



Charity Appeals

DECISION OF THE TRIBUNAL

Reference Number: CA2 07/18

Venue: George House, 126 George Street, Edinburgh EH2 4HH

**Held on: 22nd November 2018 (oral evidence)
19th December 2018 and 11th January 2019 (Deliberations)**

Appellant: New Lanark Trading Limited

**Appellant's Representative: Mr Calum MacNeill QC (instructed by Turcan Connell,
Solicitors)**

Respondent : Office of the Scottish Charity Regulator (OSCR)

**Respondent's Representative: Ms Christine O'Neill, Solicitor Advocate (instructed
By Brodies, Solicitors)**

Witnesses in attendance for Appellant: Mr Scott McAuley and Mr Alistair Duncan

Witness in attendance for Respondent: Mrs Laura Anderson

TRIBUNAL:

Legal Member: Mr Joseph C Hughes [Chairman]

Ordinary Members: Mrs Catriona Whitfield and Dr Neil K Dickson

Clerk: Mr Rennie Kay

1. REFERENCE:

This is an Appeal raised at the instance of New Lanark Trading Limited ('the Appellant') against the review Decision of the Office of the Scottish Charity Regulator (OSCR) ('the Respondent') dated 7th June 2018 to refuse to enter the Appellant in the Scottish Charity Register maintained by the Respondent in terms of section 3 of the Charities and Trustee Investment (Scotland) Act 2005 ('the Act').

This is an Appeal in terms of section 76 of the Act.

2. SUMMARY OF DECISION:

The Tribunal CONFIRMS the Decision of the Respondent to refuse to enter the Appellant in the Scottish Charity Register in terms of section 76 (5) of the Act.

The Decision of the Tribunal is unanimous.

3. PRELIMINARY MATTERS:

The Tribunal held a Joint Case Management Hearing on 2nd October 2018. A Summary Note and Order was thereafter issued.

A Site Visit of New Lanark Village by the Tribunal and Parties' Representatives took place on 22nd October 2018.

The hearing was set down originally for two days but only the first day, Thursday 22nd November 2018, was required for oral evidence.

Both Parties lodged extensive productions including witness statements, outline arguments, Authorities and a joint common paginated Bundle.

A Joint Minute was agreed and lodged in evidence.

Detailed written submissions were lodged by both parties Representatives after the conclusion of oral evidence. Submissions were lodged on 7th December 2018.

The Tribunal members convened to commence their deliberations on 19th December 2018. The Tribunal reconvened on 11th January 2019 to review the draft Decision and finalise the content of this Decision in light of the importance of the issues raised in this Appeal.

4. FINDINGS OF FACT:

[1] The Appellant is a company limited by shares, incorporated in 1970;

[2] The Appellant's 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 the Appellant;

[3] The Appellant's principal activity is the operation of a visitor attraction with related trading activities, including hydro-electric power and textile production, the Mill Shop, Café and Ice Cream Production;

[4] The Appellant's activities for which payment is required by visitors are the Visitor Centre's exhibits and interpretation of New Lanark, periodic exhibitions about New Lanark related themes as well as external events and goods and services sold from the Café and Shop;

[5] The Appellant's turnover represents entry to the Visitor Centre, hydroelectric power income, textile sales and spinning commission, retail shop sales, the manufacture and wholesale of ice cream. Some income is also derived from tours offered by the Appellant;

[6] The Appellant is a commercial enterprise;

[7] The Appellant's turnover and any profit before taxation are attributable to the aforementioned principal activity in [4] and [5];

[8] All net profits from the Appellant are donated to New Lanark Trust by Gift Aid. The Appellant accepts that a commercial enterprise cannot pass the Charity Test solely on the basis that it donates all its proceeds to one or more charitable purposes;

[9] South Lanarkshire Council has withdrawn rates relief from the Appellant;

[10] The Appellant is currently trading profitably. The Appellant accept that it is the activities of the Appellant that require to be considered and that the activities of New Lanark Trust cannot be attributed to the Appellant;

[11] The Appellant occupies, as tenant, buildings owned by New Lanark Trust under a lease entered into in 2001. The Appellant pays to the Trust an annual rent together with an additional sum based upon a percentage of annual turnover;

[12] The said lease stipulates that the Appellant is responsible for making payment to New Lanark Trust 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. The Appellant is also responsible for the repair and maintenance of the interior of their premises;

[13] New Lanark Trust is responsible for the capital expenditure programme for properties owned by the Appellant including the original refurbishment of the Visitor Centre and other buildings occupied by the Appellant;

[14] The Appellant contributes to some repair and maintenance of the buildings it occupies, but it was not possible to determine or quantify the extent of this contribution;

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

[16] The Appellant will not meet the Charity Test unless its purposes consist of one or more of the charitable purposes in terms of section 7(1)(a) of the Act;

[17] The Appellant's purposes are charitable, being purposes which fall within the advancement of education and the advancement of the arts, heritage, culture or science;

[18] The Appellant meets the 'charitable purposes' requirement in terms of section 7(1)(a) of the Act;

[19] The Appellant will not meet the Charity Test unless it provides (or intends to provide) public benefit in Scotland or elsewhere in terms of section 7(1)(b) of the Act;

[20] Whilst the Appellant's purposes are charitable, this does not automatically satisfy the 'public benefit' requirement of the Charity Test;

[21] The Respondent has issued statutory guidance on how it determines whether an applicant, such as the Appellant, meets the Charity Test. The guidance is entitled 'Meeting the Charity Test' ('MTCT'). The Respondent has also published non-statutory guidance in 2018 entitled 'Charities and Trading Guidance' ('CTG');

[22] The Appellant did not materially challenge the guidance given within MTCT or CTG;

[23] Notwithstanding the review Decision of the Respondent and the aforementioned guidance, the Tribunal is entitled to effectively make a Decision of new;

[24] The final Decision of the Tribunal is based solely on the purposes and activities of the Appellant and no other body;

[25] The Respondent determined in its assessment of the Charity Test that there was no private benefit arising from the organisation's activities. The Tribunal accepts this assessment;

[26] No question arises under section 7(4) of the Act as to distribution of assets, ministerial control or political activity;

[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 woolen 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;

[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;

[35] The Tribunal accepts that the occupation and use of the buildings within New Lanark Village is important. The occupation of buildings in the Village is under the control of New Lanark Trust as owner and landlord of those buildings. The occupation of the buildings is the responsibility of the Trust;

[36] There are a number of buildings occupied at New Lanark by commercial tenants. Distinguishing the activities of those commercial tenants from the trading activities of the Appellant, must rest on something other than the occupation of the buildings at New Lanark;

[37] The activities of the Appellant are trading activities whereby goods or services are provided in exchange for payment. This generates income for the Appellant whereby profits achieved are directly used to provide financial assistance to New Lanark Trust;

[38] The generated income and any resulting profit of the café, shop and ice cream aspects of the Appellant's activities is not, in itself utilised in furtherance of the Appellant's charitable purposes, but instead is applied to facilitate the provision of those goods and services, and to raise funds for New Lanark Trust;

[39] The Tribunal acknowledges the special nature of New Lanark Village, its location within a gorge, and the importance of the wider preservation and revivification of New Lanark Village. Some of the activities of the Appellant partially contribute to the advancement of education and heritage. The extent of that contribution is however secondary to the Appellant's activities as a company trading in goods and services on commercial terms which are not in furtherance of its charitable purposes;

[40] 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 New Lanark Trust rather than the Appellant;

[41] The Respondent in its review Decision stated there was no private benefit from the Appellant's activities. From all the evidence before us, the Tribunal concur with this assessment;

[42] The Respondent in their original and review Decision stated that it did not consider that the activities of the Appellant would result in disbenefit to the public at large. From all the evidence before us, the Tribunal concur with this assessment;

[43] The Respondent in their original and review Decision stated that it had not identified any conditions to accessing benefit that it would consider to be unduly restrictive. From all the evidence before us, the Tribunal concur with this assessment;

[44] The main focus of the Appeal was the public benefit test. This was the critical issue of dispute between the Parties. The Tribunal's deliberations therefore focused on whether the Appellant satisfied the Tribunal in respect of the public benefit test. The Tribunal was not satisfied that, when carefully assessing the activities of the Appellant, the activities met the public benefit test;

[45] If the Tribunal had been satisfied that the public benefit test was met, the Tribunal would have been minded to quash the Decision of the Respondent and enter the Appellant on the Register.

5. REASONS FOR DECISION:

The Parties and the Tribunal are agreed that the function of the Tribunal is to make a decision 'of new' as to the entry in the register in light of the presented facts and circumstances. The Tribunal whilst noting carefully the original and review Decisions of the Respondent do not necessarily require to test these Decisions for rationality, reasonableness or procedural propriety.

The Tribunal must therefore look at all the circumstances and come to our own independent view after appropriate scrutiny and deliberation.

As stated within the Findings of Fact, the Tribunal must look at the Appellant as itself and not as part of the New Lanark entity as a whole. The Tribunal had regard to the statutory and non-statutory guidance. The Tribunal agreed with the Respondent's submission that looking at the whole picture of what an organisation does is not a commitment to have regard to the activities of other organisations.

It is not possible, or indeed appropriate, to record every aspect of our deliberations. The Tribunal spent a considerable amount of time in deliberations.

The Tribunal was mindful throughout that we must apply charity law to the facts of this Appeal. The Tribunal consider that care is to be taken when using terms such as 'primary purpose trading' which arise from the interpretation of tax law and accounting standards as they apply to charities, because these terms are not strictly speaking part of charity law. The Tribunal prefer to refer to activities as either being in furtherance of charitable purposes or not being in furtherance of charitable purposes.

In respect of tax and rates, the consequences of our decision on the Appellant's tax or non-domestic rates are not relevant to our decision.

In our deliberations the profitability or otherwise of the Appellant is not materially relevant to our decision.

The Tribunal carefully considered the Appellant's submissions about New Lanark being unique, as a World Heritage Site experienced by visitors as a living, breathing, working village occupied by real people and businesses. This argument was attractive. We accept the Appellant is part of what New Lanark is about. The Tribunal did not however consider the Appellant's submissions were persuasive enough to support the premise that the Appellant's trading activities are in furtherance of their charitable purposes.

The Tribunal carefully considered the Appellant's submissions in respect of the geography and the gorge environment of New Lanark. The suggestion was made that every visitor was able to experience the heritage of the site. Again the Tribunal found that argument attractive but not persuasive enough to support the premise that the Appellant's trading activities are in furtherance of their charitable purposes.

The Tribunal carefully considered the Appellant's submissions that the occupation of New Lanark buildings by the Appellant contributes to the revitalisation of the Village, but decided that contribution is not sufficient to meet the test of its trading activities being in furtherance of its charitable purposes.

The Tribunal agree with Mrs Anderson's evidence that it is 'not possible to draw a hard line in terms of the level or proportion of ('non-charitable') activities...it...is really about the overall *substance* of what the organisation is doing'.

Having considered all the evidence, the Tribunal concluded that the overall '*substance*' is that the Appellant undertakes significant trading activities that are not in furtherance of its charitable purposes. The Appellant is therefore not providing public benefit as required by the Act.

Public Benefit is key in this Appeal. If the Appellant provides public benefit then they pass the Charity Test because their purposes are charitable, there is no private benefit (other than incidental private benefit such as staff receiving wages), no disbenefit and no unduly restrictive conditions.

Applicants for charitable status have to provide, or intend to provide, public benefit. The Appellant is an existing organisation intending to carry on its existing activities. Therefore, the test is whether its existing activities provide public benefit.

Public benefit is only provided by activities in furtherance of charitable purposes. The Tribunal believe that the intention of the Act in introducing the term 'public benefit' is that, for an entity to be allowed to call itself a charity, it is not sufficient for the entity to have charitable intentions: it has to actually deliver activities in furtherance of its charitable purposes from which the public (or a section of the public) can benefit.

The Tribunal further believes the intention of the Respondent's guidance is that public benefit, in a charitable sense, is only provided by activities in furtherance of charitable purposes.

There is no public benefit from activities not directly related to, or connected with, charitable purposes.

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.

In conclusion the Tribunal formed the view that while aspects of the Appellant's submissions were attractive, the various points made singularly and collectively failed to persuade the Tribunal that the activities of the Appellant, taken as a whole, were carried out in furtherance of their charitable purposes having specific regard to the public benefit test.

6. OBSERVATIONS:

The Tribunal wish to share their reflections on a number of matters which we feel may require further consideration by the Respondent. These observations were fully considered by the Tribunal in reaching their decision in respect of this Appeal.

Whilst the Tribunal upheld the Decision of the Respondent, the Tribunal did have reservations about certain aspects of the approach adopted by the decision makers in this case. We hope our observations might inform those making or assessing applications in the future.

(i) Commercial Activity:

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.

(ii) Turnover Test:

The use of turnover on its own in assessing different activities undertaken by an applicant takes no account of ‘free to access’ parts of an applicant’s activities and is, in our opinion, an inappropriate measure. The Tribunal took the view that whilst turnover could form part of a wider assessment (for example including visitor footfall, staff numbers, visitor tracking around a site, space usage) it should not be used in isolation, particularly in the case of an applicant which has ‘free to use’ elements to its offering.

(iii) The Respondent’s Explanations and Responses:

The Respondent’s lack of specific response in its review Decision, to each of the Appellant’s points, was unhelpful, both to the Appellant and to the Tribunal.

The Tribunal took the view that in future the Respondent should provide a full explanation addressing all issues raised by an Appellant.

(iv) Charities Trading Guidance (CTG):

CTG (at page 11) states that ‘A trading subsidiary is not a charity’.

The Tribunal took the view that this is incorrect. The Tribunal approached the matter differently.

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.

The Tribunal observes that CTG appears to have been written largely from a tax and accounting perspective using assumptions as to what is normal practice. We consider CTG does not sufficiently consider charity law.

The Tribunal took the view that if future Charity Test assessments by the Respondent start with the premise of the current CTG, the Respondent may risk making incorrect decisions on an entity's ability to meet the Charity Test.

The Tribunal observes that CTG does not point out that the quantity and nature of the trading an entity carries out may cause it to fail the public benefit test and prevent it from being registered as a charity.

The Tribunal would invite the Respondent to review CTG.

(v) Wages as private benefit and Meeting the Charity Test (MTCT):

The Respondent's witness in her evidence suggested that staff wages could be private benefit. The Tribunal took the view that this approach contradicted the Respondent's own guidance in MTCT (at page 80) where it specifically recognises staff wages as 'incidental', being something that is necessarily incurred by an entity in the pursuit of its purposes. The Tribunal concurs with MTCT in this respect.

The Respondent should ensure they are clear and consistent in their approach to this important matter.

7. EXPENSES:

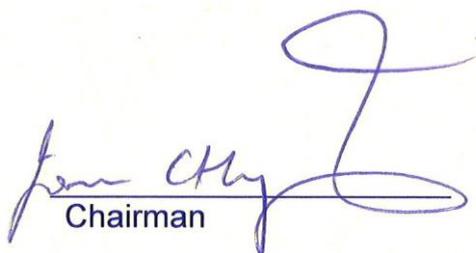
The Tribunal having regard to the First-tier Tribunal for Scotland General Regulatory Chamber Charity Appeals (Procedure) Regulations 2017 ('the Rules'), of its own initiative, make no order for expenses in terms of Rule 24.

8. PUBLICATION :

Neither party invited the Tribunal to make any order that evidence or other matters be excluded from publication (Rule 26) or from inspection in the Register (Rule 27), all in terms of Rule 25(7) of the Rules.

The Tribunal therefore makes no order.

The Tribunal wishes to express their appreciation to both parties' Representatives for their considerable assistance and professionalism in presenting this important Appeal.



Chairman

'Joseph C Hughes'
Legal Member/Chairman
First-tier Tribunal for Scotland
General Regulatory Chamber
[Charity Appeals]

11th January 2019