Case Name: *Nuffield Health v London Borough of Merton* [2021] EWCA Civ 826 (28 May 2021)

Topic: Eligibility for mandatory charitable relief in respect of a health club operated as part of a charity's wider business

Full case: Click Here

Summary: This case involves the interpretation of s.43(6)(a) LGFA 1988 in respect of the mandatory (80%) relief granted where "the ratepayer is a charity or trustees of a charity and the hereditament is wholly or mainly used for charitable purposes (whether of that charity or of that and other charities)" (emphasis added). The second limb of these requirements was examined in detail and the Court of Appeal concluded that such relief should be granted, despite the commercial nature of the health club's business, taken in isolation.

Commentary: It had been agreed between the parties that Nuffield Health met the first criterion above (being a charity) and that the only question before the court was whether the occupation of the premises (the health club at Chapter Way, Merton) was such as to satisfy the second criterion (charitable purposes).

The key provision in Nuffield's articles of association is that referring to the prevention of and relief from sickness and ill health of every kind, all for the public benefit. It operates over 200 gyms and health assessment facilities in workplace contexts and 112 fitness and wellbeing centres across the UK, of which the Merton health club is one example. Other sections of the charity's business provide healthcare (at 31 hospitals and 5 medical centres), also encompassed within the articles.

Materially, Nuffield no longer funds its activities by charitable donations, relying instead on the fees charged for its services. It has no shareholders, being a company limited by guarantee. Any surplus income is re-invested. The operations at its gyms (including at Merton) are considered by Nuffield to be very much part of its charitable activities.

The billing authority withdrew charitable relief following an inspection and took the view that the premises themselves were not being wholly or mainly used for charitable purposes. Having lost the case at the High Court, the authority appealed to the Court of Appeal on a number of grounds, the main component of which was (in its view) the absence of a public benefit, as an essential part of use for charitable purposes. In this respect, the authority was relying on the requirement for a public benefit, pursuant to s.2 of the Charities Act 2011 (s.4 of which refers to the general law of charities to determine what constitutes "public benefit", preserving the position under common law). Under common law, "public benefit" requires both that the purpose itself benefits the public and that those benefiting must be sufficiently numerous and identifiable as the public or a section of the public.

The appeal court went on to consider whether the public benefit requirement was satisfied. It noted that there is no objection to a charity charging for its services and that the services must be provided to the public or a sufficient sector of the public, without exclusion of the "poor" (meaning in this context those of modest means). The trial judge had concluded that those of modest means were not excluded from membership of the Merton club, but there was insufficient evidence of this and the appeal court did not find the trial judge's conclusion

on affordability to be reliable. Instead, it stated that Nuffield must rely on services provided to non-members to demonstrate that the premises were being used for charitable purposes. This was not sufficiently demonstrated to the Court of Appeal, but it did not affect the outcome of the case.

The billing authority argued that, in order for Nuffield to qualify for mandatory relief, a public benefit needed to be established in respect of the premises themselves, and not merely by reference to the overall activities and purposes of the charity. The trial judge had rejected this argument. One of the three appeal court judges (David Richards LJ) accepted the billing authority's submission on this point, holding that the premises themselves would need to be used for the public benefit (as part of the charitable purposes).

The majority of the Appeal Court judges (Nugee LJ and Peter Jackson LJ) dismissed the appeal. This was on the basis that when applying s.43(6)(a) the better interpretation is that the public benefit test should be applied to the charity in general rather than to the particular premises where the operations are taking place. However, if the public benefit test is not met in respect of a large number of Nuffield's fitness centres and gyms, Peter Jackson LJ commented that the charity may face scrutiny through the Charity Commission and ultimately through the courts.

In short, the conclusion was reached on the basis that the question as to charitable purposes/public benefit is to be asked in respect of the charity's operations as a whole, rather than by focusing on the particular premises. This is described by Nugee LJ as the "preferred reading" of the statutory provision, which is a clear indication (coupled with the fact that the decision was not unanimous) that LB Merton is likely to seek permission to appeal to the Supreme Court (on what is undeniably a point of law).

We do not expect Nuffield to be the final word on this subject, not least in view of the number of properties (and billing authorities) affected by the Court of Appeal's decision.

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