



DECISION OF LORD TYRE

in appeal by

NEW LANARK HOTELS LIMITED

Appellant

and

OFFICE OF THE SCOTTISH CHARITY REGULATOR

Respondent

FTT Case Reference CA107/08

**Calum MacNeill QC (instructed by Turcan Connell) for the Appellant (New Lanark Hotels Limited).
Christine O'Neill, solicitor advocate (instructed by Brodies) for the Respondent (OSCR).**

DECISION

Introduction

[1] This is one of two appeals by companies whose income is 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 have proceeded in tandem and raise the same issue for decision, although the facts are not identical.

[2] By a decision dated 27 November 2019 ([2019] UT 63), reached after an oral hearing, I allowed an appeal by the appellant (“Hotels”) against a decision of the General Regulatory Chamber of the First-tier Tribunal for Scotland (“the FTT”), exercising its charitable jurisdiction. The FTT had dismissed an appeal by Hotels against a refusal by the respondent

(“OSCR”) to enter Hotels in the Scottish Charity Register. The ground of appeal to this Tribunal was that the FTT had failed to provide proper, adequate and intelligible reasons for its decision. At the close of the hearing of the appeal, 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 Tribunals (Scotland) Act 2014 to re-make the decision, rather than remit the case to the FTT in terms of section 47(2)(b). I acceded to that invitation, but invited parties to make any further written submissions that they would wish to make on the substantive issue that had been raised in the appeal to the FTT. Both parties submitted brief additional submissions for which I am grateful.

[3] The appellant (“Hotels”) is a company limited by shares which is wholly owned by NLT. Its principal activity is the operation of a hotel, hostel and self-catering visitor accommodation and associated activities within New Lanark village. On 8 December 2017, Hotels applied to OSCR to be entered in the Register. By letter dated 26 April 2018, OSCR refused the application, on the ground that Hotels 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. That refusal was the subject of the appeal to the FTT which resulted in the decision that is now being re-made.

The power to re-make the FTT’s decision

[4] Section 47 of the 2014 Act provides *inter alia* as follows:

“(1) In an appeal under section 46 [ie against a decision of the FTT], the Upper Tribunal may uphold or quash the decision on the point of law in question.

(2) If the Upper Tribunal quashes the decision, it may –
 (a) re-make the decision...

(3) In re-making the decision, the Upper Tribunal may –

- (a) do anything that the First-tier Tribunal could do if re-making the decision,
- (b) reach such findings in fact as the Upper Tribunal considers appropriate.”

[5] It is common ground between the parties that the task of the Upper Tribunal when re-making a decision is to approach the substantive issue *de novo* and reach its own view on it, as opposed to, for example, carrying out a judicial review of the reasonableness of either the decision by OSCR or the decision of the FTT.

[6] Despite the powers conferred by section 47(3), it is however clear that the Upper Tribunal’s powers in relation to findings in fact are not unlimited. In *Sarkar v Secretary of State for the Home Department* [2014] EWCA Civ 195, at paragraph 15, Moore-Bick LJ described the power to re-make as involving “no more than substituting the tribunal’s own decision for that of the tribunal below”. In *YZ v Secretary of State for the Home Department* [2017] CSIH 41, Lord Glennie, delivering the opinion of the court, made the following observations at paragraph 42 in the context of the equivalent statutory provisions for tribunals with UK-wide jurisdiction:

“[Counsel for the Secretary of State] accepted before us that the UT was only entitled to interfere with findings in fact made by the FTT if those findings were infected by some error of law or where the FTT made an error of law in reaching those findings in fact. He was correct to make this concession. An appeal from the FTT to the UT lies on a point of law: section 11(1) of the [Tribunals, Courts and Enforcement Act 2007]. There is no appeal against the FTT’s findings in fact. It is important to understand this point.... Another situation, perhaps closer to this case, is where the FTT has erred in law, and the UT takes it upon itself to re-make the decision, as it is entitled to do under section 12(2)(b)(ii) of the 2007 Act. It may in so doing ‘make such findings of fact as it considers appropriate’: section 12(4)(b). But while in that situation the UT has the power to make additional supplementary findings, it does not have the power to overturn findings of ‘pure’ fact made by the FTT which are not undermined or otherwise infected by that or any other error of law.”

[7] Applying these observations to the present case, I consider that this tribunal must proceed on the basis of the findings in fact made by the FTT. I do, however, consider it appropriate, in exercise of the power in section 47(3)(b) of the 2014 Act, to make certain

additional findings in fact which are based upon evidence led before the FTT and not in any way inconsistent with the FTT's findings.

[8] The FTT recorded its findings in a chapter headed "Findings of Fact". It is not disputed that this chapter contains a significant amount of material which does not consist of findings in fact. The following paragraphs of this decision set out those findings by the FTT which are properly to be characterised as findings in fact.

Findings in fact

[9] Hotels is a company limited by shares, incorporated in 1971.

[10] Hotels' articles of association were updated in July 2018 for the purposes of its application for charitable status. There was no change in the activities carried out by Hotels.

[11] Hotels' principal activity is the operation of a hotel, hostel, self-catering accommodation and associated activities including a conference centre, bar, restaurant, wedding venue, leisure club, pool and beauty rooms.

[12] Hotels' principal activity involves the provision of goods and services in return for payment, albeit within New Lanark village.

[13] Hotels is a commercial enterprise.

[14] Hotels' turnover and any profit before taxation are attributable to the principal activity described in paragraph 12.

[15] All net profits from Hotels are donated to NLT by gift aid.

[16] South Lanarkshire Council has withdrawn rates relief from Hotels.

[17] Hotels is currently trading profitably.

[18] Hotels occupies, as tenant, buildings owned by NLT under a lease entered into in 1988. Hotels pays NLT an annual rent together with an additional sum based upon a percentage of annual turnover.

[19] The lease stipulates that Hotels is responsible for making payment to NLT of a proportion of the cost of repair and maintenance of the foundations, structural walls, roof and other common parts of certain of the buildings it occupies. Hotels is also responsible for the repair and maintenance of the interior of its premises.

[20] NLT is responsible for the capital expenditure programme for properties owned by the trust, including the original refurbishment of the buildings occupied by Hotels.

[21] Hotels contributes to some repair and maintenance of the buildings it occupies. It was not possible to determine or quantify the extent of this contribution.

[22] Hotels is in control of (a) exploration of the village, to the extent that leaflets, signage and interpretation are within its control; (b) access to the historic buildings; (c) digital access to the New Lanark website to the extent that information relating to Hotels forms part of the website content; (d) bespoke requests in terms of providing tours; and (e) the provision of two of the five sets of public toilets.

[23] Hotels' purposes are charitable, being purposes which fall within the advancement of education and the advancement of the arts, heritage, culture or science.

[24] Hotels engages in trading that is directed towards raising funds for NLT. Hotels is engaged in the provision of goods and services in return for payment in a manner which compares to other commercial hotel operators. It operates competitively in its market place, with the ability to charge for accommodation by reference to its location, a World Heritage Site. Hotels offers leisure services to non-residents of the hotel. Discounted accommodation is offered to interns, academics, students and conference guests.

[25] The commercial nature of Hotels' activities contributes to the funds of NLT.

[26] The revivification of New Lanark as a living and working community, and the identification of suitable uses for all the buildings, is primarily an achievement of NLT rather than Hotels.

Additional findings in fact

[27] Evidence was led before the FTT (by Hotels) from Mr Scott McCauley, chief executive of NLT and managing director of Hotels, from Mr Alistair Duncan, a trustee of NLT and lead trustee in the matter of obtaining recognition of Hotels as a charity, and (by OSCR) from Ms Laura Anderson, OSCR's head of professional advice and intelligence. The FTT made no express finding regarding the credibility or reliability of these witnesses, but there is nothing in the FTT's decision to suggest that any of them was treated as other than credible and reliable. All three provided detailed witness statements covering both appeals. Ms Anderson's statement consisted largely of narrating the procedure followed by OSCR in reaching its decision to refuse to register Hotels as a charity. The statements of Mr McCauley and Mr Duncan included a detailed description of New Lanark generally, and of the roles played by NLT and Hotels respectively. It is fair to say that some of the material in these statements is best described as argument in support of charitable status, but on the basis of Mr Duncan's statement I make the following additional findings in fact which are relevant to the point at issue:

- New Lanark is offered to the public as an inhabited, economically active settlement, with facilities for visitors.
- Hotels' 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 to satisfying the needs and expectations of visitors.

- Hotels provides facilities for those interested in experiencing the heritage of New Lanark on an all day and night basis.
- Provision of facilities for visitors is necessitated by the nature and size of the site, its relatively remote location, and the average duration of ordinary visits.

Joint minute of agreement

[28] For the purposes of the appeal to the FTT, the parties agreed the following matters by joint minute:

- (1) Hotels' purposes are charitable as defined under section 7 of the Charities and Trustee Investment (Scotland) Act 2005 ("the 2005 Act"), specifically the advancement of education, and the advancement of arts, heritage, culture or science.
- (2) OSCR determined in its assessment of the charity test that there was no private benefit arising from Hotels' activities.
- (3) No question arises under section 7(4) of the 2005 Act as to distribution of assets, ministerial control or political activity.

Statutory requirements for registration as a Scottish charity

[29] In terms of section 5(1) of the 2005 Act, OSCR may enter an applicant in the 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. As already

mentioned, it is not in dispute in the present case that Hotels' purposes consist of one or more charitable purposes. The issue is whether it provides public benefit.

[30] 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."

[31] So far as I am aware, there has not yet been any judicial consideration of the expression "provides... public benefit" that would be of assistance in the circumstances of these appeals. It appears to have been parties' common 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). I agree with that interpretation. In the present case OSCR do not contend that Hotels fails the public benefit test because either (a) there is private benefit; (b) there is public disbenefit; or (c) there are unduly restrictive conditions on the obtaining of public benefit. But that does not resolve the matter in favour of Hotels. The question whether a body can be said to be providing public benefit requires a broader inquiry into the whole of its activities.

[32] Section 9 of the Act requires OSCR, after consulting representatives of the charitable sector and such other persons as it thinks fit, to issue guidance on how it determines whether a body meets the charity test. That guidance is contained in a document entitled “Meeting the Charity Test”, a version of which published in January 2018 was produced. In its written submissions to the FTT, OSCR drew attention to certain passages at pages 74-77 of the guidance dealing with the meaning of public benefit, and argued that the FTT should adopt an approach that was consistent with it. OSCR also made reference to another of its publications, entitled “Charities and Trading Guide”, a version of which published in March 2018 was produced. It is clearly desirable for OSCR to publish guidance as to its understanding of the statutory requirements and of the duties of charity trustees, but such guidance has no statutory force of its own. If a tribunal were to decide an appeal (whether in favour of or against an appellant) according to whether or not it considered that the terms of the published guidance had been satisfied, it would commit an error of law. For that reason I do not regard it as useful to narrate any passages from OSCR’s guidance. If there is anything in this decision that is not consistent with it, then the appropriate course of action would be to amend the guidance.

OSCR’s decision

[33] The reason given by OSCR in its letter dated 26 April 2018 for refusing to enter Hotels in the Register was that the company’s activities 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. OSCR concluded:

“We recognise that you intend to contribute financially to the objects of the Trust by distributing profits from the operation of a hotel, self-catering accommodation and hostel. We also recognise that this activity is capable of providing benefit to the public.

However, in assessing whether a body provides public benefit, we need to look at all of its activities. The fact that **some** activities may result in public benefit does not equate to the organisation’s activities as a whole resulting in public benefit. Here, the primary activities being carried out by [Hotels] are operating and managing the hotel, hostel, or self-catering lodges. These activities are not directly related to or connected with its charitable purposes and nor do we regard them as being incidental (a by-product of its main activities).

In conclusion the principal activities of the applicant do not provide public benefit in furtherance of its stated charitable purposes and therefore as a whole the applicant does not provide public benefit.”

Hotels’ appeal to the FTT against OSCR’s decision

[34] The substance of Hotels’ appeal against OSCR’s decision was contained in the following three paragraphs in the reasons appended to Hotels’ Notice of Appeal:

“...The topography and geographical isolation of the village mean that all visitors to it will experience to a greater or lesser extent the architecture, heritage and atmosphere of the site.

...For those willing to pay a charge, it is possible to take this appreciation and experience to the extent of spending the evening, the night-time and the early morning in the World Heritage Site by staying in one of the original buildings which now accommodate a hotel, self-catering accommodation and a hostel. Prices are varied to suit different budgets. The accommodation run by [Hotels] allows visitors to see a side of New Lanark they would otherwise be unable easily to experience.

The hotel, self-catering accommodation and hostel are housed in original buildings. They contribute to the vitality of the community. [Hotels] is responsible for the maintenance of the buildings in which they operate, all in keeping with the strictures of their WHS status. An overnight stay of one or more nights offers a deeper, immersive visitor experience of the revitalised New Lanark which is an essential part of [Hotels’] charitable purposes. OSCR did not take cognisance of this when describing the hotel, hostel and self-catering accommodation as not advancing the charity’s purposes...”

The issue for determination

[35] Hotels accepts that it cannot pass the charity test on the basis that it donates its surplus to NLT to be used for charitable purposes. It also accepts that activities carried on by NLT cannot be attributed to Hotels, and that the question whether Hotels meets the charity test must be determined by reference to Hotels' own activities. The issue is whether Hotels, when carrying on its commercial activities, is providing public benefit.

Argument for Hotels

[36] On behalf of Hotels it was submitted that the tribunal should quash OSCR's decision and direct OSCR to enter Hotels in the Register. Its activities were not merely commercial activities to provide an income stream for NLT. They had to be seen in the context of the work of the aim of the trust to revivify the village as a living entity. The occupation and use of buildings in a way sympathetic to the story of New Lanark provided public benefit. The advancement of heritage was achieved not only by restoring, conserving and maintaining the historic village, but also by offering it to the public as an inhabited, economically active settlement with facilities for visitors. Providing different categories of overnight accommodation to suit a wide variety of budgets and requirements, within the original mill buildings, contributed to maintaining the village as a living entity and to satisfying the needs and expectations of visitors. Even if Hotels did not operate at a profit, it would be fulfilling charitable purposes. A comparison with commercially operated hotels in historic buildings elsewhere was inapt: such buildings were exploited for private gain by businesses which did not have charitable purposes.

[37] In conclusion, OSCR's reasoning was flawed by its failure to consider the application further than noting that Hotels was a company engaged in commercial activities. There was

more to the activities than making money, albeit the fact that they made money was helpful to the project and allowed NLT to offer the public an interpretation of the historic village largely at no cost to them.

Argument for OSCR

[38] On behalf of OSCR, it was submitted that the tribunal should confirm the decision to refuse to enter Hotels in the Register. OSCR had been correct to conclude that Hotels' activities were not in furtherance of its charitable purposes. Any contribution made by Hotels' activities to the charitable purpose of advancement of heritage was subsidiary to their commercial nature and to the importance of generating funds for the trust.

[39] Hotels was a trading subsidiary whose principal activity was non-primary purpose trading, directed towards raising funds for NLT. It was engaged in the provision of goods and services for payment in a manner directly comparable to other commercial hotel operators. It operated competitively in its market place, with the ability to charge a premium for accommodation by reference to the hotel's location. It offered leisure services to non-residents which appeared to account for around 12% of its income. Occupation by a trading company of a historic building could not of itself transform commercial activity into charitable activity.

[40] Hotels had emphasised the uniqueness of New Lanark village and the importance of its revivification by occupation and use of buildings. But securing occupation was the responsibility of NLT, not Hotels. There were other commercial tenants. The uniqueness of Hotels' commercial activities could be doubted. Such contribution as was made by Hotels' commercial activities to the advancement of heritage was subsidiary to the commercial nature of those activities and the importance of generating funds for the trust.

[41] In its supplementary written submission provided for the purposes of this tribunal's decision, it was emphasised that OSCR's decision had not proceeded on the basis that commercial activities could not be in furtherance of its charitable purposes. The question was whether and if so to what extent commercial activities could be said to further a charity's charitable purposes and thereby provide public benefit. If they did, an assessment required to be made as to whether the trading aspect could be disregarded or outweighed by Hotels' contribution to the advancement of heritage.

Decision

[42] I have already noted that the guidance given by the 2005 Act itself as to the meaning of "provides... public benefit" is limited. It is essentially negative in character, identifying reasons why an organisation may be regarded as not providing public benefit, because private benefit or public disbenefit outweighs public benefit, or where the conditions for obtaining public benefit are unduly restrictive, whether because of charges or fees or otherwise. It seems to me that the fact that the legislature thought fit to make specific provision for these situations indicates that the expression "provides... public benefit" is otherwise intended to have a broad compass. Clearly it is capable of including circumstances where there is some degree of private benefit or public disbenefit (though not too much), and circumstances where reasonable fees and charges are imposed. In relation at least to the matters specifically mentioned, a balancing exercise appears to be required. It is less clear that a balancing exercise is appropriate in other circumstances in which the question arises of whether an organisation is providing public benefit.

[43] The present case is concerned with the application of the public benefit requirement to commercial activities. According to OSCR's analysis, as I understand it, there are two

types of commercial activity which may be carried on by an organisation without compromising the public benefit requirement. The first is where the commercial activity contributes to the furtherance of the organisation's charitable purposes. So, for example, in the parallel case of New Lanark Trading Limited ("Trading"), it is accepted by OSCR that Trading's woollen yarn spinning and hydro-electricity production contribute to its charitable purposes (advancement of education and advancement of heritage), and thus provide public benefit. The second is where commercial activity which does not contribute to the furtherance of the organisation's charitable purposes can nevertheless be regarded as incidental thereto. It can be seen from OSCR's reasons for refusal of registration that I have set out at paragraph 33 above that "incidental" in this context means a small scale by-product, and that the reason why Hotels was not regarded as providing public benefit was because the supply of accommodation and ancillary services on a commercial basis was its principal activity and could not be regarded as incidental to its charitable purposes.

[44] That, however, is to miss the point of Hotels' argument. It is not contended by Hotels that its commercial activities should be regarded as incidental to its charitable purposes. Rather it is contended that they fall into the first type of commercial activity that I have identified: ie that the provision of accommodation on a commercial basis in the overall setting of New Lanark village of itself amounts to the provision of public benefit. OSCR's response in its submissions is to categorise these activities as "non-primary purpose trading". This phrase appears to have been taken from OSCR's Charities and Trading Guide, in which it is explained as being "...where the trading itself does not advance the charity's purposes or provide public benefit. The trading is carried out to raise funds for the charity, but it is not a charitable activity". What the guidance does not appear to envisage is that a commercial activity such as the provision of accommodation could have a dual

purpose of raising funds and also contributing to the organisation's charitable purposes. In that situation it would not seem to me to be either necessary or appropriate to carry out a balancing exercise of which of these two purposes is the more important, however one might attempt to measure importance. The 2005 Act does not, in my opinion, require the assessment contended for by OSCR of whether the contribution made by Hotels' commercial activities to the advancement of heritage is subsidiary to their commercial nature and the importance of generating funds. The statutory question is whether the organisation is providing public benefit. If that question is answered in the affirmative, then in my opinion it is irrelevant that at the same time it raises funds intended to be applied either for its own benefit or for the benefit of another charitable body.

[45] The issue in the present appeal accordingly becomes a factual one: do the commercial activities carried on by Hotels, consisting of the provision of various types of accommodation with associated services, contribute to the furtherance of its charitable purposes (advancement of education and advancement of heritage)? On the basis of the FTT's findings in fact and the additional findings that I have felt able to make on the basis of the evidence that was before the FTT, I am satisfied that they do. I accept Hotels' submission 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 overnight accommodation within the heritage site 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. I see no reason to reject

the evidence of Hotels' witnesses that the production of a surplus for donation to NLT is not its main purpose. I am not persuaded that there is any inconsistency between that evidence and the statements in documents founded upon by OSCR in its submissions. In any event, as I have said, the question of whether public benefit is provided is a different one, to be answered without regard to the relative importance of the organisation's profitability.

[46] Clearly there are elements of the services provided by Hotels, such as a spa and beauty rooms, which if considered on their own would seem to have little to do with advancement of education or heritage. That, however, would not be the correct approach. Having regard to Hotels' activities taken as a whole, I find that it provides public benefit and therefore meets the charity test.

[47] For the sake of completeness I confirm that I find nothing in the findings in fact to indicate that Hotels fails to meet the charity test as a consequence of any of the matters mentioned in section 8(2) (private benefit, public disbenefit or unduly restrictive conditions). The appeal therefore succeeds.

Disposal

[48] It follows from the foregoing that the decision of OSCR dated 7 June 2018 refusing to register Hotels in the Register is quashed. As I am satisfied that Hotels meets both elements of the charity test, I see no need to remit the matter to OSCR for further consideration. I shall simply direct OSCR to enter Hotels in the Scottish Charity Register.

*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.