



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

**[2021] CSIH 7
XA20/20 and XA21/20**

Lord Justice Clerk
Lord Malcolm
Lord Doherty

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Appeal

by

OFFICE OF THE SCOTTISH CHARITY REGULATOR

Appellants

against

**A DECISION OF THE UPPER TRIBUNAL CONCERNING (1) NEW LANARK HOTELS
LIMITED and (2) NEW LANARK TRADING LIMITED**

Respondents

**Appellants: M Ross QC, C O'Neill QC; Brodies LLP
Respondents: C MacNeil QC; Turcan Connell**

29 January 2021

Overview

[1] These are two appeals, under section 48 of the Tribunals (Scotland) Act 2014 (“the 2014 Act”), by the Scottish Charity Regulator, the body corporate which holds the Office of the Scottish Charity Regulator (“OSCR”), against decisions of the Upper Tribunal (“the UT”) of 2 February 2020 which (i) quashed OSCR’s decision refusing to enter the respondents in

the Scottish Charities Register (“the register”) and (ii) directed that the respondents be entered on the register. The two appeals have proceeded in tandem and raise the same issue for determination although the facts, while similar, are not identical. The main issue relates to the public benefit part of the charity test in section 7(1) of the Charities and Trustee Investment (Scotland) Act 2005 (“the 2005 Act”).

Introduction

[2] In each case the respondent is a limited company the shares of which are wholly owned by New Lanark Trust (“NLT”), the body responsible for managing the UNESCO World Heritage Site at New Lanark. The principal purpose of each respondent is to produce income to be donated by gift aid to NLT. New Lanark Trading Limited (“NL Trading”), operates a visitor attraction (with entry fee) in New Lanark with related trading activities including hydro-electric power and textile production, a retail shop, a café, and the production and sale of ice-cream. New Lanark Hotels Limited (“NL Hotels”), operates a hotel, hostel, self-catering accommodation and associated activities within New Lanark village, including a conference centre, bar, restaurant, wedding venue, leisure club, pool and beauty treatment facilities.

[3] In terms of section 5 of the 2005 Act, OSCR may enter an applicant on the register only if it considers that the applicant meets the charity test set out in that Act. Under section 7(1) a body meets the charity test if (a) its purposes consist only of one or more charitable purposes; and (b) it provides or intends to provide public benefit in Scotland or elsewhere. “Public benefit” is not defined. Section 8 of the 2005 Act provides:

“8 Public benefit

(1) No particular purpose is, for the purposes of establishing whether the charity test has been met, to be presumed to be for the public benefit.

(2) In determining whether a body provides or intends to provide public benefit, regard must be had to—

(a) how any—

(i) benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and

(ii) disbenefit incurred or likely to be incurred by the public,

in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and

(b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.”

It is accepted in each case that the provisions of section 7(1)(a) are met: the dispute is over the terms of section 7(1)(b). It was common ground that no issue arose in respect of the terms of section 8(2).

OSCR decision

[4] OSCR refused registration on the ground that the respondents did not provide public benefit within the meaning of section 7(1)(b) and so failed to meet the charity test.

[5] In relation to NL Trading the decision stated that all the day-to-day activities of an organisation required to be examined. Reference was made to OSCR's guidance on the point, which stated:

"Where an organisation carries out some activity that is not directly related to or connected with its purposes, any benefit from that activity will not be taken into account in our assessment of public benefit. However, if the activity is genuinely incidental (a by-product of its main activities), then it will not be a problem in terms of the public benefit requirement or the organisation's duty to act within its charitable purposes."

[6] OSCR recognised that NL Trading undertook some activities advancing its charitable purposes and providing benefit to the public, and that it would also contribute to the public

benefit provided by NLT. The exhibitions, events and tours, as well as preservation and maintenance of the buildings and exhibits, were all activities which were in furtherance of the charitable purposes. The production of woollen yarn, hydro-electric power, and attractions of the visitor centre, other events and exhibitions were all consistent with the charitable purposes. However, in its view, the mill shop, mill cafe and ice-cream manufacturing did not fall into this category. These were significant activities with a large combined turnover. They were neither in furtherance of the organisation's charitable purposes nor incidental to them in the sense of being a by-product thereof. There was thus no public benefit arising from the activities as a whole.

[7] In respect of NL Hotels the decision stated that a charity should not be carrying out large scale and/or significant activities which did not further its charitable purposes. The operation of the hotel, self-catering accommodation and hostel were not a by-product of the organisation's activities but were themselves significant activities. OSCR recognised that NL Hotels intended to contribute financially to the objects of NLT by distributing profits from the operation of a hotel, self-catering accommodation and hostel, and that this activity was capable of providing benefit to the public. However, a distinction had to be drawn between activities which directly advanced a charitable purpose, and non-charitable activities undertaken with the aim of generating profits to be applied for charitable purposes. The fact that some activities may result in public benefit did not mean that the organisation's activities as a whole did so. Here, the primary activities being carried out by NL Hotels lay in operating and managing the hotel, hostel and self-catering lodges. These activities were neither directly related to nor connected with its charitable purposes nor were they incidental thereto. There was thus no public benefit.

The First-tier Tribunal decision

[8] These decisions were upheld by the First-tier Tribunal (“the FtT”). In the case of NL Trading, the contribution to the advancement of education and heritage was subsidiary to the trading nature of the activities, when looked at as a whole. In respect of NL Hotels, any contribution to the charitable purposes was also secondary to the principal activities, which were commercial ones.

The UT decision

[9] On appeal, the UT concluded that the FtT had failed to provide proper, adequate and intelligible reasons for its decision. Having accepted that commercial or trading activity could further an organisation’s charitable purposes, the FtT required to consider in each case whether the activities in question were or were not in furtherance of such a purpose. It did not do so, predicating its decision in each case simply on the basis that the activities in question were “commercial” in nature. On the invitation of the parties the UT exercised its powers under section 47(2)(a) of the 2014 Act to re-make the decision. Following consideration of submissions on that issue, the UT concluded that the decision to refuse to enter the respondents in the register should be quashed and it directed that both respondents should be entered in the register.

[10] The UT agreed with parties’ submissions that the respondents could not pass the charity test on the basis merely that each donated its surplus to NLT for charitable purposes, nor could the charitable activities of NLT be attributed to them. The issue was whether when carrying out their own commercial activities, they were each providing public benefit. Limited guidance as to the meaning of “*provides... public benefit*” was given by the 2005 Act. Having regard to section 8, the phrase was clearly capable of including circumstances where

there was some degree of private benefit or public dis-benefit, as well as circumstances where reasonable fees and charges were imposed. The UT agreed with the parties' understanding that a body would not pass the public benefit test simply by demonstrating that it did not fall foul of any of the disqualifications implicit in section 8(2) of the 2005 Act. The question whether a body can be said to be providing public benefit required a broader inquiry into the whole of its activities.

[11] The present cases were concerned with the application to commercial activities of the public benefit requirement. The argument for OSCR recognised two circumstances in which a commercial activity may be carried out without compromising charitable status: where the activity was directly in furtherance of the charitable purpose, for example woollen yarn spinning in the case of NL Trading; or where it was merely incidental, in the form of a small scale by-product. In each case the application was rejected on the basis that the activities in question could not be said to be incidental, and that the primary activity was itself a commercial one. However, in the opinion of the UT that missed the point of the argument, which in each case was that in the overall setting of New Lanark the commercial activity in itself amounted to a public benefit. Whilst in relation at least to the matters specifically mentioned in section 8, a balancing exercise appeared to be required, it was less clear that a balancing exercise was appropriate in other circumstances. OSCR did not appear to envisage that a commercial activity such as the operation of a shop could have the dual purpose of furthering the charitable purposes of an organisation and raising funds. Where such a situation arose it was neither necessary nor appropriate to carry out a balancing exercise of which of these two purposes was the more important, irrespective of how one might attempt to measure that. If the activity furthered the charitable purposes and so provided a public benefit, it was irrelevant that at the same time it raised funds intended to

be applied either for its own benefit or for that of another charitable body. On such an analysis the issue in the present appeals accordingly became a factual one: did the commercial activities carried on contribute to the furtherance of the entity's charitable purposes of advancement of education and heritage? On the evidence the answer, in both cases, was yes.

Grounds of Appeal

[12] The UT gave permission to appeal both decisions. Three broad grounds of appeal were advanced:

- (1) The UT erred in concluding that where an applicant for entry to the register had the "dual purpose of raising funds and also contributing to the organisation's charitable purposes", it was neither necessary nor appropriate to carry out a balancing exercise to identify which of these two purposes was the more important. The UT erred in finding that there was no minimum level below which any public benefit provided or to be provided would be insufficient to meet the requirements of sections 7 and 8 of the 2005 Act. A "materiality" requirement was inherent in the statutory test. The UT's reasoning led to illogical results contrary to the intention of the 2005 Act. The scheme of the Act bound the appellant to consider an applicant's activities "as a whole" when determining the question of public benefit. Doing so inevitably involved a balancing exercise weighing one activity with another.
- (2) The UT erred in concluding that it was merely "desirable" for OSCR to publish guidance as to its understanding of the statutory requirements; and in disregarding that guidance when reaching its decision. It mischaracterised the nature, role and purpose of the guidance, which was issued in accordance with the appellant's

section 9 obligations. It should have interpreted the charity test consistently with that guidance.

- (3) The UT erred in concluding that NL Trading's ice-cream production was activity that furthered its charitable purpose of the advancement of education (at paragraph 50), and that NL Hotel's accommodation provision (paragraph 46) advanced its relative education and heritage purposes. In relation to the former the sole basis for the decision was that "the facility for demonstrating the use of local produce behind a glazed screen has educational value". This was a trivial and wholly insufficient basis for meeting the public benefit element of the charity test. It was impossible to discern how the UT had formed the view that the provision of hotel accommodation advanced education; and its reasoning appeared to be inconsistent and illogical given it had acknowledged that elements of NL Hotels' activities seemed to have little to do with the advancement of education or heritage. The UT should have had regard to OSCR's statutory guidance, which provides, *inter alia*, that:

"The way in which the education is provided doesn't have to be formal, but it must have a structure and be capable of educating the audience. Simply providing information is not necessarily advancing education. The intention of the activity must be to educate."

[13] The court was favoured with written submissions, both in support of, and against, the appeal. We do not therefore repeat the submissions, the tenor of which will be apparent from the grounds of appeal and the court's analysis of the issues. It is, however, worth pointing out that most of the core propositions advanced by the appellant were accepted by the respondents, so there was no dispute over the following:

1. That a "materiality" requirement was inherent in the statutory test, there being a minimum level below which any public benefit provided or to be provided

would be insufficient to meet the test - a predominant contribution to the charitable purposes had to be shown;

2. The activities therefore required to be looked at in the round and as a whole, and a judgement made about whether they provide public benefit;
3. Activities that made a minor or trivial contribution to the charitable purposes in the context of other extensive commercial activities making no contribution to those purposes would be insufficient: thus it was accepted that, for example, a trading subsidiary the main activity of which was to sell Christmas cards to raise funds for the primary charity would neither have nor further a charitable purpose. It could pass neither stage of the test under section 7(1). There was no question of suggesting that the charity test could be met by large scale commercial activity by a trading subsidiary which was not in furtherance of any charitable purpose of its own;
4. No issue was taken with the guidance issued by the appellant. Rather the submission for the respondents was that the decision was in accordance with the guidance, the UT having concluded that all the trading activities in question came within the concept of primary purpose trading.

Analysis and decision

[14] At the outset it is relevant to identify two matters. The first matter is that the decision to be made, originally by the FtT, but eventually by the UT, was not a consideration of the validity of the decision made by OSCR: neither the FtT nor the UT was exercising a supervisory jurisdiction. The function of the relevant tribunal was to make a decision “of new” whether the respondents should be entered in the register, in light of the facts and

circumstances established. The second matter is the factual background against which the UT required to make its decision. The UT considered that it must proceed on the basis of the findings in fact specifically made by the FtT, or obviously arising from its decision (the FtT decision not always clearly discriminating between what was properly stated as a finding in fact and what was a reason). It was also appropriate, in the exercise of its power under section 47(3)(b) of the 2014 Act, for the UT to make certain additional findings based upon evidence led before the FtT, where such findings were not in any way inconsistent with other findings made, or to be attributed to, the FtT. When reference is made to the findings of the FtT this is either to specific findings, or findings in fact to be inferred from the decision. It is helpful to set these out in full.

Findings of the FtT

[15] *Findings applicable to both respondents:*

- (i) Both entities were commercial enterprises, trading profitably with all net profits donated to NLT by gift aid.
- (ii) Each occupied, as tenant, buildings owned by NLT, paying annual rent together with an additional sum based upon a percentage of annual turnover. The leases made them responsible for a proportion of the costs of repair and maintenance of the buildings they occupied, and for the repair and maintenance of the interior of these premises.
- (iii) Both entities were in control of (a) exploration of the village, to the extent that leaflets, signage and interpretation were within their respective control; (b) access to the historic interiors of buildings; (c) digital access to the New Lanark website to the extent that information relating to NL Trading or NL Hotels formed part of their

website content; (d) bespoke requests in terms of providing tours; and (e) the provision of three of the five sets of public toilets.

(iv) In each case their only purposes were charitable, falling within the advancement of education and the advancement of the arts, heritage, culture or science.

(v) The revivification of New Lanark as a living and working community, and the identification of suitable uses for all the buildings, were primarily achievements of NLT.

[16] *Findings specific to NL Trading:*

(i) The activities for which visitors must pay were the Visitor Centre's exhibits and interpretation of New Lanark, periodic exhibitions on New Lanark-related themes, external events, and goods and services sold from the cafe and shop.

(ii) The turnover represented income from entry to the Visitor Centre, production of hydro-electric power, textile sales and spinning commission, retail shop sales, and the manufacture and sale of ice-cream. Some income was also derived from tours. The turnover and any profit before taxation were attributable to these activities.

(iii) The mill shop engaged in trading that was directed towards raising funds for NLT. The shop was engaged in the provision of goods in return for payment. The shop's merchandise included products unconnected to New Lanark, and the shop accommodated retail fashion franchises.

(iv) The cafe provided a catering service, engaging in trading that was directed towards raising funds for NLT. The cafe provided goods and services in return for payment and was typical of eateries associated with heritage sites.

(v) The ice-cream production was directed towards raising funds for NLT. The ice-cream was sold to visitors to New Lanark, and sold to hotels and restaurants at a distance

from New Lanark.

- (vi) The commercial nature of these activities, including the mill shop, café, and ice-cream production, primarily contributed to the funds of NLT.

[17] *Findings specific to NL Hotels:*

- (i) Its principal activity involved the provision of goods and services in return for payment, albeit within New Lanark village.
- (ii) The turnover and any profit before taxation were attributable to this principal activity.
- (iii) It engaged in trading directed towards raising funds for NLT, providing goods and services in return for payment in a manner comparable to other commercial hotel operators, operating competitively in its market place, with the ability to charge for accommodation by reference to its location, a World Heritage Site.
- (iv) It offered leisure services to non-residents of the hotel. Discounted accommodation was offered to interns, academics, students and conference guests.
- (vi) The commercial nature of the activities contributed to the funds of NLT.

Findings of the UT:

[18] *Regarding both entities:*

- (i) New Lanark was offered to the public as an inhabited, economically active settlement with facilities for visitors.
- (ii) Provision of facilities for visitors was necessitated by the nature and size of the site.

[19] *Regarding NL Trading*

- (i) The provision of a cafe and shop, the production of spun woollen yarn, the generation of electricity, the making of ice-cream, and the operation of the Visitor

Centre (all within the original mill buildings) contributed to the objectives of maintaining the village as a living entity and to satisfying the needs and expectations of visitors.

- (ii) The ice-cream making facility incorporated a glazed screen, enabling visitors to see the ice-cream making process without prejudicing food hygiene. The intention was to enable visitors, including school trips, to see how local agricultural produce (milk) could be used locally.

[20] *Regarding NL Hotels*

- (i) The activities of providing different categories of overnight accommodation with the normal complementary services of food and beverage etc (all within the original mill buildings) contribute to the objectives of maintaining the village as a living entity and satisfying the needs and expectations of visitors.
- (ii) It provides facilities for those interested in experiencing the heritage of New Lanark on an all day and night basis.

[21] These findings of the UT are inter-related and are critical to its decision. In each case (NL Trading para 50, NL Hotels para 45) the UT found that

“It is a crucial feature of the New Lanark site that it is not merely preserved, but maintained as a living village so that visitors may, so far as is practicable, experience the original concept which has led to its World Heritage designation. I accept that this feature distinguishes New Lanark from many (though not necessarily all) other heritage sites, where the presentation of the site as a living community may not be of central importance. At New Lanark the availability of commercial facilities to visitors is, on the evidence, an integral part of that presentation, contributing to the experience which has given the site its reputation and thereby providing public benefit.”

[22] The UT assessed the activities of the respondents within the context of these particular findings relating to New Lanark which it considered almost to be unique. The

activities in question were held by the UT as a matter of fact, to advance the charitable purposes in respect of the maintenance of New Lanark as a living village and promoting the understanding of the philanthropic intent at the heart of its founding. Unlike the Christmas card example, where the sale of cards could not advance a charitable purpose of, say, finding a cure for cancer, the findings of the UT were that the activities here – all of them – contributed to the vitality which was central to the presentation of New Lanark as a World Heritage Site.

[23] The first ground of appeal suggests that OSCR has erred in its interpretation of the decision, and has assumed that the UT found that whilst some activities did, and some did not, advance the primary purposes, overall the test was met. As we have explained that is not what the UT decided. The UT did not reject the proposition that there was a materiality or relativity element implicit in the statutory test: it held that these requirements had been met since all the activities advanced the charitable purposes. It was thus not necessary to carry out the sort of balancing exercise or assessment which would have been needed if some activities had advanced the charitable purposes and some had not.

[24] The UT did not reject OSCR's assertion that activity could be classified as "primary" or "non-primary" as advanced within its guidance. Rather the UT made an assessment, as a matter of fact, that all of the activity in question was primary activity. OSCR's guidance at para 1.2 states that "Primary purpose trading is where the trading activity directly contributes to the charity achieving its purposes". This is what the UT found all the activities in question to be, rather than ancillary or non-primary purpose trading. It may be that the UT contributed to the confusion by its use of the phrase "dual purpose", when in fact it more accurately meant that where the trading activity is all primary purpose trading, the fact that it also raised money would not of itself deprive it of public benefit or mean that it

had to fail the charity test. OSCR disagree with the assessment that all the activities consist of primary purpose trading, but the disagreement is a matter of fact not legal principle. The decision of the UT is consistent with propositions 1-3 identified at para [13] above.

Furthermore, while simply raising funds for a charitable purpose does not meet the test, it would be odd if the mere fact that primary purpose trading activity generated funds destined for the same public benefit deprived it of charitable status.

[25] On the question of the guidance, the UT did not conclude that guidance was merely desirable. It was well aware that guidance was prepared in pursuance of OSCR's statutory duty. It was concerned to make it clear that any guidance issued by OSCR could not be determinative of the legal interpretation of the statute (a proposition which seems to have been at the very least floated before the tribunals, although quite properly disavowed in this appeal). The UT did not consider that it would be helpful to narrate passages from the guidance, and it did not do so. However, it is not the case that the guidance was rejected or found to be wrong. In fact, the decision was in accordance with the guidance. In so far as the activities were trading activities, the trading was all primary purpose trading. OSCR has not identified any respect in which the UT's decision is inconsistent with the guidance. Nor has it satisfied us that any aspects of the guidance ought to have pointed the UT to a different result in the circumstances of the present case.

[26] The third ground of appeal seeks to attack the UT's decision in respect of individual elements of the activities which, according to the submission, should not be categorised as in furtherance of charitable purposes. In respect of NL Trading the manufacture and sale of ice-cream is singled out, it being submitted that the finding that "the facility for demonstrating the use of local produce behind a glazed screen has educational value" was the "sole basis" of the decision, and related to a trivial matter, providing a wholly

insufficient basis for the conclusion reached. However, as senior counsel for the respondents submitted, it is essential to have regard to the whole sentence in which the quoted phrase appears. In its context the sentence reads:

“In relation to the ice cream production business it seems to me that this too contributes to the presentation of the village as a functioning entity; moreover the facility for demonstrating the use of local produce behind a glazed screen has educational value.”

[27] It will be seen therefore that far from being the “sole basis” of the decision, the screen was of subsidiary importance, the key point being the presentation of the village as a functioning entity which was at the heart of both decisions.

[28] In respect of NL Hotels, the point made was that the basis upon which it could be said that the activities furthered the charitable purposes was not clear, and that it was illogical of the UT to note that elements of the services provided, such as a spa and beauty rooms, would seem to have little to do with advancement of education or heritage and yet find that all the activities nevertheless advanced the charitable purposes. Again, the sentence in question is taken out of context, which is that these activities “if considered on their own” might seem to have little to do with the charitable purposes. The UT accepted the evidence that the production of a surplus for donation to NLT was not the main purpose. The main purpose was to enhance the presentation of New Lanark as a living village, contributing to the visitor experience which has given the site its reputation. No doubt the analysis of the UT could have been more detailed, but in our view it is clear that this was the basis of the decision. The accommodation enabled visitors to immerse themselves more fully and for longer in the historic village and to stay in one of the historic buildings; and the hotel business provided a means of the historic buildings being occupied in a useful way which contributed to maintaining the village’s life and economy. Another

tribunal might have reached a different decision, but standing the evidence and the acceptance of the uniqueness of the village, and the aim of presenting it as a living, working community, the UT was entitled to make the findings which it did.

[29] Stripped to their essentials the appeals are no more than disagreements with the UT's conclusions on matters of fact, and they must be refused.