OUTER HOUSE, COURT OF SESSION

[2019] CSOH 76

P186/19

OPINION OF LORD BANNATYNE

In the cause

CENTRIC COMMUNITY PROJECTS LIMITED

Petitioner

against

ABERDEEN CITY COUNCIL

Respondent

Petitioner: Mr O'Rourke QC and Mr Welsh; Gilson Gray LLP
Respondent: Mr Burnett; Morton Fraser LLP

10 October 2019

Introduction

[1] In the present case the petitioner sought judicial review of a decision by the respondent dated 27 November 2018 refusing charitable rates relief from business rates ("the Challenged Decision").

The factual background

[2] The petitioner is the tenant of Craigievar House, Howe Moss Road, Kirkhill Industrial Estate, Dyce, Aberdeen conform to a lease between the petitioner and RR Sea Lamont II Limited dated 23 April 2018 ("the Property").

[3] In relation to the Property the respondent is the relevant rating authority.

[4] The petitioner is a charity registered in England and Wales with the Charity Commission.

[5] The petitioner is a charity registered in Scotland with the Office of the Scottish Charity Regulator ("OSCR") and is entered into the Scottish Charity Register.

[6] The petitioner is a charity for the purposes of the Local Government (Financial Provisions etc) (Scotland) Act 1962.

[7] The petitioner advertises the availability of space at the Property to charities and community interest groups.

[8] The petitioner gave notice in writing to the respondent, by way of application for charitable rates relief dated 11 July 2018, that the Property is occupied by a charity and is wholly or mainly used for charitable purposes.

[9] The respondent attended at the Property on or around 21 November 2018 in order to carry out an inspection.

[10] On 27 November 2018, Alison Blair, a team leader in the respondent's Revenues and Benefits division, sent an email to the petitioner on behalf of the respondent which read:

> "Having had the opportunity to view the Property and speak to the onsite staff, it cannot be agreed that property is wholly or mainly used for charitable purposes and the decision has therefore been made not to award charitable relief in this instance. … I trust this explains the position and unless the use of the Property is increased substantially, I will not be in a position to reconsider my decision. I would further advise that the business rates charge is payable in full."

The statutory framework

[11] The statutory framework in terms of which the Challenged Decision was made is section 4(2) of the Local Government (Financial Provisions etc) (Scotland) Act 1962 ("the 1962 Act") which provides as follows:

> "If notice in writing is given to the rating authority that any lands or heritages (a) are occupied by … a charity and are wholly or mainly used for charitable purposes (whether of that charity or of that and other charities) … then, subject to the provisions of this section, any rate leviable in respect of the lands and heritages … shall not exceed one-fifth … of the rate which would be leviable apart from the provisions of this subsection."

The issues

[12] The issues for determination by the court are:

1. Whether the decision made by the respondent was within the statutory requirements of section 4(2) of the 1962 Act?
2. Whether the respondent was entitled to conclude on the basis of the evidence before it that the premises were not wholly or mainly used for charitable purposes?
3. Whether the petitioner is entitled to charity relief in accordance with the said section 4(2) of the 1962 Act and if so whether declarator should be pronounced as sought?

Submissions for the petitioner

[13] Mr O'Rourke began his submissions looking at the issue of what is a charity and said this: the decision in relation to the entry or removal of a body from the Scottish Charity Register is one for OSCR (see: section 3(1) of the Charities and Trustee Investment (Scotland) Act 2005. In particular it followed from this, that it is not for a local authority to determine what is a charity and what is charitable. Any such attempt would be ultra vires. I do not understand these submissions to be contentious. He then turned to examine the charitable activities and purposes of the petitioner. The petitioner's application to OSCR for charitable status set out what its activities will be as follows:

- The provision of commercial space and premises on beneficial terms to charities or for charitable purposes;
- The provision of commercial space and premises on beneficial terms to community interest groups and not for profit organisations;
- The provision of commercial space and premises on beneficial terms to the disadvantaged, disabled and the unemployed.

[14] OSCR by letter dated 30 October 2013 acknowledged that these would be the activities of the petitioner. OSCR having registered the petitioner had confirmed its satisfaction that the petitioner's activities are charitable. The petitioner's charitable activities included:

> "i. To promote the efficient and effective application of charitable resources by charities and for charitable purposes by the provision of commercial premises, support and related assistance to charities and for charitable objects;"

[15] It was Mr O'Rourke's position that it was of critical importance in this case when considering the issues before the court to have regard to the charitable purposes and activities of the petitioner and he would return to this later in his submissions.

[16] Mr O'Rourke then turned to give a brief overview of the nature and extent of the Property: it is an office block, formerly occupied by an oil and gas business. The petitioner found the Property to be in good condition, able to be used immediately, and it was accompanied by a large car park with excellent access for the disabled. The Property is three floors in total, there is some open plan space and there are some smaller offices around its edges.

[17] So far as the use of the Property Mr O'Rourke began by saying this: in furtherance of its charitable purposes, the petitioner has advertised space at the Property to charities and

community interest groups. The petitioner advertises and makes available for use by charities and community interest groups the whole of the Property.

[18] Moreover and in furtherance of its charitable purposes, the petitioner has licensed a number of charitable bodies and community interest groups to occupy the Property. However, these licences all post-date the date of the Challenged Decision.

[19] So far as the position as at the time of the inspection and of the Challenged Decision Mr O'Rourke explained that the physical use of the Property was as follows:

- In furtherance of its charitable purposes, the petitioner has displayed on behalf of the Equality Council UK, itself a registered charity, an exhibition. The exhibition is organised by the Equality Council UK and focuses on issues in relation to the disabled, the LGBT community and women in the workplace. The exhibition explains the history of equality as set out in the Equality Act 2010.
- Space at the Property is used during office hours as well as in the evenings by different charities and community interest groups. The petitioner provides staff at the Property to greet and welcome visitors, including those from the charities making use of the space and visitors to the Equality Council UK exhibition.

[20] As I understood it as at the material date the only community interest group which was in fact using the Property was a pipe band once per week or once per fortnight.

[21] Against that factual background, Mr O'Rourke then turned to make what was his critical submission in respect of the issues before the court: in order to be able to carry out its charitable purposes the petitioner must take occupation of commercial property spaces such as the Property. Because of the nature of the charitable activities carried out by the petitioner in furtherance of its charitable purposes, it is inevitable that not all of the spaces at the Property will be actively used at all times. The petitioner's charitable purposes are to

make space available for charities and community interest groups. The availability of free space accordingly is an integral element of the petitioner's charitable function.

[22] Accordingly, he submitted the petitioner occupies the whole of the Property in the performance of its charitable purpose. He emphasised that no part of the Property has been mothballed.

[23] It was his submission that the respondent had failed in making the Challenged Decision to understand the true nature of the petitioner's charitable purposes, although these had been explained to the respondent and accordingly the decision reached by the respondent was wrong in law.

[24] In elaboration of the above Mr O'Rourke submitted that in considering the application for relief and making the Challenged Decision, the respondent had failed to take account of legal authorities and acted beyond its powers.

[25] In support of the above contention Mr O'Rourke directed the court's attention to a number of authorities. Under reference to these he put forward a series of propositions:

- The Property does not need to be in active use all of the time in order to satisfy the test for relief (see: *English Speaking Union Scottish Branches Educational Fund* v *City of Edinburgh Council* [2009] SLT 1051).
- The Property may properly and fairly be described as being wholly used for a particular purpose even though not every square metre of floor space is in constant use all the time (see: *Public Safety Charitable Trust* v *Milton Keynes Counc*il [2013] EWHC 1237 (Admin)).
- The respondent should ask itself only whether the petitioner makes use of all or most of the Property as part of its charitable activities (see: *South Kesteven District Council* v *Digital Pipeline Limited* [2016] 1 WLR 2971). In order to do this, he

submitted, it was obviously necessary that the respondent correctly identified the nature of the petitioner's charitable purposes and activities.

- The respondent should be concerned only with whether the petitioner occupies the Property to facilitate the carrying out of its charitable purposes; the efficiency or otherwise of it doing so is an irrelevant consideration (see: *Kenya Aid Programme* v *Sheffield City Council* [2014] QB 62).

[26] Returning to the *ESU* case, Mr O'Rourke contended that although the case was decided in favour of the local authority it could clearly be distinguished on its facts from the circumstances in the present case. It was his position that the two cases could be distinguished for this short reason: in the present case no part of the Property was mothballed, whereas seven out of eight floors in the *ESU* case were mothballed. It was his position that the determining factor in the Lord Ordinary's decision the *ESU* case was that the seven out of eight floors had been mothballed. He in particular drew my attention to paragraph 12 of the Lord Ordinary's opinion where he observed that the test in terms of section 4(2) could be satisfied although the amount of space used in the premises varied from time to time.

[27] Mr O'Rourke then summarised his position as follows:

- No part of the Property has been mothballed;
- The whole of the Property is offered to charities and community interest groups;
- Given the petitioner's charitable purposes it was inevitable that not all of the Property would be physically used at any given time;
- The fact that all of the Property was not actively used all of the time and that active use varied did not mean that the test in section 4(2) was not met;

- The respondents had erred in not having regard to the petitioner's charitable purposes and the whole circumstances surroundings its occupation and use of the Property;
- It had in particular not had regard to this: although not all of the Property was actively used it was nevertheless on a proper understanding of the section used wholly or mainly for charitable purposes; and
- In the whole circumstances the respondents had not applied the correct legal test. Accordingly the decision should be reduced.

The reply for the respondent

[28] At the outset of his submissions Mr Burnett made it clear that certain issues were not in dispute. In particular there was no challenge to the petitioner's charitable status nor as to the genuineness of its intentions. The sole issue was whether it had fulfilled the criteria as set out in section 4(2).

[29] It was his position that when the factual matrix was considered in terms of the legal framework it was clear that the Challenged Decision was lawful.

[30] Mr Burnett advanced the following proposition in respect of the legal framework: the question for the respondent as rating authority was whether the premises were occupied by a charity and were "wholly or mainly used for charitable purposes", (see: section 4(2) of the 1962 Act).

[31] He then turned to make a series of submissions as to how the test in section 4(2) of the 1962 Act should be approached.

[32] The "use" made of any subjects is primarily a question of fact for the relevant authority. Where the determination made by the authority is one that the court considers

that it was entitled to make on the facts the court should not interfere with that decision (see: the *ESU* case at paragraphs 8 and 11).

[33] The relevant authority is required to consider the use actually made of a property as a whole, consistent with the ordinary meaning of that phrase and determine whether the Property is "wholly or mainly used for charitable purposes" (see: *ESU* at paragraph 12).

[34] He accepted that a property does not need to be in active use all of the time in order to satisfy the test but it is a matter of fact for the authority to determine in the particular circumstances whether a property is being used wholly or mainly for a particular purpose (see: *ESU* at paragraph 12).

[35] The purpose of the use and the extent or amount of the actual use are both relevant to the determination of whether the test is made (see: *Kenya Aid Programme* v *Sheffield City Council* at paragraph 35).

[36] For the mandatory exemption from rates for a charity to apply it is reasonable to assume that parliament intended that the charity be actually making extensive use of the premises for charitable purposes (see: *Public Safety Charitable Trust* v *Milton Keynes Counc*il at paragraph 34).

[37] If the premises are being used wholly or mainly for charitable purposes, it does not matter that they could have been run more efficiently or that only part of the premises need be used (see: *Kenya Aid Programme* v *Sheffield City Council* at paragraph 36 and *South Kesteven District Council* v *Digital Pipeline Limited* at paragraph 16).

[38] Mr Burnett then turned to respond to the specific grounds of challenge advanced by Mr O'Rourke. He described the petitioner's critical assertion in support of its legal challenge in the following way: the petitioner claims that the availability of free space in the building occupied by it is central to its ability to carry out its charitable purpose because it requires to

take occupation of commercial property spaces then advertise to other charities in order to encourage them to take up the space. It therefore argues that its "occupation of the Property in order to make space available to other charities is how the petitioner fulfils its charitable purposes". The petitioner then complains that the respondent has sought to determine its application for charitable relief on the basis that the empty space at the Property is evidence that the petitioner is not using the Property for charitable purposes. It further argues that the respondent was wrong to do so because it fails to recognise that the availability of free space is an integral element of the petitioner's charitable function.

[39] He submitted that in addition as a secondary position the petitioner contended that the question that the respondent ought to have asked is whether the petitioner occupies the Property to facilitate its carrying out of its main charitable purpose and that the efficiency or otherwise of the petitioner's occupation of the Property is an irrelevant consideration and the respondent has had regard to this irrelevant consideration. The respondent contends that it was entitled and required to take into account the extent or amount of actual use of the Property for charitable purposes and accordingly the decision was reasonable in all the circumstances.

[40] His position in respect of the primary contention of the petitioner was a short one and can be summarised as follows: the respondent is required to consider the use actually made of the Property as a whole. The "provision of empty space" is not a "use" of the Property for charitable purposes. The Property is only actually used for charitable purposes if the petitioner fulfils its intention and actually finds a charity to occupy the premises. Otherwise the premises would be completely unused and empty for any length of time and the petitioner would claim that it was fulfilling its charitable purpose because it was

technically potentially available for a charity to occupy in accordance with its purposes. He submitted that that would be absurd.

[41] What he submitted had to be established to satisfy the test was this: the Property actually being used for charitable purposes and not just being made available for charitable purposes. The charitable purpose of the petitioner properly understood was not to provide space which was not taken up. When the act talks of "use" of premises it cannot have in mind an empty building which is not used. It was his position that what had to be had regard to was actual occupation and use of the Property. It was that which mattered. He found support for this in the *ESU* case at paragraph 6 where the Lord Ordinary says this:

> "Counsel founded particularly on the expression 'or is available to be used' as indicative of 'use' encompassing areas where nothing was actually being undertaken but could be. I do not find myself assisted by this reference which, if anything, points in the opposite direction. The very fact that the expression 'or is available to be used' appears in the sub-section suggests that that is something different from being 'used'."

[42] In response to the secondary argument, namely: that the respondent should have ignored the fact that the exhibition for example could have been housed in a significantly smaller area because the efficiency of the use of the Property was not relevant he said this: in terms of the case law the principle of the efficiency of the use of the premises is irrelevant in that it only arises if it is established the premises are in fact being wholly or mainly used for a charitable purpose. The respondent was entitled to assess the actual use of the premises in order to decide whether it was wholly or mainly being used for charitable purposes and consider the matter as a whole. That included an assessment of whether the use of the premises for the exhibition that the petitioner was mounting amounted to such use.

[43] In conclusion he said this: The respondent was entitled to reach the conclusion that it did. The decision was reasonable in all of the circumstances. The respondent was entitled to conclude that the Property was not being wholly or mainly used for charitable purposes. Whether the Property is wholly or mainly used for charitable purposes is a matter of fact for the respondent to determine. The court should not interfere with the respondent's decision unless the decision was not one which the respondent was reasonably entitled to make on the basis of the material before it.

[44] He went on to set out the factual position which had been found as at the time of the inspection of the Property which was this:

- At the time of the officers' site visit on 21 November 2018, 2 of the 3 floors are purportedly devoted to an exhibition. The officers found that an Equality Exhibition spread across the ground floor and the first floor. It consisted of roughly 8 boards per floor which were around 6ft tall and separated by about 8 feet from one another. A couple of meeting rooms were being used for storage of baby items. Another room was full of items for re-use. One room was being used to store office equipment. The majority of the smaller office rooms were empty and unused. There was an out of order sign on a toilet door advising that there was no water supply to the area. The heating was not working. The second floor was completely empty. There was a taped circle on the floor and they were advised that a pipe band practised on the second floor once a week, sometimes fortnightly. There were a couple of sign-in sheets which consisted mainly of the pipe band members signing in. They took several photographs during the inspection.

- During the site visit the respondent's officers found that attendance to the exhibition has been close to zero due to the location of the Property and the fact that public transport to the area is infrequent and the location of the bus stop means that the walking distance is substantial. With the exception of approx. 4 rooms which were being used for storage, the majority of the smaller offices remained empty and unused. The second floor which accounts for an area of over 1,600m², was being used by an average of 20 people on a weekly / fortnightly basis with no requirement for that level of floorspace and with the result that the space was on the whole, empty. The remainder of the building was largely unused. In the circumstances, the respondent was entitled to conclude that the building was not wholly or mainly used for charitable purposes.

Discussion

[45] The starting point in considering the issues before the court is I believe the decision of Lord Bonomy in the *ESU* case.

[46] The relevant factual background in the *ESU* case was this, the building tenanted by the charity was a large eight storey building, however, the charity used only the ground floor and the remaining floors were left dormant. He held, given the foregoing, that the test in section 4(2)(a) was not satisfied.

[47] Turning to the Lord Ordinary's reasoning at paragraph 11 he first gives the following guidance as to the proper construction of section 4(2)(a) of the act:

> "'wholly' in section 4(2)(a) is not synonymous with 'solely'. The notion that an office building which is unused for any purpose throughout seven of its eight floors is 'wholly used' for the purpose for which the one floor is actually in use does not accord with common sense."

[48] He then goes on to observe at paragraph 12:"… in applying section 4(2)(a) a committee … is obliged to give content to the full expression 'wholly used' in relation to the use actually made of the building as a whole."

[49] The above has been accepted as the correct approach to section 4(2) of the 1962 Act in all of the subsequent cases to which I was referred by counsel: (see: for example *Public Safety Charitable Trust* v *Milton Keynes Counc*il paragraph 32: *Kenya Aid Programme* v *Sheffield City Council* at page 69 G-H and *South Kesteven District Council* v *Digital Pipeline Limited* at paragraphs 13 and 14).

[50] The Lord Ordinary then turns to apply the above analysis to the circumstances of the case before him and says this:

> "I consider that the respondents made a decision which is consistent with the ordinary meaning of the language of section 4(2)(a). I find no fault with the approach taken by the respondents and with their interpretation of the sub-section. They decided that, where a self-contained area comprising roughly one-eighth of the

> subjects was devoted to charitable purposes and the remaining separable seven-eighths of the subjects were kept vacant and out of active use, the subjects were not 'wholly used' for charitable purposes."

[51] I consider on the facts that the present case can easily be distinguished from the *ESU* case for the following reasons: no parts of the Property "were kept vacant" (emphasis added) rather those parts of the Property which were not being actively used by charities or community groups in furtherance of the petitioner's charitable purposes were being offered by the petitioner for use by such groups in furtherance of its charitable purposes. There was no part of the Property which had been "mothballed" by the petitioner, which was the critical finding by the Lord Ordinary as to what had occurred in the *ESU* case (see: paragraph 12).

[52] The circumstances in the present case for the foregoing reasons are materially different from those in the *ESU* case.

[53] Rather the circumstances in the present case I believe are very similar to the circumstances which the Lord Ordinary in the *ESU* case having dealt with the factual circumstances before him then turns to consider.

[54] He commences his further consideration by making it clear that his foregoing observations on the proper construction of section 4(2)(a) and the proper approach of an authority to that section did:

> "not for a moment mean that subjects must be in active use all the time or for most of the time to satisfy that test. It is possible to envisage circumstances in which a local authority might justifiably decide that subjects were wholly used for charitable purposes where a large part of them lay vacant for substantial periods of time." (Emphasis added)

[55] Both parties directed my attention to this part of the Lord Ordinary's opinion and accepted it was a correct statement of the law.

[56] The Lord Ordinary thereafter considers a number of examples of situations which may be presented to an authority:

> "the petitioners (*ESU*) might find that the demand for studying English as a foreign language varies from term to term. Or another charity might find that at certain times of the year far more working space is required than at others. In these and other similar examples the charity's circumstances might be such that the only way in which the necessary space for storage or administrative work or teaching or counselling sessions would for sure be available when required would be if it had appropriate premises available throughout the year. An examination of the circumstances in such instances might well lead the authority to the conclusion that the test under section 4(2)(a) was met".

[57] What I believe can be taken from the entirety of the analysis by the Lord Ordinary in the *ESU* case and the authorities which have followed the reasoning contained in it is this:

- An authority is required to consider the use actually made of the Property consistent with the ordinary meaning of that phrase and determine whether the Property is "wholly or mainly used for charitable purposes".
- The purpose of the use and the extent or amount of the use are both relevant to the determination of whether the test in terms of section 4(2) is satisfied.
- Crucially for the purposes of the present case the mere fact that a property is not all of the time in active use or even for most of the time, large parts of it are not in active use does not mean that the test in section 4(2) cannot be satisfied. I am persuaded that it follows from the foregoing that in reaching its decision as to whether section 4(2) is satisfied an authority requires to have regard to the charity's whole circumstances. In considering the charity's whole circumstances it may be relevant for the authority to have regard to a number of factors and not to confine its consideration to the single factor of active use of the Property.

[58] Applying the above analysis to the circumstances of the present case I observe that the charitable purpose of the petitioner is the provision of space for charities and community interest groups. Given that charitable purpose the amount of space which will be in active use at any given time will be dependent on the amount of space required by charities and other groups. Accordingly the amount of space in the Property in active use is likely to fluctuate. The situation in the present case is I believe very similar to the example given by the Lord Ordinary in *ESU*, namely: finding that the demand for the charity's services may vary from time to time and accordingly the amount of space in active use varies from time to time. Thus in the present case the demand by charities and others for space varies from time to time. This variation in demand was a relevant factor and accordingly the respondent required to have regard to this circumstance.

[59] Moreover, I believe that the situation in the present case is very similar to the other example given by the Lord Ordinary of a charity finding at various points in time: "more working space is required than at others". Thus depending on uptake of the space being offered in the Property the amount of working space in active use will vary.

[60] A further point is this: given the petitioner's charitable purpose it is an integral element of its function that there is from time to time space available in order for it to continue to fulfil its function of offering and providing space to other charities. Accordingly in reaching its decision this is a further relevant circumstance and accordingly the respondent had to have regard to it.

[61] What is clear in the present case, is that the entire property is not in active use at all times. However, given the nature of the charity, its charitable purposes and the use to which the Property is to be put that on its own does not mean that the test in section 4(2) is not satisfied.

[62] I now turn to apply the above analysis to the question: Was the decision made by the respondent one which it was entitled on the evidence to make?

[63] For the following reasons I am satisfied that the decision made was one that the respondent was not entitled to make.

[64] First the decision appears to have been based solely on the extent to which the Property was in active use. That appears to have been the sole criterion to which the respondent has had regard given the terms of the Challenged Decision and given the terms of Alison Blair's affidavit.

[65] The charitable purposes of the petitioner and what effect that would have on whether at any given point the whole property would be in active use appears not to have been considered. In particular no consideration was given to the amount of active use varying due to the factors which I identified earlier in this opinion. Moreover, no consideration appears to have been given to the fact that the petitioner offered, by way of advert, space throughout the whole of the Property for use by charities and community interest groups. Accordingly there was no part of the Property which was "mothballed", which as I have already said made the circumstances in the present case entirely different from that in *ESU*. In order to fulfil its charitable purpose to provide property to charities the petitioner necessarily requires to offer property to charities. Thus the offering of the Property is a circumstance of the petitioner to which regard must be given by the respondent. It gave no consideration to this factor. It was argued by Mr Burnett that the offering of the Property was not a relevant factor. With that contention I disagree for the above reasons.

[66] I am persuaded, given the foregoing, that in making its decision and applying the test the respondent has failed to have regard to material relevant factors, namely: the

petitioner's charitable purposes and activities. Rather, the respondent has focused solely on one consideration in terms of the test, namely: the extent to which the Property is in active use and has failed to take account of the obvious explanation for the Property not being in its entirety in active use, namely: the petitioner's particular charitable activities and purposes. In reaching its decision the respondent has not applied the test in terms of section 4(2) correctly. It has taken as the starting point and the end point of its decision the extent of the active use of the Property. It has failed to have regard to the observations of the Lord Ordinary in *ESU* to the effect that the test could be met where: "for most of the time" the Property was not in active use:

> "it is possible to envisage circumstances in which a local authority might justifiably decide that the subjects were wholly used for charitable purposes where a large part of them lay vacant for substantial periods of time."

I believe the circumstances in the present case are such that the above observations of the Lord Ordinary in *ESU* are applicable and the respondent has failed to have any regard to them.

[67] In conclusion I am satisfied that the respondent has reached a decision which on the facts it was not entitled to reach. It has misconstrued the test in section 4(2) and accordingly has not had regard to material relevant matters. As above identified its approach to its task I consider is fundamentally flawed.

[68] The respondent argues that the position advanced by the petitioner is one which will lead to an absurd result. It is contended on its behalf (in its note of argument) that if the petitioner's position is correct then the Property:

> "could be completely unused and empty for any length or period of time and the petitioner would claim that it is fulfilling its charitable purpose because it is technically potentially available for a charity to occupy in accordance with its purposes".

I do not think this argument is correct. An authority has to have regard to all of the circumstances including the active use made of the Property as a whole. In its consideration it is obliged to give content to the expression "wholly used". If the Property were lying "completely unused and empty" for lengthy periods this would be a factor to which the respondent would be entitled to have regard. Moreover, it would in my view be a very powerful factor in holding that the test for relief was not satisfied. However, it does not follow that an authority is entitled not to have regard to the whole evidence and circumstances and in particular in the present case not to have regard to the charitable purposes and activities of the petitioner and the effect of these on the active use of the Property at any given time. The position which the respondent puts before the court in its above submission was not the position which it faced when making the Challenged Decision.

[69] The respondent's argument continues that:

> "The provision of empty space is not a 'use' of the Property for charitable purposes. The Property is only actually used for charitable purposes (if) the petitioner fulfils its intention and actually finds a charity to occupy the premises."

[70] I am of the view that the above argument is misconceived. Taken to its logical conclusion what is being said is that the observations of the Lord Ordinary to which I have already referred in the *ESU* case are wrong. I have already said that I regard those observations as being correct and Mr Burnett in the course of his submissions accepted that they were correct. The above argument is in effect saying: that a property must be in active use all the time or for most of the time to satisfy the test. I consider that a clear misconstruction of section 4(2).

Decision

[71] For the above reasons I would answer the questions posed for determination by the court as follows:

1 No

2 No

[72] Given I have answered the above two questions in the negative I will reduce the Challenged Decision.

[73] In respect of the third question posed given the basis upon which I have held that the Challenged Decision should be reduced, I will have the matter put out by order in respect of the third question to hear further submissions. I reserve all questions of expenses.