

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
Prior Courts
33 Bull Street
Birmingham B4 6DS
Date: 11/09/2020

Before :

MRS JUSTICE JEFFORD DBE

Between :

THE QUEEN	<u>Claimant</u>
on the application of	
PRESERVATION AND PROMOTION OF THE	
ARTS LIMITED	
-and-	
GREATER MANCHESTER MAGISTRATES'	<u>Defendant</u>
COURT	
-and-	
THE BOROUGH COUNCIL OF BOLTON	<u>Interested</u>
	<u>Party</u>

And between:

PRESERVATION AND PROMOTION OF THE	<u>Appellant</u>
ARTS LIMITED	
-and-	
BIRMINGHAM CITY COUNCIL	<u>Respondent</u>

Matthew Collings QC (instructed by **The Ellen Court Partnership**) for the
Claimant/Appellant
Kelly Pennifer (instructed by **The Legal Services Department of the Borough Council of**
Bolton) for the **Borough Council of Bolton**
Rowena Meager (instructed by **The Legal and Governance Department of Birmingham**
City Council) for **Birmingham City Council**

Hearing dates: 29 to 31 October 2019

JUDGMENT APPROVED

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 22/09/2020

MRS JUSTICE JEFFORD:

Introduction

1. This judgment deals with two cases in each of which the claimant/appellant is a private limited company called Preservation and Promotion of the Arts Limited (“PAPOA”). In its articles of association, the company is described as “the charity” and the charity’s objects are stated to be to promote the appreciation of the arts (in any form) amongst people in the United Kingdom and elsewhere, to promote education in the arts, to develop and enhance appreciation and understanding of art in any form, to introduce persons to the arts, and to provide a platform for unknown or developing artists.
2. In what I shall refer to as the Bolton case, the claimant seeks judicial review of the decision of the District Judge, sitting in the Greater Manchester Magistrates’ Court, not to state a case and/or, in the circumstances I explain below, judicial review of his substantive decision made on 26 April 2018.
3. In what I will call the Birmingham case, the claimant appeals, by way of case stated, against the decision of the District Judge sitting in the Birmingham Magistrates’ Court.
4. Both cases arise out of the decisions of the relevant local authorities to seek Liability Orders against the claimant PAPOA for payment of business rates, for a variety of properties, pursuant to Part III of the Non-Domestic Rating (Collection and Enforcement) (Local List) Regulations 1989. Under Regulation 12 of the 1989 Regulations, applications for a liability or charging order are made to the Magistrates’ Court and that court shall make the relevant order if it is satisfied that the sum is due and has not been paid.
5. The liability to pay business rates arises under sections 43 and 45 of the Local Government Finance Act 1988 which provide as follows:
 - (i) Section 43:

“Occupied hereditaments liability.

 - (1) *A person (the ratepayer) shall as regards a hereditament be subject to a non-domestic rate in respect of a chargeable financial year if the following conditions are fulfilled in respect of any day in the year—*
 - (a) *on the day the ratepayer is in occupation of all or part of the hereditament, and*
 - (b) *the hereditament is shown for the day in a local non-domestic rating list in force for the year.*
 - (2) *In such a case the ratepayer shall be liable to pay an amount calculated by—*
 - (a) *finding the chargeable amount for each chargeable day, and*
 - (b) *aggregating the amounts found under paragraph (a) above.”*

(ii) Section 45:

“Unoccupied hereditaments: liability

- (1) *A person (the ratepayer) shall as regards a hereditament be subject to a non-domestic rate in respect of a chargeable financial year if the following conditions are fulfilled in respect of any day in the year—*
- (a) *on the day none of the hereditament is occupied,*
 - (b) *on the day the ratepayer is the owner of the whole of the hereditament,*
 - (c) *the hereditament is shown for the day in a local non-domestic rating list in force for the year, and*
 - (d) *on the day the hereditament falls within a class prescribed by the Secretary of State by regulations.*
- (2) *In such a case the ratepayer shall be liable to pay an amount calculated by—*
- (a) *finding the chargeable amount for each chargeable day, and*
 - (b) *aggregating the amounts found under paragraph (a) above.”*

6. PAPOA’s position was and is that it is entitled to relief from those rates under section 43(6) or 45A:

- (i) Section 43(6) makes provision for a discounted rate where on the day concerned *“the ratepayer is a charity or trustees for a charity and the hereditament is wholly or mainly used for charitable purposes (whether of that charity or of that and other charities)...”*
- (ii) Section 45A headed “Unoccupied hereditaments: zero-rating” provides:
“(1)Where section 45 applies in relation to a hereditament, the chargeable amount for a chargeable day is zero in the following cases.
(2)The first case is where—
 - (a)the ratepayer is a charity or trustees for a charity, and*
 - (b)it appears that when next in use the hereditament will be wholly or mainly used for charitable purposes (whether of that charity or of that and other charities).”*

7. On this basis, PAPOA opposed the local authorities’ applications. In both matters PAPOA was unsuccessful. The outcome was that, in the Bolton case, PAPOA was liable to pay £123,130.99 and, in the Birmingham case, PAPOA was liable to pay £371,019.99.

The Bolton case: procedural background

8. Before I come to the substance of the Bolton case, it is necessary to set out some of the procedural background.

9. The hearing in the Bolton case was held on 17 April 2018 before District Judge Hadfield, who reserved his judgment. In the normal way, he then provided a copy of his written ruling in draft and judgment was handed down on 26 April 2018. That gave PAPOA the opportunity to formulate any application to the District Judge to state a case prior to the hearing at which judgment was handed down. Mr Collings QC, who appeared before me, also appeared on that occasion: he prepared a written submission and applied orally to the District Judge to state a case. In short, it is common ground that the District Judge told the claimant that the application should be made in writing by letter from the claimant's solicitors. That was, therefore, done the following day, by the solicitors putting the submissions into the form of a letter sent on 27 April 2018.
10. By an undated letter (stamped as received by the claimant's solicitors on 8 May 2018) the Court acknowledged receipt of the letter and indicated that the District Judge was minded to state a case. A further letter from the Court dated 11 May 2018 stated that the District Judge had decided to state a case. The letter further noted that the appropriate fee had not been paid and stated that until the fee was paid the draft case would not be prepared.
11. The fee was paid, or an attempt was made to pay the fee, by cheque enclosed with a letter dated 21 May 2018. A letter dated 25 May 2018 from the Court then said this:

“On 12/5/18 the court wrote to you to confirm that the required fee had not been paid. The fee was eventually received on 21/5/18. The court have (sic) no discretion to extend the 21 day time limit. Your fee paid application is therefore out of time. As such DJ Hadfield has confirmed that he is not able to state a case.”
12. There was further correspondence about this and, on 15 June 2018, the District Judge gave written reasons for his refusal. He set out the history that I have just summarised. He said that he was not aware of any authority directly on point but he relied on authorities in a different jurisdiction (that of immigration) where an application made without payment of a fee was invalid, as a result of paragraph 21 of the Immigration and Nationality (Fees) Regulations 2007. On this basis he reasoned that an application made without payment of a fee was invalid and remained so until the fee was paid. I return to this issue below.
13. The District Judge's refusal to state a case was, therefore, a procedural decision and not a substantive one. It is uncontroversial that it placed PAPOA in the position that the only means by which it could challenge the District Judge's decision involved, first, judicially reviewing the decision not to state a case. In accordance with section 111(6) of the Magistrates' Courts Act 1980, it was open to PAPOA to apply to the High Court for judicial review and to seek an order requiring the District Judge to state a case.
14. Permission to apply for judicial review was granted by Choudhury J on 5 October 2018.

15. The matter then came before Kerr J on 27 March 2019. Kerr J anticipated what might happen in due course when the claim for judicial review came to be heard. He gave a clear indication, but without deciding the point, that he considered the District Judge had been wrong to refuse to state a case. The consequence, assuming that the judge hearing the matter took the same view, would be that the writ or order of mandamus would be issued and the matter sent back to the District Judge for him to state a case. That would then have to come back before the High Court on the substantive appeal. That procedure is obviously cumbersome and inefficient and Kerr J suggested that the solution lay in determining the matter in the manner contemplated in *Sunworld Ltd. v Hammersmith and Fulham LBC* [2001] 1 WLR 2102.

16. In that case, the Crown Court had stated a case on one of three questions but refused to state a case on the remaining two questions. The matter came before the Divisional Court on both the case stated and the application for judicial review. Simon Brown LJ said that, where at least the relevant facts were found in the judgment of the Crown Court, he would suggest the following approach:

*“(1) Where a court, be it a Magistrates' Court or a Crown Court, refuses to state a case, then the party aggrieved should without delay apply for permission to bring judicial review, either (a) to mandamus it to state a case and/or (b) to quash the order sought to be appealed. (2) If the court below has already (a) given a reasoned judgment containing all the necessary findings of fact and/or (b) explained its refusal to state a case in terms which clearly raise the true point of law in issue, then the correct course would be for the single judge, assuming he thinks the point properly arguable, to grant permission for judicial review which directly challenges the order complained of, thereby avoiding the need for a case to be stated at all. (3) If the court below has stated a case but in respect of some questions only, as here, the better course may be to apply for the case stated to be amended unless again, as here, there already exists sufficient material to enable the Divisional Court to deal with all the properly arguable issues in the case. (4) This court for its part will adopt whatever course involves the fewest additional steps and the least expense, delay and duplication of proceedings. Whether, as in *Ex Parte Levy*, it will be possible to proceed at once to a substantive determination of the issues must inevitably depend in part upon whether all interested parties are represented and prepared, and in part upon the availability of court time.*

Applying those principles to the present case, there can be no doubt that rather than remit the case stated to the Crown Court for further questions to be raised, this court should proceed as if this challenge had been brought by judicial review. I see no possible need to produce further formal documents for the purpose.”

17. Kerr J also directed that the claimant should serve a further skeleton argument addressing the claim as if it were an appeal by way of case stated. There was some discussion before me as to the procedural nature of the “shortcut” contemplated in *Sunworld*. Ms Pennifer, who appeared on behalf of Bolton, submitted that what Simon Brown LJ intended was not that there would be some quasi appeal by way of case stated but rather that the matter would proceed by way of judicial review of the substantive decision. That seems to

me to be the proper reading of the decision and the effect of the shortcut is simply that the defence to a claim for judicial review that there was an adequate alternative remedy (namely an appeal by way of case stated) would not be available.

18. The Bolton case was also transferred to Birmingham to be heard with the appeal by way of case stated in the Birmingham case. The two cases next came before Swift J. His directions ordered that the two cases be managed and heard together. Swift J gave permission to apply for judicial review. He included provision that the claimant could amend its Claim Form in the Bolton case so as to include a claim for an order that the Liability Orders be set aside and amend the Detailed Statement of Facts and Grounds, so as to rely on certain paragraphs of its skeleton argument dated 3 April 2019. I do not set out those paragraphs because it was not in issue that the effect of that was to leave open to the claimant the claim for judicial review of the substantive decision in that case. Provision was also made for further skeleton arguments and that seems to me consistent with my understanding of the effect of Kerr J's order.

The threshold question: payment of the fee

19. A threshold question in the hearing before me was, therefore, whether the District Judge had been wrong to refuse to state a case simply on the procedural ground that the application was out of time, the court having no power to extend time. If he were right about that, PAPOA's claim for judicial review of the decision not to state a case would fail, there would be no need for the short cut and the substantive challenge would fall away. Following some discussion between counsel, it was, however, agreed on the second day of the hearing that I should not decide the point there and then but should allow the substantive challenge to be argued in any event. Given the overlap between the two sets of proceedings, that was a practical course and was adopted.
20. Nonetheless, before I turn to the substantive grounds of challenge in the Bolton case, I deal with this threshold issue.
21. Section 111 of the Magistrates Court Act 1981 deals with the stating of cases by the magistrates' court and provides as follows:
"(1) Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved;
(2) An application under subsection (1) above shall be made within 21 days after the day on which the decision of the magistrates' court was given.
.....
(5) If the justices are of opinion that an application under this section is frivolous, they may refuse to state a case, and, if the applicant so requires, shall give him a certificate stating that the application has been refused; but the

justices shall not refuse to state a case if the application is made by or under the direction of the Attorney General.

(6) Where justices refuse to state a case, the High Court may, on the application of the person who applied for the case to be stated, make an order of mandamus requiring the justices to state a case.”

22. Section 114 is headed “Recognizances and fees on case stated” and provides:

“Justices to whom application has been made to state a case for the opinion of the High Court on any proceeding of a magistrates’ court shall not be required to state the case until the applicant has entered into a recognizance, with or without sureties, before the magistrates’ court, conditioned to prosecute the appeal without delay and to submit to the judgment of the High Court and pay such costs as that Court may award; and (except in any criminal matter) a justices’ clerk shall not be required to deliver the case to the applicant until the applicant has paid the fees payable for the case and for the recognizances to the designated officer for the court.” (My emphasis)

23. It is, to my mind, clear from the words “to whom application has been made to state a case” that the application may be validly made before payment of the fee. The payment of the fee is the condition of the requirement to undertake the stating of the case and, other than in a criminal matter, of the delivery the case stated, but it is not a condition of the application. If that were not the case, the words “to whom an application has been made” would not make sense or would have to be read as meaning “to whom the application has been putatively made subject to the payment of the fee”.

24. The stating of a case is covered by Part 35 of the Criminal Procedure Rules. Part 35.2(1) provides:

(1) A party who wants the court to state a case for the opinion of the High Court must— (a) apply in writing, not more than 21 days after the decision against which the applicant wants to appeal; and (b) serve the application on— (i) the court officer, and (ii) each other party.....”

There are further provisions relating to the content of the application. Nothing is said about payment of a fee.

25. A form for “Application to Magistrates’ Court or Crown Court to state a Case for an Appeal to the High Court” (pursuant to CPR 35.2) is available to download online. It tells the applicant to complete the boxes on the form; sign and date the form; and send a copy to the court and each other party. It continues (with some wording in bold):

*“You must send this form so as to reach the recipients **not more than 21 days after the decision about which you want to appeal to the High Court.** If that decision was by a magistrates’ court, **the court has no power to extend that time limit.**”*

Again there is no reference to the payment of a fee.

26. Section 92 of the Courts Act 2003 confers power on the Lord Chancellor to prescribe fees payable in respect of anything dealt with in courts including the magistrates' court. Provision is made for the payment of a fee by Schedule 1 of the Magistrates' Court Fees Order 2008 (as amended) on an application to state a case.
27. I can see nothing in these provisions which makes payment of the fee a condition of a valid application. It is no more than a fee payable for the matter being dealt with in the magistrates' court.
28. The Nationality (Fees) Regulations 2007, on which the District Judge relied, are in marked contrast and make specific provision of the consequences of failure to pay a fee. Regulation 21 provides as follows:

“Consequences of failing to pay the specified fee

21.—(1) Subject to paragraph (2), where an application to which these Regulations refer is to be accompanied by a specified fee, the application will not be considered to have been validly made unless it has been accompanied by that fee.”

29. In my judgment, the District Judge was wrong to read across from this specific provision and to infer that an application to state a case was not validly made until payment of the fee.
30. It follows that the application was made within the 21 day period. On that basis, I would have remitted the matter to the Magistrates' Court for a case to be stated. As it is, that means that I will consider the substantive challenge to the District Judge's decision.

The statutory framework and the issues in these cases

31. I set out above the statutory framework within which this matter came before the District Judges in both cases. It is well-known that arrangements may be made between charitable organisations and the owners of otherwise untenanted premises by which those premises are leased to the charitable organisation for a peppercorn or other favourable rent. The charitable organisation (and not the landlord) then becomes liable for the payment of business rates but subject to the mandatory relief in sections 43(6) and 45A set out above.
32. This type of arrangement has been referred to in other cases as part of the factual background only and it has been made clear that any aversion the court may feel to this kind of tax avoidance scheme is not, in any sense, a relevant factor in the determination of whether the charity is entitled to relief.
33. In *Sheffield City Council v Kenya Aid Programme* [2013] EWHC 54 (Admin), the issue that arose was whether the units occupied by the charity were “wholly or mainly used for charitable purposes” within the meaning of the then section 43(6) of the Local Government Finance Act 1988. I consider this issue further below. At [38], Treacy LJ commented on the relevance the district judge had

attached to the mutual advantages to the charity and the landlord and said that, if the district judge had meant that they were indulging in tax avoidance, that was not a matter to which weight should have been attached.

34. *South Kesteven District Council v Digital Pipeline Ltd.* [2016] EWHC 101 (Admin) was another such case. In that case, the charity, Digital Pipeline Ltd. (“DP”), had the use of a large retail warehouse on a meanwhile use lease for a peppercorn rent and received a premium from the landlord. DP held quarterly public access appeals to collect unwanted IT equipment with a view to providing functioning equipment to African schools. The decision that, on other days, DP did not occupy the premises and the owner was liable for the rates was not challenged on appeal. However, DP’s position was that it was liable for the rates on the days that it used the premises but entitled to an 80% discount under subsection 43(6). The judge at first instance found in DP’s favour on that issue and the local authority appealed. At [17], Elias LJ said this:

“Thirdly, it is widely appreciated that the rules on charitable exemption can be manipulated to the advantage of both the owner of business premises and the charity leasing the premises. The landlord of unoccupied business premises will have to pay rates. However, if he lets it to a charity which carries on charitable activities, the landlord is no longer the ratepayer within the statutory definition in section 65. But the charity is able to take advantage of the charitable exemption. However, when determining whether the exemption applies or not, it is immaterial that the purpose of the arrangement between the landlord and the charitable tenant is to reduce or avoid payment of the business rates: see the Kenya Aid case ...para. 38. There is nothing unlawful in parties seeking to arrange their affairs so as to avoid paying taxes which they would otherwise have to pay, if they can lawfully do so.”

35. The issue that arose in the present cases (whether it is properly to be regarded as one of fact or law) was whether on days that events were held at the properties they were used wholly or mainly for charitable purpose and whether it appeared that, when next in use, the properties would be wholly or mainly used for charitable purposes. That involved issues as to the benefit to the public of PAPOA’s events and the extent of use. It is, therefore, convenient next to set out some of the factual background of both cases to explain how these issues are said to arise.

The Bolton case

The evidence before the District Judge

36. The Bolton case concerned 11 properties. In the proceedings before the District Judge, there was, from the Council, a body of evidence from Robin Gibbons (Business and Rates Billing Valuation and Support Team Manager) and Roy Maggs (Local Taxation Inspector).
37. The relevant evidence was largely photographs and notes of visits to the properties. In summary, and allowing for the poor quality of the images in the hearing bundles, on some of the visits the spaces were empty or there were

stands with pictures on the stands or trestle tables with small stands and pictures on them.

38. Mr Maggs visited Ashworth House, at Deakins Business Park, on 8 February 2017. Mr Maggs was told by Alex, a volunteer for PAPOA, that an empty first floor space (at 14 Ashworth House) was intended to be used for projection artwork but the equipment had not arrived. He was told that two other ground floor and first floor spaces were being used for 3 days for an exhibition of two artists. The photos showed large spaces with stands or tables used to display pictures. Another space was being used for 3 days to display artwork in a similar way and to give away books.
39. Mr Maggs revisited the sites the following day. He reported that the first floor space at 14 Ashworth House now contained two paintings, two violins, and two projectors (one of which was not working). The other projector was projecting text on to the wall. There was nothing outside to advertise an exhibition. The unit was unattended and, to get in, Mr Maggs had to use the buzzer to the main building and the receptionist at one of the ground floor units let him in. The receptionist told him that no-one else had been there. At two other units, the lights were on and there was artwork inside but the units were unattended. At the unit where books were being given away, Mr Maggs met a local artist, Laura, whose work was on display. She told him that only a couple of people had been in. There were no signs outside advertising the exhibition and only two small signs at first floor level. Mr Maggs did find an advert for the exhibition on the PAPOA Facebook page.
40. Neither of these witnesses was called to give evidence and their evidence was uncontroversial.
41. The evidence for PAPOA was given by Martin Wilcock in two statements. Mr Wilcock described himself as dealing with operational matters for PAPOA on a part time basis.
42. In respect of Deakins Business Park, he said that PAPOA had run events in November 2016, February 2017 and May 2017 for 2 to 3 days each time. He described the events as very large and including extensive displays of artwork covering a range of styles and with thousands of books to be given away. He said that some of the events were attended by a local artist, LM Art (Laura), who displayed her art and provided painting demonstrations. Guitars were available for those looking to engage in music or try playing. Digital art was available from an artist called Daniel Grimshaw and films were on display which demonstrated the film making process and techniques. He provided photographs of the events which were similar to those I have referred to above, although the Council put in issue where those photographs had been taken.
43. Mr Wilcock also gave evidence about a property called Little Lever where there appeared to have been an event in one unit in February 2017 and he produced photographs. He said that an event in another unit, planned for January 2017, had not taken place because some works had overrun and the lease had been terminated before the event could take place.

The legal arguments

44. Before the District Judge it was argued that PAPOA was not a charity. That argument was rejected and is unchallenged. The further argument before the District Judge (and indeed before me) focussed on the meaning of charitable purposes.
45. It was common ground that that issue itself had to be approached by reference to sections 2 to 4 of the Charities Act 2011:

“2(1) For the purposes of the law of England and Wales, a charitable purpose is a purpose which –

(a) falls within section 3(1), and

(b) is for the public benefit (see section 4)...

3(1) A purpose falls within this subsection if it falls within any of the following descriptions of purposes –

...

(f) the advancement of the arts, culture, heritage or science ...

(4)(1) In this Act “the public benefit requirement” means the requirement in section 2(1)(b) that a purpose falling within section 3(1) must be for the public benefit if it is to be a charitable purpose.

(2) In determining whether the public benefit requirement is satisfied in relation to any purpose falling within section 3(1), it is not to be presumed that a purpose of a particular description is for the public benefit.

(3) In this Chapter any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.

(4) Subsection (3) is subject to subsection (2).”

46. It is part of that definition, therefore, that in order to be charitable purposes, the purposes must be ones for the public benefit. It was and is common ground that there are two elements to the public benefit requirement, namely that there must be a benefit to the public and that it must be available to a sufficiently wide section of the public.
47. PAPOA’s argument is essentially that, where matters of an artistic nature are concerned, it is no part of the court’s function, in determining whether the public benefit test is met, to take it upon itself to decide that the quality of the art (as in this case) or music or literature (as in others) is not sufficient to be for the public benefit. Such a decision is open to the court if the issue is raised. If the council raises that issue, then it is for the council to adduce evidence of the lack of quality. But, importantly, for PAPOA’s case, if the issue is not raised, it is not incumbent on it to adduce evidence of quality.

48. Bolton's position was the opposite. On Bolton's case, there is no presumption of public benefit and section 4(2) of the Charities Act says as much. As the District Judge summarised it, where it was obvious that there was a public benefit, the court could take judicial notice but where it was not obvious there was a need for evidence. Bolton submitted that this was wholly a question of fact; that the legal and evidential burden fell on PAPOA; and that there was insufficient evidence to satisfy the court that the public benefit test was met.
49. In this case, the District Judge was not satisfied that the actual or intended use was for the public benefit. At [26] he said this:
- “Even taking all the evidence, including that of Mr Wilcock, at its highest I could not be satisfied that those items which were exhibited (or intended to be exhibited) were such as to enable judicial notice of their quality to be taken. In the absence of such judicial notice being taken the court would require evidence as to their quality to make such an assessment. In this case there was insufficient evidence to enable me to be satisfied the public benefit test was satisfied.”*
50. The application to state a case identified two proposed grounds of appeal: firstly, that the court erred in finding that PAPOA bore the burden of proving that the events were of sufficient artistic quality to be capable of advancing its charitable purposes and therefore being for the public benefit; and secondly, that the court should not have considered that argument without expert evidence (relying on *Westminster Bank Ltd. v Pinion* [1965] 1 Ch 85).
51. Ms Pennifer submitted on behalf of Bolton that the only challenge to the decision of the District Judge was on a finding of fact, namely his finding that the evidence adduced by PAPOA was insufficient to shift the evidential burden to Bolton. It was, she submitted, not alleged that he had misdirected himself in law or taken into account any irrelevant fact or failed to take into account any relevant fact. Thus there were no grounds for judicial review and that is why her argument as to the nature of the hearing was significant.
52. I am not at all sure that that reflects either the decision of the District Judge or PAPOA's position. It seems to me that, for the purposes of what is now, in practical terms, a judicial review, the same issues that PAPOA would have raised by way of case stated still arise, in that PAPOA submits that the decision was wrong in law as to the burden of proof and/or that the District Judge took into account irrelevant considerations, namely the lack of expert evidence from PAPOA as to the quality of the art and/or events.

Discussion

53. I start with the issue of the burden of proof. A distinction is to be drawn between the legal burden of proof (or, as it is called in Phipson on Evidence, 19th ed, the persuasive burden) and the evidential burden of proof. The legal burden is that imposed on a party as a matter of law to prove or disprove a fact. The evidential burden is described in Phipson at paragraph 6-02 as obliging “the party on whom the burden rests to adduce sufficient evidence for the issue to go

before the tribunal of fact.” Generally speaking the party who asserts the affirmative on the issue has both burdens. In practice, however, the evidential burden is often referred to as a shifting one. Once the party who asserts the affirmative has adduced sufficient evidence to get the issue before the tribunal, in reality the burden may pass to the other party to disprove or at least cast doubt on that evidence. The court then undertakes an evaluative exercise on the evidence as a whole to determine whether the relevant facts or matters have been proved to the requisite standard.

54. In the present case, there is no issue that PAPOA would be liable to pay the rates pursuant to section 43. It seems to me self-evident that it is PAPOA that then bears the burden of proving that the days in issue fall within section 43(6) or section 45A. Therefore, PAPOA has the burden of proving that on those days the properties were used wholly or mainly for charitable purposes or that they would, on their next use, be so used.
55. Since PAPOA has that burden, it must similarly have the burden of proving that the purposes for which the properties were being or were to be used were wholly or mainly charitable. That would include proving that they fell within section 2 of the Charities Act 2011 and that, in turn, would involve proving that the purposes were for the public benefit. It is then clear from section 4, that the mere description of the purposes as charitable (within section 3) is not sufficient to discharge that burden. There is, therefore, an evidential burden on PAPOA to adduce sufficient evidence to persuade a court of the public benefit.
56. For PAPOA, Mr Collings QC’s answer to that analysis was twofold. Firstly, he relied on the decision of the Court of Appeal in *Ratford v Northavon District Council* [1987] QB 357. In that case the Court of Appeal considered an application by a rating authority for a warrant of distress under section 97 of the General Rate Act 1967 which is materially in the same terms as Regulation 12(2) of the 1989 Regulations. There was a dispute between the parties as to whether Ratford was the occupier. The council argued that all it needed to show was that the rates had been made, published and demanded and remained unpaid, and that the burden was then on Ratford to prove that it was not in rateable occupation. Slade LJ took the view that it was probable that the legislature would have contemplated that the burden of proving a defence based on non-occupation would first fall on the party in Ratford’s position:
“However, the standard of proof will merely be that of the balance of probabilities, and ...like all cases of the burden of proof in litigation, it is a swinging burden. As the evidence of varying weight develops before the magistrates, the eventual burden of proof will, in accordance with ordinary principles of evidence, remain with or shift to the person who will fail without further evidence.”
- The court went on to find that Ratford had discharged this burden by showing that they had been appointed on terms which did not oblige them to take occupation and that the burden then shifted to the council.
57. Mr Collings QC sought to draw a direct comparison between that case and the present on the premise that, once PAPOA had established that it had undertaken

arts events at the properties, the burden (whether legal or evidential) passed to Bolton to show that the events were not for the public benefit.

58. In my view there is no such comparison to be drawn. *Ratford* is simply a case in which the burden of proof in respect of a particular defence was found to be on the defendant, the terms of the lease were sufficient prima facie to establish that defence, and the evidential burden then shifted. That does not assist as to where the burden of proof lies in this case. In *Ratford*, sufficient evidence was adduced to get the issue before the court, so to speak, and the burden then shifted to the claimant to prove its case. As I have said, the end result would be an assessment and weighing of the whole of the evidence. *Ratford* is an example of the swinging burden but no more. The position, in my view, remains that if the burden of proof is on PAPOA to show that the properties were being or were to be used wholly or mainly for charitable purposes, it is inherent in that that it is for PAPOA to prove that the activities undertaken were or would be for the public benefit.
59. The second limb of PAPOA's argument is that PAPOA has to do no or little more than adduce evidence that it was undertaking arts events and exhibitions, which is not in issue, for there to be sufficient evidence of public benefit, so that the burden then shifts to the council to prove that the activities were not for the public benefit.
60. Ms Pennifer submitted that the principles of law relevant to this issue are to be derived from *R (Independent Schools Council) v Charity Commission for England and Wales* [2011] UKUT 421 (TCC); [2012] Ch 214. The case concerned sections 1 to 3 of the Charities Act 2006 which were, so far as material, in like terms to sections 2 to 4 of the 2011 Act. So far as relevant, Ms Pennifer derived the following principles from the *Independent Schools* case:
- (i) Sections 2 to 4 of the Charities Act 2011 provide an exhaustive code for the definition of a charity and supersede the pre-Charities Act 2006 law except to the extent that the pre-existing public benefit requirement remains. The effect of section 3(2) is to preclude the making of a presumption about public benefit (at [72]) but the nature of the requirement is not otherwise changed.
 - (ii) The public benefit requirement requires both that the nature of the purpose was such as to benefit the community and that those who might benefit were sufficiently numerous and identified in such a manner as to constitute "a section of the public" (at [44] and [53]).
 - (iii) There is no presumption that a purpose of any particular description within section 3(1) meets the public benefit requirement. The court must form its own view on the evidence. It may be permissible for the court to take account of its own view that the terms of the trust (as in that case) speak for themselves (at [67]) if there is nothing to displace that view; the court may take account of decided cases (but only if strictly binding); and the court may take account of facts of which it can take judicial notice (see [60]-[62], [67] and [68].)
 - (iv) The public benefit must be more than de minimis (at [215] – [216]).

61. Those seem to me to be entirely correct statements of principle and they were not seriously disputed by PAPOA although it was suggested that there might be some difference between educational purposes and artistic ones. The relevance of that submission is that, prior to the 2006 Act, artistic objects were not a distinct class of charitable object and were treated as educational objects.
62. In the *Independent Schools* case, as Warren J set out at [69], it was not suggested that the provision of education to school age children according to conventional curricula was not for the public benefit in the first sense. He continued:
- “70. But suppose, for the sake of argument, that someone wished to argue that such education [according to conventional curricula] was not for the public benefit at all, perhaps because of some deeply held religious or other belief. The starting point of the judge would surely be that the provision of standard education is for the public benefit. ... there are surely some matters of which the court can take judicial notice, one of which must be the proposition that mainstream education of that sort is for the public benefit.*
-
- 85. ... our above analysis shows that there is to be no presumption made that any particular type of education is for the public benefit: there is to be no presumption that education according to the curriculum adopted across schools (whether in the public or independent sector) is for the public benefit and there is to be no presumption even that specialist education for physically or mentally disabled children at no extra cost to them or their parents is for the public benefit.”*
63. I can see no relevant distinction between education and the arts. Whilst there might be a general view that the promotion of the arts is for the public benefit – and judicial notice might be taken of the public benefit in the promotion of what might be described as mainstream or core curriculum art – there is no more presumption of public benefit in those or any particular artistic activities than there is in respect of educational activities. It remains a matter for evidence.
64. Mr Collings QC, however, argued, as I have indicated above, that the decisions in *In re Pinion* [1965] 1 Ch 85 and in *In re Shaw’s Will Trusts* [1951] 1 Ch 63, remained relevant and had the effect that, in forming its view as to public benefit, the court could not and should not make a value judgment as to the quality of the artwork. As he put it, if the properties or spaces were occupied wholly or mainly with the items exhibited and if they had a sufficient air of art about them, then PAPOA has met the statutory requirement and judicial notice of the quality of the art does not come into it.
65. It seems to me, firstly, that Mr Collings’ submission is not supported by the decision of the Court of Appeal in *Pinion*, in which each judge said that the court could not take judicial notice of the quality of, or form its own view as to, in that case, the gifted chattels for the purpose of determining whether there was a public benefit, without expert evidence.

66. On the appeal, the Attorney General sought to uphold the decision below that the gift was charitable. The Attorney General did not seek to argue that the gift was beneficial to the public in a general sense but “confined his plea to that head of charity which is characterised as the advancement of education” and argued that no evidence was receivable on the subject:
- (i) Harman LJ concluded that a gift to found a public museum may be assumed to be charitable if no-one questions it. That proposition is at the very least open to doubt in the light of section 4(2) of the Charities Act 2011. He observed, referring to *In re Shaw’s Will Trusts*, that where the object was to fund a school, the court would not study the methods of education, provided they were, on their face, proper. A school for prostitutes or pickpockets would obviously not be for the public benefit.
 - (ii) However, in respect of a museum, Harman LJ said this:
“Where a museum is concerned and the utility of the gift is brought in question it is, in my opinion, ... essential to know at least something of the quality of the proposed exhibits in order to judge whether they will be conducive to the education of the public. ...
It was said that this was a matter of taste, and de gustibus non est disputandum, but here I agree with the judge that there is an accepted canon of taste on which the court must rely, for it has itself no judicial knowledge of such matters, and the unanimous verdict of the experts is as I have stated.”
 - (iii) Davies LJ was of a similar view:
“It is, in my opinion, clear that where necessary the court, in order to decide whether a valid charitable gift has been made in circumstances like the present, may, and indeed must, receive expert evidence on the question of whether the display of the articles comprised in the gift is calculated to be for the advancement of education or otherwise of benefit to the public.”
 - (iv) Likewise Russell LJ:
“The mere fact that a person makes a gift of chattels to form a public museum cannot establish that its formation will have a tendency to advance education in aesthetic appreciation or in anything else. Inquiry must first be made, what are the chattels? Five hundred balls of string could not have that tendency. ... Some further judicial inquiry is needed directed to the quality of those chattels. The judge cannot conduct that inquiry on his own, unless the matter be so obvious as to call for no hesitation. He may be lacking in aesthetic appreciation. He is, I consider, entitled to the assistance of people expert in such matters and to arrive at a conclusion based on such assistance.”
67. It seems to me, therefore, that the thrust of this decision is not that the judge is not entitled to take into account the quality of the art but rather that he should not rely on his own judgment and is entitled to evidence. Since the burden of proving the public benefit was on PAPOA, the burden of adducing such evidence must also have been on PAPOA.
68. It may be that, once there is sufficient evidence to get over the first hurdle and get the issue before the court, the evidential burden shifts, but that itself was a

matter for evidence. It cannot be right that having sufficient an air of art about the exhibits is enough because that would be tantamount to saying that the public benefit is to be presumed from the mere fact of something being “art”.

69. Further, it seems to me that PAPOA’s submissions proceed on the basis that the District Judge decided the case on the basis that there was no public benefit because the quality of the art was so poor. That approach itself assumes that PAPOA had got over the first hurdle simply because it had on occasion exhibited “art”. That does not, however, properly reflect the District Judge’s reasoning which was that he could not find that there was a public benefit without further evidence.
70. The District Judge was faced with evidence from the Council of some rather half-hearted attempts to put on display some pictures or projections for short periods of time. He was right in my judgment to say that he could not, without evidence, decide whether those exhibitions were for the public benefit or whether future exhibitions would be and, since the burden of proof was on PAPOA, he was then right to make the liability orders. The position is similar to that in *My Community Space v Ipswich Borough Council* [2018] EWHC 3313 (Admin) in which Walker J concluded, at [90], that the District Judge’s view as to whether “exhibitions” had the appearance of a public exhibition was a question of fact which was not open to challenge.
71. In my judgment, there was no error that could be the subject of judicial review and the judge did not take into account factors that he ought not to have done.

Costs

72. A further matter arises in the Bolton case, namely PAPOA’s application for costs against the Greater Manchester Magistrates’ Court. Kerr J, in his order of 27 March 2019, reserved costs to the judge sitting in Birmingham on 11 April 2019 and PAPOA’s skeleton argument addressed that claim for costs. On 11 April 2019, Swift J ordered that the Greater Manchester Magistrates’ Court may, if so advised, file and serve a skeleton argument on that application by 13 June 2019 and that the application would be determined at the final hearing. A skeleton argument was then filed on 11 June 2019. The Greater Manchester Magistrates’ Court did not otherwise participate in the substantive proceedings.
73. PAPOA relied on paragraph 23.12 of the Administrative Court Judicial Review Guide which provides as follows:

*“.1 Where the defendant in judicial review proceedings is a Court, Tribunal or Coroner, the Administrative Court will generally not impose costs orders against the defendant where the defendant has not acted obstructively or improperly and only makes representations neutrally on the procedure or law.
.2 Where a Court, Tribunal or Coroner does contest the claim, it becomes liable for costs, subject to the principles discussed in this section of the Guide.”*
74. Both PAPOA and the Magistrates’ Court relied on the decision on *R (on the application of Davies) v Birmingham Deputy Coroner* [2004] EWCA Civ 207,

which has been consistently followed. The judgment of Brooke LJ at [47] sets out the relevant principles or practice as follows:

“(i) The established practice of the courts was to make no order for costs against an inferior court or tribunal which did not appear before it except when there was a flagrant instance of improper behaviour or when the inferior court or tribunal unreasonably declined or neglected to sign a consent order disposing of the proceedings.

(ii) The established practice of the courts was to treat an inferior court or tribunal which resisted an application actively by way of argument in such a way that it made itself an active party to the litigation, as if it was such a party, so that in the normal course of things costs would follow the event.

(iii) If, however, an inferior court or tribunal appeared in the proceedings in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case law and such like, the established practice of the courts was to treat it as a neutral party, so that it would not make an order for costs in its favour or an order for costs against it whatever the outcome of the application.

....”

75. PAPOA’s application for costs is limited to the costs of making the application for permission on paper and the costs of the hearing before Kerr J. Those costs would not have been incurred if the District Judge had stated a case.
76. PAPOA’s submission is that the Administrative Court Guide admits of the possibility of an adverse costs order where the court has acted “obstructively or improperly”. PAPOA makes the point that this is an unusual case because the District Judge initially agreed to state a case but then refused to do so purely on the basis that the necessary fee had not been paid. PAPOA argues that it set out clearly in its letter dated 30 May 2018 why that was wrong but the District Judge, in his written reasons, failed to engage with PAPOA’s case and instead relied wrongly on immigration regulations. This, it is therefore argued, amounts to the court behaving improperly or obstructively.
77. This is plainly not a case where the Magistrates Court has taken an active role in the proceedings. The only question that arises is whether it behaved improperly or obstructively and did so to the extent that it would be appropriate to make a costs order against it. Although I have concluded that the District Judge was wrong to refuse to state a case because of the perceived failure to pay the relevant fee in time, I am not satisfied that can be characterised as improper or obstructive, let alone a flagrant instance of such behaviour. It is rather a simple case of the court being wrong on the law. The District Judge did not refuse to consider PAPOA’s position as set out in its solicitors’ letter of 30 May 2018 and, on the contrary, provided written reasons for his decision.
78. I do not, therefore, make the costs order sought.

The Birmingham case

79. The Birmingham case arises out of a similar factual scenario to the Bolton case. Birmingham City Council (“Birmingham”) sought liability orders against PAPOA in respect of hereditaments within premises known as Windsor House,

Cobalt Square and Delta View. The buildings were large, comprising in total 18 floors and PAPOA was tenant of 25 units, as tenant at will.

The hearing before the District Judge

80. The matter came before District Judge Jellema on 31 October and 1 November 2018. The 2 day hearing had been fixed following the adjournment of the hearing previously fixed in August 2018. PAPOA claimed to be entitled to relief pursuant to sections 43(6)(a) and 45A(2). The District Judge found that PAPOA was not entitled to that relief and issued liability orders in the total sum of £371,019.09 and also ordered PAPOA to pay costs in the sum of £19,615.08.
81. At the hearing before the District Judge, evidence for PAPOA was given by a witness statement of Joshua Jacques. He did not attend the hearing and was, therefore, not cross-examined.
82. Mr Jacques said he was a director of PAPOA. A substantial part of his statement was concerned with the issue of whether PAPOA was a charity. He gave what can best be described as some general evidence about PAPOA's purposes, the types of art forms it sought to preserve and promote, and evidence about events held at premises other than those in issue. As to the premises in Birmingham, he said firstly that an event had been held at Windsor House from 11 to 13 July 2017; he attached copies of advertising material; and he said a video was available for viewing. He said that events had been held at Delta View between 22 and 24 August 2017 and 10 and 13 October 2017. He attached photographs. Lastly, he said events had been held at Cobalt Square on 4 to 6 April 2018, 24 to 25 May 2018 and 21 to 23 November 2017 and he attached photographs. He gave no evidence as to any future intentions for the use of the premises.
83. Evidence for Birmingham was given by Niamh Ni-Ghormain, Belraj Rai and Martin Mullaney. These witnesses were cross-examined and, in his judgment, the District Judge said that he did not consider that cross-examination to have undermined their evidence.
 - (i) Ms Ni-Ghormain is a Revenues Court Officer. In her statement, she put in issue whether PAPOA was a charity and gave evidence about its published accounts which she said showed no movement or activity. As to the buildings, she referred to the evidence of Mr Mullaney in respect of Windsor House and of Mr Rai in respect of Cobalt Square.
 - (ii) Balraj Rai is a Business Rates Investigations Officer for Birmingham. He visited Cobalt Square on 21 November 2017 in response to what he had seen on PAPOA's Facebook page. He noted that there are 7 relevant units or hereditaments at Cobalt Square. There was only one person there representing PAPOA and he thought that one person could not possibly be responsible for all seven units if they were open to the public. Mr Rai had to wait 40 minutes to be collected. The display that he saw was of print outs. He exhibited photographs of the displays on easels. He visited again on four days in March 2018 and no one was present on these occasions.

- (iii) Martin Mullaney is the Business Improvement District Manager for King's Heath. Windsor House is in King's Heath and, Mr Mullaney said, almost opposite his offices. He inspected Windsor House in April, May, June and July 2017 and saw no evidence of occupation by PAPOA. In particular, on 11-13 July 2017, while he spent the day in his office, he saw no signs of activity and no advertising outside the building of any activity. He also said that, as part of his job, he monitored social media for adverts relating to things happening in King's Heath and he saw nothing about events planned by PAPOA.
84. The District Judge gave an ex tempore judgment. A note of that judgment was prepared by counsel and no issue has been taken with its accuracy. PAPOA applied to the District Judge to state a case. The background and reasoning set out in the case stated very much mirrors the note of judgment and, to avoid repetition, it is convenient to refer to that rather than the judgment.

The law

85. Before I come to the case stated, I return to the issues of law. Firstly, Mr Collings QC accepted in the course of argument that, in the Birmingham case, the burden of proof as to use was throughout on PAPOA. Secondly, whether the use to which the premises were put or were to be put was charitable, and specifically whether the public benefit requirement was met, was also in issue. However, the emphasis in argument was not on whether the District Judge had undertaken any qualitative assessment of the events but on whether he was entitled to take into account matters going to the advertising and accessibility of the events. Thirdly, the Birmingham case raised a further issue, namely the extent of use of the premises in the context of the meaning of the expression "wholly or mainly for charitable purposes".
86. In *Sheffield City Council v Kenya Aid*, the sole issue was whether the properties were "wholly or mainly used for charitable purposes." In that case, the district judge had decided that the correct approach to be applied in determining whether the premises were being used wholly or mainly for charitable purposes was that set out by Lord Bonyon in *In re English Speaking Union Scottish Branches Educational Fund* [2010] RA 227. At [11], Lord Bonyon had said this:
"However, counsel's submission, that [the judge's] approach of concentrating exclusively on the question of "use" leads to the conclusion that, in all cases where a building is used for a single purpose, that sole use, however limited in extent within the building, is that for which the building is "wholly used", is unpersuasive. "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."
87. There was evidence before the district judge as to the extent of use of two units (totalling 58,120 square metres) for furniture storage, with unit 1 being estimated to be 30-35% used and unit 2, 25-30% used. His conclusions are set out in the judgment of Treacy LJ at [4]. The district judge concluded that there

was a marked absence of substantial use of the premises. As to the extent of use, the way in which the furniture was stored and spaced out suggested that a more efficient approach could compress the space taken; the occupation of other similar properties contradicted the charity's assertion that Sheffield was the hub of its operation; and the quantity of furniture shipped to Kenya and frequency of shipments was small. The questions posed by way of case stated included whether the judge was entitled to place weight on the extent to which the premises were used, the inefficiency of storage, and the necessity to occupy both units.

88. In giving the judgment of the Divisional Court, Treacy LJ considered that the approach in the *English Speaking Union* case, requiring the court to consider on a broad basis whether the premises were being used wholly or mainly for charitable purposes, was a tenable approach (at [34]). At [35], he continued: “... As was pointed out in the *English Speaking Union* case and again in argument before us, the charity's construction would substitute the word “solely” for the word “wholly”. I see no reason why the statute should be thus narrowly confined. The natural reading and meaning of the words used are, in my judgment, apt to cover not only consideration of the purpose of the use but also the extent or amount of the actual use. It follows therefore that I would hold that the judge was right to take account of and place weight upon the extent to which the premises were used.”
89. However, he regarded both the inefficiency of the storage and the issue of the necessity of using both units to be irrelevant considerations. He observed that, in this context, questions of inefficiency seemed to be closely related to questions of necessity.
90. In the *Digital Pipeline* case, Elias LJ cited the *English Speaking Union* case, the *Kenya Aid* case at [35], and the decision of Sales J in *Public Safety Charitable Trust v Milton Keynes Council* [2013] EWHC 1237 (Admin). At [34] of that decision Sales J had said this: “In the context of this legislation and having regard to the language used, it is reasonable to infer that Parliament intended that the substantial mandatory exemption from rates for a charity in occupation of a building should depend upon the charity actually making extensive use of the premises for charitable purposes (i.e. use of the building which is substantially and in real terms for the public benefit, so as to justify exemption from ordinary tax in the form of non-domestic rates), rather than leaving them mainly unused.”
91. At [15], Elias LJ then added that, if as a matter of fact the premises were being used wholly or mainly for charitable purposes, “it matters not that they could have been run more efficiently or that strictly only part of the premises need have been used.”
92. What these decisions make clear is that words “wholly and mainly used for charitable purposes” are to be given a natural and common sense reading. The word “wholly” is not synonymous with “solely” so that the fact that the premises are used for no other purpose than one that is at least purportedly

charitable is not sufficient. The court is entitled to have regard to the extent of use and, to fall within the statutory provisions, the use must be extensive in the sense of substantially and in real terms for the public benefit, the public benefit requirement being in itself an element of the definition of charitable purpose. That said, whether it was necessary for the charity to use so much space and whether it could have been more efficient in its use of space is not material.

93. In this context, Sales J's further consideration of the meaning of "wholly" in the *Public Safety Trust* case illustrates the common sense approach. At [36] he said that the strongest argument against the narrower meaning of the word "wholly" was that it would be stripped of sensible meaning but he rejected that argument: *"37. However, I do not think that the argument can be sustained. A building may fairly and properly 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. For instance, the whole of a room used as an office can be described as being wholly used as an office, even though it is spacious and not crammed with people working. I also think it can fairly be described as being wholly used as an office, albeit it is closed and left vacant during the night. Even if that is not right, it is possible to imagine buildings which indeed are in constant use the whole time for charitable purposes (e.g. a permanent soup kitchen to feed the destitute or an office staffed 24 hours a day by the Samaritans to be available to give advice to people who feel suicidal). So it cannot be concluded that the word "wholly" in the phrase "wholly or mainly used for charitable purposes" has no meaning or proper function if the extent of use interpretation of section 43(6) is adopted."*
94. Lastly, Mr Collings QC also relied on the *Digital Pipeline* case for the approach which he submitted I should take. In that case, the appellant council argued that, once the judge had determined that only 42% of the floor space was in use by the charity, it was perverse for him to have concluded that the premises were wholly and mainly used for charitable purposes. Elias LJ did not accept that submission but the appellant's further argument found favour and that was that the judge had placed too much weight on the fact that there was no other activity taking place on the premises. At [28], Elias LJ said that if the judge's conclusion had been clear cut, he would not have regarded that as material but it was not so clear cut and: *"I would not go so far as the appellant in describing this factor as "decisive" but it plainly was seen by the judge as a matter of some weight. In those circumstances I cannot be sure that the decision would necessarily have been the same even if this factor had been ignored."*
95. In this case, it is submitted on behalf of PAPOA that I cannot be sure that the District Judge's decision would have been the same if he had not taken into account what are argued to be irrelevant factors and that, for the purposes of the appeal, PAPOA falls "the right side of the line".

The case stated

96. At paragraph 3 of the case stated, the District Judge referred to the definition of a charity in the Charities Act 2011 as one established for charitable purposes only. He referred to the public benefit requirement and then identified, from the

Digital Pipeline case, that the test for determining whether premises were “wholly or mainly used for charitable purposes” was “whether they were being used wholly or mainly for charitable activity which required that the charity actually make extensive use of the premises for charitable purposes, rather than whether the activity being conducted on the premises was wholly or mainly charitable.” He recognised that the decision in the *Digital Pipeline* case also confirmed that it was immaterial that the purpose of the arrangement between the landlord and tenant was to avoid or reduce the payment of business rates. He referred to what Elias LJ had said about the need to consider the extent or amount of the actual use and he repeated the citation from the *Public Safety Trust* case. Thus far, therefore, that was a proper statement of the law.

97. At paragraph 4, the District Judge then said that in considering the entirety of the evidence presented to him, he had found the following matters of significance – and he identified eight matters which I summarise and number as follows:

(1) The buildings were large block buildings, with PAPOA holding 5 hereditaments in Windsor House, 7 in Delta View and 13 in Cobalt Square: “*No explanation has been presented to me as to why the respondent company should need such an extensive portfolio of property nor has any explanation been put before me as to precisely what charitable use the company is making of those hereditaments.*”

(2) The tenancies were all tenancies at will on the same terms and with rents of £1. All the tenancies were granted by three companies with the same directors. The tenancies of Windsor House and Delta View were all dated 11 April 2017 and the tenancies of Cobalt Square were dated between 16 December 2016 and 23 September 2017.

(3) The published accounts showed that the company’s balance sheet had shown assets of £500 for two years and that it was “as though the company is totally inactive”. He noted that there were no payments for rent or utilities, for the expenses of volunteers, or for the acquisition of art.

(4) There was no persuasive evidence of any charitable activity actually taking place across the three buildings in question. The District Judge referred to the events which Mr Jacques claimed had taken place and said: “*There is no evidence of further or additional use of the hereditaments by [PAPOA] at all, nor even any claim of such additional use. The inescapable conclusion is that the hereditaments stood empty and unused for almost all of the time involved, even on [PAPOA’s] own account of matters*”. He then referred to the evidence of Mr Rai and Mr Mullaney, both as it appears in their statements and in cross-examination. He recorded Mr Rai’s evidence, in addition to that in his statement, that, when he attended Cobalt House, he could not enter without a security officer allowing his entry; that the entire time he was there he saw no other member of the public; and that the photographs showed “extremely sparsely populated rooms with a ridiculously small number of exhibits per room”; and he observed that all the exhibits (prints and a few books) could comfortably have fitted within a single room. In respect of Windsor House, and in addition to the evidence in his statement, Mr Mullaney confirmed –

presumably in cross-examination – that Windsor House was actually in the process of being converted into residential properties with signs telling people to keep out and warning of danger.

(5) The director of PAPOA, Mr Jacques had failed to attend court for cross-examination on either 6 August 2018 or on 31 October and 1 November 2018.

(6) PAPOA had failed to respond to Birmingham’s reasonable requests for any specific item of evidence that may have assisted PAPOA in its claim for relief.

(7) PAPOA was not a registered charity and was not, therefore, subject to the rigours of such registration

(8) *“The purported evidence submitted by [PAPOA] in respect of the events allegedly held is wholly flawed and unconvincing.”*

98. I set out paragraph 5 of the case stated almost in full:

“Taking everything into account that had been put before me in this matter, I was driven to the conclusion that, despite the ostensible charitable nature of [PAPOA’s] purposes, at least according to its Articles of Association, there was no persuasive evidence at all that [PAPOA] was actually pursuing or promoting those purposes. Furthermore I had heard no evidence that would properly serve to contradict the assertion of one of [Birmingham’s witnesses] that [PAPOA] is a shell or a sham set up specifically to avoid the payment of non-domestic rates properly due in relation to the hereditaments in question. There was, in my view, no evidence from which I could have properly concluded that a significant section of the public has, would have or could have benefitted from [PAPOA’s] extremely limited activities. I similarly was not satisfied that the use or next use of the hereditaments in question would be wholly or mainly for charitable purposes. From the very sparse use, if actual use there was at all of these hereditaments by [PAPOA], it was abundantly clear to me that the premises were not being used wholly or mainly for charitable activity. It was further absolutely clear that [PAPOA] was certainly not making extensive use of the premises for charitable purposes. ...”

99. Paragraph 6 addressed the issue of costs.

100. The District Judge then stated two question for the opinion of the High Court namely:

- (1) Was I entitled to conclude that [PAPOA] did not qualify for charitable relief in respect of the hereditaments in question?
- (2) Was I entitled to order that [PAPOA] should pay [Birmingham’s] costs in full?

The parties’ cases

101. The first question is a broad question and not confined to any particular issue of law. On the face of case stated, the District Judge made no error of law,

correctly setting out the relevant principles in paragraph 3, and the conclusion that he then reached raised purely a question of fact.

102. With no disrespect to Ms Meager's detailed submissions, that was essentially her position - that is, that there was not enough evidence for the District Judge to be satisfied that PAPOA had met the statutory test. She submitted that Birmingham's evidence squarely put in issue (i) whether the particular events relied on by PAPOA had, in fact, occurred or were for the public benefit; (ii) whether any use of the premises had been wholly or mainly for charitable purposes; and (iii) whether any future use was likely to be for charitable purposes. PAPOA failed to adduce any satisfactory evidence on these issues and the evidence of Mr Jacques did not meet these points. She accepted that the eight matters set out in paragraph 4 of the case stated might include some matters that were not relevant to the test to be applied but she submitted that they could properly be regarded as observations and they did not undermine the overall assessment that the evidence was inadequate - an assessment that she submitted was entirely accurate.
103. PAPOA, on the contrary, approached the argument by dissecting the District Judge's judgment and the case stated.
104. PAPOA's approach starts with the application to state a case (and subsequent "grounds of appeal").
105. In the application to state a case, PAPOA set out a brief summary of the eight matters the District Judge had referred to in his judgment as significant and that I summarised above. The first question on which PAPOA asked the District Judge to state a case was whether, in deciding whether PAPOA was a charity, the court had taken the right approach by assessing whether PAPOA's actual activities had benefitted the public and, in particular, whether the court was entitled to consider the factors at (1), (2), (3), (6) and (7).
106. Mr Collings QC submitted that that question was subsumed within the first question for the opinion of the High Court. It is not at all clear to me that that is right or is what the District Judge intended. Ms Meager submitted that the District Judge had not reached any conclusion that PAPOA was not a charity and that his decision turned on whether the use of the premises was or was to be wholly or mainly for charitable purposes. That seems to me to be right. The reference to PAPOA being a sham or shell may suggest that the District Judge did not consider it to be a charity but he made no express finding to that effect. Rather, his decision was based on the fact that, whatever PAPOA's expressed purposes, there was, in his judgment insufficient evidence that the premises were used or were to be used wholly or mainly for charitable purposes. As in the Bolton case, that conclusion was open to him even if PAPOA was a charity.
107. The second question on which PAPOA asked the District Judge to state a case was whether in deciding whether the properties had been wholly or mainly used for charitable purposes on the date on which events took place, the court took the right approach by assessing the relative success or efficiency of PAPOA's

use of the properties and whether the court was entitled to consider the factors set out in (1), (2), (3), (6) and (7) above.

108. I observe that, as PAPOA framed that question, it only related to the actual, and not prospective use, of the premises and, therefore, only to one ground for the relief claimed. The District Judge's question was not so limited. The wording of the question indicated, however, how PAPOA sought to frame the question as one of law, on the basis that the court's approach had applied a test based on success or efficiency of the use of the premises.
109. The third question raised an issue as to whether PAPOA or Birmingham had complied with the Magistrates' Courts (Hearsay in Civil Proceedings) Rules 1999 in respect of Mr Jacques' statement and whether the court had been entitled to give little or no weight to Mr Jacques' evidence because it was hearsay. Mr Collings recognised that the District Judge did not state a case on this issue and that the evidence had been admitted in any event and Ms Meager invited me to put a line through the parts of the skeleton arguments that dealt with this issue. There remained an issue about the way in which the District Judge treated Mr Jacques' evidence in the context of the question he did pose but, as I will come to, that was not the same issue.
110. The fourth question PAPOA raised related to the costs order.
111. This sets the background to the arguments that PAPOA then advanced in the skeleton argument originally drafted for the hearing in April 2019 and on which Mr Collings QC relied before me. Paragraph 4 of the skeleton argument, as Mr Collings QC put it, took apart the Judge's reasoning and the reliance he had placed on the eight factors at paragraph 97 above.

Errors of law

112. PAPOA argued that the District Judge had made only cursory reference to the case law; made no attempt to apply the principles in the case law to the facts; and failed to make any clear findings of fact. PAPOA then argued that where the District Judge did attempt to state the legal test he was applying, he adopted a number of "erroneous formulations". These submissions lie at the heart of PAPOA's case that there was an error of law, and not of fact, which ought to lead to an answer to the first question in PAPOA's favour.
113. The first complaint was that the statement in (4) that there was no evidence of further or additional use on the days between the events and that the premises stood empty and unused for most of the time fundamentally misunderstood the interaction between section 43(6)(a) and 45A(2). PAPOA submitted that the fact that the premises stood empty was beside the point and that the judge ought to have analysed separately the days on which there were events and the days when the premises were empty. That seems to me, however, to misunderstand the point the District Judge was making. He was clearly well aware that he was concerned with days on which the premises were, on PAPOA's case, used for charitable purposes and with days on which the premises were unoccupied but in circumstances where their next use would be for charitable purposes. As he

said at the start of the paragraph, he had no persuasive evidence of any charitable activity actually taking place on the premises. So far as the days on which the premises were empty were concerned, he had no evidence of the intended use and he could not infer the likely use from a pattern of use where they stood empty for most of the time. That, to my mind, discloses no misunderstanding of the law and involves an evaluation of the evidence, and, as Ms Meager submitted, the District Judge's observations were made in the course of a much lengthier review of the evidence.

114. The second complaint related to the District Judge's reference to PAPOA being a shell or a sham set up to avoid the payment of domestic rates. PAPOA submitted:
- (i) That the true meaning of a sham was that articulated by Diplock LJ in *Snook v London and West Riding Investments Ltd.* [1967] 2 QB 786:
“... that for acts or documents to be a “sham”, with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.”
 - (ii) Since it was not argued that anyone intended that the Articles of Association should not have legal effect, there could be no sham.
 - (iii) To the extent that the District Judge's statement implied that he had taken into account the intention to avoid payment of business rates, that was impermissible.
115. Again it is clear that the District Judge was aware that the fact that the arrangements were set up to avoid the payment of business rates was immaterial because he said so expressly in paragraph 3 of the case stated. Taking that into account, it seems to me that his statement was no more than an observation about the purpose for which PAPOA was set up made in the context of the overall assessment of the evidence as to the use of the premises. It was perhaps an irrelevant statement but it did not demonstrate that the District Judge, having correctly stated the law in paragraph 3, had then ignored it in paragraph 5.
116. The third complaint was that the District Judge's error of law was shown in his statement that the use of the premises was “very sparse”. PAPOA submitted that the test was not (i) the amount of floor space occupied, (ii) the extent to which the space could have been used more efficiently, and further (iii) that the premises could be used wholly or mainly for charitable purposes even if the proportion of the occupied floor space was minimal (see *Digital Pipeline* at [25]).
117. The expression “very sparse use” appeared in paragraph 5 of the case stated in which the District Judge drew the threads together. It has to be read against the background of the evidence of use which he had set out in some detail at paragraph 4, all of which was then drawn together under that one adjective.
118. I do not accept that that summary expression demonstrates any error of law or, put another way, that it demonstrates that the judge was wrongly taking into

account whether the whole of the space available to PAPOA was necessary for its events or was efficiently used. The District Judge's observation that everything could have been fitted in a single room is a description of the paucity of the print outs and books exhibited. The judge was entitled to make a broad assessment of whether the premises were being used, on the days of the events, wholly or mainly for charitable purposes and that included a broad assessment of the extent of use. His reference to sparse use captures the conclusion, on the evidence, that the premises were barely used at all.

The eight matters

119. PAPOA then addressed the eight matters which the District Judge described as of significance, as set out above. I note that the application for a case stated only raised an issue as to whether (1), (2), (3), (6) and (7) ought to have been taken into account although the skeleton argument addressed all eight.
120. As to (1) PAPOA argued that it was not incumbent on it to offer any explanation for its property portfolio and that the necessity or efficiency of its use of premises was not a material factor to the issue of whether the premises were wholly or mainly used for charitable purposes. That seems to me to miss the point that the District Judge was making which was twofold. Firstly, the extensive property holding comprising multiple units in three large properties in Birmingham called into question whether the premises were being used wholly or mainly for charitable purposes or would be when next used. Secondly, although that question might have been answered by evidence as to the use that was being made of the premises, that evidence was limited to that of Mr Jacques which he considered unsatisfactory.
121. As to (2), PAPOA argued that these matters had no rational link to the statutory test for charitable use. That seems to me to miss the point that the District Judge can be inferred to have been making. The point he was making, in my view, was a continuation of the first point, namely that the extensive property portfolio, all acquired over a short period of time, invited an explanation as to the use to which the premises were being or were to be put but none was forthcoming.
122. As to (3):
 - (i) PAPOA advanced arguments as to why the accounts might understandably demonstrate what they do, for example, that no expenses are paid to volunteers but this is simply a question of fact.
 - (ii) PAPOA further argued that the District Judge's conclusion involved matters of expert evidence and that it was for Birmingham to call expert evidence if they wished to rely on it. In fact, Birmingham relied on the evidence of Ms Ni-Ghormain to which no objection was taken. In any event, the accounts spoke for themselves.
 - (iii) Lastly PAPOA argued that there was no rational connection between the state of the balance sheet and the issue of whether the premises were used for charitable purposes on the relevant days.

123. The accounts may not have been directly relevant to the use of the premises but they provided some evidence of lack of activity. I cannot see how the District Judge's having regard to that as part of the evidence overall can be said to have been wrong in law.
124. As to (4), as I have said above, this "matter" comprised a detailed recitation of the evidence of actual use of the premises for charitable purposes. PAPOA's skeleton argument took from this passage that the District Judge had had regard (i) to whether the events were widely advertised, popular among members of the public, readily locatable and/or actively promoted in local venues; and/or (ii) as to whether the events could have been comfortably fitted into a small space. PAPOA then submitted that the Divisional Court, in the authorities referred to above, had repeatedly said that the relative success of the activity and the efficiency of the charity's use of space were not material considerations.
125. The first part of that argument is, in my view, misconceived. The District Judge was concerned with the issue of public benefit. Whether the events were known about and accessible by the public or a sufficiently large section of the public were matters that he was properly entitled to take into account. In an extreme case, an exhibition which no-one knows about and no-one can gain access to would not be for the public benefit. In this case, the events were barely advertised; nothing at the premises gave any indication they were being held; and access was in issue. The absence of attendees was relevant not to the success of the activity but to the absence of advertising and access. The second element of the argument repeats the point about "sparse use" and adds nothing.
126. So far as (5) is concerned, PAPOA argues that if the District Judge sought to draw any adverse inference from non-attendance, he should have spelt that out. I shall deal with this point shortly. Putting to one side the arguments about compliance with the Hearsay Rules, there was no dispute that Mr Jacques did not attend the hearing originally listed on 6 August 2018 and that the hearing was adjourned, and given a two day estimate, on the basis that he would attend for cross-examination. He did not and his evidence was admitted as hearsay. Section 4(1) of the Civil Evidence Act 1995 provides that, in estimating the weight (if any) to be given to hearsay evidence in civil proceedings, the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence. One such matter is whether it would have been reasonable and practicable to produce the maker of the statement as a witness (section 4(2)(a)). I do not see that the District Judge needed to spell that out any more than he did.
127. As to (6), PAPOA argues that this is an assertion by the District Judge that PAPOA failed to produce evidence when PAPOA had produced such evidence in the form of Mr Jacques' statement. Since the District Judge was plainly aware of that and took Mr Jacques' evidence into account, that is a difficult submission and certainly not one that demonstrates any error of law. In fact, in her statement, Ms Ni-Ghormain had said that she had asked PAPOA (i) to provide a register of the individuals who attended their events and (ii) to provide evidence of volunteers/ employees. No such evidence had been provided. In his statement, Mr Jacques had sought to give explanations as to why this

evidence could not be provided. Although he did not expressly say so, it seems more likely that this was what the District Judge was referring to and it is entirely a matter of factual evidence.

128. As to (7), PAPOA argues that it was not registered because it was too small and that no inference could be drawn from lack of registration. As Ms Meager submitted the District Judge drew no inference, from the absence of registration, that PAPOA was not a charity. If PAPOA had been registered, the issue of whether its purposes were for the public benefit would already have been addressed and some inference as to the use of premises might have been drawn from that. But since PAPOA was not registered, it could derive no assistance from that fact. This matter was arguably of little or no relevance either way but it does not appear to have been a factor on which the judge placed any great weight.
129. As to (8), in its skeleton argument, PAPOA complains that the District Judge's conclusion on Mr Jacques' evidence was (i) unfair when (a) there was no notice to challenge his credibility in accordance with the Hearsay Rules and (b) he had had no opportunity to defend his evidence in cross-examination and (ii) that the judge failed to state what aspects of the evidence were unconvincing and why.
130. The issue on the Hearsay Rules no longer arises. The argument as to unfairness because Mr Jacques did not have an opportunity to defend his evidence is unsustainable when PAPOA chose not to call him to give oral evidence.
131. Mr Collings QC's submissions therefore focussed on the last element of this argument. He submitted, rather colourfully, that Mr Jacques' evidence could not be said to be a work of insanity and that it followed that, if the judge was to find it wholly flawed and unconvincing, he had to provide cogent reasons for doing so. Unless he did so, he could not dismiss the evidence wholesale and this court could not be satisfied that the outcome would have been no different if the judge had accepted some part of the evidence which he ought to have accepted.
132. In my judgment, this is an unfair criticism of the District Judge's judgment and takes his view of Mr Jacques' evidence out of context. The context was the evidence adduced by Birmingham and cross-examined on behalf of PAPOA. If, for example, Mr Jacques' evidence about the events were capable of refuting what was said by Birmingham's witnesses, it was no doubt put to them, or could have been put to them. The District Judge accepted the Birmingham witnesses' evidence and set it out at some length with his observations on that evidence. That, in itself, is sufficient explanation of why he regarded Mr Jacques' evidence as unconvincing and goes beyond a bald statement that one witness' evidence was preferred to that of another. PAPOA relied on the decision of the Court of Appeal in *Weymont v Place* [2015] EWCA Civ 289 as providing a salutary warning against blanket rejections of evidence but, as one would expect, that was a case on its own facts where there were numerous specific disputes of fact and the Court of Appeal considered that the District Judge could not properly simply reject all the evidence one way without any further analysis. I do not consider that that is what the district judge did here since he accepted

the evidence of the witnesses tendered for cross-examination which undermined that of the witness whose evidence was admitted as hearsay.

133. I noted above that Mr Collings QC had referred to PAPOA's argument as taking apart the Judge's reasoning. In doing so, what PAPOA's submissions do is elevate these eight matters which the District Judge described as significant (or some extract from what he said under these headings) to the status of factors which were taken into account in reaching his decision and which, it is submitted, it was wrong in law to take into account. Mr Collings QC pointed out that in the Note of Judgment, the paragraph that followed started with the words "Against that total background" which differs, it might be said, from the opening words of the equivalent paragraph 5 in the case stated. In any event, he submitted that these words linked the eight matters to the District Judge's conclusion. He accepted that he had to persuade me that he fell on the "right side of the line", with reference to the *Digital Pipeline* case, so that I could not be sure that the judge would have come to the same conclusion if he had not taken into account irrelevant factors.
134. I have gone through PAPOA's dissection of the District Judge's reasoning because, in my view, it involves, to a large extent, taking statements or observations out of context and ignoring the overall conclusion of the District Judge on the evidence or lack of evidence which he addressed in detail. That evidence went not only to the extent of use of the premises but also to the issue of whether there was any public benefit or benefit to a sufficient sector of the public. Where the District Judge has referred to something as significant which ought to have been immaterial, it is clear that that had no impact on the overall conclusion which was based on the evidence.
135. There was, in my judgment, no error of law in the District Judge's reasoning and the answer to the first question posed in the case stated is that the judge was entitled to reach the conclusion that he did. The District Judge was entitled to reach that conclusion both on the issue of failure to meet the public benefit requirement and on the issue of extent of use.

Costs

136. The second question posed for this court was whether the District Judge was entitled to order PAPOA to pay Birmingham's costs in full.
137. In the application to the court to state a case, PAPOA said that Birmingham had asked the court to award costs under section 64(1) of the Magistrates Court Act 1980 and relied on a costs schedule in the sum of £19,615.08, "which had been filed by analogy to the procedure in the Civil Procedure Rules". PAPOA accepted that it had agreed in principle that it should pay costs but said (i) that it had submitted that the amount was not just or reasonable, (ii) that it had invited the judge to hear submission on the schedule and assess them "by analogy to the Civil Procedure Rules" and (iii) that the judge had refused to hear those submissions and had simply said that the amount was just and reasonable.

138. Section 64(1) of the Magistrates' Court Act 1980 provides that a magistrates' court shall have power in its discretion to make such order for costs "as it thinks just and reasonable". It is common ground that there is no further provision for assessment of costs. PAPOA's skeleton argument made clear that the analogy with the Civil Procedure Rules was a reference to summary assessment of costs and that the starting point for PAPOA's argument was the fact that Birmingham had provided a schedule of costs. PAPOA submitted that it was a matter of natural justice that the judge should give proper consideration to the matters in CPR Part 44.4(3) and allow the paying party to be heard on those matters.
139. In answer, Ms Meager submits that the fact that a costs schedule was provided on Form N260, as it would have been for a summary assessment, was the product of using a convenient form and is irrelevant. I agree. The use of this form does not bring the CPR into play by analogy or otherwise.
140. Ms Meager's skeleton argument for the hearing before the District Judge gave notice of the application that would be made for costs and the fact there was a schedule of costs meant that the District Judge and PAPOA were not presented simply with a claim for a lump sum amount but with a particularised claim. PAPOA had, therefore, had the opportunity to indicate any issues that it took with the costs schedule and indicate any aspect that was not on its face "just and reasonable".
141. I accept, based on counsel's note of the hearing, that the District Judge did not hear such oral submissions and proceeded on the basis that he regarded the costs claimed as just and proportionate.
142. In my judgment, the District Judge was not obliged to follow any procedure similar to that on summary assessment which itself involves a broad brush assessment of costs. Had PAPOA identified some aspect of the costs schedule that was not just and proportionate, and I repeat that it had had ample notice of the costs claimed, it might have been argued that it was wrong in law for the District Judge to proceed to make an order without giving PAPOA an opportunity to address him. But counsel's note records no more than a general assertion that the costs were not just and proportionate and that it was necessary to conduct an assessment. As it was, the modest costs related to a dispute about a substantial amount and related to the adjourned hearing on 6 August 2018 and the two day hearing in October/November 2018. Even on this appeal, there is no identification of any respect in which the costs in a total of less than £20,000, were not just and reasonable.
143. In short, I can see no error of law in the District Judge's award of costs and the answer to the second question posed is that the judge was entitled to make the order that he did.
144. Accordingly, the appeal by way of case stated fails on both grounds.