[2016] UKUT 354 (TCC)

Appeal Ref: UT/2015/0155

VAT – zero-rating – construction by a rugby club of a clubhouse on a sportsground – whether intended for use "as a village hall or similarly in providing social or recreational facilities for a local community" – VATA Sch 8, Group 5, item 2 and note 6(b) – Appeal refused

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and -

CAITHNESS RUGBY FOOTBALL CLUB

Respondent

TRIBUNAL: THE HONOURABLE LORD DOHERTY
(Sitting as a Judge of the Upper Tribunal)

Sitting in public at The Tribunal Centre, George House, Edinburgh on 12 April 2016

For the Appellants: Julius Komorowski, Advocate instructed by the Office of the Advocate General for Scotland

For the Respondent: Philip Simpson QC, instructed by BBM Solicitors

DECISION

The appeal is refused.

REASONS

Introduction

1. The Respondent is a members club affiliated to the rules of the Scottish Rugby Union. It is a registered charity. It is the tenant and occupier of land in Thurso let to it by Highland Council at a rent of £1 per year if asked. Most of the land comprises playing fields. The lease permits the Respondent to erect a clubhouse on the land.

2. In 2012 the Respondent embarked upon a project to build a new clubhouse. Of the £300,000 construction cost, 50% was provided by Sport Scotland. Other contributions came from the Robertson Trust, the Community Landfill Fund and the Caithness and North Sutherland Fund; but £95,000 had to be raised by the Respondent through fund-raising events.

3. In July 2013 the Respondent requested confirmation by the Appellants that construction of the new building would be zero-rated for VAT purposes. The Appellants refused to treat the works as zero-rated. The Respondent appealed to the First-tier Tribunal ("the FTT"). On 6 August 2015 the FTT allowed the appeal ([[2015] UKFTT 378 (TC)). The Appellants now appeal to this tribunal (the FTT having refused leave, but the Upper Tribunal ("the UT") having granted leave).

The new building

4. The clubhouse comprises four changing rooms which occupy just under half of the building; a main hall; a kitchen which doubles as a bar area when functions are held; toilets, an officials' room; a store room and a boiler room. The main hall, kitchen and toilets constitute about 40 per cent. of the building.

The legislation

5. Section 30(2) of the Value Added Tax Act 1994 ("VATA") provides that a supply of goods or services is zero-rated if the goods or services are of a description for the time being specified in Schedule 8 of VATA.

6. Group 5 of Schedule 8 relates to "Construction of buildings, etc". Item No. 2 of Group 5 specifies the following supply:

> "The supply in the course of the construction of—
> (a) a building … intended for use solely for … a relevant charitable purpose …
>
> of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity."

7. Note (6) to Group 5 states:

> "Use for a relevant charitable purpose means use by a charity in either or both the following ways, namely—
> (a) otherwise than in the course or furtherance of a business;

(b) as a village hall or similarly in providing social or recreational facilities for a local community."

The Appellants' submissions to the FTT

8. The essence of the Appellants' submissions to the FTT regarding the construction and application of the legislation was set out in paragraphs 35 - 38 of the FTT's decision:

> "35. In sub-paragraph (b) of Paragraph 6 ("Paragraph 6(b)"), "village hall or similarly" is a requirement that is separate and additional to the requirement of "social or recreational facilities for a local community". The fact that social or recreational facilities are provided to a local community is therefore not of itself sufficient. To meet the additional requirement of "village hall or similarly", the building must in some sense be at the disposal of the community, that is, subject to the direction of the local community as to how it is used. In determining whether this requirement is met, relevant factors include the nature of the building, the nature and extent of any commercial activity, whether control is exercised by a person other than the local community, and whether use of the building is at the direction of the local community. These questions should be considered decisive or at the very least highly relevant.
> 36. … [T]he question is whether what was contemplated was something which was owned, organised and administered by the local community in the sense of providing equitable access and, so far as desired, participation. It is necessary that the building be subject to the direction of the local community in relation to how it is used.
> 37. In this case, equitable access and participation are missing. The Appellant holds the lease and can grant and deny access as it chooses. Only full members of the rugby club can be elected to the executive committee that is responsible for managing the clubhouse. Other users are secondary users. No other user would be given priority over the Appellant club's own required use. The changing rooms … are not "social or recreational facilities" but are used in preparation for or after recreation. The majority of other users do not use the changing rooms.
> 38. Some users appear to be commercial organisations. The Appellant does not pay a fee for its own use of the clubhouse but other users are charged a fee. There is an expectation of profit from the bar and kitchen sales. Thus, other users are financially supporting the rugby club, rather than the rugby club supporting the community. The clubhouse was not conceived as something similar to a village hall, run by the local community for the local community."

The Appellants placed particular reliance upon *Ormiston Charitable Trust v Commissioners of Customs and Excise* [1996] BVC 2,228, *Jubilee Hall Recreation Centre Ltd v Customs and Excise Commissioners* [1999] STC 381, *South Molton Swimming Pool Trustees v Commissioners of Customs and Excise* [2000] (VAT decision 16495), and *New Deer Community Association v Revenue & Customs* [2014] UKFTT 1028 (TC). Other decisions referred to during parties' submissions were *Sport In Desford v Customs and Excise* [2005] UKVAT V18914, *Hanbury Charity v Revenue & Customs* [2007] UKVAT V20126, and *Jeanfield Swifts Football Club v Revenue & Customs* [2008] BVC 2490.

The FTT's decision

9. The FTT found that since its construction there had been very substantial use of the clubhouse for a wide variety of sporting, social and recreational activities in addition to the rugby club's own use; and that the actual use of the clubhouse was consistent with what had been intended at the time of its construction. It was satisfied on the evidence that the building had been intended for use by a charity (the Respondent) in providing social or recreational facilities for the local community. It was also satisfied that the intended use by the Respondent of the building was "use as a village hall or similarly". It set out particular considerations it took account of at paragraph 81:

> "(1) The clubhouse is used by a significant number of diverse community groups. The clubhouse is advertised as a "community venture" available for use by "any groups or individuals"…
> (2) The clubhouse was constructed by and is managed by a members' club on a non-commercial basis. The clubhouse is let out to other groups for modest rates, on the basis that users are responsible for their own cleaning.
> (3) At the time of construction, the town hall in Thurso had recently ceased to be available for use as such, and the Appellant's clubhouse has played a role in filling that gap …
> (4) The clubhouse is located on council-owned land, which has been rented to the Appellant club for a peppercorn rent, on the basis that this will save the council the cost of maintaining the grounds, while ensuring that the grounds continue to be available for the Highland Games, charity, gala and other events unconnected to the Appellant club. Thus, even before the clubhouse was constructed, the Appellant club played a role in maintaining the publicly owned land on which the clubhouse is located for community use.
> (5) A sporting pavilion or clubhouse is capable of being used as a "village hall or similarly"…
> (6) The Tribunal does not consider it decisive that the clubhouse is managed by one of the groups that use it, or that only members of the Appellant club can be elected to its executive committee, which is ultimately responsible for management of the clubhouse. HMRC argue that a "village hall" must be "at the direction of the local community", whereas in this case the Appellant club can as it chooses grant or deny others access to the clubhouse. However, the Court of Appeal [*Jubilee Hall Recreation Centre Ltd v Customs and Excise Commissioners*] has rejected the suggestion that a "village hall" must be "owned, organised and administered by the local community" .... Any charity managing a "village hall"-type building will normally have the legal right to admit or exclude others, but that is not determinative.
> (7) However, the Tribunal takes into account that the Appellant club also uses the clubhouse for its own activities, and that its own needs were the motivation for building the clubhouse in the first place. Furthermore, the Appellant club gives priority to its own needs, in that bookings are made for rugby matches as soon as the fixtures for a season are published and others cannot book the clubhouse for those times. The Tribunal does consider this to be a material consideration weighing against the characterisation of the clubhouse as a "village hall or similar". However, this needs to be weighed together with all other considerations. The Tribunal takes into account that the needs of all users have been accommodated in practice. The Tribunal also takes into account that in practice bookings once made by others are honoured, even where they conflict with subsequent needs of the Appellant club.
> (8) Given that 90% of the usage of the hall is by clubs or groups other than the Appellant club, it cannot be said that the majority of activities at the clubhouse are organised by the Appellant club itself … or that use by groups other than the Appellant are merely secondary or ancillary … The direct users of the clubhouse are people (individuals and groups) from the local community.
> (9) …The Appellant club is not making a commercial profit from letting out the clubhouse. The Appellant club itself is ultimately financially responsible for all of the expenses of operating the clubhouse, and paid a significant part of the costs of construction. Those costs are defrayed to a degree by the amounts paid by others. There is no evidence that the others contribute an amount that is disproportionate to their use of the facility. Members of the Appellant club when letting the clubhouse for private purposes get no preferential rate.
> …
> (11) …The Tribunal rejects the HMRC argument that changing rooms cannot be considered part of a "recreational facility". Furthermore, these are inherently capable of use by sporting clubs other than the Appellant club, for any kind of sport. The evidence is that one changing room is also used by a non-sporting group, and that one changing room is used mainly for storage…"

In paragraph 82 the FTT concluded:

> "82. On the basis of the considerations above, the Tribunal finds that the facilities are used, and were at the time of construction intended to be used, as a "village hall or similarly".

The Appellants' submissions to the UT

10. Mr Komorowski did not challenge any of the FTT's findings-in-fact. He accepted that it had been entitled to find that the building had been intended for use soley by the Respondent in providing social or recreational facilities for a local community. However, he submitted that the FTT had committed a material error in law when determining whether the building had been intended soley for use by the Respondent as a village hall or similarly. He maintained that a prerequisite of satisfying note 6(b) was that there be local community direction or control of the use of the building. Direction or control had to be understood in a reasonable way. It could be indirect and representative (*e.g.* by the local community electing representatives to the managing body) but the end result had to be that the local community had practical and effective direction or control of the use of the building.

11. The provisions found in Group 5 were formerly contained in the Value Added Tax Act 1983. They had been introduced by way of amendment effected by the Finance Act 1989 following the decision of the Court of Justice in *Commission of the European Communities v United Kingdom* [1988] ECR 3127, [1990] 2 QB 130 ("*Commission v United Kingdom"*). Article 17 of the Second VAT Directive, Directive 67/228, stated that provisions for reduced rates or exemptions "may only be taken for clearly defined social reasons and for the benefit of the final consumer". (A transitional provision in the current directive allows such previously established measures to be maintained). At the time of *Commission v United Kingdom* the United Kingdom had applied zero-rating for all building work, irrespective of the type of building, its intended use, or its intended user. The Commission challenged that approach (and other applications of zero-rating). In its judgment the Court stated:

> *"The phrase 'for the benefit of the final consumer'*
> 15. The Commission regards as 'final consumers' those persons who stand at the final stage in the manufacturing and commercial chain and have no right to deduct value added tax, that is to say non-taxable persons.
> 16. The United Kingdom considers that there is nothing in the general scheme of value added tax to indicate that the term 'final consumer' should be treated as synonymous with the term "non-taxable person." On the contrary, the final consumer must be taken to be the natural or legal person at the end of a particular production or distribution chain for a particular product or service, even where that product or service is used in the production of other products or the provision of other services, regardless of whether or not the person is a taxable person.
> 17. Under the general scheme of value added tax the final consumer is the person who acquires goods or services for personal use, as opposed to an economic activity, and thus bears the tax. It follows that having regard to the social purpose of article 17 of the Second Directive the term "final consumer" can be applied only to a person who does not use exempted goods or services in the course of an economic activity. The provision of goods or services at a stage higher in the production or distribution chain which is nevertheless sufficiently close to the consumer to be of advantage to him must also be considered to be for the benefit of the final consumer as so defined."

The Court held that the UK's zero-rating for construction of housing did not contravene article 17 of the Second Directive. The facilitation of home ownership for the whole population fell within the purview of "social reasons". However, the
Court concluded that the construction of industrial and commercial buildings and community and civil engineering works "cannot be considered to be for the benefit of the final consumer" (paragraph 37).

12. Mr Komorowski submitted that the construction of note 6(b) which he proposed was consonant with the terms of the Second Directive and with the Court's judgment in *Commission v United Kingdom*. The exemption contemplated that zero-rating was

permissible only where the supply of building services had been intended to be for the benefit of the local community as the final consumer. In order for the local community to be the final consumer of the services it was essential that the intention was that it directed or controlled the use of the building. That was how the Court of Appeal had construed the exemption in *Jubilee Hall Recreation Centre Limited v Customs and Excise Commissioners* [1999] STC 381 (Sir John Vinelott at p. 390a - b; Thorpe LJ and Beldam LJ had both agreed with Sir John Vinelott's judgment (p. 394j)).

13. The construction which the commissioners proposed had the advantage that it resulted in a clearer criterion than the FTT's approach. Only where there was such direction or control of the building by the local community could it be said that the supply of services was sufficiently close to the local community to be of advantage to it in the relevant sense.

14. Mr Komorowski recognised that a local community could be the real beneficiary of construction services supplied to a charity where the charity's object was to provide social or recreational facilities for the local community: and that that was so regardless of whether the community directed or controlled the use of the relevant building. He accepted that the passage in Sir John Vinelott's judgment in *Jubilee Hall* upon which he founded did not form part of the *ratio* of the decision. The *ratio decidendi* was that very substantial commercial use of a building was inconsistent with use of it as a village hall or similarly in providing social or recreational facilities for a local community. Nevertheless, Mr Komorowski contended that the judgments in *Jubilee Hall* ought to be treated as being highly persuasive authority that "use … as a village hall or similarly" required direction or control by the local community of use of the building. The construction proposed had the benefit that it provided a clearer and more certain test than the FTT's approach. As the cases discussed by the FTT tended to show, the approach favoured by it was productive of a degree of uncertainty and unpredictability, involving questions of balance and of fact and degree. It was unlikely that Parliament had intended that zero-rating should turn on such indeterminate factors.

15. If the UT accepted that the FTT had not applied the correct test, it was clear that that error was likely to have had a material effect on its decision; or that at the very least it may have done so. In those circumstances the UT should either simply allow the appeal and uphold the commissioners' refusal to approve zero-rating; or it should remit the case to a differently constituted FTT with directions to reconsider the appeal in light of guidance which should be given by the UT as to the proper construction of note 6(b).

The Respondents' submissions to the UT

16. Mr Simpson submitted that FTT had not misdirected itself in law, and that the appeal did not raise a question of law. On a proper construction note 6(b) did not provide that there could only be "use as a village hall or similarly" if a local community directed or controlled the use of the building. No such requirement was stated, and there was no need to import it in order to comply with art. 17 of the Second Directive or the judgment in *Commission v United Kingdom.* All that was required for such compliance was that the provision of goods or services to the charity was sufficiently close to the final consumer (here the local community) to be of advantage to it. That was the position on the facts here.

17. The proposition which the commissioners advanced had been rejected by Lord Tyre (sitting as the UT) in *New Deer Community Association v Commissioners for HMRC* [2016] STC 507, at para. 17. The proposition did not form any part of the *ratio* of *Jubilee Hall*. On a proper reading of that case the judgments did not lay down that direction or control of the use of the building by a local community was an essential prerequisite to zero-rating in terms of note 6(b). Rather, they identified, correctly, that the existence or non-existence of such direction or control would be a relevant circumstance (Sir John Vinelott at p. 390b;

Beldam LJ at p. 397c; Thorpe LJ at p. 394j). That was precisely how the FTT had approached matters here. It had taken account of the absence of such direction or control, but had concluded that, having regard to the whole circumstances, the building had been intended to be used similarly to a village hall. The FTT had been entitled to reach that conclusion.

18. In any case there was an additional reason why the Appellants' interpretation of note 6(b) was erroneous. Mr Simpson described this as his "alternative submission". He submitted that, properly read, the alternatives in note 6(b) were "use … as a village hall" and "use … similarly in providing social or recreational facilities for a local community". The phrase "in providing social or recreational facilities for a local community" qualified only "use … similarly". It did not qualify "use … as a village hall". It identified the only requirements which had to be satisfied to make the use of a building use similar to use as a village hall - that the building was used to provide social or recreational facilities for a local community.

Decision and reasons

Art. 17

19. It was common ground that note 6(b) ought to be interpreted in a way which is consistent with art. 17 of the Second VAT Directive and with paras 15-17 of Court's judgment in *Commission v United Kingdom*. It is clear from para 17 that exemption for social reasons may comply with art 17 and be for the benefit of the final consumer if the consumer does not use the exempted goods or services in the course of an economic activity; and that the provision of the goods or services at a stage higher in the production or distribution chain may be for the benefit of the final consumer if it is sufficiently close to the consumer to be of advantage to him.

20. In my opinion there is nothing in art 17, or in the judgment of the Court of Justice in *Commission v United Kingdom*, which supports the proposition that the degree of closeness between the consumer and the supply will *necessarily* be insufficient to make the consumer the final consumer unless he has direction over or control of the goods or services or the product (e.g. a building) in which they have been incorporated.

Jubilee Hall

21. Does *Jubilee Hall* hold otherwise? In my opinion it does not. In order to fully appreciate the context of the Court of Appeal's decision, and the observations made in the judgments, I think it is helpful to understand the submissions made to, and the ground of decision of, the VAT tribunal.

22. Before the tribunal ([1996] BVC 2,899) counsel for the commissioners had referred to the need for note 6(b) to be construed in a way which was consistent with art 17 and with the judgment in *Commission v United Kingdom*; but the primary submission was that so much of the activities being carried on were commercial that the operation was essentially a commercial venture (para 36). Relief was given to village halls because they could in substance be regarded as not carrying on an economic activity; but it would be absurd to say that Jubilee Hall was not carrying on an economic activity (para 39).

23. In his decision the tribunal chairman referred to a submission counsel had made to him in the *Ormiston* case - that what note 6(b) contemplated was "something which is owned, organised and administered by the community" (para 45). The chairman continued:

> "46. That kind of concept appears to me now, as it appeared to me then, to be consistent with the principles enumerated by the European Court to which I have referred.
> 47. I do not accept [counsel for the taxpayer]'s submission that the test is satisfied in this case. There is free use by local people and I agree with him that that is important. But it is still subsidiary to what is quite plainly a well organised commercial operation competing with other sports centres in the neighbourhood. Such a venture in my judgment is rather the antithesis of how a village hall operates.
> …
> 49. The final consumers here include a large proportion of members paying commercial charges … In my opinion it is not possible to say that the provision of building services to the appellant is sufficiently close to those consumers to be of advantage to them and thus be considered as being for their benefit…"

It is not necessary for present purposes to examine the arguments and the decision in the appeal from the tribunal to the High Court ([1997] STC 414).

24. Having set the scene, I turn to the judgments delivered in the Court of Appeal. At pp. 389j -390d of his judgment Sir John Vinelott opined:

> "It is true that the local community … are the final consumers in that they not only may use the facilities provided but that any surplus derived from use by them or others is applicable primarily for the benefit of that community. However, that is not the sense in which 'the final consumer' is used by the Court of Justice. The Court of Justice had in mind the case where the final consumer either benefits directly from the supply or where it can be said that the supply is 'sufficiently close to the consumer to be of advantage to him'.
> In this context the plain purpose of sub-para (b) was in my judgment to extend the relief in sub-para (a) to the case where a local community is the final consumer in respect of the supply of the services, including the reconstruction of a building, in the sense that the local community is the user of the services (through a body of trustees or a management committee acting on its behalf) and in which the only economic activity is one in which they participate directly; the obvious examples are the bring-and-buy or jumble sales, the performance of a play by local players and the like. On a strict construction, any economic activity carried on by somebody outside the local community even to raise money for the maintenance of a village hall (by, for example, letting the village hall at a commercial rate) would be outside sub-para (b)….
> Lightman J criticised (at 421) the formulation which had been advanced by [counsel for the commissioners] of 'something which is owned, organised and administered by the community'. I agree that that formulation adds a gloss to the words used which may be too restrictive. I prefer the tribunal's approach. Sub-paragraph (b) is intended to cover economic activities which are an ordinary incident of the use of a building by a local community for social, including recreational, purposes. The village hall is the model or paradigm of that case. Lightman J's approach, in effect, removes all meaning from the words 'as a village hall or similarly'".

He added at p.391a-b:

> "It is enough to say that I agree with the tribunal that, on the facts found by it, it cannot be said that the use made of the centre is similar to the use of a village hall in providing social or recreational facilities for a local community."

Beldam LJ opined at pp. 395j - 397c :

> "The United Kingdom provisions [including Note (6)] were intended to implement the requirements of the relevant articles of the community directives on VAT and, in particular, art 17 of EC Council Directive 67/228 (the Second Directive) which permits member states to –

'… provide for reduced rates or even exemptions with refund, if appropriate, of the tax paid at the preceding stage … Such measures may only be taken for clearly defined social purposes and for the benefit of the final consumer …'

These provisions were considered by the Court of Justice of the European Communities in *EC Commission v United Kingdom* …
The phrase 'for the benefit of the final consumer' means for the benefit of the person who acquires goods or services for personal use and thus bears the tax as opposed to those who acquire them in an economic activity. From this it followed that, having regard to the social purpose of art 17, the term 'final consumer' can be applied only to a person who does not use exempted goods in the course of an economic activity. But the provision of goods and services at a higher stage in the production or distribution chain which is nevertheless sufficiently close to the consumer to be of advantage to him must also be considered to be for the benefit of the final consumer as so defined.
…
…[T]he real question is whether, having regard to the scale of the commercial activities carried on at the Jubilee Hall to subsidise and promote the charitable objects, it can properly be said that the works were carried out to a building to be used *solely* for a relevant charitable purpose; in this context use by the centre in providing social or recreational facilities for a local community in a similar way to the use made of a village hall.
The introduction of the concept of the village hall seems to me to have been intended to equate the activities with the kind of use ordinarily made of a village hall and thus to introduce considerations of scale and locality. For my part I think the scale of Jubilee Hall's commercial activities went well beyond the normal activities of a village hall, though from time to time village halls are used to raise money by commercial activities. Further, the beneficiaries of the zero rate are clearly not solely those who benefit from the charitable purposes.
Mr Miller, the chairman of the tribunal, decided the case as a question of fact in the commissioners' favour. In the course of doing so he adopted an argument put forward by the commissioners that what was contemplated by use similar to a village hall was something which was owned, organised and administered by the community. But he held that in the present case *the use by local people was subsidiary to what was quite plainly a well organised commercial operation* competing with other sports centres in the neighbourhood (see p 10, para 47). Such a venture in my judgment is outside any normal conception of how a village hall is ordinarily used.
In allowing the centre's appeal Lightman J ([1997] STC 414 at 421) was critical of the test which he said the chairman had applied of something owned, organised and administered by the community. He thus felt able to hold that a question of law was involved because the chairman had adopted an inappropriate test.
When the reasons for his decision are read as a whole I do not think that he did. In considering some of the attributes of an organisation which runs village hall and the kind of use to which it is put the chairman was not saying that these were the only considerations which needed to be taken into account. They were, however, circumstances which were not irrelevant.
I do not think that the centre raised a question of law before Lightman J and accordingly I would allow the commissioners' appeal."

Beldam LJ agreed with Sir John Vinelott's judgment. Thorpe LJ agreed with both judgments.

25. It is common ground (and I agree) that the proposition which the commissioners advance does not form any part of the *ratio* of *Jubilee Hall*. Moreover, in my respectful view, on a proper reading of the judgments none of them states that direction or control by a local community of the use of the building in which construction services have been incorporated is essential for zero-rating in terms of note 6(b).

26. While at p. 390a Sir John Vinelott opined that the plain purpose of note 6(b) was to extend relief "to the case where a local community is the final consumer in respect of the supply of services … in the sense that the local community is the user of the services

(through a body of trustees or a management committee acting on its behalf)", I doubt whether he intended the words in parenthesis to be an exhaustive or prescriptive statement of the ways in which the local community could be users, in a qualifying sense, of the services. At p. 360d he described the suggestion that in order to qualify a building had to be owned, organised and administered by the community as "a gloss" on the statutory wording "which may be too restrictive". Ultimately he preferred the tribunal's approach, the gist of which, as outlined above, was that the commercial nature of the operation at the centre prevented the supply of construction services to the charity from being sufficiently close to members of the local community using the building to make them "final consumers" (even if that there was some degree of advantage or benefit to some members of the local community).

27. Beldam LJ was very clear that the real question before the tribunal and before the Court of Appeal was whether, having regard to the scale of the commercial activities carried on, it could properly be said that the works were carried out to a building to be used soley for a relevant charitable purpose; *viz.* use by the centre soley in providing social or recreational facilities for a local community in a similar way to the use made of a village hall. In his view note 6(b) required the use to be of the kind ordinarily made of a village hall, and thus to introduce considerations of scale and locality.

28. In my opinion the judgments in *Jubilee Hall* support the proposition that the existence or non-existence of direction or control over the use of a building is a relevant circumstance, but not necessarily a decisive one (Sir John Vinelott at p. 390b; Beldam LJ at p. 397c; Thorpe LJ at p. 394j). It is one of several factors which may be pertinent. The judgments - particularly that of Beldam LJ - also suggest that in determining whether the requirements of note 6(b) are satisfied an important focus will be the intended uses of the building at the time goods or services were supplied; and that examination of actual uses which have ensued may often provide assistance in identifying the uses of the building which were intended at the time of the supply.

Yarburgh Children's Trust and *New Deer Community Association*

29. Two cases since *Jubilee Hall* which deserve mention are *Commissioners of Customs and Excise v Yarburgh Children's Trust* [2002] STC 207 and *New Deer Community Association v Commissioners for HMRC, supra.*

30. In *Yarburgh Children's Trust* a building owned by a (charitable) Trust was refurbished and let at a nominal rent to another charity which operated a playgroup from it. The Trust claimed zero-rating for the supply to it of construction services but the commissioners refused to treat the supply as zero-rated. The tribunal held that note 6 (b) was satisfied and it allowed the Trust's appeal. On appeal Patten J held that zero-rating was appropriate because note 6(a) was satisfied. In relation to note 6(b) he disagreed with the tribunal:

> "38. Note 6(b) was intended to preserve zero rating for village halls or other buildings used for a similar purpose. The provision was needed because the operation of such buildings might be thought to constitute or involve some form of business or economic activity. To put the matter beyond doubt they have been expressly included within the zero rated categories…"

After quoting passages from Sir John Vinelott (pp. 389j - 390d) and Beldam LJ (p.396j) in *Jubilee Hall*, Patten J continued:

> "39. It seems to me to follow from the passages I have quoted that it is not enough to show that the building in question was intended to be used for an activity which could conceivably

take place in a village hall and is available to members of the local community. What needs to be shown is that the building is or fulfils the role of a village hall or other building designed for public use in the provision of social or recreational facilities for the local community. If, as in the present case, the use to which the building can be put is severely limited it is no answer to say (as the Tribunal did) that those who benefit from that limited use are members of the local community. The village hall was deliberately chosen as the obvious or paradigm example of a building which exists for the benefit of a local community being able to provide premises for a wide range of social and other activities for their benefit. The words "or similarly" were intended to include other buildings which although not village halls as such provide a centre for community activities. They qualify the words "village hall" and not the words which follow in Note 6(b). The provision of social and recreational facilities to a section of the public does not make the building a village hall or something similar. For Note 6(b) to apply the building must be a village hall or its equivalent and provide social and recreational facilities for the local community at large. The building used by the Playgroup is not generally available and does not do this…"

31. In *New Deer Community Association* Lord Tyre observed:

> "17. I begin my own analysis by noting that, grammatically, the words "or similarly" relate back to the word "use". Enquiry must therefore focus upon whether the use or intended use of a building is similar to use of a building as a village hall, rather than, for example, upon whether the building is similar to a village hall. I note also that the need for "local" use is made clear by the reference in sub-paragraph (b) to provision of social or recreational facilities "for a local community". The reference to use similar to that of a village hall must therefore, in my view, be to something other than use by or for persons who live in the vicinity of the building. I am not inclined to adopt either the formulation approved in *Ormiston Charitable Trust* (but doubted by Sir John Vinelott in *Jubilee Hall*) or the respondents' primary contention in the present appeal, both of which focus upon local control or administration of the building's use. I prefer the approach of the tribunal in *Caithness Rugby Football Club*, which focused upon local community use rather than local community control.
> 18. It is also clear that something more is required than mere use for the provision of social or recreational facilities for the local community: otherwise, the reference to use as a village hall or similarly would be emptied of content. I respectfully agree with the view expressed by Beldam LJ in *Jubilee Hall* that attention must focus on the nature of the activities conducted – or intended to be conducted – in the building, and that the question is whether these are similar to the type of social or recreational activities that one would expect to be conducted in a village hall for the benefit of a local community. That will, inevitably, depend upon the facts and circumstances of each case…"

32. The approaches of Patten J and Lord Tyre are similar, and both provide further elucidation: but in my opinion Lord Tyre is correct to emphasise that enquiry should focus upon whether the use or intended use of a building is similar to use of a building as a village hall, rather than, for example, upon whether the building is similar to a village hall. It may be that when Patten J referred to a requirement that "the building" be a village hall or its equivalent he was using that expression as shorthand for saying that the *use of the building* must be as a village hall or its equivalent. A second possible difference is that while Lord Tyre (at para 18) left open the possibility that in certain circumstances use of a building for a single use might qualify as use similar to use as a village hall, it rather seems that Patten J (at para 39) would not have countenanced that a building used for a single purpose could ever be used similarly to a village hall. Since in the present case that particular matter is not in issue (because of the wide variety of uses), I prefer to reserve my opinion in relation to it.

33. Finally, in *New Deer* Lord Tyre concluded that on the facts the sports pavilion was not used in providing social and recreational facilities to a local community "but is used rather as an adjunct to the social and recreational facilities provided for the local community by the sports pitch" (para 19). The facts found in the present case do not permit such a conclusion. On the findings made in *New Deer* the conclusion that the pavilion was not intended to be used as a village hall or similarly was unsurprising. However, I suspect that

in many cases the provision of sports pavilion facilities to a local community is likely to be the provision of social or recreational facilities. In sporting life the commencement of society and recreation is not usually suspended until members of a local community step on to a sports pitch, and it does not usually cease immediately with the final whistle. With team sports in particular, society and recreation often begins with the team gathering in the changing room, exchanging pleasantries and news, preparing for the match, and discussing tactics for the game. Sometimes the pavilion can be resorted to at half-time for similar purposes. After the match the pavilion is the venue for post-match discussions and banter. For my part I would be very slow to conclude that none of that is social or recreational activity; or that the provision of facilities for it is not the provision of social or recreational facilities, but only an adjunct to social or recreational activity taking place outside the building. Whether in a particular case the building was intended to be used as a village hall or similarly may, of course, be another question.

Conclusions

34. I am satisfied, for the reasons discussed above, that the Appellants' suggested interpretation of note 6(b) is not correct. On a proper construction of the provision it does not require that a local community has direction over, or control of, the use of the building within which the relevant facilities are provided. In any particular case the existence or absence of direction or control will be a relevant factor, but not necessarily a decisive one. In my opinion the use of a building may be intended to be at the disposal of a local community even though the community is not the body directing or controlling its use.

35. Mr Komorowski accepted that if his argument in relation to the construction of note 6(b) was not well founded it could not be said that the FTT had materially misdirected itself in law in any material respect. I agree. He readily accepted that, if the interpretation he advanced was not sound, it had been open to the FTT to make the findings which it did. Once again, I concur. It follows that the appeal must fail.

36. In those circumstances it is unnecessary to consider Mr Simpson's "alternative submission". However, since I heard argument in relation to it, I shall provide a brief indication of my views. In my opinion Mr Simpson's suggested interpretation of note 6(b) is not the ordinary and natural reading of the provision. Moreover, I do not think such a construction is consistent with *Jubilee Hall* (Sir John Vinelott at p. 390d, Beldam LJ at p. 396j); or with *Yarburgh Children's Trust* (Patten J at para 39); or with *New Deer Community Association* (Lord Tyre at paras 17-18). As Lord Tyre observed, "something more is required than mere use for the provision of social or recreational facilities for the local community: otherwise, the reference to use as a village hall or similarly would be emptied of content." I respectfully agree.

37. The Appellants have failed to demonstrate any error of law on the part of the FTT. The appeal is refused.

Lord Doherty
Upper Tribunal Judge

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