

ZERO-RATING – Construction – Relevant residential purpose – Annexe – Low secure unit for mentally ill persons – Separate building not an annexe – Institution – Whether an institution or part of institution – Yes – Whether use as hospital or similar institution – Yes – VAT Act 1994 Sch 8, Grp 5, item 2(a), Notes (4) and (16) – Appeal dismissed

LONDON TRIBUNAL CENTRE

**WALLIS LTD - Appellant
- and -**

THE COMMISSIONERS OF CUSTOMS AND EXCISE - Respondents

Tribunal: THEODORE WALLACE (Chairman)

**PRAFUL DAVDA FCA
MICHAEL SILBERT, FRICS**

**Sitting in public in London on 26-29 November 2002 with a site visit on
25 November 2002**

Andrew Hitchmough, counsel, instructed by Ernst & Young, chartered accountants, for the Appellant

Peter Mantle, counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

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DECISION

1. This appeal concerns the VAT treatment of the construction by the Appellant for the Oxleas NHS Trust at the Bracton Centre, Bexley of a Challenging Behaviour Unit for mentally ill persons known as Heath House.
2. The work formed part of a phased development of the site. The first stage was the extension of the existing Bracton Clinic (renamed as "Danson unit"), a medium secure unit. The second stage was the building of Heath House, a low secure unit, some distance away in the grounds. Further stages were carried out immediately afterwards by a different contractor, Norwest Holst Construction Ltd, consisting of the building of the Burgess and Crofton medium secure units, administration and outpatients units followed by the construction of an occupational therapy unit and gym with corridors linked to the Danson unit, to Heath House and to the block containing the Crofton and Burgess Units.
3. The Appellant claimed that the construction of Heath House was zero-rated under item 2(a) of Group 5 of Schedule 8 to the VAT Act 1994 on the footing that the building was intended for use solely for a relevant residential purpose.

4. The Commissioners ruled that the work was standard-rated since the use did not fall within Note (4) which defines use for a relevant residential purpose and was also excluded by Note (16) as being an annexe to an existing building.

5. The issues are

1. whether Heath House was an annexe to an existing building;
2. whether "institution" in Note (4)(b) and (g) includes part of an institution;
3. whether Heath House is an institution in its own right within Note (4)(b) and (g) as opposed to part of an institution; and
4. whether Heath House is a hospital or similar institution within the exception to Note (4).

In order to succeed the Appellant needs to show that Heath House was not an annexe, that either Note (4)(b) or (g) cover part of an institution or Heath House is an institution in its own right and that it is not a hospital or similar institution; the Appellant needs to succeed on all these issues.

6. Item 2 of Group 5 of Schedule 8 reads as follows:

"2. The supply in the course of the construction of -

(a) a building designed as a dwelling or number of dwellings or intended for use solely for a relevant residential purpose or a relevant charitable purpose; or

(b) any civil engineering work necessary for the development of a permanent park for residential caravans,

of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity."

Notes (4) and (16) are as follows:

(4) Use for a relevant residential purpose means use as -

(a) a home or other institution providing residential accommodation for children;

(b) a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder;

(c) a hospice;

(d) residential accommodation for students or school pupils;

(e) residential accommodation for members of any of the armed forces;

(f) a monastery, nunnery or similar establishment; or

(g) an institution which is the sole or main residence of at least 90 per cent of its residents,

except use as a hospital, prison or similar institution or an hotel, inn or similar establishment.

(16) For the purpose of this Group, the construction of a building does not include -

(a) the conversion, reconstruction or alteration of an existing building; or

(b) any enlargement of, or extension to, an existing building except to the extent the enlargement or extension creates an additional dwelling or dwellings; or

(c) subject to Note (17) below, the construction of an annexe to an existing building."

7. Both counsel agreed that the test under Note (16)(c) is concerned only with the physical character of the buildings rather than their intended or actual use. The issues under Note (4) on the other hand concern the use for which the building was intended. Logically the annexe issue comes first. Furthermore the evidence relevant to the Note (4) issues is wholly different. We find it convenient to consider the annexe issue under Note (16) before the Note (4) issues.

Agreed Facts

8. In April 2002 the parties agreed a statement of agreed facts which included the following:

"3. Oxleas NHS Trust formerly Bexley Community Health NHS Trust whose address is Pinewood House, Bexley Lane, Old Bexley, Kent and who is registered for VAT with effect from 1 April 1995 under registration number 654 9126 20.

4. Since 1985 there has been a medium secure unit on land owned by Oxleas NHS Trust. This was known as the Bracton Clinic and was a 15 bed building. There were also ancillary buildings on the land owned by Oxleas NHS Trust comprising a separate workshop, a separate administration block a large rehabilitation workshop and

training facility and a 15 bed secure unit known as Stansfield which was subsequently replaced by the Heath Unit. There was also a drug and alcohol rehabilitation unit called Ashdown and Elmsdean respectively. These were demolished after the Heath Unit was built.

5. It became clear that the number of beds provided was not sufficient to service the areas of Bexley, Greenwich, Lambeth, North Southwark and Lewisham with ever increasing reliance on the private sector.

An outline business case for development was submitted in October 1994 and approved in November 1994. On 6 February 1995 a full business case for a new development on the land owned by Oxleas NHS Trust was created.

6. The Scheme comprised of a five bed extension to the existing Bracton Clinic, a 15 bed challenging behaviour unit to replace the existing substandard accommodation, (being the Stansfield Unit) and with potential for a further 13 medium secure beds and complementary accommodation.

7. The Bracton scheme comprised the following elements:

- 5 bed extension to Bracton Clinic
- A 15 bed challenging behaviour unit
- Two 15 medium secure units with shared facilities
- New main entrance and reception area
- Administration, research and outpatient facilities
- Occupational therapy including workshop and library
- Activity centre including small indoor sports hall and multi gym
- All weather external sports pitch
- Centralised supporting facilities (catering, equipment and luggage stores)
- Space for engineering and plant
- Car parking and new road way

8. It was decided that the construction works should be done in stages.

9. Planning permission for the construction of Heath House and ancillary works had been granted by the Dartford Borough Council on 6 April 1995 and was granted for the erection of a detached single storey building to provide a medium secure unit together with associated facilities, Bracton Clinic and PH2.

10. The tender process for Heath House took place between 18 April and 30 May and Wallis was appointed on 13 June 1995. Construction work started on 27 June 1995 and the project was completed on 23 January 1996.

11. On 4 September 1995 Oxleas NHS Trust and Wallis Limited, South East Construction Division entered into a point contracts Tribunal for the standard form of building contract ("JCT") for the new build construction of a 15 bed challenging behaviour unit [and] associated external services for the price of £1,272,000.

12. For stage 3 works [of Phase 2] planning permission was granted by the Dartford Borough Council on 5 January 1996 for the erection of a detached building to provide a medium secure unit comprising administration, occupational therapy and activity sections together with improved access road and associated car parking.

13. The tendering process took place between 14 November and 26 December 1995. On 9 January 1996 [Norwest Holst] was appointed to undertake the stage 3 works.

14. By letter of confirmation of contract signed by [Norwest Holst] on 24 November 1995 and by Oxleas NHS Trust on 29 November 1995 [Norwest Holst] was appointed to carry out stages 3 and 4 of the Bracton Clinic Phase 2.

15. The JCT contract was signed between Oxleas NHS Trust and [Norwest Holst] for the build construction of a 30 bed medium secure unit, ancillary accommodation and associated external works landscaping to serve the phase 2 development for a price of £3,968,600.

16. The construction started on 23 January 1996 being completed on 19 November 1996. In summary the work on Phase 4 (a Gymnasium, therapies unit and linking corridors) commenced on 6 December 1996 being completed on 9 May 1997.

17. Wallis and [Norwest Holst] standard rated its supplies of construction services to the Trust.

18. By letter dated 13 November 1998 the Respondents rejected Wallis' contention that the supplies were properly to be zero-rated.

19. By letter dated 21 June 1999 the Respondent rejected [Norwest Holst's] contention that the supplies were zero-rated."

9. The only witness was John Richard Ensor, acting director of forensic services and prisons, Oxleas NHS Trust. He confirmed a written statement and gave oral evidence lasting a whole day. He was an excellent witness and we accept his evidence, which was mainly explanatory and appears from the submissions and our conclusions.

Sketch Plan

10. We attach to the decision a sketch plan which is roughly to scale. This shows, hatched and marked "Danson", the original Bracton clinic after the five bed extension and Heath, also hatched. The hatched parts are those in existence at 23 January 1996 when the works on Heath were completed. Work on Crofton, Burgess and the Administration units started on 23 January 1996. Work on the fourth stage, including the connecting corridors started on 6 December 1996. The sketch plan also shows the staff accommodation which was not affected; it is hatched.

11. The sketch plan does not show the Stansfield and Bramwell Units which were demolished after construction of Heath in order to make way for the Crofton,

Burgess and Administration units. Nor does it show the Team Base building which was linked by a long corridor to Danson and was demolished at stage 4 to make way for the gym; Danson was never physically linked to Heath. A Resource Centre was demolished to make way for the secure sports area.

12. On completion of its construction on 23 January 1996 Heath had no physical connection to any buildings. It had its own access, cooking facilities and mains utility supplies. The corridor linking Heath to the occupational therapy unit and through it to the administrative unit and via the gym and a further corridor to Bracton was not built until the occupational therapy unit was built in the final stage several months after Heath was completed.

Submissions on whether Heath House is an "annexe to an existing building"

13. Mr Mantle submitted that an annexe is a structure which is physically integrated with or adjoined to the building to which it is an annexe but has less physical integration than an extension or enlargement. He referred to the decision in *Macnamara v Commissioners of Customs and Excise* [1999] V&DR 171 at paragraphs 10 to 13 and 17. He said that there must be physical joining or integration since otherwise the form-based test laid down in *Cantrell v Customs and Excise Commissioners* [2000] STC 100 is not satisfied. In *Yeshurun Hebrew Congregation v Commissioners of Customs and Excise* (2000) Decision No.16487 it was said that an annexe is supplementary to the main building. Mr Mantle said that it is necessary to compare the physical characteristics of the original building before the works, here the original Danson building, with the characteristics of the buildings after the works were completed, see *Cantrell* at page 103. Those characteristics included the corridors and gym as well as Heath. Although the comparison had to be made at the time of supply, it is necessary to look at what was intended when the works ended. Although there were different contractors, the four stages were planned as a whole. It would be unreal to disregard the later stages. Note (17) shows that an annexe may be capable of functioning independently.

14. He said that on completion of the works as a whole Heath was joined by the corridors and gymnasium to Danson : this was sufficient physical integration for an annexe. Having regard to the similarities in appearance, layout and the way in which the buildings were physically equipped to function, Heath was an annexe within the test in *Cantrell* at paragraph 4, as were the other new structures. It is not, he submitted, necessary that the annexe should not be larger than the existing building; there is no limit to the size of an enlargement or an extension, nor is there to the size of an annexe, although size may be a factor. An annexe can be capable of functioning independently with a separate main access, otherwise Note (17) would be unnecessary. An annexe is less closely integrated than an enlargement or extension; the three are mutually exclusive in Note (16).

15. Mr Hitchmough said that the only building in the course of construction at the time when the supplies by the Appellant were made was Heath : that was the building to be compared with the original Danson building. There was no physical integration with Danson. The question was not whether Heath was an annexe to an annexe, the gymnasium; indeed as a matter of form the gymnasium was not an annexe.

16. He said that the reference to "equipped to function" in *Cantrell*, being limited to physical characteristics, covered fixtures and fittings but no more. Heath was completely self-contained and was equipped to function as a principal building. He

adopted the approach in *Yeshurun Hebrew Congregation* at paragraph 23; Heath House was not "a supplementary building, connected or associated with a main building, and fulfilling a subordinate role in relation to that building."

Conclusions on annexe issue

17. The starting point must be Note (16) which, subject to Note (17), excludes "the construction of an annexe to an existing building." from construction of a building. The construction of a building is relevant because unless a supply is "in the course of construction of" a building it cannot come within Item 2(a). The focus under Note (16) is on the building; other Notes govern its design or intended use, including Note (4).

18. The "existing building" within Note (16) is the building before the construction of the annexe. It is common ground in the present case that the relevant building was Danson as it was before the construction of Heath started; at that time Danson was not connected physically to any other building apart from the Team Building.

19. The proposition that Heath was an annexe to Danson rests on the proposition that the construction of Heath House by the Appellant was in the course of construction of a building consisting not only of Heath but also the corridors, occupational therapy unit and gymnasium connecting to Danson; such building would also consist of Crofton, Burgess and the Administration units. The building in question would have to include the entire complex connected to Danson by corridors after the completion of the phase. Furthermore if Heath is an annexe, then logically the entirety of the new work must be an annexe to Danson also.

20. We accept that the contractor does not have to be the same. It cannot be decisive that the building said to be annexed to an existing building is constructed by more than one contractor.

21. We do not accept however that Heath can be described or treated as forming part of a building which includes the corridors and gymnasium. Leaving aside the corridors, Heath is clearly a separate unit from the gymnasium. We consider such a description to be wholly unreal. Given the need under the statute for any annexe to be "an annexe to an existing building" in the singular, each construction constituting an annexe must in our judgment be a single unit.

22. In normal English an annexe will often be a separate building not joined in any way, for example a college annexe. However since the test is an objective physical test it must be physically close if it is not joined or adjoining. In *Macnamora* the Tribunal said at paragraph 13, "The term annexe connotes something that is adjoined but either not integrated with the existing building or of tenuous integration." Separate annexes may be separately joined to a building, each independently being an annexe. We do not however accept that a second annexe can be joined through the first.

23. Even if we had concluded that all the structures erected as part of the whole project fell to be viewed as a whole, having viewed the site, each of us from our differing professional backgrounds concluded that having regard to the appearance, layout and how the buildings were equipped to function, neither the new construction as a whole nor Heath House were an annexe to Danson. While the materials and style of buildings were similar, they did not look like an annexe and their layout did not give the impression that they are annexes to Danson. Nor did their physical equipment indicate that they are subsidiary to Danson.

Furthermore their size relative to Danson would cause an observer to think that the question was whether Danson is the annexe rather than the reverse. Heath is some distance away from Danson.

24. We have all concluded without any hesitation that the work by the Appellant was not a supply or supplies in the course of the construction of an annexe to Danson.

The Note (4) issues

25. We now turn to the Note (4) issues. It was common ground that Heath is the sole or main residence of at least 90 per cent of its residents. That being so, apart from the exception to Note (4), the question arises whether Note (4)(g) covers part of an institution or alternatively whether Heath is by itself an institution. If Heath is an institution or if Note (4)(g) covers part of an institution, the question arises whether Heath is a hospital or similar institution within the exception.

26. Since this is purely a matter of statutory interpretation, we set out first the submissions as to whether Note (4)(g) or indeed (4)(b) cover part of an institution or whether the use for which the building is intended must be use as an entire institution.

27. Mr Hitchmough submitted that the term "an institution" in Note (4)(g) includes part of an institution on the basis that the greater includes the lesser. He said that such an interpretation is consistent with the apparent policy of the legislation. He submitted that there is no reason as a matter of policy to exclude a building intended to function as part of an institution which is otherwise within Note (4). He said that if part of an institution is excluded from Note (4)(g), it is also excluded from (a), (b), (c) and (f).

28. He submitted that Note (5) is directed at the separate construction of a dormitory and dining hall; it did not advance the debate and undermined the reasoning in *Riverside School (Whasset) Ltd v Commissioners of Customs and Excise* [1995] V&DR 186, which was argued before Note (5) was introduced.

29. He said that Notes (10) and (12) could only achieve their purpose by referring to part of a building; there was thus a clear need to refer to part of a building in those Notes. There was no need to refer to part of an institution in Note (4).

30. Mr Mantle said that Note (4) did not cover part of an institution or a home: where the draftsman intended to cover part, he had done so expressly as with Notes (10), (12) and (13). He said that Note (5) covers the situation where there are a number of buildings, which are therefore not excluded by Note (16), and which although constructed at the same time would not individually fall within Note (4). Note (5) did not apply here because Danson was built well before the others.

31. He said that *Riverside School*, although decided on the law before the present Group 5 was substituted by the Value Added Tax (Construction of Buildings) Order 1995, was correctly decided and was consistent with his submissions.

32. Mr Hitchmough's alternative argument on Note (4)(g) was that Heath House was and is an institution in its own right. He said that it functions as an independent Challenging Behaviour Unit catering for residents with different

needs and demands to those admitted into other parts of the Bracton Centre. He said that it is a separate clinic. Most of the residents are admitted under section 3 of the Mental Health Act 1983. Although in two years six out of thirty residents were admitted following a court order under Part III of the Act, these were low risk persons because Heath was less secure than Burgess and Crofton. The regime is more relaxed with half the residents allowed to go out unescorted; those subject to Part III orders go out escorted. There are shared facilities, such as the gym, but this does not make the Bracton Centre a single institution. He said that to a large extent Heath has its own staff and is separate on an organisational basis; he submitted that there is no need for separate higher management. He accepted that Heath has no independent budget, but said that it is independently managed with its own Responsible Medical Officer. The files for residents are kept at Heath House and for the most part staff are not interchangeable.

33. Mr Mantle said that, adopting a common sense approach, Heath is not an institution in its own right but is merely part of the Bracton Centre. He said that Oxleas NHS Trust holds out the Bracton Centre as a single entity; he referred to the Bracton Centre Service Guide, which referred on page 1 to the "staff team". There are shared facilities in the Bracton Centre – the gymnasium, occupational therapy and administrative areas. There is a common main entrance in the Administration Building.

34. He said that Heath has no separate management structure although it has its own RMO. Mr Enser, the Service Manager, and the Lead Nurse cover all clinics; the next grade down cover two clinics. Staff are transferred to cover shortages.

35. He accepted that there are clear differences in that Heath is a low security unit whereas the others are medium, but said that in all four clinics there are people who need to be detained for medical treatment. Mr Enser had referred to the clinics as "wards".

Conclusions on Note (4)

36. Before considering whether the term "institution" in Note (4)(g) and (4)(b) embraces part of an institution, it is necessary to consider what the term "institution" means in Note (4). Although neither counsel said so expressly, both addressed us on the assumption that "institution" refers to an organisation, Bracton Centre in this case. However the Note is in our view confusingly worded, using loose terminology, and we do not consider this assumption to be correct.

37. There is no definition of "institution" in the Act. The New Shorter Oxford English Dictionary (1993) includes the following for "institution":

"7. A society or organisation, *esp.* one founded for charitable or social purposes and freq. providing residential care; the building used by such a society or organisation."

None of the other six meanings given approaches anywhere near to the sense in which the term is employed in Note (4).

38. In Note (4)(g) "institution" must be referring to a building: a society or organisation cannot be the main residence of its residents. In Note (4)(a) and (b) the term must also be referring to a building; the "use" is that of a building. In all those cases "institution" refers to buildings of a certain type, namely buildings

used by an organisation or a body; they could be described as "institutional buildings".

39. In the exception clause the words are "use as a hospital, prison or similar institution" and must again refer to the use of the building. The clause equates a hospital or prison with an institution. It must however refer to a hospital in the sense of a hospital building. A patient might ask the way to the local hospital. It is not used in the sense that a member of the staff might use when saying that he works for a hospital meaning the body which operates the hospital. In the context of Note (4) use as a "hospital" and "prison" must refer to use as a hospital building and a prison building and "similar institution" must refer to use as a similar institutional building. It has a similar flavour to the term "similar establishment" in the exception clause.

40. With those observations in mind, we return to the submission of Mr Hitchmough that the words "an institution which is the sole or main residence of at least 90 per cent of its residents" cover a building which forms part of an institution. On the basis of our analysis of the use of the word "institution", his submission is that it covers a building which forms part of the buildings used by an organisation or body, here the Bracton Centre. Mr Mantle's submission is in effect that the building must comprise the totality of the buildings used by the Bracton Centre or occupied by the Bracton Centre, being the organisation or institution.

41. Identical wording to that in Note (4) was considered by the Tribunal in *Riverside School (Whasset) Ltd v Commissioners of Customs and Excise* [1995] V&DR 186 in relation to the law before the 1995 Order. In that case classrooms were built for the appellant which carried on the business of a residential school for children suffering from mental disorder. The appellant argued that the classrooms were an integral part of the totality of the school and were within item 2(a). The Tribunal emphasised the words "use as" in the Note pointing out that the Act did not say "use for any one or more of the purposes of ..." or "use as, or as part of ..." At page 192 Mr Simpson said that the buildings,

"... are not 'intended for use solely as a home or institution ..' or '... as an institution ...' since they are intended for use solely as classrooms and for purposes associated with that use; they are thus intended to be used merely as part of a home or other institution and not as the home or institution itself."

He said that unless a home or institution is constructed as a whole it cannot come within item 2(a).

42. On first reading that reasoning appears valid. However it does not address the fact that on analysis the term "institution" must refer to a building used by an institution rather than to the body or organisation using it. The decision in *Riverside School* was correct since the words "providing residential accommodation" were clearly intended to refer to the institutional building in question which in that case was a classroom. However the contrast between part of an institution and an institution itself was in our view mistaken as also was the statement that the home or institution must be constructed as a whole in order to come within item 2(a).

43. We conclude that the word "institution" refers to a building used by a body or organisation rather than to the body or organisation itself. Heath House clearly is such a building. There is no need to consider whether "institution" includes part only of an institution. This makes it unnecessary to enter into an investigation as to whether Heath can properly be considered as an "institution" or organisation or body in its own right. On the evidence before us, however, we do not consider Heath to be an institution in its own right; it is certainly not a separate legal entity and on the evidence we would not regard it as a separate organisation except in the very loosest sense.

44. The draftsman has used the word "institution" in a way which confuses the word "institution" in its organisational sense with its use in the physical sense of the building used by an organisation. If contrary to our view it is not to be interpreted as referring not to an institutional building but to an institution in the organisation sense, we see no reason to exclude part of an organisation. Note (4)(d) and (e) clearly do not involve the new building constituting the entirety; there is no reason in logic why (b) and (g) should do so.

The exception to Note (4)

45. Both parties agreed that the words "similar institution" apply either to "hospital" or to "prison". Mr Mantle did not suggest that it is a prison or similar institution. This issue therefore concerns the words "hospital ... or similar institution."

46. The submissions again treated "institution" as referring to an organisation rather than to the building used by an organisation. Here however the difference is less important since "similar institution" must refer to the building in its functional sense being directed to its intended use.

47. Mr Hitchmough said that the exception for hospitals and similar institutions must not be construed so as to deprive any of the specific heads of Note (4) of any force. Hospital must mean something more than a hospice or an institution providing accommodation and personal care for persons suffering from mental disorder.

48. He endorsed the approach of the Tribunal (chairman, Mr De Voil) in *General Health Care Group Ltd v Commissioners of Customs and Excise* [2001] V&DR 323 based on identifying the characteristic badges of a hospital. He said that Heath does not provide a wide range of medical treatments and does not treat all forms of mental illness; treatment of itself is not enough, nor is the fact that all residents are on drugs, since the drugs are for alleviation rather than cure; the aim at Heath is care and rehabilitation. He said that diagnosis comes before admission to Heath; there is on-going assessment but that is not the same as diagnosis. He accepted that there are in-patient facilities in so far as residents are patients and that there is a high proportion of medical staff. He said that the average one to two year stay at Heath House contrasts with the normal short stay in an acute general or psychiatric hospital; he referred to the Commissioners' Manual on zero-rating which said that the purpose of the Note is to relieve buildings which are places of abode and tax short term stay buildings like hospitals, prisons and hotels. He said that typically a hospital aims to cure substantially if not totally : the aim at Heath is to mitigate the effects of mental illness, the treatment being palliative. He said that residents can personalise their rooms and put up posters : this is not typical of a hospital nor is the fact that they can smoke. Residents are encouraged to do their own domestic chores.

Nurses are not in uniform. He said that Heath does not have enough of the badges of a hospital to be a similar institution.

49. Mr Mantle said that if Note (4)(g) covers part of an institution, the exception must cover part also. He said that Bracton Centre and Heath, if it is a separate institution, are both similar to a hospital, if not a hospital. He said that hospital and prison are grouped together in the exception clause, but it is difficult to find a common characteristic apart from being community buildings or performing a public function. It would be odd to exclude an institution from being similar to a hospital, because of its similarity to a prison and vice versa.

50. He said that a hospital need not be a district general hospital but includes a maternity or specialist hospital; a hospital need not have a surgical capability, acute psychiatric hospitals do not. He accepted that qualified medical staff are important as is the treatment of illness but said that there are dangers in the badges approach.

51. He said that most admissions to the Bracton Centre and a sixth of Heath admissions in the last two years were by hospital orders under section 37 of the Mental Health Act 1983 by which following conviction a court ordered detention in a specified hospital. The treatment of the Bracton Centre clinics including Heath as hospitals suggests that at the least they are similar to hospitals. The purpose of such orders is to provide a secure environment in which people can be detained to receive medical treatment.

52. He said that the hierarchy in Bracton and Heath is similar to a hospital, with full-time appointments. Heath has a special Registrar and 16.8 nurses. One to one therapy by psychologists is indicative of a hospital as is the use of the word "patients" on a list in Heath House.

53. He said that the fact that a complete cure for patients is not possible does not prevent Heath being a hospital. He accepted that the length of stay is longer than a hospital but said that the issue is similarity to a hospital. He accepted that the exception must not deprive Note (4)(c) covering hospices of effect.

54. Mr Mantle said that he only needed to rely on similarity to a prison if the Commissioners' argument that part of an institution is not covered by Note (4)(b) and (g) is wrong. Heath has some persons detained under hospital orders : loss of liberty by detention is characteristic of a prison as are the security aspects.

55. Mr Hitchmough in reply said that the fact of medical care in *General Heathcare* did not exclude Grafton Manor from Note (4)(b). Medical treatment is inherent in (4)(b) and (c). It is not right to compare the institution in issue with specific types of hospital. He said that in order to give "hospice" meaning, it is necessary to look for elements of hospice which prevents its exclusion as being a hospital or similar institution; he identified the length of stay and the aim as being palliative rather than curative. These distinguishing features of a hospice were present with Heath: it follows that Heath is not within the exception. Heath has the other feature that residents cannot discharge themselves.

Conclusions as to exception clause

56. Mr Hitchmough's submissions in reply have some force. They do not however address the provisions of the Mental Health Act 1983 in particular as to hospital orders. Section 37 empowers courts to make hospital orders in relation to

persons who have been convicted of certain offences. It is a condition of making such an order that,

"the mental disorder ... is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and, in the case of psychopathic disorder or mental impairment, that such impairment, that such treatment is likely to alleviate or prevent a deterioration of his condition."

Under section 55 a mental nursing home registered under the Registered Homes Act 1984 is treated as a hospital. There was no evidence that Bracton or Heath are registered under that Act; being operated by Oxleas NHS Trust, it seems most unlikely that they are. It follows that they are a hospital or hospitals for the Mental Health Act because they come within the definition of hospital in the National Health Service Act 1977. This defines hospital as meaning "(a) any institution for the reception and treatment of persons suffering from illness ... and includes clinics ... maintained in connection with any such ... institution."

57. Bracton and Heath must fall within the definition of hospital since otherwise hospital orders for detention there could not be made. There being no definition of hospital in the VAT Act, it seems to us that it would be anomalous to treat what is a hospital under the National Health Act and the Mental Health Act as not a hospital under the VAT Act. While the treatment under those other Acts is not conclusive, we accept Mr Mantle's submission that it is highly significant. It would require a powerful reason to show that the VAT Act has a narrower meaning. No such reason has been shown. Indeed our impression having heard the evidence and visited the site is that Heath and the Bracton Centre are at the least similar to a hospital.

58. The appeal is therefore dismissed since the exclusion clause in Note (4) applies.

Non-compliance with direction

59. At the outset of the hearing Mr Hitchmough applied for a direction that the appeal should be allowed under Rule 19(4) by reason of the failure of the Commissioners to comply with a direction to serve their skeleton argument five clear working days before the hearing date. The direction was given by consent on 28 March 2001. The skeleton argument of 23 pages was served at 1824 hrs on Thursday November 21, only one clear working day before the hearing. The direction provided for sequential service of skeleton arguments. The Appellant's was served on 8 November 2001. The direction provided for a response by the Appellant; this was rendered impossible in the time specified. The Appellant was not told that the Commissioners' skeleton would be late and there was no application for an extension.

60. Mr Hitchmough asked the Tribunal to exercise its discretion to allow the appeal for failure to comply with the direction as in *Young v Commissioners of Customs and Excise* (1992) affirmed on appeal by the Court of Session [1993] STC 394 and *Costello v Commissioners of Customs and Excise* [2000] Decision No.16680. He said that in this case there was a serious and significant delay.

61. Mr Mantle apologised to the Tribunal and the Appellant. He said that the direction was overlooked when he was instructed for the hearing. Although present at the directions hearing, he had not remembered the details. On receipt

of the skeleton he had inquired of the Solicitors' Office as to whether there was a direction and was told there was not. He had only learned of the direction on Tuesday November 19 after a conference. Because of the complexity of the appeal, the skeleton was extensive and he considered it necessary that it be approved before it was lodged; that only took half a day.

62. He said that unlike Young and Costello this was not a case where the Commissioners had not served the Statement of Case, the basic pleading; it was not a case where Customs had sought and been given extra time but had failed to comply with the extended time limit. It was a case of inadvertence and had not delayed the hearing. The skeleton did not contain any wholly new point, but was an amplification of existing arguments. The effect was solely to delay the Appellant's knowledge of the detailed argument. The effect of allowing the application would be to allow the appeal without the merits being considered.

63. Mr Mantle said that the fact that the burden of any VAT would fall on Oxleas NHS Trust was not relevant; the contractual position between the Appellant and the trust was not material. If the appeal was allowed, the Commissioners would suffer the loss on behalf of the Treasury. The Tribunal had power to award costs. If necessary, the Appellant could be given more time before the hearing on the next day or before the reply. He said that he had no instructions as to why the Solicitors' Office had not communicated with the Tribunal on the Tuesday.

64. Mr Hitchmough said that penalty under Schedule 12, paragraph 10 would not benefit the Appellant, the Tribunal or the Trust. It would merely go from one government pocket to another. It was unclear why no application had been made once it was released that the skeleton was late. He said that the reason for frequent non-compliance with directions is that the Tribunal does not take a strong line. The Commissioners were professionally represented, it was not good enough that the direction had been overlooked. The explanation here was no better than that in Young. There was no actual delay in Young. Any direction allowing an appeal means that the merits are not considered. The present case does not involve principle but was a matter of impression on the facts. If the appeal was allowed there would be no real loss to the Exchequer, if it failed there was a loss to the Appellant at the Trust.

65. After a brief discussion, the Tribunal decided not to dismiss the appeal under Rule 19(4), but to consider a penalty when the reason for the oversight was explained and to reserve the costs aspect.

66. On the third day of the hearing Mr Khan of the Solicitor's Office said that he had told Mr Mantle's clerk on 15 November that there was no express direction. Later Ernst & Young told Customs that it had to be in 5 days before. He should have made an application to the Tribunal after the conference but had another conference when he got back.

67. Mr Mantle did not suggest that this was a minor breach, nor was it. Sequential skeletons were directed together with a site visit because of the complexity of the issues, the legislation being opaque and the facts involving considerable detail. The failure to serve the skeleton on time meant that it could not be sent to the members of the Tribunal to read before the site visit. We did not allow the appeal because we considered that there was inconvenience rather than real prejudice. There was no history of non-compliance in this case, although the Commissioners did fail to reply to the request for dates to be avoided for the hearing. It is important that in the future the Commissioners ensure that systems are put in place to ensure that Directions are not overlooked.

68. Mr Hitchmough was fully entitled to apply for the appeal to be allowed by reason of the non-compliance although he did not succeed. The hearing of the application took up the morning of the site visit. We allow the Appellant the costs in respect of that. We estimate that one-third of the hearing time was taken up on the issue on which the Commissioners ultimately succeeded, and two-thirds on the issues on which the Appellant succeeded. We award the Appellant 40 per cent of the costs of the appeal to be taxed on the standard basis if not agreed.

THEODORE WALLACE

CHAIRMAN

RELEASED:

LON/98/1516