



DECISION OF LORD TYRE

in appeal by

NEW LANARK TRADING LIMITED

Appellant

against

OFFICE OF THE SCOTTISH CHARITY REGULATOR

Respondent

**Calum MacNeill QC (instructed by Turcan Connell) for the Appellant (New Lanark Trading Limited)**

**Christine O'Neill, solicitor advocate, (instructed by Brodies) for the Respondent (OSCR)**

**FTT Case Reference CA207/08**

27 November 2019

**Decision**

**Introduction**

[1] This is one of two appeals by companies whose principal purpose is to produce income to be donated by gift aid to New Lanark Trust (“NLT”), the body responsible for managing the UNESCO World Heritage Site at New Lanark. The two appeals proceeded in tandem and raise the same issue for decision.

[2] The appellant (“Trading”) is a company limited by shares, incorporated in 1970 and wholly owned by NLT. Its principal activity is the operation of a visitor attraction with

related trading activities, including hydro-electric power and textile production, a retail shop (“the Mill Shop”), a café, and production and sale of ice cream. Entry fees are payable by visitors to the visitor centre’s exhibits and interpretation of New Lanark, periodic temporary exhibitions, and external events. Trading’s turnover is derived from entry to the visitor centre, hydroelectric power income, textile sales and spinning commission, retail shop sales, and the manufacture and wholesale of ice cream. It is currently trading profitably.

[3] Trading occupies, as tenant, buildings owned by NLT, paying an annual rent together with an additional sum based upon a percentage of annual turnover. It contributes a proportion of the cost of repairs and maintenance of the buildings and common parts, and is responsible for the repair and maintenance of the interior of the premises that it occupies.

[4] On 8 December 2017, Trading applied to the respondent (“OSCR”) to be entered in the Scottish Charity Register. By letter dated 26 April 2018, OSCR refused the application, on the ground that Trading did not provide public benefit and accordingly failed to meet the charity test. Following review, the decision to refuse registration was maintained in a decision dated 7 June 2018.

[5] Trading appealed to the General Regulatory Chamber of the First-tier Tribunal for Scotland (“the FTT”) exercising its charity appeals jurisdiction. By its decision dated 11 January 2019, the FTT confirmed OSCR’s decision to refuse to enter Trading in the Scottish Charity Register, and refused the appeal.

[6] Trading applied to the FTT for permission to appeal to the Upper Tribunal for Scotland. The sole ground of appeal was that the FTT had failed to give adequate reasons for its decision. The FTT refused permission to appeal and Trading applied to the Upper

Tribunal for permission. By a decision dated 28 May 2019, I granted permission to appeal.

An oral hearing of the appeal took place on 4 October 2019.

### **The statutory test**

[7] In terms of section 5(1) of the Charities and Trustee Investment (Scotland) Act 2005, OSCR may enter an applicant in the Scottish Charity Register only if it considers that the applicant meets the charity test. 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.

[8] It is not in dispute in the present case that Trading's purposes consist of the charitable purpose of advancement of education. The issue is whether it provides public benefit. Section 8 of the Act contains some limited guidance on the expression "public benefit", stating as follows:

"(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."

Neither of these subsections is directly relevant to the point at issue in these appeals, but I mention them because no further guidance is provided by the legislation as to the meaning of public benefit.

### **OSCR's decision**

[9] The reason given by OSCR in its letter dated 26 April 2018 for refusing to enter Trading in the Register was that the company would be carrying out a significant level of activity which was not in furtherance of its charitable purposes, and therefore that the body as a whole did not provide public benefit. In arriving at this decision, OSCR drew a distinction between (a) activities which directly advance charitable purposes and (b) activities undertaken with the aim of generating profits to be applied for charitable purposes. The activities of the Mill Shop and Mill Café, and the manufacture of ice cream, were considered not to be activities that advanced the charitable purposes which could be inferred from Trading's objects. OSCR concluded:

"In deciding whether the body provides public benefit, we have to take into account **all** of the day to day activities carried out by [Trading]. OSCR accepts that if an organisation is carrying out small-scale incidental activities which do NOT provide benefit related to its stated charitable purposes, this will not automatically mean it fails the public benefit part of the charity test...

However, the Mill Shop, Mill Café and Ice Cream Manufacturing do not fall into this category. These are significant activities with a combined turnover of £889,456 in the year to January 2017 – nearly 49% of [Trading's] total income.

Overall, we recognize that [Trading] is undertaking some activities which advance its charitable purposes and which provide benefit to the public and that it will also contribute to the public benefit provided by New Lanark Trust.

However, we do not regard the Mill Shop, Mill Café, or Ice Cream Manufacturing as activities which are in furtherance of the organisation's charitable purposes and nor do we regard them as being incidental (a by-product of its main activities)."

### **Trading's appeal to the FTT against OSCR's decision**

[10] The substance of Trading's appeal against OSCR's decision was contained in the following two paragraphs in the reasons appended to Trading's Notice of Appeal:

"The Mill 3 shop, the original village shop and café are housed in original buildings. They contribute to the vitality of the community. They are responsible for the maintenance of the buildings in which they operate, all in keeping with the strictures of their WHS status. A visit to the shops or café is part of the visitor experience of the revitalised New Lanark which is an essential part of its charitable purposes. The village shop lays claim to be the 'seed' and inspiration from which the Co-op Movement grew (the Rochdale Pioneers) which again enhances the visitor experience, and is included as part of the Visitor Centre which visitors pay to enter.

OSCR did not take cognisance of this when describing the activities of the shops, café and ice-cream manufacture as 'not charitable and ... undertaken with the aim of generating profits to be applied for charitable purposes' ... OSCR erred in its distinction between the two categories of activity as identified in paragraph 46 of its decision letter."

Trading also took issue with OSCR's use of turnover figures to support its view.

[11] At the hearing before the FTT, evidence was given by, among others, Mr Alistair Duncan, a trustee of NLT and a non-executive director of Trading. His witness statement emphasised the points made in the reasons for the appeal. They were again taken up in Trading's closing submissions (in relation to both appeals), where it was argued that:

"...OSCR's reasoning in both cases is flawed by its failure to consider the applications further than noting that they are companies engaging in trading activities. There is a great deal more to the activities than making money, albeit the fact that they make money is helpful to the project and allows New Lanark to offer to members of the public an interpretation of the historic village, largely at no cost to them. The evidence establishes that the activities are charitable in themselves in that they further the charitable aims of each company from which public benefit is derived."

[12] In its closing submission, OSCR adhered to the reasons given when refusing Trading's application for registration. OSCR submitted in particular that "...the occupation by a shop, café or food manufacturing business of historic buildings from which they carry

out their operations cannot of itself transform commercial activities into charitable activities"; and, in direct response to Trading's argument, that "...such contribution as is made by Trading's commercial activities to the advancement of heritage is subsidiary to the commercial nature of those activities and the importance of generating funds for the Trust".

### **The FTT's decision**

[13] The FTT's decision is divided into chapters headed, *inter alia*, Findings of Fact, Reasons for Decision, and Observations. Unfortunately the material contained in each of these chapters does not always correspond to the heading, and it was common ground at the appeal hearing that it was necessary to read the whole decision in order to identify what findings in fact were made, and what the reasons for the decision were. This is the approach that I have adopted.

[14] The FTT's key findings in fact are contained in paragraphs 27 to 30 of its decision, under the heading Findings in Fact. They are as follows:

"[27] The Respondent accepts that a number of activities carried out by the Appellant advance its charitable purposes and result in public benefit. These activities include the attractions in the Visitor Centre, other events and exhibitions held throughout the year, the production of woollen yarn and hydro-electric power. The Tribunal accepts this assessment;

[28] The Mill Shop engages in trading that is directed towards raising funds for New Lanark Trust. The Shop is engaged in the provision of goods in return for payment. The Shop's activities go beyond New Lanark-related merchandise. The Shop sells a range of products that have no connection with New Lanark. The Shop has accommodated retail fashion franchises having no connection with New Lanark's charitable activities;

[29] The Café provides the catering service. It engages in trading that is directed towards raising funds for New Lanark Trust. The Café is engaged in the provision of goods and services in return for payment. The Café is typical of eateries associated with heritage sites;

[30] The Appellant's Ice Cream Production is engaged in trading that is directed towards raising funds for New Lanark Trust. The ice cream is sold to visitors to New Lanark, available for purchase in the Café, and sold to hotels and restaurants at a distance from New Lanark;

[31] The commercial nature of the Appellant's activities, including the Mill Shop, Café and Ice Cream Production, primarily contributes to the funds of New Lanark Trust. As previously stated the Appellant contributes funds to the Trust in the form of commercial rent paid under its lease with the Trust and, following each year end, by donation of its whole net profits under Gift Aid;"

[15] In the immediately following paragraphs, still under the same heading, the FTT departs from making findings in fact and sets out what are in effect, as counsel for OSCR submitted at the hearing before me, the reasons for its decision to refuse the appeal:

"[32] In assessing whether the Appellant delivers public benefit the Tribunal must consider the whole of the activities of the Appellant;

[33] The trading activity of the Mill Shop (in so far as it encompasses products unrelated to New Lanark), Café and Ice Cream Production is not in furtherance of the Appellant's charitable purposes and cannot be viewed as incidental;

[34] Whilst some activities of an entity may in result in public benefit, this may not necessarily equate to an entity's activities resulting in public benefit, when looked at as a whole. In considering whether the activities of the Appellant are in furtherance of its charitable purposes of the advancement of heritage and education, the Tribunal conclude that the level of contribution to the furtherance of the advancement of education and heritage is subsidiary to the trading nature of the Appellant's activities when considered as a whole;"

[16] To these paragraphs may be added the following paragraph in the section headed

Reasons for Decision:

"While the Tribunal accept that within the current structure of the Appellant some of the activities are accepted by the Respondent to be in furtherance of its charitable purposes - for example, production of woollen yarn, hydro-electric power and the attractions of the visitor centre, other events and exhibitions - these activities are outweighed, in the opinion of the Tribunal, by its solely commercial activities - for example the Mill Shop, Cafe and Ice Cream Production."

Otherwise there is nothing in the section headed Reasons for Decision which adds anything material to paragraphs 32 to 34. There is, however, a further important element of the FTT's reasoning contained in the section headed Observations, where it is stated:

“The Tribunal took the view that just because an entity is undertaking trading or activity which is commercial in nature, this does not automatically prevent that trading or activity being in furtherance of its charitable purposes in terms of assessing public benefit.

...

CTG [ie OSCR's Charities and Trading Guidance] (at page 11) states that 'A trading subsidiary is not a charity'. The Tribunal took the view that this is incorrect... It is possible for a trading subsidiary to be a charity. It may have been separated from its parent charity for risk management purposes. It does not automatically follow that it is not trading in furtherance of its charitable purposes and that it cannot meet the charity test.”

### **Argument for Trading**

[17] On behalf of Trading it was submitted that there was no distinction in principle between the standard of reasoning required of a court and that required of a tribunal in the nature of the FTT which had all the hallmarks of a fully judicial body. It was the duty of a judge to enter into the issues canvassed and to explain why one case was preferred. What the judge had to do in order to explain why he reached the decision he did would vary from case to case, but transparency was the watchword.

[18] The issue between the parties had been identified in Trading's submissions to the FTT, namely whether activity that was commercial in nature could also further charitable purposes and thus assist Trading to meet the public benefit test. OSCR had been of the view that it could not, and its officer gave evidence to that effect, adhering to published guidance. The FTT had rejected OSCR's submission in this regard, in the passages reproduced above from the chapter of the decision headed “Observations”. But having rejected the proposition that commercial activity was not *ipso facto* non-charitable, the FTT had failed to

explain its conclusion that Trading failed to satisfy the public benefit test because its activities which OSCR accepted as being in furtherance of its charitable purposes were outweighed by its “solely commercial activities”. Since commerciality had been held not to prevent trading or activity from advancing charitable purposes, it was not explained what balancing exercise was being applied in reaching the FTT’s decision.

[19] It was unnecessary to show prejudice in addition to a lack of adequate reasons. The case law had established that it was all part of a single question. Failure to provide adequate reasons and prejudice were one and the same thing. In any event, Trading had suffered prejudice by being left not knowing how to arrange their affairs so as to increase their chances of meeting the public benefit test, or even whether it was possible.

### **Argument for OSCR**

[20] On behalf of OSCR it was submitted that the reasons given by the FTT were adequate. In assessing whether reasons given by a judicial or quasi-judicial body were proper and adequate, consideration had to be given, firstly, to the nature of the decision-maker; secondly, to proportionality; and thirdly, to the degree to which they were addressed to an informed reader. In the present case, (i) the FTT was an expert tribunal whose decisions should not lightly be interfered with; (ii) although inadequate reasons would not be acceptable, a sense of proportionality had to be applied, and elaborate reasoning was not required; and (iii) the appeal had been preceded by correspondence for over a year, so both parties were fully aware of the factual background and the contentious issues. The decision should be read as a whole and not subjected to hyper-critical analysis.

[21] For a reasons challenge to succeed, the challenger had to demonstrate that it had suffered actual prejudice as a result of a failure to give adequate reasons. In this case the

prejudice said to have been suffered was that the decision did not inform Trading of what it had to do to structure its business activities in a compliant manner. But it was not the function of the FTT to give guidance as to what Trading would have to do in order to meet the charity test. No prejudice had been demonstrated.

[22] Reading the decision as a whole, the FTT had made findings in fact and, at paragraph 34, had set out a conclusion that flowed from those findings. OSCR had not submitted that simply because Trading engaged in commercial activity, it was impossible for it to meet the test of providing public benefit. The issue was rather the extent of the commercial activity. The FTT's decision took account of the nature of the commercial activity, as described in paragraphs 28-30. It was because of the nature of the activities (providing goods and services for payment to raise funds for NLT), and not merely their commerciality, that the FTT had concluded that the company, looked at as a whole, was not providing public benefit. The decision might have been more clearly presented, but there was no real or substantial doubt about the reasons for it. Trading simply disagreed with those reasons.

### **Decision**

[23] The parties were agreed that the well-known dictum of Lord President Emslie in *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345 at page 348 continued to provide authoritative guidance as to what was required in order to comply with the statutory duty of a decision-maker:

“...[to] give proper and adequate reasons... which deal with the substantial questions in issue in an intelligible way. The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it.”

[24] As Lord Brown of Eaton-under-Heywood observed in *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953 at paragraph 36, the degree of particularity required will depend upon the nature of the issues falling for decision. There is nothing intrinsically wrong with briefly-stated reasons; on the contrary, as the Court observed in *JC v Gordonstoun Schools Ltd* 2016 SC 758 at paragraph 63, brevity may be commendable. “It is enough that the reasons are intelligible and enable the reader to understand why the tribunal decided as they did and what conclusions were reached on the principal issues in the case” (Lord Brown, *ibid*).

[25] The principles just stated apply equally to both judicial and administrative decision-makers. Whilst I accept the proposition that respect ought to be given to the expertise of a decision-making tribunal, I would reject any suggestion that a different or lesser standard of reasoning applies to the decision of a tribunal as opposed to the decision of a court.

Assessment of adequacy and intelligibility will depend upon the nature of the issue being decided rather than upon the categorisation of the body making the decision, although I recognise that certain administrative tribunals will regularly, by virtue of the nature of the subject-matter, be making decisions that can (and should) be stated briefly. In the present case, the FTT was acting in a fully judicial capacity, and dealing with an issue that was of sufficient complexity to require more than a brief and summary decision. The adequacy of its reasons must be judged accordingly.

[26] On the question of the need to show prejudice, counsel for OSCR referred to the observation of Lord Brown (*South Bucks*, also at paragraph 36) that a reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision. I do not

read this dictum as imposing a two-stage process in which the party aggrieved must surmount separate hurdles of showing, firstly, inadequate reasoning and, secondly, prejudice. At paragraph 29 of his speech, Lord Brown had referred, with apparent approval, to the following dictum of Lord Bridge in *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153 at 167:

“There are in truth not two separate questions: (1) were the reasons adequate? (2) if not, were the interests of the applicant substantially prejudiced thereby? The single indivisible question, in my opinion, which the court must ask itself whenever a planning decision is challenged on the ground of a failure to give reasons is whether the interests of the applicant have been substantially prejudiced by the deficiency of the reasons given.”

Lord Bridge went on to give (at page 168) examples of complaints regarding inadequacy of reasoning that might suffice to discharge the onus resting upon the party aggrieved: where it was necessary to the decision to resolve an issue of law and the reasons did not disclose how the issue was resolved, or where the decision depended on a disputed issue of fact and the reasons did not show how that issue was decided.

[27] Applying the guidance provided by these authoritative statements, I am of the opinion that the FTT has not provided proper, adequate and intelligible reasons for its decision, because it has failed to address the point truly at issue between the parties.

OSCR's argument before the FTT had been founded upon the commercial nature of some of the activities pursued by Trading, but, as the FTT held in the first paragraph of its Observations, the fact that an entity undertook trading or activity which was commercial in nature did not prevent *that trading or activity* being in furtherance of its charitable purpose in terms of assessing public benefit. The FTT thus accepted an important step in Trading's argument, and rejected the counter-proposition that commercial activity was not charitable

activity and, accordingly, that if it constituted a sufficiently high proportion of the organisation's activities it would cause the organisation to fail the public benefit test.

[28] Having thus accepted Trading's argument that commercial trading or other activity *could* be in furtherance of an entity's charitable purpose in assessing public benefit, the FTT then required to consider whether the admittedly commercial trading or other activities of Trading *were or were not* in furtherance of its charitable purpose. At paragraphs 28 to 30 the FTT identified Trading's commercial activities. But it did not go on to address Trading's argument that these commercial activities were, for the reasons set out in its Notice of Appeal, elaborated upon by Mr Duncan in his oral evidence and founded upon in its closing submission (and challenged by OSCR in its evidence and closing submission), in furtherance of its charitable purpose. Instead, the FTT appears to have decided the point (at paragraph 34 and under the Reasons for Decision heading) under reference to the trading (ie commercial) nature of the organisation's activities when considered as a whole, despite having concluded elsewhere in its decision that commercial nature was not determinative of whether trading or activity was in furtherance of Trading's charitable purpose.

[29] In order to resolve the issue of law between the parties, it was, in my view, necessary for the FTT directly to address the question whether (and if so to what extent) the activities of Trading that had been characterised as commercial did or did not further Trading's charitable purposes and thereby provide public benefit, and to give reasons for its decision on that question. That was in substance a disputed issue of fact in respect of which a finding was essential in order to address the issue of law and decide the appeal. Without such a finding, the FTT's reasons are in my opinion inadequate, in a manner that is prejudicial to Trading. The FTT's decision must accordingly be quashed.

**Disposal**

[30] In exercise of the power in section 47(1) of the Tribunals (Scotland) Act 2014, I quash the FTT's decision under appeal.

[31] Both parties invited me, in the event that the FTT decision were to be quashed, to exercise the power in section 47(2)(a) of the 2014 Act to re-make the decision, rather than to remit the case to the FTT in terms of section 47(2)(b). I am willing to accede to that invitation. I would wish, however, to afford parties an opportunity to make any further written submissions that they would wish to make before I begin to address the substantive issue that was raised in the appeal to the FTT. Any such submissions should be made within **42 days** after the date of intimation of this decision.

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within 30 days of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*