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Coffee and a charity law catch up

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Overview

- Cases
 - *Nuffield Health v London Borough of Merton* (28 May 2021)
 - *Butler-Sloss & Ors v Charity Commission for England and Wales* (14 April 2021)

Nuffield Health v LB of Merton

- Local Government Finance Act 1988, s43(6)(a) – mandatory 80% relief from non-domestic rates where:

the ratepayer is a charity or trustees for a charity and the hereditament is wholly or mainly used for charitable purposes (whether of that charity or of that and other charities)

Nuffield Health v LB of Merton

- Company limited by guarantee and a registered charity
- Principal object "to advance, promote and maintain health and healthcare of all descriptions and to prevent, relieve and cure sickness and ill health of any kind, all for the public benefit"
- Owns and operates 31 hospitals, 112 fitness and wellbeing centres and 5 medical centres – and operates over 200 gyms and health assessment facilities in workplaces across the UK
- Trading charity with a group turnover of around £909.1m in 2017 – with fees covering the cost of services

Nuffield Health v LB of Merton

- Premises – gym, pool etc., treatment room, member-only creche and car park (£80pcm or £852pa) (extra fee for creche)
- Purchased by Nuffield Health on 1 August 2016, who then applied for rate relief. Mandatory rate relief given initially, but withdrawn in November 2016. Nuffield Health issued proceedings in April 2019
- Stuart Isaacs QC (sitting as a Deputy Judge of the High Court) [2020] EWHC 259 (Ch) – declared that Nuffield Health was entitled to mandatory rate relief in respect of the premises

Nuffield Health v LB of Merton

Grounds of appeal:

- 1 – the Judge was wrong to hold that Nuffield Health was not required to show that the premises were being used for the public benefit, as an aspect of showing that the premises were being used wholly or mainly for its charitable purposes;
- 2 – the Judge failed to apply the correct standard of public benefit for Nuffield Health's use of the premises;

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Grounds of appeal:

- 3 – even if he applied the correct standard, the Judge erred in his evaluation of whether the public benefit requirement was satisfied;
- 4 – the Judge was wrong to conclude that the premises were not being used wholly or mainly for fundraising.

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Decision:

- Ground 1: The public benefit requirement is to be applied to the purposes of the charity and not to its activities carried on at the individual hereditament, the appeal was dismissed accordingly (David Richards LJ dissenting);
- Ground 2: Does not arise as appeal dismissed on ground 1 (although Peter Jackson and Nugee LJJ indicated that they would have agreed with David Richards LJ). There is no hard edged rule that some charities (such as recreational charities and/or those of general public utility) are required to be for the public at large or those those in need of the charity's provision. In any event, Nuffield Health was not a recreational charity and, even if it were, s5(5) CA 2011 preserves the public benefit requirement without reference to the other provisions of s5 (David Richards LJ);

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Decision:

- Ground 3: did not arise as the appeal was dismissed on ground 1. However, both Peter Jackson and Nugee LJ agreed with David Richards LJ, and would have allowed the appeal on this ground had the appeal not been dismissed on ground 1.

Nuffield Health could not show that the membership fees did not exclude those of modest means, or that it was satisfying a need that was not otherwise met from market providers. Only limited and token benefits were enjoyed by non-members – which were insufficient to satisfy the requirement for charitable use;

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Decision:

- Ground 4: Nugee LJ inclined towards the view that the premises were used wholly for Nuffield Health's charitable purposes, and the generation of a surplus did not mean that it was being used for other means.

There was no evidence of the actual income and surplus generated by operations at the premises, the use to which Nuffield Health put any surplus, or that the operations at the premises were subsidising Nuffield Health's other operations. In any event it does not follow that the generation of a surplus means that the premises are being used for fundraising.

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Ground 1 interesting points:

- The public benefit requirement is subsumed into the status of the charity ratepayer [99]
- Registration of a charity is conclusive of the charitable status of its purposes. Provided the charity is in fact using its premises for those purposes, that is sufficient for rating purposes [138]

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Ground 1 interesting points:

- Practical consideration 1 – consistency across local authorities
- Practical consideration 2- assessment of public benefit is left to the Charity Commission (which is better placed to decide and avoids wasting resources in the duplication of the task)
- Practical consideration 3 – prevents anomalies where a charity is split across multiple sites

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Ground 3 interesting points:

- *Independent Schools Council* at [244]: “Provision for the ‘poor’ going beyond a de minimis or token benefit may be present, but it is not necessarily enough; the level of provision for them (taken with benefits to the not-so-poor who would otherwise be unable to afford the fees) must be at a level which equals or exceeds the minimum which any reasonable trustee could be expected to provide”.
- Nuffield Health supported the finding of Stuart Isaacs QC at [41]-[42] and said that the court should defer to the trustees as to the minimum required to meet the threshold

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Ground 3 interesting points:

- It was for Nuffield Health to produce evidence that the membership fees did not exclude those of modest means [71]
- The availability of comparable commercial facilities at lower prices meant Nuffield Health could not argue that it was satisfying a public need that would otherwise go unsatisfied [72]
- Nuffield Health could not rely on the provision of service to non-members to demonstrate that the premises was being used for charitable purposes. Occasional free health MOTs and 'meet the experts' days (with a one day free gym pass included) and free 15 minute physio session were typical of commercial operators and could be inferred as promotional [78]

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Ground 3 interesting points:

"Nuffield Health may have succeeded under the rating legislation, but its failure, in our unanimous view, on Ground 3, may not be without consequences in the context of charity law. Its trustees are obliged to satisfy themselves in good faith that its provision is for the public benefit. If the situation at the Premises is replicated across several hundred fitness centres and gyms, the organisation may face scrutiny through the Charity Commission and ultimately through the courts, as occurred in the ISC case."

Peter Jackson LJ at [124]

Butler-Sloss v Charity Commission

- Trustees of the Ashden Trust and Mark Leonard Trust (both of which have the charitable purpose of environmental protection or improvement) sought permission under s115(5) to bring charity proceedings
- The Trustees propose to seek declaratory relief and directions regarding (i) the nature and scope of their powers of investment and (ii) how they might discharge those powers where particular investments and investment policies might be inconsistent with or in conflict with the charitable objects
- The Trustees were proposing to adopt an investment policy excluding investments that were not aligned with the Paris Agreement – but there was the possibility of lower investment returns

Butler-Sloss v Charity Commission

- *Harries v The Church Commissioners for England* [1992] 1 WLR 1241, at 1246 (Sir Donald Nicholls VC):

"There will also be some cases, again I suspect comparatively rare, when trustees' holdings of particular investments might hamper a charity's work either by making potential recipients of aid unwilling to be helped because of the source of the charity's money, or by alienating some of those who support the charity financially. In these cases the trustees will need to balance the difficulties they would encounter, or likely financial loss they would sustain, if they were to hold the investments against the risk of financial detriment if those investments were excluded from their portfolio. The greater the risk of financial detriment, the more certain the trustees should be of countervailing disadvantages to the charity before they incur that risk."

Butler-Sloss v Charity Commission

- Responsible Investment (draft guidance):
<https://www.gov.uk/government/consultations/charity-responsible-investment-guidance> (Para 2.1)
 - *You can decide that rather than just focussing on the financial return on an investment, your approach will also take into account your charity's purposes and values*
 - *You can take a responsible investment approach even if there is no apparent direct conflict with your charity's charitable purposes, if you can show it is in the best interests of your charity*
 - Extra rules apply to permanent endowment (ie. balance of capital and income returns)

Butler-Sloss v Charity Commission

- Permission granted

“...it can safely be said that the proposed proceedings raise highly topical issues that are seemingly unresolved by legal authority. It is clear that a further judgment of the court in this area will not only provide the necessary protection to the trustees but will also provide much needed clarity to charity trustees generally” at [6]

“The proposed proceedings will conclusively and in a legally binding way resolve issues of real importance to the ongoing administration of these charities” at [13]

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