore the assumption of open market sale ... in the Regulations had to be adjusted to take account of that. The Committee concluded that the "golden share" restrictions ... amounted to a restriction not only on acquisition ... but also on sale price and, thus, value to the seller... The committee concluded that the valuation assumption used by the Assessor in valuing and banding the subjects in Band D had to be qualified to take account of the reality and effect of restriction on sale price for a seller and, to that extent, concluded that this appeal should be allowed."

The Committee was also not persuaded by Mr Gill's suggestion that the golden share provisions ought to be treated as being of a transitory nature. It held that clauses 2, 3 and 6 of the Schedule would not be engaged by a sale by the respondent and his wife. It noted Mrs Fraser's evidence that even if the dwelling was to be valued having regard to the golden share restrictions it would still be Band D, but it "was not convinced of that", because the subjects could fall within either Band C or Band D depending upon which uplift factor between 2.5 and 3.21 was used. It decided that the matter of valuation should be remitted to the Assessor:

> "... to consider of new the appropriate banding ... having regard to the Committee's decision on the qualification to the assumption of open market, willing buyer, willing seller that should be applied in the valuation for banding."

The appeal to this court

[16] Mr Gill appeared once again for the Assessor, but on this occasion there was no appearance for the respondent. Mr Gill submitted that the Committee had erred in law in a number of respects.

[17] First, it had misunderstood the statutory hypothesis in reg 2 of the 1992 Regulations. On a proper construction of reg 2 the golden share restrictions ought to have been disregarded. Reg 2(1) required the Assessor to determine:

> "...the amount which the dwelling might reasonably have been expected to realise if it had been sold in the open market by a willing seller ...".

The discounted sale price of £129,600 was not an amount which had been realised by an open market sale. The open market sale value had been the underlying value - £162,000 - from which the discounted sale price had been derived. *Brownlie* should be distinguished. What the court decided in that case was that a planning restriction on use which affects the value of a dwelling must not be disregarded. The restriction there had not concerned who

could acquire the dwelling, only who could occupy it. By contrast, the golden share restrictions were not restrictions on occupancy or use, but restrictions on acquisition and price. They did not affect underlying value. The Committee had fallen into error. There was no scope for "adjustment" of the valuation principle in reg 2(1). What required to be determined was the open market price which would be achieved in the hypothetical sale envisaged by regulation 2.

[18] A further factor, which Mr Gill advanced somewhat tentatively, was that the effect of the golden share restrictions on the subjects might potentially only be transitory. In terms of clauses 2 and 3, and clause 6, there were circumstances where the restrictions might cease to affect the property. The possible transitory nature of the restrictions was another reason for leaving them out of account. It was also an additional ground for distinguishing *Brownlie.*

[19] Second, if, contrary to Mr Gill's submission, the golden share restrictions did require to be taken into account, the Committee had erred in law in its approach to the evidence. Mrs Fraser's expert opinion evidence (which had not been challenged in cross-examination by the respondent or queried by the Committee) was that if the restrictions were taken into account the appropriate banding for the appeal subjects would still have been Band D. While the respondent had asserted in evidence that the banding ought to be Band C, there was no relevant evidence which supported that view. The Committee had no proper basis upon which to conclude that it was "not convinced" by this aspect of Mrs Fraser's evidence. Given the absence of any relevant evidence which contradicted her view and the absence of any reason to doubt it, the Committee ought to have accepted it. The Committee had failed to give adequate reasons for not accepting Mrs Fraser's view, failed to specify the evidence on which it relied, and failed to set out the reasoning which led it from that evidence to its conclusions (*Assessor for Lothian* v *Martin* 2010 SC 749, per Lord Justice-Clerk Gill at para 10;

Assessor for Lothian v *Holland* 2010 SC 743, per Lord Justice-Clerk Gill at para 12). Mr Gill asked the court to accept Mrs Fraser's evidence and hold that the banding should be Band D. He submitted that it would be legitimate to do so because expert evidence such as Mrs Fraser's was not evidence of primary facts. Rather, it was an expression of opinion about the analysis of those facts according to the specialist knowledge and skill of the expert. It was inferential in nature, and an appellate court was entitled to make its own assessment of it (*Ted Jacob Engineering Group Inc.* v *Morrison* 2019 SC 487, per the Opinion of the Court delivered by Lord Drummond Young at para 10; *Assessor for Lothian v Holland*, *supra*, per Lord Justice-Clerk Gill at para 9).

[20] Third, it was the Committee's duty to make a decision on the central issue before it and not to leave the issue unresolved as it had done (*City of Edinburgh Council v GD* 2019 SC 1, per Lord President Carloway at para 36). It erred in law in its disposal of the appeal. It had no power to direct the Assessor to reconsider the matter and "to carry out a fresh banding valuation". It had no jurisdiction to regulate the ways in which the Assessor exercised his statutory duties (*cf. Customs and Excise Commissioners* v *J H Corbitt (Numismatists) Ltd* [1981] AC 22, per Lord Lane at pp 60-61). The Committee's jurisdiction was limited to appeals against entries made by the Assessor. Its function was to decide the appeal on the evidence before it (*Thorburn* v *Assessor for Peeblesshire* 1941 SC 232). A Committee had no supervisory jurisdiction over the performance by the Assessor of his statutory functions. Only this court has such a jurisdiction (*West* v *Secretary of State for Scotland* 1992 SC 385, per the Opinion of the Court delivered by Lord President Hope at pp 412-413). The Committee's order that the Assessor should carry out a fresh valuation was, in substance, a direction to him as to the proper performance of his statutory duties.

[21] Fourth, the Committee failed to provide adequate and intelligible reasons for its decision, both in relation to the proper treatment of the golden share restrictions and in taking the position that it did in respect of Mrs Fraser's evidence relating to the correct banding. The reasons which it gave left the informed reader in genuine and substantial doubt as to the Committee's conclusions on the determining issues (*Moray Council* v *Scottish Ministers* 2006 SC 691, per Lord Justice-Clerk Gill at para 30).

[22] Mindful of his duty to the court where a party is unrepresented, Mr Gill repeated the arguments against the Assessor's position which he had outlined to the Committee.

Decision and reasons

[23] The reference in the definition of Affordable Housing Unit to shares is puzzling. Presumably, the idea of a party other than the owners holding a share is what underlies the use of the term golden share. Be that as it may, the respondent and his wife are the sole registered proprietors. It was not suggested that they hold any part or share of the subjects in trust for anyone else. We note that although the Council's *A Guide to Golden Share March 2018* describes the golden share scheme as being "an approved affordable housing tenure", it explains that in fact purchasers own 100% of the Affordable Housing Unit but that the sale and resale prices are capped at a maximum of 80% of open market value.

[24] Before turning to what we consider to be the central issue in the case it is convenient to say something about council house sales. For obvious reasons, council house "right to buy" sales were not treated by assessors as being sales in the open market. When banding such dwellings assessors looked to the pre-discount value which had been calculated by the District Valuer and/or to subsequent open market sales of comparable dwellings rather than

to the discounted price (see eg *Assessor for Strathclyde* v *Rea* 1995 SC 577, per Lord Justice-Clerk Ross at p 578F). To do otherwise would have been inconsistent with reg 2(1).

[25] In our opinion the provisions which are central to this appeal are clauses 1 and 4 of the Schedule. The critical issues are (i) are the restrictions in clauses 1 and 4 compatible with an open market sale? (ii) is *Brownlie* in point or is it distinguishable?

[26] Before addressing those questions we remind ourselves what was decided in *Brownlie*. The case concerned a dwelling at a farm. It was a condition of the planning permission for the dwelling, and the condition was reiterated as a planning obligation in a s 75 agreement between the local authority and the owner, that occupancy of the dwelling was to be limited to a person mainly employed on the farm or a dependant of such a person residing with him or her or a widow or widower of such a person. It was common ground that if this restriction was ignored, as the assessor argued it should be, the appropriate band was Band G. The valuation appeal committee decided that it did not fall to be ignored, and that the dwelling should be placed in Band F. On appeal to the court the assessor argued that taking account of the restriction would be contrary to the assumption that the dwelling had been sold in the open market; that the assumptions in reg 2 were exhaustive (*Strathclyde Assessor* v *Rea*, *supra*, per Lord McCluskey at pp 586F and 587C); and that any restrictions on the market for the dwelling had to be ignored. The court refused the appeal. Lord President Cullen delivered the Opinion of the Court:

> "10. We are not persuaded that the submission for the Assessor is well-founded. There is nothing in Regulation 2(2) which states, or implies, that a planning restriction which affects the value of a dwelling falls to be ignored... [T]he Assessor is not required to ignore any depreciation in value which is due to a planning restriction...
>
> 11. The core of the Assessor's argument was that the assumption of sale on the open market by a willing seller excluded any effect which the planning restriction might have on the value of the dwelling. It is of some significance, we consider, to

> bear in mind that planning permission runs with the land to which it relates (see section 44 of the Town and Country Planning (Scotland) Act 1997). While the number of persons who would be interested in making an offer for the dwelling would, by reason of the planning condition, be limited, it does not follow that it is impossible to assume the dwelling being sold on the open market by a willing seller for the best price which could be obtained in the circumstances. Seen from that point of view the contention that the planning condition fell to be ignored involves a departure from reality which is required neither by the assumption of sale on the open market or by any of the specific assumptions set out in subparagraph (2).
>
> 12. For these reasons we have come to the conclusion that the appeal should be refused. The dwelling will accordingly be treated as falling within Band F in accordance with the decision of the Committee."

[27] As we read the decision, the court decided that while the planning restriction would be likely to reduce the number of potential purchasers who would be interested in bidding for the dwelling, and would thereby reduce what would otherwise have been the open market value of the dwelling from Band G to Band F, the restriction was not incompatible with the statutory hypothesis of a sale in the open market.

[28] We digress to note that in England, where the relevant statutory provisions are similar (but not identical) to the Scottish provisions, the court's approach in *Brownlie* appears to have been followed by the Valuation Office Agency (see *Practice Note 1: England only: Definition of Dwelling and Basis of Valuation for Council Tax*, para 4.10) and to have been endorsed at first instance in the High Court (see *McKenzie (Listing Officer) v Marshall* [2008] EWHC 641 (Admin), per Dobbs J at para 11).

[29] We turn then to the first issue - are the restrictions in clauses 1 and 4 compatible with an open market sale? In order to answer that question it is necessary to consider what makes a sale an open market sale. In our opinion an essential requirement is that the dwelling is freely exposed for sale to all those who may be desirous of purchasing (*cf. Inland Revenue Commissioners* v *Clay* [1914] 3 KB 466, Swinfen Eady LJ at p 465; *Baptist* v *Masters of the Bench and Trustees of the Honourable Society of Gray's Inn* [1993] 2 EGLR 136, Judge Aron

Owen at pp 138M-139C). The open market sale envisaged by reg 2 ought to reflect the principle in reg 2(1) and the assumptions in reg 2(2). It may also reflect actual characteristics of the dwelling as long as those characteristics are not incompatible with the statutory hypothesis.

[30] The restrictions in clauses 1 and 4 are obligations which run with the land and will affect any owner. They are enforceable against proprietors and occupiers of the appeal subjects. That is the combined effect of the Agreement and s 75(5) of the 1997 Act. In terms of clause 1, for as long as they remain an Affordable Housing Unit the appeal subjects may not be occupied other than by an Eligible Purchaser (or widow or widower) and dependants. In terms of clause 4, the appeal subjects are only to be sold, assigned, transferred or disponed to an Eligible Purchaser and the price is not to exceed the Approved Maximum Disposal Price (80% of the value of a similar Open Market Dwelling situated within the development). In our opinion the combined effect of clauses 1 and 4 is irreconcilable with the notion of an open market sale. A sale on those terms would not involve the subjects being freely exposed for sale to all those who may be desirous of purchasing them. The sale price obtained would not be one conditioned by the open market. On the contrary, the discounted price would be derived by assessing the open market value but then applying a discount to that value.

[31] Are we bound nonetheless by *Brownlie* to conclude that the subjects must be valued on the basis that the clause 1 and clause 4 restrictions apply? In our opinion we are not.

[32] While at first blush the restriction in clause 1 might be thought to be similar in nature to the restriction in *Brownlie (*both provisions restrict the category of persons who may occupy the dwelling) there is a material difference. In *Brownlie* the occupation restriction did not preclude an open market process, though it made the class of purchasers likely to be

interested in bidding smaller than it would have been but for the restriction. (The potential market might have included (i) a person who wished to acquire the house and occupy it personally to work the agricultural land; (ii) the owner of the agricultural land who wished to acquire the house for occupation by an employee who would work the land; or (iii) a third party who wished to acquire it and let it to an agricultural worker or to the agricultural worker's employer.) The open market sale price reflected the restriction on occupancy. Here, by contrast, it is inherent in the clause 1 restriction that Eligible Purchasers cannot afford to pay the open market value of the dwelling to acquire it. That linkage to ability to pay makes it difficult to say that the clause 1 restriction is truly analogous to the *Brownlie* restriction.

[32] In any case, what is important is the combined effect of clauses 1 and 4. The restrictions in clause 4 have no analogues in *Brownlie.* They provide that sale etc. of the dwelling may only be to an Eligible Purchaser (the "first restriction"); and that the price must not exceed the Approved Maximum Disposal Price (which price shall be 80% of the value of a similar Open Market Dwelling situated within the Development) (the "second restriction"). The first restriction limits the field of potential purchasers to those who do not have the ability to finance the purchase at an open market value price. The second restriction caps the sale price of an Affordable Housing Unit at a maximum of 80% of the value of comparable Open Market Dwellings. Thus, even if some Eligible Purchasers have the means and inclination to bid more than 80% (though by virtue of being Eligible Purchasers they would not have the means to bid as much as 100%), the restriction prevents a sale at that higher price.

[33] It follows in our opinion that the decision in *Brownlie* ought to be distinguished. In *Brownlie* the restriction on occupiers was not incompatible with there being a sale on the

open market in accordance with the statutory hypothesis. Here the position is different. The combined effect of the restrictions in clause 1 and clause 4 is incompatible with an open market sale on the statutory hypothesis.

[34] In our view, for the foregoing reasons, the Committee erred in law and the appeal should be allowed. The Committee focussed on the sale price which a proprietor could have achieved at the tone date if constrained by the golden share restrictions, instead of focussing on the dwelling's open market value in accordance with the statutory hypothesis. It looked for the "value to the seller" on the footing that the seller was affected by the restrictions, rather than for the open market sale value. It failed to appreciate that, unlike the restriction in *Brownlie,* the golden share restrictions are incompatible with the statutory hypothesis.

[35] That is sufficient to dispose of the appeal. However, we also think it appropriate to express agreement with Mr Gill that the Committee's jurisdiction was to grant or refuse the appeal on the basis of the material before it. It had no supervisory jurisdiction over the Assessor's exercise of his statutory functions. It ought to have decided the appeal one way or the other on the basis of the evidence. It had no power to direct that the Assessor revalue the appeal subjects.

[36] It is unnecessary to express views on the other grounds of appeal and we prefer not to do so. In particular, we think there are good reasons for reserving our opinion on the proper construction of clauses 2, 3 and 6 of the Schedule. First, it is clear to us that those provisions are not central to this appeal. Second, in view of the way in which battle lines were drawn before the Committee we do not think it is open to the Assessor in the present case to argue that the golden share restrictions ought to be left out of account because they might be of transitory effect. At Committee both parties proceeded on the basis that if the restrictions were consistent with the statutory hypothesis then the value of the appeal

subjects would be less than it would have been had the restrictions been left out of account. Mrs Fraser's position was that it would be within Band D, but that it would be near the lower threshold of the band (rather than near the top of the band if the restrictions were left out of account). Third, we did not have the benefit of fully developed submissions on the matter from Mr Gill or the assistance of submissions on it from a contradictor.

Disposal

[37] For the foregoing reasons we allow the appeal.