Neutral Citation Number: [2020] EWHC 259 (Ch)

Claim No: PT-2019-000303

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 12 February 2020

Before :

STUART ISAACS QC (sitting as a Deputy Judge of the High Court

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Between :

Nuffield Health

Claimant

London Borough of Merton

Defendant

Mr Daniel Kolinsky QC and Mr Matthew Smith (instructed by BDP Pitmans LLP) appeared on behalf of the Claimant.

Mr Jonathan Fowles and Mr Cain Ormondroyd and (instructed by South London Legal Partnership) appeared on behalf of the Defendant.

Hearing date: 23-24 January 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Stuart Isaacs QC:

Introduction

1. This is the final hearing of a Part 8 claim issued on 10 April 2019 in which the claimant seeks a declaration that it is and, at all times since 1 August 2016, has been entitled pursuant to section 43(6)(a) of the Local Government Finance Act 1988 ("the 1988 Act") to mandatory relief from non-domestic rates in respect of premises at Merton Abbey, 29 Chapter Way, London SW19 2RP (the "Premises") which it acquired on that date. In consequence, it also seeks repayment of 80% of the sums paid to the defendant in respect of rates since 1 August 2016, together with simple interest and costs. The defendant accepts that, if the declaration is granted, the claimant is entitled to the return of the sums claimed and that it would be open to the court to award interest but it disputes the claimant's entitlement to the declaration and, therefore, to an award of costs.

2. The claimant's case is supported by witness statements dated 8 April 2019 and 12 June 2019 of Mr Toby Newman, its General Counsel and Company Secretary, and witness statements dated 8 April 2019 and 16 January 2020 by Mr Anthony Platt, its Head of Estates. The defendant's case is supported by witness statements dated 2 May 2019 and 6 January 2020 by Mr David Keppler, its Head of Revenue and Benefits, and a witness statement dated 6 January 2020 by Mr Guy Bishop of the defendant's solicitors.

3, Under section 43(1) of the 1988 Act, a ratepayer shall as regards a hereditament be subject to a non-domestic rate in respect of a chargeable financial year if, in respect of any day in the year, on the day he is in occupation of all or any part of the hereditament and the hereditament is shown for the day in a local non-domestic rating list in force for the year. For rating purposes, a hereditament means property which is or may become liable to a rate, being a unit of such property which is, or would fall to be, shown as a separate item in the valuation list, see *Woolway v Mazars* [2015] UKSC 53 at [4] *per* Lord Sumption.

4. Section 43(5) of the 1988 Act provides for mandatory relief where section 43(6) of the 1988 Act applies. Section 43(6)(a) provides that section 43(6) applies where on the day concerned "*the ratepayer is a charity or trustees for a charity and the hereditament is wholly or mainly used for charitable purposes (whether of that charity or of that and other charities)*". Where section 43(6) applies, the liability for rates is calculated at 20% and the 80% reduction constitutes the mandatory relief.

5. The claimant is a company limited by guarantee without a share capital. It was originally incorporated on 14 January 1957 as the Nursing Homes Charitable Trust but underwent name changes first to Nuffield Hospitals and then to its present name so as better to reflect its expanding activities in the health and fitness sectors. Section 67(10) of the 1988 Act defines a charity to mean "*an institution or other organisation established for charitable purposes only or any persons administering a trust established for charitable purposes only*". Similarly, section 1(1) of the Charities Act 2011 (the "2011 Act") defines "*charity*" to mean an institution which is established for charitable purposes only and falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities. The advancement of health,

including the prevention or relief of sickness, disease or human suffering, is a charitable purpose within section 3(1)(d) of the 2011 Act. Under section 37(1) of the 2011 Act, an institution is, for all purposes other than rectification of the register, "*conclusively presumed to be or to have been a charity at any time when it is or was on the register*". It is not in dispute that the claimant is and has at all material times been a registered charity.

6. Under clause 3.1 of the claimant's memorandum of association, its objects are to "*advance, promote and maintain health and healthcare of all descriptions and to prevent, relieve and cure sickness and ill health of any kind, all for the public benefit*", in furtherance of which it has a number of powers under clause 3.2 of the memorandum. Its strategy for benefiting the public is described in a document entitled *Delivering Public Benefit Policy*, under which amongst other things its primary method of raising funds is to charge fees for the provision of its charitable products and services. The strategy anticipates that, in the great majority of cases, the fee charged will cover the full costs of the product or service plus a margin to maintain and reinvest in the services. It expressly states that fees must not be set at a level which excludes people of modest means after taking into account the available funding arrangements and distribution channels. The claimant's trustees conduct annually a review of its objectives, its activities and the degree to which the services it provides are made accessible to the public. The annual reports for both 2016 and 2017 state that the trustees have concluded that the claimant's objectives remain entirely for the public benefit and that the trustees are also satisfied that its activities are overwhelmingly carried out to fulfil its charitable objectives, that there are no activities that are inconsistent with its objectives and that it meets the requirements of its stated policies.

7. Over time, the focus of the claimant's activities has moved from the cure of illness to its prevention. Mr Newman summarises the position in paragraph 11 of his first statement. He there states that the charity aims to achieve its objectives:

> "*by maintaining a widely-accessible health system which connects three key elements: first, the promotion of fitness, emotional wellbeing and health education as a means of maintaining good health; secondly, the identification, assessment and containment of health risks; and, thirdly, the treatment of diagnosed health problems, including rehabilitation following treatment. To that end, Nuffield Health has now established a network of fitness and wellbeing centres, diagnostic units, hospitals, and medical clinics, complemented by digital health and wellbeing services. There are 31 hospitals, 112 fitness and wellbeing centres, 5 medical centres, and over 200 further gyms and health assessment facilities operated by Nuffield Health in workplaces across the UK.*"

8. The Premises stand on the site of one of 35 gyms previously operated under the "Virgin Active" brand, which the claimant acquired on 1 August 2016 to add to its existing network of fitness and well-being centres in pursuit of its strategy of the prevention of ill-health. During its operation by Virgin Active, the Premises were subject to non-domestic rates, having been entered on the rating list with effect from 29 May 2005. Their current rateable value is £565,000.

9. The layout of the Premises is described in some detail by Mr Platt in his evidence. The first floor is principally taken up by a gym and an area for spinning classes but also features a crèche, available only to members, office space and storage areas. The ground floor comprises a swimming pool and smaller spa pool and sauna and steam rooms, together with toilets, changing rooms, two consultation rooms, and a reception and waiting area where refreshments can be purchased. The waiting area is primarily used by people resting after exercise but also serves as a holding area for local school students who attend a "swim school" and for quarterly "Meet our Experts" events. Under Virgin Active, there had also been a hair and beauty salon on the ground floor but the salon owner vacated the space which it occupied sometime after the end of April 2017 and the space was then converted into a Physiotherapy and Emotional Wellbeing Suite. There is also an underground car park for the use of members.

10. On 19 August 2016, the claimant, through its agent, Bilfinger GVA, applied to the defendant for mandatory and discretionary rate relief. The defendant refused discretionary rate relief but initially applied mandatory rate relief. However, following a visit by Mr Keppler and a colleague to the Premises at the end of November 2016, the defendant took the view that such relief should be withdrawn since the use of the Premises was not wholly or mainly for charitable purposes. The defendant so informed the claimant in a letter dated 5 December 2016 which stated that:

> "*... during the visit it was noted that part of the property consisted of a large private members only car park on the ground floor and that a good part of the 1st floor is occupied as a café/seating area, with wi-fi access, in addition to the area used as a hair and beauty salon. It was evident that the 2nd floor is used mainly as a gym or studio with the exception of a smaller crèche area.*
>
> *Taking these circumstances into consideration, in looking at the overall usage of the space within the premises I have cancelled the mandatory relief with effect from 1 August 2016, the date Nuffield Health took occupation, as I do not consider the property is occupied wholly or mainly for charitable purposes.*"

(The first and second floors referred to in the letter correspond to what Mr Platt describes as the ground floor and first floor respectively).

11. In subsequent correspondence, the defendant expanded on the reasons for its refusal to grant mandatory relief to include reliance on the main usage of the Premises allegedly being fundraising.

12. The first question which arises is whether, having regard to the extent of the use of the Premises, they are "*wholly or mainly used for charitable purposes*" within the meaning of section 43(6)(a) of the 1988 Act.

13. The claimant submitted that the answer to that question is yes. It conceded that, while the beauty salon remained in operation, the Premises were mainly albeit not wholly used for charitable purposes but that, after the space which it occupied had been converted into its present use, they became wholly used for such purposes.

14. In *Glasgow Corporation v Johnstone* [1965] AC 609, the House of Lords held by a majority (Lord Guest dissenting) that a house physically occupied by the caretaker of a church (and his wife) as a condition of his employment was wholly or mainly used for charitable purposes of the church. The house and the church were parts of a single building, the only access to the house being through the church premises, but the house was a separate entity from the church for rating purposes. The relevant legislation in that case was section 4(2) of the Local Government (Financial Provisions, etc) (Scotland) Act 1962 under which any lands occupied by a charity which were wholly or mainly used for charitable purposes benefited from a 50% reduction in the rate which would otherwise be leviable.

15. Lord Reid said, at pages 621-622:

> "*Once the respondents* [the church] *have been held to be the occupiers, I think that it is their use of the premises that we must consider. They use the house to have a servant on the spot to assist them in the more efficient performance of their charitable activities. I think that it is much too narrow a view simply to see whether any charitable activity is carried on in the house. Let me take a hospital as a case where it is obviously necessary for the nurses, servants of the charity, to live nearby. I cannot think that it would be right or that it is the intention of the Act, to draw a line between the wards, where they perform the charitable function of nursing the sick, and the places where they eat, rest and sleep. The efficient performance of their charitable function depends on their being properly cared for when they are off duty, and so caring for them appears to me to be wholly ancillary to the charitable purpose of the hospital. But there is nothing to prevent a charitable organisation from conducting activities which are not wholly ancillary to the carrying out of its main charitable purpose. I do not propose to give examples because this provision is new and difficult cases may arise under it. But I cannot accept the appellant's argument that if the respondents succeed in this case it must follow that this provision adds nothing to the requirement that the premises must be occupied by the charity. If the use which the charity makes of the premises is directly to facilitate the carrying out of its main charitable purposes, that is, in my view, sufficient to satisfy the requirement that the premises are used for charitable purposes.*" (underlining added)

16. *Glasgow* was applied in *Oxfam v Birmingham City District Council* [1976] AC 126. That case concerned the interpretation of section 40(1)(a) of the General Rate Act 1967 under which any hereditament occupied by a charity and wholly or mainly used for charitable purposes might benefit from a reduction of 50% of the rate which would otherwise be chargeable. The charity, Oxfam, operated gift shops throughout the United Kingdom which sold three categories of articles: donated articles that could not be used in its work overseas, accounting for about 80% of total sales; village handicraft articles made in the developing world to encourage local industries and provide employment, accounting for about 7% of total sales; and articles produced by a wholly-owned trading subsidiary, accounting for about 13% of total sales. The House of Lords held that user for charitable purposes meant user for purposes directly related to the charity's objects, as opposed to user for the purpose of getting in, raising or earning money for the charity and that, since the shops were used mainly for the sale of donated clothing

in order to raise money for use in the charity's work overseas, they were, accordingly, not entitled to relief.[1]

17. Lord Cross said, at pages 138A-139F:

> *"The wording of section 40(1) of the Act of 1967 shows that the legislature did not consider that the mere fact that the hereditament in question is occupied by a charity justifies any relief from rates. That is only justified if the hereditament is being used for "charitable purposes" of the charity. So the first question which arises is "what are 'charitable purposes' of a charity as distinct from its other purposes?". The answer must be, I think, those purposes or objects the pursuit of which makes it a charity – that is to say in this case the relief of poverty, suffering and distress. Assuming that to be so it might be argued that relief from rates could only be granted if the premises in question were being used for the actual giving of relief to those in need – if, for example, those in need came to them to receive food, clothing, money or shelter. But the decision of this House in Glasgow Corporation v Johnstone [1965] AC 609 shows that such a construction is too narrow. ...*
>
> *Oxfam, therefore, is entitled to rating relief in respect of premises which it occupies and which are not being used for the actual relief of poverty or distress if – to quote Lord Reid – the use which it makes of them is "wholly ancillary to" or "directly facilitates" the carrying out of its charitable object – the relief of poverty or distress. One example of such a use would be the head office of Oxfam.*

18. On the question of user, Lord Cross, at page 141F, went on to say that the shops were undoubtedly mainly used for the sale of clothing given to Oxfam and that the question was whether such user was user "*for*" its charitable purposes. His answer to the question, at page 146C-D, was no:

> *"the choice is between (A) drawing the line so as to exclude from relief user for the purpose of getting in, raising or earning money for the charity, as opposed to user for purposes directly related to the achievement of the objects of the charity, and (B) only excluding from relief user for the purpose of carrying on a business to earn money for the charity. If the second be the true view, the further question arises whether Oxfam shops can be distinguished – for the purposes of the section – from a shop run by a charity on ordinary commercial lines.*
>
> *In my judgment, the first alternative is to be preferred."*

19. Lord Morris' speech was to the same effect. The court has first to ascertain the charity's charitable purposes and the use of the premises and then to decide whether that user was "*for*" the charitable purposes (see at page 148D). Having set out Oxfam's charitable purposes, he continued, at pages 148F-150A:

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[1] The actual result in *Oxfam* was reversed by section 64(10) of the 1988 Act whereby "[a] *hereditament shall be treated as wholly or mainly used for charitable purposes at any time if at the time it is wholly or mainly used for the sale of goods donated to a charity and the proceeds of sale of the goods (after any deduction of expenses) are applied for the purposes of a charity.*".

> " *There being a distinction between, on the one hand, activities which a charity may undertake, and, on the other hand, activities which consist in the actual carrying out of its charitable purposes, it is manifest that some activities are on one side of the line and some activities are on the other. This is shown on a consideration of decided cases. But because each case must be decided by an application of the relevant statutory words to some particular facts or sets of circumstances, I consider that any useful comment on any particular decision requires detailed statement of the features of the particular facts and circumstances. The facts in the present case are ascertained and are uncomplicated and so our only task is to apply the statutory words to them.*
>
> *While care must always be taken to adhere to the statutory words and not to supplement them or supplant them, I consider that user "for charitable purposes" denotes user in the actual carrying out of the charitable purposes: that may include doing something which is a necessary or incidental part of, or which directly facilitates, or which is ancillary to, what is being done in the actual carrying out of the charitable purpose. There may, on the other hand, be things done by a charity, or a use made of premises by a charity, which greatly helps the charity, and which must in one sense be connected with the charitable purposes of the charity and which are properly described as being the carrying out, or part of the carrying out, of the charitable purposes themselves. The nature of the user may not be sufficiently close to the execution of the charitable purpose of the charity. A charity may be entitled to occupy premises and to use them other than for its charitable purposes: only if to occupation of a charity there is added user "for charitable purposes" will the benefit given by the section accrue.*
>
> ...
>
> *... The use of the premises, however helpful to Oxfam it may be, cannot, in my view be regarded as use which directly relates to the carrying out of the charitable purposes. The hereditaments are used as shops and for the purpose of selling goods therein. The shops are used for an activity which is not inherently charitable. The occupation by Oxfam in ways which will benefit them and indirectly assist them in their work but the user is not user for the charitable purposes of the charity.*"

20. In *Sheffield City Council v Kenya Aid Programme* [2014] QB 62 ("*Kenya Aid*"), the Divisional Court was concerned with a question which did not arise in *Glasgow* or *Oxfam,* namely the relevance of the extent of the use of the premises when determining whether, for the purposes of section 43(6) of the 1988 Act, they were wholly or mainly used for charitable purposes. The court stated that it should look at the whole of the evidence and decide the question on a broad basis, following the approach taken in *Glasgow* and *Oxfam*, and that account could properly be taken of the extent or amount of the actual use of the premises. It was accepted by both parties in that case that the nature of the use had to be viewed from the standpoint of the occupying charity.

21. These cases, and the quoted passages from them, show first that it is the charity's use of the premises that must be considered; second, that if the use which the charity makes of the premises is directly to facilitate or ancillary to the carrying out of its main charitable purpose, that is sufficient to satisfy the requirement that the premises are used for

charitable purposes; and third, conversely, that if the charity's use of the premises is not for its charitable purposes or does not directly facilitate or is not ancillary to its charitable purposes, the charity will not be entitled to relief.

22. The defendant submitted that on any view of the constituent parts of the Premises, they are not being used or have not been used wholly or mainly for the claimant's charitable purposes and that various parts of the Premises were not used for charitable purposes on any basis. It submitted that there is no direct link between the current use of the reception and waiting area and the previous operation of the café in that area and the claimant's charitable purposes; the spa pool, sauna and steam room simply provide a means of relaxation and recreation for the claimant's members; and there is no evidence that the crèche and car park directly facilitate or are wholly ancillary to the claimant's charitable objects rather than simply a convenience to members. It further submitted that, even if the gym, swimming pool and directly ancillary facilities such as the reception and waiting area, consultation rooms, staff areas and plant are regarded as being in charitable use, on a broad brush approach the Premises are not mainly used for charitable purposes.

23. I reject the defendant's submissions. In my judgment, it is artificial to break up the Premises into their individual constituent parts and consider the use of each individual part and not to focus on the user of the Premises as a whole. Such an approach would not be in accordance with the need to approach the question of the user from the claimant's viewpoint on a broad basis. Applying *Glasgow* and *Oxfam*, and applying the relevant statutory wording to the substantially undisputed facts of the present case, I agree with the claimant that, having regard to the extent of the use of the Premises, they are wholly used for its charitable purposes and, prior to the conversion of the beauty salon space, were mainly used for those purposes. Even if the parts of the Premises are considered individually, in my judgment, the gym, area for spinning classes, swimming pool, Physiotherapy and Emotional Wellbeing Suite and consultation rooms which comprise the greater part of the Premises serve to advance, promote and maintain health and prevent ill health. The other spaces, in particular the crèche and car park and reception and waiting area, directly facilitate or are ancillary to those uses. The crèche facilitates the use of the Premises by those who might not otherwise be able to use the facilities there if they were unable to leave their children. The car park enables members with vehicles conveniently to get to the facilities.

24. The next question is whether, as the defendant submitted, the use of the Premises is not for purposes directly related to the charity's objects but is for commercial operations, with the consequence that the use is not "*for*" charitable purposes within the meaning of section 43(6)(a) of the 1988 Act. I accept that premises which have a single use may be used for more than one purpose. The question in that situation becomes whether the main use of the premises is for charitable purposes. There are two limbs to the defendant's submission: first, that the main purpose of the Premises' use is to raise funds for the claimant; and, second, that the Premises' use is not for or wholly ancillary to the public benefit.

25. The defendant relied on the approach taken, albeit on different facts, in *Royal Society for the Protection of Birds v Brighton Borough Council* [1982] RA 33. In that case, the High Court refused to grant the charity, the RSPB, a declaration that its premises in a prestigious shopping area in Brighton were entitled to mandatory relief under section

40(1)(a) of the General Rates Act 1967. At the premises, the RSPB ran a shop which sold articles which featured representations of birds and also had an exhibition centre. It encouraged people to become members of the society by having membership application forms available at the premises. The articles for sale were described by the judge, at pages 37-38, as follows:

> *"... They are in the main the sort of articles which are sold in premises which are operated for the purposes of raising money to be devoted to the objects of the occupier. In the case of other charities, or even perhaps of non charitable organisations, it has become in recent years a well known way of raising money to purvey to the members or, where appropriate, to the public at large, articles bearing the crest or (as it is sometimes called) the logo which denotes the activity carried on by the vendor of the articles. The nature of the articles of course varies from vendor to vendor, but they include such things as tablemats, cheeseboards, cufflinks, and other objects of personal use or ornament, and articles for use in the home, and so on, which identify the article with the activity of the vendor. In the present case, some of the articles are useful, others are ornamental or decorative.*
>
> *The particular feature which distinguishes the articles sold on the premises by the ratepayer is that each of them features a particular species of bird. This is not, therefore, a case in which it can be said that the ratepayer is simply carrying on a retail trade with a view to profit. For that purpose it might do better if it widened the range of articles which it had to sell. However, it is the fact that the activity being carried on in the premises is described by the ratepayer itself upon the fascia of the premises as that of a 'Gift Shop'."*

26. The judge rejected the RSPB's submission that the direct object of the sales was the development of public interest in birds, such that the use of the premises was one directly devoted to its charitable objects of *inter alia* encouraging the better conservation and protection of wild birds by developing public interest in their place in nature, as well as in their beauty of plumage and note. After considering *Glasgow* and *Oxfam*, he concluded, at pages 44-45:

> *"that the use made by the ratepayer of the premises is not such as "directly to facilitate" the carrying out of its main charitable purpose sufficiently to justify my deciding this case in its favour. I have no doubt that counsel for the ratepayer is correct in submitting to me that <u>one</u> of the objects of the ratepayer in using these premises as it does is to carry out its main object of developing public interest in birds. But I am of course considering the words of the statute, which involve an investigation of matters of fact and degree. If I were satisfied that the activity of the ratepayer at these premises were "wholly or mainly" used for charitable purposes, not just partly so used, I would have accepted the submission of counsel for the ratepayer. But bearing in mind the restricted sense in which the words "charitable purposes" have to be construed for this purpose, I am unable to do so.*
>
> *It seems to me that the premises are "mainly" used for the purposes, as Lord Cross of Chelsea would have put it, of "getting in, raising or earning money" for the ratepayer. I believe this is one of those cases to which I have*

> *adverted where, although you draw the line, you find yourself unable to say that your case falls exclusively on one side or the other. In this respect, the task of the court is made easier because the statute does include the words "or mainly" in the test which it requires the court to apply. I find here activities carried on in the premises which beyond doubt are activities carried on for the purpose of "getting in, raising or earning money"; and I also find here activities carried on which include the presentation of the exhibition which I mentioned, and the proselytising activity (in the sense of winning converts to the cause) having forms available which people who wish to be members of the ratepayer Society can complete. I then look to see where the activities are to be found. Are they to be found "mainly" on the proselytising side of the line or are they to be found "mainly" on the fund raising side of the line? In my judgment, they are "mainly" to be found on the fund raising side of the line."*

27. In support of its submission that the main purpose of the Premises' use is fundraising, the defendant drew attention to the following matters: (i) the facilities provided by the reception and waiting area, spa, car park and, formerly, the beauty salon exceed what is directly facilitative of or wholly ancillary to the delivery of health and wellbeing benefits; (ii) the relatively high membership fees which are commensurate with those charged at high-end commercial gyms; (iii) the fact that the facilities and services at the Premises do not differ markedly from those at comparable commercial operations; (iv) the operation of the Premises in a broadly similar fashion to when they were operated by Virgin Active for revenue raising purposes; and (v) a large amount of money was paid to acquire the goodwill of the existing commercial business and the Premises appear to subsidise other parts of the claimant's operations.

28. I am not satisfied that those matters are made out on the evidence. However, even if they were, I agree with the claimant that they would not establish that, in application of *Glasgow* and *Oxfam*, the Premises are not used wholly or mainly for charitable purposes. In particular, in my judgment, the fact that the claimant charges for the facilities offered at the Premises does not lead to the conclusion that their user is for fundraising and not charitable purposes.

29. In that regard, Mr Newman's evidence, in paragraphs 12 and 13 of his first statement, is that the claimant's primary revenue source is the fees it charges for its services which are intended to maintain a margin to reinvest. In *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138, the House of Lords decided that the activities of a charity did not cease to be charitable by reason of the fact that the beneficiaries were required to pay for the services which they received: see *per* Lord Reid at pages 147F-148A and Lord Wilberforce at pages 156F-157A, where he stated that the fact that cremation - the service in question in that case - was provided for a fee rather than gratuitously:

> *"does not affect the charitable character of the company's activity, for that does not consist in the fact of providing financial relief but in the provision of services. That the charging for services for the achievement of a purpose which is in itself shown to be charitable does not destroy the charitable element was clearly and, in my opinion, rightly decided in Inland Revenue Commissioners v Falkirk Temperance Café Trust 1927 SC 261.*

See also the statement to the same effect by Lord Wilberforce in *Re Resch's Will Trusts* [1969] 1 AC 514, 541A-B.

30. The claimant submitted that in *RSPB* the judge was wrong to have accepted that the promotion of public interest in birds was a charitable purpose and thus that the issue whether the premises were used for charitable purposes should not have arisen in the first place. I am not sure that it is correct that the promotion of public interest in birds is not a charitable purpose but it is unnecessary to reach a conclusion on that matter. Leaving that submission aside, *RSPB* was in my judgment a straight application of *Glasgow* and *Oxfam* and is clearly distinguishable on its facts from the present case. In *RSPB*, the shop was mainly used for fundraising purposes. In the present case, fundraising was, in my judgment, not a purpose for which the Premises were used. The present case is not one in which the Premises are used for more than one purpose, of which one is charitable and the other is not.

31. I should add that I did not derive assistance from the demographics data and map evidence adduced by Mr Keppler which was said by him to provide "*socio-economic context*" to his first statement and to be relevant to the defendant's fundraising argument (see paragraphs 11 and 12 of his second statement).

32. The second limb of the defendant's submission that the Premises' use is not wholly or mainly for charitable purposes is that their use is not for or wholly ancillary to the public benefit.

33. In my judgment, the defendant's submission fails at the outset. Under section 2(1) of the 2011 Act, in order for one of the purposes falling within section 3(1) of the 2011 Act to be a charitable purpose it must be for the public benefit. Under section 2(2)(a) of the 2011 Act, any reference in any enactment to charitable purposes is to be read in accordance with subsection (1). Accordingly, the need for the public benefit requirement to be fulfilled is imported into the expression "*charitable purposes*" in section 43(6)(a) of the 1988 Act and section 1(1)(a) of the 2011 Act. An institution will only be a "*charity*" in accordance with section 1(1)(a) of the 2011 Act if it is established for charitable purposes only, which again requires the purposes in question to be for the public benefit. The public benefit requirement is thus to be applied to the purposes of the charity and not to its activities carried on at the individual hereditament. In *ISC*, the court stated at [195] that the inquiry is whether the activities overall of the charity are for the public benefit. Further, as already stated, under section 37(1) of the 2011 Act, an institution is, for all purposes other than rectification of the register, "*conclusively presumed to be or to have been a charity at any time when it is or was on the register*". The conclusive presumption that the claimant is a charity means that the requirements for it to be a charity are conclusively presumed to have been met, namely that it is established for purposes which are within section 3(1) of the 2011 Act and that the purposes in question fulfil the public benefit requirement.

34. The defendant's reliance on two authorities in support of its submission that the focus under section 43(6) of the 1988 Act is on whether the use of the particular hereditament satisfies the public benefit requirement is, in my judgment, misplaced. It first relied on the statement of Sales J in *Public Safety Charitable Trust v Milton Keynes Council* [2013] EWHC 1237 (Admin), at [34], that in the context of section 43(6) of the 1988 Act and having regard to the language used:

> *"it is reasonable to infer that Parliament intended that the substantial mandatory exemption from rates for a charity in occupation of a building should depend upon the charity actually making extensive use of the premises for charitable purposes (i.e. use of the building which is substantially and in real terms for the public benefit, so as to justify exemption from ordinary tax in the form of non-domestic rates), rather than leaving them mainly unused."*

However, Sales J's comments were made in the context of whether the extent of the use of the hereditament in question was for charitable purposes so as to satisfy the test in section 43(6) of the 1988 Act. The judge was not addressing the question whether the use of the particular hereditament had to satisfy the public benefit requirement. I do not read the words in parentheses in the passage from the judgment quoted above as supporting a contrary conclusion.

35. The defendant also relied on *Wynn v Skegness UDC* [1967] 1 WLR 52, a first instance decision which preceded *Oxfam*. However, that case was concerned with the interpretation of a proviso to section 1 of the Recreational Charities Act 1958. Section 1 was to the effect that, subject to the provisions of the Act, it would always be charitable to provide, or assist in the provision of, recreational facilities. The proviso stated that nothing in the section would be taken to derogate from the principle that a trust or institution must be for the public benefit in order to be charitable. The 1958 Act and the case were not concerned with the question whether the use of a hereditament had to satisfy the public benefit requirement. Also, as pointed out by Mr Kolinsky, the passage in Ungoed-Thomas J's judgment at pages 63H-64B relied on by the defendant appears after the judge had already concluded earlier in his judgment that the premises were occupied wholly for charitable purposes and qualified for relief.

36. In the result, I do not consider that either of those cases supports the defendant's submission that the Premises themselves must satisfy the public benefit requirement.

37. If the question arises, as to what is needed to satisfy the public benefit requirement I agree with the defendant that a central aspect is that those who may benefit from the carrying out of the purpose must be sufficiently numerous, and identified in such manner as, to constitute a section of the public: *R (Independent Schools Council) v Charity Commission* [2012] Ch 214 ("*ISC*") – a case which concerned the effect of the public benefit requirement on fee-paying schools – at [44], *In re Resch's Will Trust* at 540G-541A. What satisfies the public benefit requirement may differ markedly between different types of allegedly charitable purposes and so caution must be exercised in applying authorities decided in one area of charities law to another area: *ISC* at [15] and [45]. In all cases, there must be a benefit for the poor which is not de minimis or merely token: *ISC* at [222]; and "poor" in this context does not mean destitute but might cover those of modest or "some" means: *ISC* at [179].

38. The defendant submitted, by reference in particular to the common law position and *Inland Revenue Commissioners v Baddeley* [1955] AC 572 and *Bath and North East Somerset Council v HM Attorney General* [2002] EWCA 1623 (Ch) – cases which concerned allegedly charitable recreational trusts - that it will be more difficult to satisfy the public benefit requirement where the purpose of the advancement of health or the saving of lives is sought to be achieved by the provision of recreational facilities than in other cases where that purpose is more directly achieved by, for example, the

provision of hospital facilities. In *Baddeley*, the House of Lords held, by a majority (Lord Reid dissenting), that trusts created by two conveyances for the benefit of members and potential members of the Methodist Church were not charitable. Viscount Simmons considered that, even if they were charitable, it could only have been on the basis that they were trusts of general public utility but that they were excluded even from that class of charitable trust since the beneficiaries did not constitute a sufficient class to satisfy the necessity of a benefit to the public. The present case, unlike *Baddeley* and *Bath and North East Somerset Council,* does not concern a recreational charity. Also, unlike in *Baddeley*, there is no restriction on the persons who may benefit from the facilities at the Premises.

39. Based on what is stated in paragraphs 14 to 18 of Mr Newman's first statement and the reviews carried out by its trustees, who are well aware of the legal requirements under which charities operate, as illustrated by its *Delivering Public Benefit Policy* document published on 30 January 2019, there is no basis for any suggestion that the activities overall of the claimant are not for the public benefit.

40. If, contrary to what I consider to be the case, it were necessary to determine whether the use of the Premises themselves is for or wholly ancillary to the public benefit, I would have concluded that the public benefit requirement is satisfied. I deal briefly with this aspect in view of my conclusion that it does not in fact arise.

41. The defendant submitted that the user of the Premises could not be regarded as being wholly or mainly for charitable purposes because they are used to provide high-end services already available on the open market at full price, at a level which excludes the poor. It referred to the following matters, which to some extent overlap with the matters it relied in the context of its argument that the main purpose of the Premises' use is fundraising: (i) the fees charged being set at market rates so as to maintain a margin to reinvest; (ii) the level of membership fees, which would deter those of modest means from membership, including in the local area and which are higher than the cost of membership of other local fitness facilities; (iii) the crèche fees and charges for other services; (iv) the unavailability at the Premises of some free and reduced-fee services offered by the claimant elsewhere; (v) the limited and token additional services offered free or at a reduced cost to those who otherwise could not afford to use the Premises, which are no more than would be expected of any business seeking to advertise and promote its sales on a commercial basis.

42. In my judgment, none of those matters, either individually or collectively, leads to the conclusion that those of modest or some means are excluded from benefiting from the use of the Premises. I consider that the comparisons made by Mr Keppler in his first statement between the Premises and other facilities in the area are not of assistance in determining whether the Premises themselves exclude the poor. To the extent that the demographics data and map evidence are relied on in the context of the public benefit requirement, as the claimant pointed out, without further elucidation they provide insufficient detail so as to be relied on and their relevance is unclear. In particular, it is unclear why the existence of other facilities in the area and the absence of any specific need for the Premises (*cf Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney General* [1983] Ch 159) should point to the public benefit requirement not being satisfied in the instant case. In the light of Mr Platt's evidence, I do not regard the Premises as providing only token facilities for the poor.

Interest

43. Although the claimant originally maintained a claim to interest on a compound basis, at the start of the hearing it indicated that it would be content with an award of simple interest. Under section 35A of the Senior Courts Act 1981, the court may award interest at such rate as the court thinks fit and the defendant accepted that it would be open to the court to make an award of interest in this case. The claimant suggested that the appropriate rate of interest is 1% over base rate; the defendant drew attention to regulation 4(1) of the Non-Domestic Rating (Payment of Interest) Regulations 1990 which, although inapplicable in the present case, suggests a rate equivalent to 1% less than base rate.[2]

44. During the period from 4 August 2016 until 2 November 2017, the Bank of England base rate was 0.25%. It then rose to 0.50% until 2 August 2018, when it rose to 0.75% and it has stayed at that rate since. In the exercise of the court's wide discretion under section 35A, having regard to those rates, I determine that the defendant should pay simple interest at the flat rate of 1.5% on the sums to be repaid to the claimant. Such interest shall run from the date of payment of each sum paid to the defendant pursuant to its demands until the date of repayment of the sums to be repaid.

Costs

45. I shall hear counsel on the issue of costs.

[2] Regulation 4(1) provided for the appropriate rate of interest for the purposes of the Regulations equivalent to one percentage point less than the arithmetic mean of the base rates quoted by the four largest members of the Committee of London and Scottish Bankers (now subsumed into the British Bankers Association).