Alba Energy

FOR INDEPENDENT
HYDRO OPERATORS IN SCOTLAND

RATEABLE VALUES FOR SMALL HYDRO IN SCOTLAND

The Tayside Assessor vs Old Faskally & Others

Summary

Appeals against the Rateable Values applied to small hydro sites have been outstanding since 2010. These appeals were initially referred to the Tayside Valuation Appeal Committee, which found in favour of valuations proposed by the small hydro subjects, collectively known as "Old Faskally & Others".

The essence of the Old Faskally argument was that the Assessor had applied excessively high Rateable Values (RVs) to small hydro sites in the mistaken assumption that, in addition to the powerhouse building, construction associated with the Penstock also fell to be valued. The Committee accepted the argument that the Penstock (derived from the history of sluicing systems) comprised all civil construction from intake to outflow – and was, according to the terms of the Plant & Machinery Order, exempted from valuation.

Since then, the Assessor has twice appealed against the Committee's decisions.

Next month, the Lands Valuation Appeal Court (LVAC) will hear the Assessor's appeal for the second – and final – time and the court's Opinion is likely to determine the course of both political and legal arguments over the way small hydro sites are assessed for valuation.

Background

The case of the Tayside Assessor vs Old Faskally & Others is due to be heard by the Lands Valuation Appeal Court (LVAC) on January 15th, 2019. The LVAC is highest court in Scotland for such an appeal.

This is the second time the Assessor has appealed against the determinations of the Tayside Valuation Appeal Committee – which has twice found in favour of Old Faskally & Others, represented by Alba Energy. (Those appeals were based on the 2010 valuation roll; not to be confused with current 2017 RVs being disputed by the industry.)

The first appeal brought by the Assessor against the Committee was heard in 2016. On that occasion the Committee had supported Alba/Old Faskally's valuations, using the

"comparative method" of valuation. The opinion of Lady Dorrian and the other two judges was that the Committee needed to reconsider its interpretation of the Plant & Machinery Order and give further thought to meaning of the term "Penstock", but the court offered no specific methodological instruction and reverted the matter back to the committee to decide which valuation method to use.

Having reconsidered, the committee decided to change the method of valuation, to accord with the Assessor's preferred "Revenue and Expenditure" methodology. Nevertheless, the committee's resulting valuations continued to support the small hydro case. Instead of the Assessor's split of rateable elements (the divisible balance between hypothetical tenant & landlord) – a split of 50:50 – the committee settled on a split of 75:25, based on expert evidence provided by the hydro appellants in the first case.

Such a split was considered unacceptable by the Assessor, who again appealed the decision of the committee, leading to the second hearing at the LVAC in January, 2019.

This will be the final hearing of the appeal. The Assessor has formally stated he will not appeal a third time. (It is also worth noting that, early in proceedings, the Assessor stated that Old Faskally & Others would be a test case, the outcome of which should apply to all other small hydro subjects under appeal.)

Both the Assessor and Alba Energy must lodge their arguments by 15th December, 2018.

The case will again by heard by Lady Dorrian (alongside two other judges).

Alba will be represented by Geoff Clarke QC; the Assessor by Steven Stuart QC.

The argument

It will be a short hearing of just half a day. The purpose of the hearing is not to revisit all the arguments about how small hydro should be assessed. Rather, the question will be whether the Committee has erred in the correct application of the law in arriving at its decision.

Much of this boils down to a familiar subject: the definition and extent of the Penstock and the question of its rateability. At the initial hearing in 2013, the Assessor failed to provide expert witnesses (NB he is not himself an expert in this regard). The small hydro appellants, however, did produce expert witnesses, who provided accepted historical and industry definitions of the Penstock. In the eyes of the court, the evidence of such witnesses, if not contested by alternative expert witnesses, amounts to matters of fact.

It is the view of Geoff Clarke QC that the case being brought against the committee by the Assessor is unlikely to be strong. The Committee, it seems, has been diligent in seeking to respond fully to matters remitted to it by the court and has acted within its competency by allocating a percentage of rateable elements according to expert evidence provided in the original case and in applying its own measure to produce the resulting valuations.

No additional evidence or witnesses are permitted at this stage. The appeal of the Assessor is bound to the terms of the previous case.

The case to be presented by Steven Stuart QC on behalf of the Tayside assessor, in order to be successful, must show that the Committee has erred in law in its assessment of which elements may fall to be rated, the division of those rateable assets and the calculation of the resulting Rateable Values.

In response, the case to be presented by Geoff Clarke on behalf of Alba Energy will be designed to defend and reinforce the stated case of the Tayside Committee – to demonstrate that it has acted within the law – and thus to justify the Rateable Values ascribed to Old Faskally & Others by the Committee.

After this, what happens to the 2017 appeals?

Appeals against the 2017 valuations are still outstanding and, if unresolved by negotiation, will most probably be referred to the Lands Tribunal.

The 2017 valuations increased RVs for small hydro by an average 150% and represent a far greater threat to the small hydro sector than the 2010 valuations over which the Old Faskally case is being argued. But the principal terms of argument are the same for both.

After the January 15th hearing, the judges will produce their written Opinion within a matter of weeks. It is possible that they will find that the committee has erred in law and instruct that valuations provided by the Assessor should prevail.

Alternatively, the judges might produce a provisional judgement, with instructions that both committee and Assessor modify valuations to new stipulations, as set out by the court.

If either of these were to be the outcome, it would still be possible for the small hydro sector to bring an appeal against the 2017 valuations (probably to the Lands Tribunal) based on a new argument (eg that FiTs, as a form of grant, have been improperly allocated as revenue in the Assessor's methodology).

But if the LVAC does not find clearly in favour of Old Faskally & Others, any subsequent case would be much more difficult and Alba would most likely consider that the most plausible form of resolution would have to come, instead, from the process of political lobbying that is already underway through the hydro sector's formal engagement with government through the Task and Finish Group and the Tretton Review.

However, should the LVAC find in favour of the Committee's valuations, the Assessor would not appeal again and would be required to revise RVs for Old Faskally – and all of the 2010 valuations which were under appeal.

In this eventuality, the small hydro sector would be in a strong position to take an appeal to the Lands Tribunal to have the 2017 Rateable Values overturned.

A new case would be based on the terms of the Old Faskally precedent, but would also have the opportunity to raise additional arguments, such as whether the Assessor has also erred in his calculation of grants (Feed-in-Tariffs) as revenue.

How would this affect the political case?

A successful outcome of the Old Faskally case, providing potential precedent for the hydro sector to bring a successful case to the Lands Tribunal, might persuade the Assessor that a negotiated revision of the 2017 valuations would be his wisest course of action – and voluntarily correct his methodology for small hydro subjects.

In this case, the terms on which the Tretton Review had assumed valuations were being legitimately made by the Assessor would be altered and the team representing the hydro sector would be able to renew its essential argument: that RVs should be brought down to an average of 8-10% of turnover, in line with other sectors, such as wind.

If the Assessor concurred, it might not require legislative change to achieve that end.

If the Assessor did not concur, a new case would need to be brought to the Lands Tribunal.

In previous meetings with Scottish Government, the Assessor has accepted that the determination of the Lands Tribunal would be decisive.

Conclusion

The outcome of the Old Faskally case is likely to be decisive on both the legal and political routes currently being pursued by the small hydro sector.

If there is a successful outcome of the case, but the Assessor continues to resist calls to revise the 2017 valuations, the small hydro sector will be in a good position, collectively, to raise a new case at the Lands Tribunal in 2019.

Such a case would be most effective if it were to be brought forward jointly by the two principal bodies representing the small hydro sector: the British Hydropower Association and Alba Energy.

Success for the small hydro case at the Lands Tribunal would likely be definitive, forcing both the Assessor and Scottish Government to revise their positions according to terms laid down by the court.

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On behalf of Alba Energy
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