Neutral Citation No. [2014] NICh 20

Ref: **DEE9363**

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **12/08/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

2013 No. 126617

BETWEEN:

VICTORIA HOUSING ESTATES LIMITED

Appellant;

-and-

THE CHARITY COMMISSION FOR NORTHERN IRELAND

Respondent.

-and-

THE ATTORNEY GENERAL FOR NORTHERN IRELAND

Notice Party.

DEENY J

[1] The Charity Commission for Northern Ireland (the Commission) is a body established under Section 6 of the Charities Act (Northern Ireland) 2008 (the Act). On 28 September 2012 the Commission decided to institute an inquiry into Victoria Housing Estates Limited (Victoria).

[2] On 17 September 2012 Victoria applied to the Charity Tribunal for Northern Ireland (the Tribunal), a body established under Section 12 of the Act, for a review of the Commission's decision to institute an inquiry. This was pursuant to s. 12 of the Act and Schedule 3, paragraphs 3, 4 and 5 thereof. The Tribunal is empowered by those provisions to direct the Commission to end such an inquiry.

[3] In its decision of 10 May 2013 (conjoint with Bangor Provident Trust Limited v The Charity Commission for Northern Ireland) the Tribunal dismissed the application brought by Victoria and allowed the respondent Commission to continue its s.22 inquiry in relation to Victoria. The Commission proposed to conduct the inquiry because it believed Victoria to be a charity and to have conducted itself or to have intended to conduct itself in a manner inconsistent with that status.

[4] Victoria sought the permission of the Tribunal to appeal to the High Court but this was refused by the Tribunal on 19 June 2013. Victoria then sought the leave of the court to appeal pursuant to s. 14(4)(b) of the Act. Following consideration by the court such permission was granted by Order of 4 December 2013 and directions were given for the trial of this matter.

[5] It was heard by me on 12 and 13 May 2014. Victoria was represented by Michael Humphreys QC and Ms Francesca Quint. The Commission was represented by Mr Michael Smith and the Attorney General by Mr William Gowdy. The Attorney General is a party to all proceedings before the Tribunal by virtue of s.14 of the Act. The court had the benefit of helpful submissions from counsel which have all been taken into account even if not expressly referred to in this judgment.

[6] An appeal under s.14 to the Court against a decision of the Tribunal is only on a point of law. The Court, pursuant to s. 14(3), "(a) shall consider afresh the question referred to the Tribunal, and (b) may take into account evidence which was not available to the Tribunal". There was no application to consider further oral evidence not before the Tribunal but certain additional documents were put before the Court by agreement.

[7] Victoria's grounds of appeal, as set out on 10 December 2013 were as follows:

> "(1) The Tribunal erred in law in failing to take any or adequate account of the unchallenged and uncontroverted evidence of two witnesses, namely Patricia Reid and Derek McAfee;
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> (2) The Tribunal erred in law in failing to take any or adequate account, in particular, of the evidence of these two witnesses that no meeting of the Applicant company took place on 31 December 1985;
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> (3) In the circumstances, the Tribunal erred in law in failing to take into account a relevant consideration in the decision making process;

(4) The tribunal erred in law in holding that a meeting of the Applicant took place on 31 December 1985 since such there was insufficient basis on the evidence for such a finding;

(5) The Tribunal erred in law in finding that the fact that amended Rules were submitted to the Registrar of Industrial and Provident Societies could effect, in law, a change to the Rules of the Applicant, even where no valid meeting had been held to approve any amendment to the Rules;

(6) The Tribunal erred in law in taking into account the potential effect on the system of statutory regulation of Industrial and Provident Societies of accepting the submissions advanced on behalf of the Applicant;

(7) In the circumstances, the Tribunal erred in law in taking into account irrelevant considerations in the decision making process;

(8) The Tribunal erred in law in holding that it was necessary to take steps to rectify an alleged error and that, until then, the registered Rules remained in effect even in circumstances where no valid meeting had been held to approve any amendment to the Rules;

(9) The Tribunal erred in law in concluding that the Applicant company could have ratified the 1986 rules by a subsequent amendment in 2003;

(10) The Tribunal erred in law, in all the circumstances, in reaching a decision which was irrational and contrary to the evidence;

(11) The Tribunal was guilty of unfairness and breached the rules of natural justice by making a finding contrary to the unchallenged evidence of two witnesses whom the

> Respondent had chosen not to require to attend for cross-examination."

[8] The skeleton argument on behalf of Victoria and the oral submissions of Mr Humphreys QC followed those grounds of appeal with particular emphasis on the decision of the Tribunal to hold that a meeting of the applicant company Victoria had taken place on 31 December 1985 (see below) and had amended its rules. (The reference in the decision to the meeting on 31 December 1986 is clearly an error).

[9] It was common case between the parties that the original rules of this association set up to provide housing "for persons in necessitous circumstances" were not, despite that worthy objective, in law charitable. An important reason for that consensual view was that the dissolution clause of the original rules allowed the assets of the company, after payment of debts and liabilities to be distributed amongst the members. The court was told that the net assets of the company were in excess of £8m. The court was told by counsel for the Victoria that all of the shares in the company were now owned by Mr Derek Tughan.

[10] The significance of the meeting is that on foot of it new rules were registered in 1986 which would and do constitute Victoria Housing Estates Limited a charity entitled to charitable tax relief, inter alia. Therefore the Commission would be entitled to make a s. 22 inquiry into it and Mr Tughan would not be entitled on a dissolution to take the benefit of the assets which would, under the amended Rules, and Rule 77, be given or transferred to some other charitable institution with similar objects to Victoria.

[11] Victoria, through Mr Derek Tughan and other witnesses, now maintains that such a meeting never took place. The Tribunal, at paragraph 39, concluded otherwise, on the balance of probabilities. The Tribunal had the benefit of considering written statements that had been submitted in evidence and of hearing the makers of some of those statements cross-examined before it. If the matter was confined to those witnesses I would be of the view that the Tribunal was entitled to reach the conclusion it did in the light of the views it formed as to the credibility of Mr Tughan and the evidence generally. The members of the Tribunal had the benefit of seeing the demeanour of the witnesses and comparing their oral testimony to other evidence including documents.

[12] Victoria, however, identified a lacuna in the reasoning of the Tribunal. The Tribunal was sent the statements of eight persons; in two cases supplemental statements were also sent. That fact is recorded at paragraph 19 of the Tribunal's decision, without enumeration and without naming the witnesses. In the course of a subsequent discussion of the evidence there is no reference to the fact that no request was made by the Commission to cross-examine Patricia Reid and Derek McAfee. There is no reference to the material in or even the existence of their statements. Indeed, to the contrary, at the conclusion at paragraph 39 the Tribunal said as follows:

> "The parties were referred to the findings of the Tribunal on the evidence of the three witnesses who attended and gave oral evidence set out in paragraphs 35, 36 and 37."

However the material in the two statements of Patricia Reid, nee Tughan, and Derek McAfee is relevant to any decision as to whether this meeting was in fact held. They both deny receiving any notice of such a meeting. Mrs Reid said she was not aware that she was a member at that time. The evidence of Mr McAfee in his statement is particularly important as he was the actual property manager of the company at that time and he positively asserts in his statement that he is "clear on my recollection that I did not attend any such meeting with the other attendees who were supposedly present and recorded as being present in the minute".

[13] It may be that a tribunal of fact properly directing itself could have arrived at the same conclusion as this Tribunal did despite taking into account those statements. However it does not seem to me that one could be certain that that would be the case.

[14] Victoria relies on two relevant authorities on the issue of whether an error of fact on the part of a decision-maker subject to judicial review, or a similar procedure as here on a point of law only, can vitiate the decision. In Railtrack v Guinness (2002) EWCA 1431 the Court of Appeal in England had to consider this point. Carnwath LJ addressed this issue at [51].

> "This case is no more than illustration of the point that issues of 'law' in this context are not narrowly understood. The court can correct 'all kinds of error of law, including errors which might otherwise be the subject of judicial review proceedings. (R v IRC ex p. Preston [1985] 1 AC 835, 862 per Lord Templeman; see also De Smith, Woolf and Jowell, Judicial Review, 5th Edition, paragraph 15-076). Thus, for example a material breach of the rules of natural justice will be treated as an error of law. Furthermore, judicial review (and therefore an appeal on law) may in appropriate cases be available where the decision is reached "upon an incorrect basis of fact" due to misunderstanding or ignorance" due to misunderstanding or ignorance (see R (Alconbury Limited) v Secretary of State [2001] 2 WLR 181 389, 2001 UKHL 23, paragraph 53, per Lord Slynn). A failure of reasoning may not in itself establish an error of law, but it may "indicate that the Tribunal had never properly considered the matter … and that the

> proper thought processes have not been gone through". (My underlining).

[15] Pausing there, and noting the words underlined by me, this supports the view that an error of fact by the decision-maker can, in certain circumstances, to be addressed shortly, amount to a point of law. It is not a question of the Tribunal's assessment of the evidence which is a matter for them. It can be seen as a subspecies of the general requirement that a decision-maker should take into account relevant considerations and exclude from its mind irrelevant or improper considerations. Associated Provincial Pictures Houses Limited v Wednesbury Corp [1947] 1 All ER 498 per Lord Greene MR. The matter was further considered by the Carnwath LJ, as he then was, sitting with Lord Phillips of Worth Matravers MR and Mantel LJ in E v Secretary of State for the Home Department [2004] QB 1044. It is perhaps simplest to quote the headnote.

> "Held, allowing the appeals, (1) That mistake of fact giving rise to unfairness was a separate head of challenge on an appeal on a point of law, at least in statutory context (including asylum claims) where the parties shared an interest in co-operating to achieve the correct result; that in order for a court to make a finding of such unfairness it would have to be shown that the Tribunal whose decision was under appeal had made a mistake as to an established fact which was uncontentious and objectively verifiable, including a mistake as to the availability of evidence on a particular matter, that the appellant or his advisors had not been responsible for the mistake, and that the mistake had played a material though not necessarily a decisive part in the Tribunal's reasoning; and that, accordingly, if the new evidence were admitted the court would be entitled to consider accordingly, if the new evidence were admitted the court would be entitled to consider whether the tribunal had made a mistake of fact giving rise to unfairness so as to amount to an error of law."

Applying this decision, which is of strongly persuasive authority in this court, and with which, in any event, I respectfully agree, it seems to me that a mistake does appear to have been made here in overlooking, and certainly making no reference to, the statements in written form of Mr McAfee and Mrs Reid and that the material in their statements was material although not necessarily decisive in the reasoning of a Tribunal properly directing itself. As indicated above it may well be that even taking that into account a Tribunal could arrive at the same decision but the apparently overlooked material is sufficiently material in my view to vitiate the decision.

[16] I say that in the light of the submissions by counsel for the Commission. He said virtually nothing on this point and counsel for the Attorney General was content to rely on the points which the court had made itself in the course of Mr Humphreys' argument. The thrust of their case was that whether or not there was a meeting Victoria must fail in its contentions. On foot of a statutory declaration by Mr Kenneth Anderson and a document signed by four of the members, including Mr Derek Tughan, these new rules were formally registered. The respondent and Attorney General submit that that registration is binding on Victoria whether or not there was a meeting. They rely, inter alia, on Re Quinn and National Catholic Benefit and Thrift Society's Arbitration [1921] 2 Ch. 318. Mr Humphreys distinguishes that on the basis that it is not merely the failure to notify members of this meeting but the fact, as his clients now would have it, that there never was a meeting.

[17] I make it clear that I am not ruling on these submissions. They may well be entirely correct in law. However, given the amount of money in this case it seems almost inevitable that any decision of mine based on that point would be appealed. I am confident that our Court of Appeal, based on its previous decisions, would want to have the factual basis for such a finding of law clearly established. At one point the Tribunal thought that it need not make a decision on this finding but then it decided to do so. The preferable course, in my own view, is that a clear finding of fact based on all the evidence should be made before a finding on the legal consequences of those facts is arrived at.

[18] Similarly the respondent, and again supported by the Attorney General, relies on Re Duomatic Limited [1969] 2 Ch. 365. In that case subsequent ratification of a decision by all of the members entitled to vote was held to be sufficient. Counsel for the respondent argues that although there does not appear to have been unanimity of members here, nevertheless, the principle can be extended in the light of the factual situation here. Again that may well be right. As I am remitting this matter to the Tribunal it may wish to address more fully than was done at the previous hearing the factual basis on which any extension of the Duomatic principle might apply here.

[19] I wish to make it clear that there is nothing in this decision contrary to the views expressed by Neuberger J in EIC Services Limited v Phipps [2003] 3 All ER 804 at paras 121 to 146. But before any court seeks to arrive at a decision on equitable or discretionary grounds it must be clear as to the underlying facts on which that decision is made. Justice is the daughter of truth. The Tribunal's decision apparently overlooks material evidence and it may not, therefore, have arrived at the truth in its conclusion. It is best that it now does so taking into account all relevant considerations.

[20] Victoria submits that this should be done by a newly constituted Tribunal. I have received submissions on that particular point from neither counsel for the

respondent nor the Attorney General. I shall give them an opportunity to make such submissions and hear from counsel for all three parties as to the consequences, regarding the decision on issues of law if a freshly constituted Tribunal is directed to reconsider the matter.