

CHARITABLE RELIEF UPDATE

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ISSUES COVERED

- Charities and Parent Companies – paramount occupancy and application of relief in the light of York Museum – approach when a charity and its trading arm jointly occupy the same property.
- Charities and Rate Mitigation Schemes – Charity Commission Guidance; further cases post – Kenya Aid and issues to watch out for
 - *Digital Pipeline*
 - *Exhibitions - challenges*
 - *Relevance of reality of charitable endeavour*

STATUTORY PROVISIONS



- Mandatory relief – s.43(6)
 - “ratepayer” a charity and
 - “hereditament” is “wholly or mainly used for charitable purposes”

Cumulative and inter-related requirements as demonstrated in *Hughes (VO) v. York Museums and Gallery Trust* [2017] UKUT 200 (LC) (23rd May 2017)

Ratepayer a Charity?

1. Registration as a charity (with Charity Commission) is conclusive (of this question): s.37(1) Charities Act 2011
2. No requirement (at this stage) to prove “bona fide” charity or “substantial” charitable activity
3. But it is necessary to demonstrate that the charity is the ratepayer applying standard rating principles:
 - *Laing* – the classic four tests; and
 - *Southern Railway* - paramount occupancy:

Southern Railway and Paramount



- The classic statements:
 - where the same unit of property is occupied concurrently by more than one occupier each occupying for a purpose of their own, the person in RO is identified by asking who is “in control”;
 - if the occupier of a large hered “retains to himself general control of the [parts occupied by others] he will be in RO; if he retains to himself no control, the occupiers will be in RO”
 - “control” depends on facts in every case - “the degree of control must be examined and the examination must be directed to the extent to which its exercise would interfere with the enjoyment by the occupant ... for the purpose for which he occupies them”

York Museums – the hereditament/the ratepayer

- Only concerned with the first issue in that case “Identifying the Hereditaments”
- Structure of the landholdings – common set up (HMRC/CC):
 - Charitable Trust owned and managed the museums/galleries/heritage centre (“the Trust”)
 - Wholly owned (non-charitable) company ran gift shops and cafes located within the museums (“OpCo”) – physically distinct and identifiable areas.
 - VO contended the gift shops/cafes were separate hereditaments because in separate occupation of OpCo not Trust;
 - Would result in no entitlement to relief for those areas.

Factual Assessment



- LC considered the factual issues in detail (not just the legal title) – following *ESSO* and *Southern Railway*:
 - OpCo wholly owned subsidiary but separate legal personality and not agent
 - OpCo had no lease or other property right over the shop
 - OpCo established on advice of Charity Commissioners because charities could not carry out commercial trading
 - All profit of OpCo paid to Trust
 - Initially directors of the Trust and of OpCo were the same
 - Trust employed all staff but fully recharged to OpCo.
 - All stock belonged to OpCo; separate tills
 - Trust had free run of whole space

Analysis - Shop

- Given inter-relationship between the Trust and OpCo – **“no sense in which they were rivals in their occupation of the shop”** (para 53) – entirely complementary; shop was integral to the museum; interests completely aligned
- “unhelpful” to apply a *Southern Railway* test of control – neither party controls or interferes with occupation of the shop for the purposes for which the other is in occupation”
- thus - question was simply whose occupation was paramount and whose incidental or subordinate on the facts
- “The whole of the daily retail activities in the shop are those of the OpCo; for retail purposes, OpCo’s occupation is exclusive”
- Note in such cases focus is on the activity and whose activity it was - not on control
- OpCo in RO even though:
 - no legal rights at all and no legal control
 - Its operations integral to charity and initially same board and OpCo had no staff

Application of York Museums – Key Factors



- Common structure – charities and trading activities; housing associations and commercial development; any situation where HMRC/CC guidance requires separate trading arm.
- Factors:
 - what “hat” is being worn for the activity in question;
 - staff – employer not determinative; recharge
 - query - what control is exercised by whom on whom on facts - agency/separate legal personality
 - absence of legal title not conclusive – although may indicate control (ESSO)

Application of York Museums (2)



Example: Take HQ of a charity where charity also has non-trading arm:

- all operated from HQ;
- all staff for both at HQ – intermingled/indistinguishable on ground; no separate hereditaments
- all services provided by OpCo to charity but full recharge
- significant majority of activity is for charity but many staff do work for both
- Charity wholly owned sub of OpCo – OpCo controls Board of charity.

Obvious scope for significant dispute – 50/50 case.

To ensure charity is ratepayer (at least):

- (1) full recharge for staff (or staff employed by charity)
- (2) preferably charity to own the HQ or have lease (invert burden of proof).
- (3) OpCo to have no right to exercise day to day control over charity's use;
- (4) if central services provider – full recharge/ wholly separate accounts
- (5) relevance of corporate structure – invert

Rate Mitigation Schemes and Charities



Standard Scheme:

- vacant property;
- lease to charity to try to trigger 80% relief - short term occupation and then “when next in use” to get continuity of relief or surrender re-triggering of new unoccupied rate exemption at end of lease
- scheme depends on charity being in actual/beneficial/non-transient occupation; being the ratepayer and wholly or mainly used for charitable purposes.

If it fails, charity (as owner) may be on hook for unoccupied rates

Can charities engage in such schemes? Important reminder to those advising charities



Charity Commission Alert and Enforcement

- 2012/13 – Guidance from Charity Commission warning of PSCT

Africa Relief: March 2017 - its scheme failed and LOs pursued. AR ceased activities. CC gave repeat guidance. Trustees must:

1. be assured that tenancy is for **exclusive benefit** of charity, will **further its purposes** and is **in its best interests**;
2. ensure property is **genuinely required** and fit for purpose
3. consider potential rates liability exposure
4. safeguard charity's independence and ensure charity is not being abused for benefit of commercial company
5. take professional advice.

CC not LA police these obligations – extent of policing questionable

Case Law and Principles

1. Evident Parl intent that exemption should depend on charity actually making extensive use of premises for CP (*PSCT*);
2. “Wholly” does not mean “solely” (*ESU*). Must look at extent of use of the whole (*Digital* and *ESU*). Areas of nil use count against WorM used. ;
3. Question is not whether the activities are WorM charitable but whether the premises are WorM used for CP;
4. That is question of fact – books on shelves (*Digital/ PSCT*). Avoid arbitrary distinctions (*Digital*) – broad brush approach
5. If in fact WorM so used, irrelevant that space could be used more efficiently (*Kenya Aid*); that premises sub-optimal (although query limits);
6. Lack of significant activity/visits of doubtful materiality (*Digital*) – *but see below*
7. It is immaterial that motive of arrangement is rate mitigation (*Kenya Aid*).

Recent application - Digital Pipeline

MC refused to make LO - bona fide charity had lease and ran occasional (10 in 2 years) appeal days to collect unwanted IT equip.

Issue turned on “wholly or mainly”. 42% of the premises was used on appeal days. MC relied on fact that nothing else happened in the other 58% of the space – “the only thing happening was the appeals” – to find “mainly” used for CP on those days

Quashed and remitted. Lack of other uses could not mean WorM test satisfied.

The Limits



“Extensive charitable use” – PSCT - are expertise/energy/success/number of visitors/ quality of event (in promoting the CP) relevant.

To be tested in *My Community Service v. Ipswich* (pending in HC).

Poster exhibitions for 6 weeks on 6 month rolling programme spread over 8 floors advertising volunteering opportunities at other charities. Exhibitions advertised in press. CP included for this purpose. Only viewable by appointment.

MC held did not constitute “active and extensive use for CP” and “does not have the appearance, purpose or intent of a public exhibition”

The Competing Arguments – two different ways of looking at the Issues:

- Two diametrically opposed ways of viewing it:
- MC appears to have rejected argument that it was an charitable exhibition at all – thus for CP at all – looked behind the asserted CP and concluded on the facts it was not an exhibition pursuant to the CP at all – not “for” the CP. If it was just designed to give the appearance of a charitable exhibition but in fact was judged on the facts not be so, why should the Court ignore that reality? Fact it could not and did not meet CP is relevant as to whether it was in fact for those purposes.
- On the other hand, bona fide charity policed by CC claiming to pursue its CP and physically undertaking an exhibition – not role of MC on LO to judge success of exhibition and fact it was not a perfect exhibition and could be done better is of no relevance. Exhibition filled the building on the facts. People could visit. It was thus “for CP” even if not successful.
- Watch this space – adjourned till June