

LONDON TRIBUNAL CENTRE

ST. DUNSTAN'S

Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE

Respondents

**Tribunal: A EDWARD SADLER
R S JOHNSON**

Sitting in public in London 10 and 11 October 2002

Mr Keith Warner of Howarth Clark Whitehill, Chartered Accountants, for the Appellant

Mr Hugh McKay of Counsel, instructed by the Solicitor for the Customs & Excise,
for the Respondents

DECISION

The appeal

1. St. Dunstan's appeals against a decision of the Commissioners given in their letter dated 23 December 1999 that St. Dunstan's is not entitled to issue a certificate to the relevant contractors that supplies made to St. Dunstan's comprising building works are zero-rated supplies for VAT purposes.
2. In summary, these are the issues raised in this appeal: St. Dunstan's is the well-known charity which provides a range of care services to ex-servicemen and women who have been blinded in the service of their country (colloquially known, and conveniently referred to here, as "St. Dunstaners"). It owns and occupies for its charitable purposes substantial premises known as Ian Fraser House at Ovingdean near Brighton which it operates as a residential care, respite and rehabilitation centre. Ian Fraser House has Grade II listing under the relevant listed building legislation. Building works were carried out to part of Ian Fraser House in 2000, and St. Dunstan's claims that the supplies made to it in relation to those building works should be zero-rated for VAT purposes on the grounds that such supplies were made in the course of an approved alteration of a protected building within Items 2 and 3 of Group 6 of Schedule 8 to The Value Added Tax Act 1994 ("VATA").
3. The Commissioners claim that the relevant supplies fall to be standard-rated for VAT purposes. They argue that the relevant supplies do not come within the scope of Items 2 and 3 of Group 6. They argue first that Ian Fraser House does not come within the definition of "protected building" since although the premises are a listed building, the use which St. Dunstan's makes of the premises fails to satisfy the stringent requirements set out in that definition. They argue secondly that the building works are not works of alteration, or that even if they are, some at least of the building works comprise works of repair or maintenance, or some at least of the alterations are incidental alterations to the fabric of the building resulting from carrying out repairs or maintenance work, and to that extent the building, works do not come within the definition of "approved alteration".
4. The value of the supplies of building works made to St. Dunstan's was £1,241,094, and the amount of VAT for which it will be liable if its appeal fails is £217,191.

The legislation

5. This appeal is concerned solely with the issue of whether certain supplies of goods and services made to St. Dunstan's were zero-rated supplies for VAT purposes: if they were not, it is agreed that St. Dunstan's must pay VAT at the standard rate on those supplies.

6. Section 30 VATA 94 provides the legal framework for the zero-rating of certain supplies (so that supplies which are within the zero-rated categories are to be treated as taxable supplies, but no VAT is to be charged on such supplies), and goods or services are to be zero-rated if they are of a description for the time being specified in Schedule 8 to VATA 94. For the purposes of this appeal the relevant part of Schedule 8 is Group 6, and the material provisions of Group 6 are as follows:

Group 6 – Protected Buildings Item No

... 2 *The supply, in the course of an approved alteration of a protected building, of any services other than the services of an architect, surveyor or any person acting as consultant or in a supervisory capacity.*

3 *The supply of building materials to a person to whom the supplier is supplying services within item 2 of this Group which include the incorporation of the materials into the building (or its site) in question.*

Notes

(1) *"Protected building" means a building which is designed to remain as or become a dwelling or a number of dwellings (as defined in Note (2) below) or is intended for use solely for a relevant residential purpose or a relevant charitable purpose after the reconstruction or alteration and which in either case, is –*

(a) *a listed building, within the meaning of*
(i) *the Planning (Listed Buildings and Conservation Areas) Act 1990....*

...

(3) *Notes (1), (4), (6), (12) to (14) and (22) to (24) of Group S apply in relation to this Group as they apply in relation to that Group but subject to any appropriate modifications.*

...

(6) *"Approved alteration " means –*

...

(c) *... works of alteration which may not... be carried out unless authorised under, or under any provision of*
(i) *Part I of the Planning (Listed Buildings and Conservation Areas) Act 1990...*

and for which ... consent has been obtained under any provision of that Part

but does not include any works of repair or maintenance, or any incidental alteration to the fabric of a building which results from the carrying out of repairs, or maintenance work.

...

(9) *Where a service is supplied in part in relation to an approved alteration of a building, and in part for other purposes, an apportionment may be made to determine the extent to which the supply is to be treated as falling within item 2....*

It will be seen that Note (3) of Group 6 imports into Group 6 certain Notes of Group 5 (which deals with the zero-rating of certain supplies relating to the construction of

buildings). Those Notes of Group 5 which are material to this appeal are the following:

Group 5 – Construction of Buildings, etc

...

Notes

...

- (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 for use as a hospital, prison or similar institution or an hotel, inn or similar establishment.

...

- (6) Use for a relevant charitable purpose means use by a charity in either or both of the following ways, namely –
- (a) otherwise than in the course or furtherance of a business;
 - (b) as a village hall or similarly in providing social or recreational facilities for a local community.

...

- (12) Where all or part of a building is intended for use solely for a relevant residential purpose or a relevant charitable purpose –
- (a) a supply relating to the building (or any part of it) shall not be taken for the purposes of items 2 and 4 as relating to a building intended for such use unless it is made to a person who intends to use the building (or part) for such a purpose; and
 - (b) a grant or other supply relating to the building (or any part of it) shall not be taken as relating to a building intended for such use unless before it is made the person to whom it is made has given to the person making it a certificate in such form as may be specified in a notice published by the Commissioners stating that the grant or other supply (or a specified part of it) so relates.

7. In applying these legislative provisions, the parties are agreed that Ian Fraser House where the building works were carried out was at the relevant time a listed building within the Planning (Listed Buildings and Conservation Areas) Act 1990 (see Note (1)(a) of Group 6), so that this element of the definition of "protected building" is satisfied. They are also agreed that the building works in question could not be carried out without consent under that legislation and that the necessary consent was obtained (see Note (6)(c) of Group 6), so that this element of the definition of "approved alteration" is satisfied.

8. The scheme of the legislation as it applies to the circumstances of the appeal by St. Dunstan's can be summarised as follows:
- (1) To establish that there is a zero-rated supply, the goods or services must be supplied in the course of an "approved alteration" of a "protected building": Items 2 and 3 of Group 6;
 - (2) It is necessary first to establish whether the building is a "protected building", and to be so it must have appropriate listed building status (which is agreed in this case), and it must also be intended for use for a specified purpose: Note (1) of Group 6;
 - (3) Thus the building must be "intended for use solely for a relevant residential purpose or for a relevant charitable purpose" after the alteration: Note (1) of Group 6;
 - (4) To satisfy the test of use for a "relevant residential purpose", the building must be used as "a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of ...disablement..." or as "an institution which is the sole or main residence of at least 90 per cent of its residents" (but at the hearing St. Dunstan's agreed that it could not satisfy this "90 per cent" test, so that its case in relation to residential purpose rests on the "residential accommodation with personal care" test only): Note (4)(b) and (g) of Group 5, imported into Group 6;
 - (5) But, even if the use of the building satisfies the "residential accommodation with personal care" test, it will nevertheless fail to qualify as a "relevant residential purpose" if the building is used "as a hospital, prison or similar institution or an hotel, inn or similar establishment": proviso to Note (4) of Group 5;
 - (6) To satisfy the separate test of use for a "relevant charitable purpose", the building must be used by a charity "otherwise than in the course or furtherance of a business": Note (6)(a) of Group 5, imported into Group 6;
 - (7) The supply of goods or services relating to the building must be made to the person who intends to use the building for a "relevant residential purpose" or a "relevant charitable purpose": Note (12) of Group 5, imported into Group 6;
 - (8) If it can be shown that the building is "intended for use solely for a relevant residential purpose or for a relevant charitable purpose" and is therefore a "protected building", the second question is whether the building works comprise an "approved alteration" within the definition set out in Note (6) of Group 6;

- (9) To be an "approved alteration" the building works must require (and must have obtained) appropriate listed building consent (which is agreed in this case);
 - (10) Additionally, the building works must be "works of alteration", but excluding any "works of repair or maintenance", and excluding also "any incidental alteration to the fabric of a building which results from the carrying out of repairs, or maintenance work": Note (6) of Group 6.
9. At some risk of over-simplifying the arguments put to us, and which are set out at length below, it is a reasonable summary of the dispute between the parties to say that the Commissioners argue that St. Dunstan's fails to establish that Ian Fraser House is a "protected building" because the premises are not intended for use "solely for a relevant residential purpose", nor are they intended for use "solely for... a relevant charitable purpose"; Whilst St. Dunstan's argues that all use it makes of Ian Fraser House satisfies either the "relevant residential purpose" test or the "relevant charitable purpose" test and the "protected building" definition is thereby satisfied. If Ian Fraser House is a "protected building", the Commissioners argue that the works are works of repair, not alteration, and that even if the building works are works of alteration, some at least of those works fail to qualify as an "approved alteration" since they are works of repair or incidental alteration resulting from carrying out repairs; whilst St. Dunstan's argues that all the building works are works of alteration and none are disqualified on grounds that they comprise works of repair or maintenance.

The evidence and the findings of fact

10. There was no statement of agreed facts by the parties. Oral evidence was given at the hearing on behalf of St. Dunstan's by two witnesses, both employees of the charity. There were also produced to us by St. Dunstan's documents relating to the "listed building" status of the building works; the nature and scope of the building works (including plans showing the changes made by the building works and photographs of the premises before and after the building works were carried out); the annual report and financial statements of the Council of St. Dunstan's for the year ended 31 March 1997; brochures relating to the rehabilitation and training activities of St. Dunstan's and also the facilities available to St. Dunstaners at Ian Fraser House; the current scale of charges for residents together with the costs per resident of running Ian Fraser House; various pro forma and administrative documents relating to admission to the care and residential facilities provided by St. Dunstan's at Ian Fraser House; and the use of facilities by external organisations. No evidence was given on behalf of the Commissioners.
11. The witnesses appearing for St. Dunstan's were entirely credible, and we accept their evidence in full. In so far as we were referred to the documents produced to us, the Commissioners did not seek to challenge their veracity. Our findings of fact are derived from the evidence of the witnesses and the documents produced to us.

12. We heard first the evidence of Miss Susan Harrison, who is currently the Director of Professional Services at St. Dunstan's, for whom she has worked for five and a half years. Prior to her current position (and as at the time when the building works were carried out) she was general manager of Ian Fraser House at Ovingdean, the care and rehabilitation premises which are the subject of this appeal. Her evidence dealt largely with the nature and scope of the facilities at Ian Fraser House and the way in which St. Dunstan's uses Ian Fraser House for the benefit of the St. Dunstaners: in the context of the applicable legislation, her evidence largely related to the "protected building" issue in dispute. We heard next the evidence of Mr Michael Hordell, who for the last thirteen years has been the Facilities Manager at St. Dunstan's, with responsibility for the charity's major premises, including Ian Fraser House. Mr Hordell was closely involved with all stages of the building works which are the subject of this appeal, and his evidence dealt with the nature and scope of those building works: in the context of the applicable legislation, his evidence related to the "approved alteration" issue in dispute.
13. We find the following to be the facts relevant to this appeal:
 - (1) St. Dunstan's is a registered charity whose objects, broadly stated, are to provide lifelong care for blind ex-servicemen and women. In pursuit of those objects St. Dunstan's cares for St. Dunstaners by providing for them a range of services, support and facilities, including rehabilitation following blindness; training for employment; respite care (for St. Dunstaners and also their carers); nursing care; and residential care.
 - (2) St. Dunstan's owns and occupies Ian Fraser House for the purpose of carrying out its charitable objects.
 - (3) Seven types of care are provided by St. Dunstan's at Ian Fraser House: rehabilitation and training; long-term nursing care; respite nursing care; long-term residential care; respite residential care; respite holidays; and facilities for daily visitors. All types of care, except for that provided to daily visitors, require some element of accommodation provided to St. Dunstaners (and in some instances their carers or spouses) at Ian Fraser House.
 - (4) The building works which are the subject of this appeal were carried out to the Ansell Wing of Ian Fraser House. Ian Fraser House comprises a large single building and the Ansell Wing is an integral part of that single building. The Ansell Wing houses a range of rooms and facilities which are available for use by all St. Dunstaners (both residents and day visitors) for recreation, training and rehabilitation. The facilities include a swimming pool and gym, a sports hall, a "talking books" and video library, a braille room, an IT centre, assessment and physiotherapy facilities, a craft workshop, lounges and a ballroom. No residential accommodation (in the sense of rooms with beds) is provided in the Ansell Wing – that is provided in other parts of Ian Fraser House.

- (5) There are 88 rooms available to St. Dunstaners at Ian Fraser House providing residential accommodation for up to 107 persons. The normal arrangement is for single occupancy of these rooms, but if a St. Dunstaner is staying at Ian Fraser House with his or her spouse or carer, there may be double occupancy of rooms.
- (6) All of the rooms are potentially available for St. Dunstaners requiring long-term residential or nursing care, but on average each week there will be 50 St. Dunstaners who are long-term residents (about 22 of whom will require nursing care) and 8 St. Dunstaners who are short-term residents who are there for training and rehabilitation; rooms are also available for those who visit for short-term respite care and respite holidays. The average occupancy rate for the residential accommodation is 84 per cent. On average there are 10 St. Dunstaners visiting and using the facilities as day visitors each day and for whom no residential accommodation is provided at Ian Fraser House.
- (7) All of the residents require special care appropriate to their visual impairment, and all the staff (including catering and housekeeping staff, as well as specialist staff) are trained for looking after the blind. In addition, some of the residents, by reason of infirmity, old age, or disablement or brain damage which they suffer in addition to their blindness, require nursing care. Ian Fraser House is fitted out with special aids to assist St. Dunstaners in their use of and movement around the building, including braille signage, textured walls, special guidance buttons on handrails and colour contrasts for the partially-sighted. These features are designed to give the maximum independence to St. Dunstaners, and are especially useful to short-term residents, who would find it difficult to cope in a normal residential home or hotel.
- (8) Those who visit for rehabilitation and training are regarded as short-term visitors. The normal pattern is that those in need of rehabilitation (perhaps following recent blindness) will visit for a 5 day period when they receive training in basic living skills and an assessment of future training requirements. They will then return for appropriate training, and will stay for anything between one week and a year, depending upon the type of training and the progress they make.
- (9) The second category of short-term visitors is those who come for respite care and respite holidays. Those coming for respite care may be St. Dunstaners who cannot, for a short period, be looked after in their own homes, for example because their carer or spouse is taking a holiday or is ill, or because building work is being carried out to their home. Their stay will depend upon their individual circumstances, varying from a few days to several weeks. Those coming for respite holidays will come as a break from home, and to use the facilities available at Ian Fraser House. Some belong to sports or other "clubs" run by St. Dunstan's, and will visit as members of a "club" to share with others the sport and other facilities provided. If they are

independent they may come alone, but they may also come with their spouse or carer. The purpose of their visit is essentially recreational, and they visit Ian Fraser House because of its facilities, its familiarity, its features and special aids designed to assist the blind, and the camaraderie of fellow St. Dunstaners.

- (10) Finally, there are the day visitors. A significant community of St. Dunstaners has grown up in the Brighton area as people have moved there to be near the facilities offered by St. Dunstan's. The day visitors largely come from this community. They will live in their own homes, and will visit on the basis of a timetable of visits arranged with a welfare officer, usually for half a day at a time. The purpose of their visits is to enjoy the full range of the facilities available at Ian Fraser House, and to socialise with fellow St. Dunstaners.
- (11) St. Dunstan's makes charges for some, but not all, of the accommodation, care and facilities which it offers, but in all cases its charges fall well short of the costs of providing those services. The shortfall is met by St. Dunstan's out of its own funds. We were given evidence as to the scale of charges as well as the costs applicable as from 10 April 2002, but we are to assume that comparable (but no doubt proportionately lower) charges and costs will have applied in previous years. For a resident (including one who has come for short-term respite care) who requires nursing care, the actual weekly cost is £1,188.63, and the weekly charge to the resident is £242.00; for a resident who does not require nursing care, the weekly cost is £961.22, and the weekly charge to the resident is £149.00; for those who visit Ian Fraser House for holidays (that is, for recreational purposes), the cost is £830.54 and the charge £142.00. Daily charges are pro rated. St. Dunstaners are required to pay these charges themselves, but in some cases all or part of the charges will be met by social services agencies.
- (12) No charges are made by St. Dunstan's to those who visit for the purposes of rehabilitation and training – the full cost (calculated at £1,438.21 per week) is met by St. Dunstan's. Similarly, no charge is made to day visitors, except for any meals taken (and the prices of meals are subsidised by St. Dunstan's).
- (13) The financial statements of St. Dunstan's for the year ended 31 March 1997 show the upkeep and refurbishment of Ian Fraser House as costing £3,667,000 for that year, whilst the amount received by way of accommodation charges was £377,000.
- (14) St. Dunstan's has made certain of its facilities in the Ansell Wing of Ian Fraser House available to a number of external organisations unconnected with its charitable objects. In the period 12 September 1999 to 26 May 2000 (when the building works began) the ballroom and the winter garden room were used for training courses and other functions by, amongst others, the Brighton Police, American Express, the Crown Agents and the local branch of the Marie Curie charity. In

all during this period approximately 40 functions of this kind took place. Some were regular weekly evening or part-day events, and some were two and a half day events. None of the activities undertaken at these functions at Ian Fraser House by these organisations related to, or benefited, St. Dunstan's or its work, although some of the organisations had other connections with St. Dunstan's or provided support in other ways to the charity. St. Dunstan's did not "market" these facilities, and the requests to use the facilities from these organisations came from existing connections with St. Dunstan's. St. Dunstan's has not charged a letting or other fee for making these facilities available, but it has requested, and has received, donations. It has been the organisations, and not St. Dunstan's, which have set the level of the donations. Most of the organisations have required St. Dunstan's to issue an invoice for the donations made presumably for their own accounting purposes. For this period the donations totalled approximately £6,750.00. St. Dunstan's did not budget for any income from this source, and in its accounts it has treated the income as donations. Catering facilities for organisations using its premises for functions such as these were provided by an outside catering company, and not by St. Dunstan's.

- (15) The building works carried out to the Ansell Wing followed from a regular building survey which revealed that the part of the roof over the swimming pool was showing wear by deflection of the roof planking and was letting in water. The defective area required repair. It covered 35 per cent of the swimming pool roof area. The roof of the Ansell Wing was constructed in the 1930s: it was a flat roof constructed of lightweight concrete planks reinforced with steel. The roof area over the swimming pool comprises 35.5 per cent of the total roof area of the Ansell Wing (so that the defective area requiring repair or replacement was approximately 12.5 per cent of the total roof area).
- (16) It was decided to re-roof the whole of the Ansell Wing with a pitched roof, rather than simply repair the defective part of the roof over the swimming pool. It was decided to re-roof the entire Ansell Wing because it was anticipated that the remaining part of the roof, although shown as sound in the survey (and having an expected life of a further 5 to 10 years), would eventually deteriorate in the same way. It was decided (consistent with the policy adopted by St. Dunstan's in respect of other properties and other parts of Ian Fraser House to replace flat roofs with pitched roofs) to re-roof with a pitched roof because a pitched roof drains off water and is likely to last longer and require less maintenance and repair than a flat roof, where water may stand. The new roof was made of colour coated seamless aluminium insulated cladding sheets supported on steel trusses.
- (17) In order to reduce the visual impact of the new roof it was necessary to use two low pitched roofs (rather than a single, higher pitched, roof) to span the total area. The height of the pitch of the new roof is 2ft 6ins, and the pitched roof required a new roofing and drainage system

(gulleys, gutterings, drains and the like) and also a new secondary structural support arrangement. In addition, in order to obtain listed building consent for the works to the roof, a new parapet was built around the roof to a height of at least 2ft 6ins to conceal the pitched roof.

(18) It was decided to take the occasion of re-roofing the Ansell Wing to carry out other building works to enhance and add to the structure and to the facilities housed there. The following were the main works undertaken:

- (a) extension and internal changes (requiring reconfiguration of internal walls, the construction of some new internal walls and realignment of some external walls to create additional space) to add a gym, a resource room, and to extend existing, information technology and physiotherapy facilities;
- (b) a new electrical supply and fire alarm system for the Ansell Wing;
- (c) a heat recovery system for the swimming pool area to control temperature and humidity (this was a new feature, not a replacement of an existing facility);
- (d) new glass curtain walling around part of the swimming pool area and part of the office/resources area (replacing, but on a different alignment, an existing glass wall) with special high performance thermal qualities to reduce heat loss. This walling was built outside the main steel and concrete frame of the building and therefore required a new secondary support structure.

(19) No evidence was adduced as to the costs of the different parts of the building works.

St. Dunstan's case

- 14. Mr. Warner argued first for St. Dunstan's that Ian Fraser House comprises a "protected building" within Item 2 of Group 6. He argued that the building is intended for use either for a relevant residential purpose or for a charitable purpose as those terms are defined for these purposes – there is no use of the building for any purpose outside these two categories.
- 15. He argued that the primary purpose of Ian Fraser House is to provide residential and nursing care for long-term residents, which is clearly a relevant residential purpose within Note (4)(b) of Group 5 (imported into Group 6): "a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of ...disablement...." All of the rooms are available for this use, and a majority of the rooms are in fact used for this purpose.

16. Some of the rooms are used by St. Dunstaners who visit, as residents, for training and rehabilitation. In their case Mr. Warner argued that St. Dunstan's is either providing residential accommodation with personal care within Note (4)(b) (since all those visiting for training and rehabilitation are disabled by visual impairment and to varying degrees require personal care as a result), or is providing residential accommodation for students within Note (4)(d), since training (whether in mobility and living skills or in some kind of vocational skills) is the essential factor for such residents, who could therefore fairly be regarded as students. Alternatively, in the case of such residents, Mr. Warner argued that since no charge is made to them by St. Dunstan's, the use of Ian Fraser House in this case is use for a relevant charitable purpose within Note (6) of Group 5 (also imported into Group 6), namely "use by a charity...otherwise than in the course or furtherance of a business...."
17. For the third category of resident, those who visit on holiday or short-term respite care, since all will require some element of personal care whilst at Ian Fraser House (even if they visit with their spouse or carer), use of the premises in their case satisfies the relevant residential purpose test of Note (4)(b). Alternatively, and notwithstanding that some payment is made by such visitors for their stay, Mr. Warner argued that this use also comprised use for a relevant charitable purpose within Note (6)(a). (Mr. Warner's submissions as to the non-business nature of these arrangements are referred to below.)
18. It is accepted by St. Dunstan's that the use of Ian Fraser House by day visitors cannot comprise use for a relevant residential purpose, since in such cases no residential accommodation is provided. Instead, it is submitted that use by day visitors, all of whom are St. Dunstaners, is use for a relevant charitable purpose within Note (6)(a). No charge is made to day visitors for use of the facilities at Ian Fraser House, so no question arises as to whether in this case the use of the building is in the course of a business.
19. Therefore, and leaving aside for the moment the question of the use made by external organisations of some of the facilities at Ian Fraser House, St. Dunstan's contends that all use satisfies either the relevant residential purpose test or the relevant charitable purpose test. Mr. Warner advanced the wider proposition that even if the relevant residential purpose test is not satisfied, the entire use of Ian Fraser House satisfies the relevant charitable purpose test within Note (6)(a). He accepted that in most cases (but not all) a charge is made for the accommodation and care provided so that in those cases at least it might be said that there was use by the charity in the course of a business. However, he pointed to a published concession made by the Commissioners in relation to exemption from VAT for supplies made by a charity of welfare services (that exemption is available by virtue of Item 9 of Group 7 of Schedule 9 VATA – its terms are not relevant to this appeal). By that concession, where a charity applies a deliberate policy of subsidising the cost of welfare supplies made to its beneficiaries by at least 15 per cent of that cost, such supplies are to be regarded as a non-business activity. Mr. Warner submitted that this concession should be applied to Note (6)(a) of Group 5 in the following way: since all the charges made by St. Dunstan's for residential and nursing care are subsidised well beyond 15 per cent of the cost of such

supplies (and some are subsidised to the extent of 100 per cent – i.e. there is no charge), St. Dunstan's is engaged in a non-business activity in respect of all the use it makes of Ian Fraser House, and therefore the entire use is use by a charity "otherwise than in the course or furtherance of a business".

20. As for the use of Ian Fraser House by external organisations, Mr. Warner submitted that this should not be seen as a commercial hiring of part of the premises. No fee was stipulated by St. Dunstan's as consideration for the use of the rooms and facilities in such cases. A donation was offered, and in some instances St. Dunstan's agreed to invoice the organisation for that donation, but from St. Dunstan's perspective, as evidenced by the way it accounted for such sums, the amounts received were donations. St. Dunstan's raised awareness of its work by making the premises available in this way in some cases leading to an involvement of the organisation with the work of the charity. Furthermore, it was argued, even if this use of the premises was not strictly use "otherwise than in the course or furtherance of a business", St. Dunstan's should have the benefit of a concession published in Notice 708 (and re-stated with effect from 1 June 2000 as an Extra Statutory Concession, ESC 3.29). This concession allows the "relevant charitable purpose" use test of Note (6)(a) to be applied notwithstanding *de minimis* use of premises by a charity for business purposes: thus the non-qualifying use of a building can be ignored if the entire building is used for a qualifying use (i.e. use for a relevant charitable purpose) for more than 90 per cent of the total time the building is available for use (the "90 per cent test" can be applied in different alternative ways, for example by reference to floor space or the total number of people using the building).
21. Finally, in connection with the "protected building" definition, Mr. Warner referred to the letter of 23 December 1999 in which the Commissioners had refused zero-rating for the works. It appeared from that letter that the Commissioners were arguing that since the works had been carried out to the Ansell Wing of Ian Fraser House; where there is no actual residential accommodation (that is, rooms with beds), there could be no use of the building for a relevant residential purpose. Mr. Warner argued that where there is a single building (as in the present case) it is necessary to look at the use of that building as a whole, and not at its component parts, even if the works are carried out to a specific part of the building. The facilities in the Ansell Wing are provided for, and as part of the care available to, the St. Dunstaners who reside at Ian Fraser House and as a means whereby the charity carries out its purposes. He cited *C & E Commissioners v Arib* [1995] STC 490 in support of the argument that for these purposes it is necessary to view the building as a single entity. We should note here that at the hearing the Commissioners conceded that they were no longer pursuing the point that the works failed to qualify for zero-rating on the grounds that there is no relevant residential use because the Ansell Wing itself has no residential accommodation.
22. Mr. Warner argued secondly for St. Dunstan's that the works carried out to Ian Fraser House were "an approved alteration". The point at issue in the Note (6) of Group 6 definition of "approved alteration" is whether the works are works

of alteration, and if so whether nevertheless they fall outside the definition because of the exception that a work of alteration "does not include any works of repair or maintenance, or any incidental alteration to the fabric of a building which results from the carrying out of repairs, or maintenance work."

23. It should be noted here that at the hearing the Commissioners accepted, first, that the works carried out otherwise than to the roof would qualify as "approved alterations"; and secondly, that if the works carried out to the roof were works of alteration, the maximum amount which should fall within the exception (i.e. which would be denied zero-rating on the grounds that it was nevertheless repairs or incidental alteration resulting from repairs) was that part referable to the portion of the swimming pool roof where repairs were shown as necessary (comprising approximately 12.5 per cent of the total roof area).
24. The essence of Mr. Warner's case was that the work to the roof of the Ansell Wing of Ian Fraser House comprised the replacement of a flat roof with a pitched roof of different material, with a new roof drainage system and screening parapet wall consequent upon the pitched roof. Such major work, although initially prompted by the need to repair a small part of the total roof area, amounted to a complete redesign resulting in an improvement to the building. The works were therefore works of alteration, and were not repairs, nor were they alterations which were incidental to repairs.
25. We were referred to *C & E Commissioners v Windflower Housing Association* [1995] STC 860 where the Commissioners succeeded in arguing that works comprising a new roof were not works of alteration, but were works of repair. Mr Warner distinguished that case from the case of St. Dunstan's. In the Windflower case the objective was to replace an old roof which was insufficient and badly leaking, and in the course of so doing the appellant made certain changes to the roofing materials and roof drainage system consequent upon using modern techniques and materials. These included raising the pitch of the roof by one inch to allow for thermal insulation required by local building controls. In Mr. Warner's submission the works carried out in re-roofing the Ansell Wing were of a different order: they were carried out largely for a different motive (to improve, not simply to repair); they resulted in significant changes to the physical feature of the roof beyond those dictated by repair or maintenance. In the judgment in the Windflower case certain observations of the VAT Tribunal chairman in the case of *All Saints Parochial Church Council v C & E Commissioners* [1993] VATTR 315 were cited, and Mr. Warner referred us to the following:

"It does, however, seem to me that there is a distinction between works which after completion enable a part of a building to perform the same function in the same way as it did before the work was carried out even though using different materials, and work which after completion enables a part of a building to perform the same function in a different way to that in which it performed the function before the works were undertaken."

In his submission, the works carried out to the roof of the Ansell Wing fall into the second category – the changes were such that the new roof performed the same function in a different, not the same, way.

26. Mr. Warner referred us to two further "re-roofing" cases, *PCC of St. Andrew's Church Eakring and C & E Commissioners* VAT Tribunal ref: 15320 and *Charles Nicholas Foley and C & E Commissioners* VAT Tribunal ref: 13496. In his submission they represented opposite ends of the spectrum, but both decisions supported St. Dunstan's case. In the *St Andrew's Church Eakring* case a roof which was not in disrepair was replaced by a traditional lead roof (with consequent change in the pitch and level to support the additional weight), and this was held to be an alteration which was an approved alteration, there being no works of repair or maintenance. In the *Foley* case, however, the entire roof was leaking, and in part was in a state of collapse. Nevertheless, the works required to change the pitches of the roof slopes and to raise the height of the ridges were alterations, and were not repair or maintenance (although certain parts of the work, including replacing the slates, were held to be repairs).

The Commissioners' case

27. For the Commissioners, Mr McKay submitted that the main issue in the appeal (namely, whether or not the premises comprise a "protected building") involves a relatively straight-forward question of statutory construction. He pointed out that zero-rating is a relief from tax, and that accordingly the scope of the relieving provisions should be construed narrowly. The key words, in the definition of "protected building" in Note (1) of Group 6 are these: "...a building which... is intended for use solely for a relevant residential purpose or a relevant charitable purpose..." In his view St. Dunstan's fails to satisfy the definition since it cannot demonstrate that Ian Fraser House is used "solely" for a relevant residential purpose on the one hand, nor can it demonstrate that the building is used "solely" for a relevant charitable purpose on the other hand.
28. He argued first that St. Dunstan's cannot establish that Ian Fraser House is used solely for a relevant charitable purpose, since the premises are not used "otherwise than in the course or furtherance of a business", as required by Note (6)(a): in his submission the premises are used, at least as to part, in the course of a business. The evidence shows that St. Dunstan's makes a charge to those St. Dunstaners in long-term residential care and those who come for holiday or respite care. That charge is below the cost to St. Dunstan's of providing the accommodation and care facilities, and the charge may be met in some instances in whole or in part by social service or similar agencies, rather than by the St. Dunstaners themselves. The charge made is payment for the services provided by St. Dunstan's. Further, the activities of St. Dunstan's in providing the services for which it makes a charge amount to a business. In this connection we were referred to the case of *C & E Commissioners v Lord Fisher* [1981] STC 238, and in particular to the indicia or criteria suggested by the Crown for determining whether an activity is a business for VAT purposes (at p 245): those indicia (serious undertaking earnestly pursued with

reasonable continuity; an activity with a certain measure of substance; an activity conducted in a regular manner and on sound and recognised business principles; an activity concerned with the making of taxable supplies to consumers for a consideration; an activity where the taxable supplies are of a kind which are commonly made by those who seek to profit by them) were drawn from the relevant case law and in particular *C & E Commissioners v Morrison's Academy Boarding Houses Association* [1978] STC 1), and in Mr. McKay's submission were all present in the case of the supplies made by St. Dunstan's, except that the supplies it makes are exempt and not taxable, a point of difference which Mr. McKay argued is not material. In particular, the fact that St. Dunstan's chooses, entirely in line with its charitable purposes, to supply its services at a loss, on a subsidised basis, does not mean that it is not supplying those services in the course of a business: see the *Morrison's Academy* case.

29. Mr. McKay noted that Mr. Warner, for St. Dunstan's, had sought to overcome this difficulty by claiming the benefit of the concession offered by the Commissioners to the effect that welfare services supplied at significantly below cost should be regarded as "non-business" services. But that was by concession, and was not germane to the construction or application of the terms of Note (6)(a); it conferred no legal right on St. Dunstan's in this appeal, and a review of the application by the Commissioners of such a concession was not within the jurisdiction of the Tribunal: see the decision of the Tribunal in *Greenwich Properties Ltd v C & E Commissioners* (VAT Tribunal Decision 16746).
30. Neither, it was submitted, is St. Dunstan's able to establish that Ian Fraser House is used "solely for a relevant residential purpose". The Commissioners recognise that St. Dunstan's provides at Ian Fraser House residential accommodation with personal care for persons in need of personal care by reason of disablement, as specified in Item (4)(b) of Group 5: but to a material extent it uses the premises for other purposes. The premises are used for training and rehabilitation, and whilst those who visit the premises for such purposes are provided with accommodation, that is a use which is beyond the scope of the category of "residential accommodation with personal care". More tellingly, in part Ian Fraser House is used for purposes which have no residential component. Thus the premises are used by non-residential St. Dunstaners on a regular and consistent daily basis. They are also used regularly for functions by external organisations – whether or not for a fee or donation is not relevant to the question of whether the use is as a home providing residential accommodation.
31. In Mr. McKay's submission, we should not be surprised that zero-rating is denied for buildings which have "mixed" use: the proper context of the zero-rating relief in Group 5 and Group 6 is that of "dwellings", or buildings which provide a "home" in terms of a place of residence of some permanence. This also explains why "use as a hospital, prison or similar institution or an hotel, inn or similar establishment" is excluded from the definition of relevant residential purpose in Note (4). In this context Mr. McKay made a secondary submission that, on the evidence adduced, some part at least of the use by St.

Dunstan's of Ian Fraser House is use as "an hotel...or similar establishment", since some short-term residents visit for essentially recreational purposes, "on holiday", staying in surroundings which are specifically geared to provide the maximum independence taking account of their blindness, but which otherwise fulfil the function of a normal hotel. He drew our attention to the decision of the Tribunal in the case of *Dinaro Ltd T/A Fairway Lodge v C & E Commissioners* (VAT Tribunal Decision 17148) where it was held, in the different context of the exemption provisions relating to land, that a hostel providing residential accommodation (some long-term) for individuals with mental health difficulties was not "an hotel, inn or boarding house or similar establishment" since the hostel exercised choice over the residents it accepted (i.e. only persons with mental problems); the hostel offered a high degree of care and supervision for all the residents because of their (mental) disability; and the hostel fostered a "family" ethos embracing all its residents. Although the case would seem unhelpful to the Commissioners' submissions in the present appeal, Mr. McKay sought to draw a distinction from the different context provided by Note (4), where the expression "hotel, inn or similar establishment" is stated as an exception to categories of accommodation which provide a "home".

32. If the Commissioners failed in their principal submission that Ian Fraser House comprises a "protected building", then Mr. McKay asked us to hold that the works replacing the roof of the Ansell Wing are not an "approved alteration" (the Commissioners having conceded that the remaining works are an "approved alteration"). His simple assertion was that a material part of the roof was in need of repair, and that although St. Dunstan's had taken the opportunity to improve the roof, the works were works of repair or maintenance and not works of alteration. At the very best, if there were alteration works, that was incidental alteration resulting from carrying out repair work, and as such was excluded from being an "approved alteration" by reason of the proviso to Note (6) of Group 6.

Our decision

33. It is our decision that Ian Fraser House does not comprise a "protected building" for the purposes of Group 6 of Schedule 8 of VATA, and for that reason the appeal of St. Dunstan's should be dismissed. We are not therefore required to reach a decision as to whether the works carried out in re-roofing the Ansell Wing of Ian Fraser House comprise an "approved alteration" to the building for these purposes: but the point was argued before us and a decision may be required if the matter proceeds to appeal. It is our decision that all those works comprised an "approved alteration" to Ian Fraser House for the purposes of Group 6.
34. Since there is no issue between the parties as to the listed building status of the building, this appeal as it relates to the "protected building" status of Ian Fraser House, turns on the short point as to whether or not the building "is intended for use solely for a relevant residential purpose or a relevant charitable purpose after the reconstruction or alteration....", as required by Note (1) of Group 6.

35. St. Dunstan's cannot, in our view, establish that Ian Fraser House is used "solely for a relevant residential purpose", having regard to the definition of "relevant residential purpose" which is set out in Note (4) of Group 5 of Schedule 8 VATA, and which also applies for the purposes of Group 6. It is clear from the evidence, and not disputed by the Commissioners, that a substantial part of the use of Ian Fraser House is use as "a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of ...disablement...." Certainly all the long-term residential and nursing care fits within such use. But it is also clear that there is significant use of Ian Fraser House which has no residential element: the premises and the facilities it offers are used on a daily basis by St. Dunstaners who live in the Brighton area (some of whom have moved to live in that area in order to be able to use the premises and its facilities as day visitors). The evidence is that 10 day visitors on a daily average use Ian Fraser House and this compares with about 75 "residents" (using the 84 per cent weekly average occupancy rate we were given in evidence for the 88 rooms). Furthermore, St. Dunstan's has made the premises, or part of them, available to outside organisations for their training and similar events – there is no doubt good sense in this, since it builds links with local commercial and public organisations which may be of benefit in other ways to the charity, and it results in income (whether it is regarded as donation income or as payment for the use of the facilities) which helps to defray in a small way the costs of running Ian Fraser House. According to the evidence produced to us, which showed the extent of such use for the period of approximately eight months up to the time the works began, St. Dunstan's allowed some organisations to use the relevant parts of the premises on a regular and systematic basis. In the scale of things such use was not significant relative to what may be regarded as the primary use of the premises, but in asking the question whether Ian Fraser House is used "solely for a relevant residential purpose", it must be taken into account.
36. Although this non-residential use is sufficient to deal with the point, for the Commissioners Mr. McKay argued additionally that the building is not used for a relevant residential purpose in relation to those St. Dunstaners who visit and stay at Ian Fraser House on a short-term basis, whether for training and rehabilitation or for respite care. In his submission the context of Note (4)(whether as it appears in Group 5 or as "imported" into Group 6) requires that it should be applied to situations where the residential accommodation has the feature or characteristic of "home", a place where one lives with a degree of permanence: in support of this he pointed out that what is now Group 5 was introduced to comply with European requirements to restrict largely to domestic housing the benefits of zero-rating. It is for that reason, he says, that use as a hospital, prison, hotel, inn or similar institutions or establishments is excluded. We agree that "residential accommodation", that is, accommodation where one resides or dwells, has something of the connotation of "home". but for the purposes of Note (4) it must include accommodation which is "home" on a temporary, and perhaps even a short-term, basis occupied for a purpose which takes one away from one's permanent home. This must be so, for example, in the case of "residential accommodation for students or school pupils" (Note (4)(d)), as Mr. Warner pointed out to us. We cannot see that

there is anything in the terms of Note (4)(b) which excludes temporary accommodation of this kind: those who stay at Ian Fraser House for training and rehabilitation purposes or who are there for respite care can fairly be said to be staying there in residential accommodation with personal care, even if their stay is of limited duration. For the period of their stay (which may be for several weeks or even months), and notwithstanding that they are there for a specific purpose, that is where they are residing or dwelling, in similar way to a student residing or dwelling in a hall of residence or a school pupil in a school boarding house.

37. To satisfy the relevant residential purpose test set out in Note (4) it is not sufficient that St. Dunstan's demonstrates that the building is used as a home providing residential accommodation with personal care for persons in need of personal care by reason of disablement: it must also demonstrate that the use is not as an hotel, inn or similar establishment. Ian Fraser House shares some of the characteristics of an hotel, in that those who stay there are provided with board and lodging together with a range of recreational rooms and facilities frequently found at hotels. For most of those who stay there, however, the significant feature provided by St. Dunstan's is the special care available to those with visual impairment: they stay at Ian Fraser House in order to have the benefits of that care, whether nursing care, training and rehabilitation, or the care provided in the course of daily life by all the staff who are trained to deal with the special requirements of those who are blinded. However, some St. Dunstaners visit entirely for recreational or "holiday" purposes. We were told that if they are independent they may come alone, or they may come with their carers or spouses. They come because the facilities and premises are tailored to meet their special needs, and therefore to an extent they too stay in order to have the benefits of the care provided at Ian Fraser House, although if they are independent, or stay with their carers, the extent to which they rely on the care facilities may well be limited. It is reasonable to say that in their case they come for the accommodation and its facilities and not for the personal care and it is not unreasonable to regard St. Dunstan's as providing a service akin to that which would be provided by an hotel, albeit an hotel which is equipped and geared to look after guests with particular needs. For this category of persons at least, is the building used "as an hotel, inn or similar establishment"? We have concluded that it is used as an establishment which is similar to an hotel in so far as it is used by those who visit entirely for recreational or "holiday" purposes, as described to us by Miss Harrison. In the VAT Tribunal decision in the case of *Dinaro Ltd* to which Mr. McKay referred us (with its helpful review of other decisions in this area) it was regarded as a significant element in establishing that a hostel was not a similar establishment to an hotel, inn or boarding house that the hostel exercised selectivity over the choice of its residents – in that case the hostel would accept only those persons who had mental problems. St. Dunstan's, of course, accepts at Ian Fraser House only those who are St. Dunstaners, that is, beneficiaries of the charity. For this reason, amongst others, it is not an hotel. But in this particular case we are of the view that this factor alone is not determinative of the question whether use is as an establishment similar to an hotel when, for this category of visitor, all the other characteristics point strongly to use which is similar to that of an hotel.

38. In summary, therefore, Ian Fraser House is not used solely for a relevant residential purpose: most clearly because the building is used in part by those who are day visitors (whether St. Dunstaners or external organisations), and also because, in relation to those who stay there for "holiday" purposes, use is as an establishment similar to an hotel.
39. Can St. Dunstan's establish that Ian Fraser House is used solely for a relevant charitable purpose, and bring themselves within the "protected building" definition by that means? Our decision is that they cannot. We accept the contentions of the Commissioners that, in part at least, Ian Fraser House is used by St. Dunstan's in the course of a business, so that the requirements of Note (6) of Group 5 are not met.
40. In the case of most, but not all, of those who stay at Ian Fraser House St. Dunstan's makes a charge for the accommodation, care facilities and other services it provides. Payment of that charge may in some cases be made (at least as to part) by a third party rather than the St. Dunstaner himself, but we do not consider that to be relevant. The charge made is very much less than the cost to St. Dunstan's of providing the accommodation – in the figures we were given for the different types of care, the weekly charge was between 15 and 20 per cent of the estimated weekly cost, so that St. Dunstan's clearly subsidises heavily the charges it makes. But it is clear that for VAT purposes it is not a requirement, in determining whether an activity is a business, that the person carrying on the activity should be seeking to recover all his costs. As is well established by the *Morrison's Academy* case, an activity may, still be a business for VAT purposes even if it is not carried on commercially or with the objective of making a profit. The issue is whether there is a recognisable and distinct activity conducted on a regular basis on recognised business principles and of a kind which could be carried on commercially. In this appeal we were referred to the case of *C & E Commissioners v Lord Fisher*, which follows the *Morrison's Academy* case (whilst holding that an activity which is no more than an activity for pleasure and social enjoyment is not an activity which is a business). The features of an activity which characterise that activity as a business which are discussed in *Lord Fisher's* case are present in the activity which St. Dunstan's carries out at Ian Fraser House in making accommodation and care available to those who stay there: it is a substantial function pursued actively, seriously and in a regular manner and with continuity; it is conducted on recognised business principles (even though, as an act of deliberate policy, at a loss – but the manner in which it costs, charges and accounts for the activity demonstrates that business principles are applied); the supplies made in the course of the activity are of a kind which can be made on a commercial basis and are done so by anyone who wishes to make a profit from them.
41. For St. Dunstan's, Mr. Warner argued that even if the provision of accommodation and care services in a business for VAT purposes, those services are welfare services provided by a charity and accordingly a published concession made by the Commissioners for such services provided below cost should apply. As it was explained to us, the concession applies where a charity makes a supply of welfare services, and charges its

beneficiaries for those services, but the charge is no more than 85 per cent of the cost of the services. In such cases the Commissioners are prepared to regard the supply of welfare services as a "non-business" activity. We did not explore the scope of this concession, its possible application to the circumstances giving rise to this appeal, nor whether St. Dunstan's had sought to have the concession applied in their case. Mr McKay for the Commissioners reminded us that a concession of this kind does not affect the meaning or the application of statutory provisions or the rights and liabilities arising under such provisions: we must construe those provisions and apply them to the circumstances before us without any regard to any concessions. He also reminded us that it is not within our jurisdiction to review the operation or application of (or the failure to apply) a concession. We agree with this, and merely observe that St. Dunstan's must seek to pursue elsewhere any claims it might have that its position has been prejudiced by the failure of the Commissioners to apply in its favour a relevant published practice.

42. The final observation we need to make on the question of use for a relevant charitable purpose is that the use of the building by St. Dunstan's in making parts of the building available to external organisations is itself a business, applying the case law referred to above. For this use alone, however insignificant it is relative to what might be seen as the primary use of Ian Fraser House, the relevant charitable purpose test is not satisfied. Once more Mr. Warner looked for support in a concession published by the Commissioners: he told us that, by such concession, if at least 90 per cent of the use of a building is for a relevant charitable purpose, the non-qualifying use can be ignored. Leaving on one side the point that St. Dunstan's can achieve that 90 per cent threshold only by first relying on the "non-business" welfare services concession referred to above, we are in any event and for the reasons given, precluded from taking into account this further concession.
43. In summary, therefore, Ian Fraser House is not used solely for a relevant charitable purpose, since the building is not used by St. Dunstan's "otherwise than in the course or furtherance of a business" – it cannot bring itself within the scope of Note (6) of Group 5 since in part, at least, it uses Ian Fraser House for activities carried out in the course of a business.
44. Mr. Warner argued that if those uses of the building which fail as use for a relevant residential purpose are uses which nevertheless comprise a use for a relevant charitable purpose (because they are "non-business"), then the "protected building" definition should apply. Thus, for example, use of the building for day visitors falls outside the relevant residential purpose test, but arguably falls within the relevant charitable purpose test since no payment is made by the St. Dunstaners for such services. In other words, he argues, if every use made of the building falls within one or other (or both) of the relevant purpose categories, that is sufficient. In his view in applying the definition of "protected building" it is too restrictive to construe the expression "...is intended for use solely for a relevant residential purpose or a relevant charitable purpose..." so that each category must be exclusive of any other use, even a use which falls into the other qualifying category. It seems to us, however, that that is the precise function served by the word "solely". If it had

been the intention for the legislation to be applied in the way Mr. Warner suggests, that would be achieved without use of the word "solely" or, even more clearly, by use of the phrase "either or both" (as is used in Note (6) of Group 5). We should also add that even if the legislation were to be applied as Mr. Warner submits, that would still leave certain types of use of the building which, on our findings, would fall within neither the relevant residential nor the relevant charitable purpose – this would be the case with "hotel" use, and use of the premises by external organisations.

45. Our decision that Ian Fraser House is not a "protected building" results in the dismissal of St. Dunstan's appeal. However, we heard argument on the question of whether the works carried out comprised an "approved alteration" within the terms of Note (6) of Group 6, and we decide that issue now in case a decision on the point becomes relevant should St. Dunstan's successfully appeal against our decision on the "protected building" issue.
46. As we have already mentioned, it was conceded by the Commissioners at the hearing of this appeal that the works to the Ansell Wing which do not relate to the re-roofing should be regarded as works which are an "approved alteration". It is also common ground that Ian Fraser House is a listed building, that the works could not be carried out without listed building consent, and that such consent was obtained for the works. The point at issue, therefore, is whether the works relating to the re-roofing of the Ansell Wing are works of alteration to Ian Fraser House, and if they are, whether they are works of repair or maintenance, or are incidental alteration to the fabric of the building which results from the carrying out of repairs or maintenance work.
47. Our decision is that the re-roofing works in their entirety are an "approved alteration" to Ian Fraser House. They are works of alteration, and no part of those works amounted to works of repair or maintenance, or incidental alteration resulting from the carrying out of repairs or maintenance work.
48. The evidence is clear that the re-roofing altered the building: a flat roof of concrete planking was replaced with a pitched roof of seamless aluminum insulated cladding sheets supported on steel trusses. In addition, and consequent upon the change to a pitched roof, a new system of roof drainage was installed, and a parapet was built around the roof to screen it from view from the ground. The works were therefore works of alteration.
49. Were they works of repair or maintenance? The evidence is that a part of the swimming pool roof (approximately 12.5 per cent of the total roof area of the Ansell Wing re-roofed by these works) was shown in a routine periodic survey to be in need of repair, but that the remaining part of the roof was shown in the survey to be sound and to have an expected life of a further 5 to 10 years. The evidence is also that it was this need of repair to the swimming pool roof that prompted the decision to re-roof the entire Ansell Wing with a different roof structure made of different materials, implementing a policy adopted by St. Dunstan's to replace over time flat roofs where they had been built on its properties with pitched roofs because pitched roofs have proved to be more durable and to require less maintenance. Clearly, as a result of the re-roofing,

the roof ceased to be in that need of the repair which had been revealed by the survey. But it does not follow that the re-roofing works, (even that part which, by replacing the defective part of the flat roof, directly obviated the need to repair the flat roof) were works of repair or maintenance. The flat roof was demolished and removed and replaced with something different in design, structure, construction and all other material respects. As a pitched roof with a different rainwater drainage system it functioned differently from the flat roof: see the observations of the Tribunal chairman in the decision in the *All Saints PCC* case cited above. The differences between the old flat roof and the new pitched roof were not "dictated exclusively by the nature and use of modern building materials in the exercise of proper repair and maintenance" as was the case in the *Windflower* case. In this case we hold that the scope and nature of the alteration works were such that those works could not reasonably be described as works of repair or maintenance to the roof. It follows that no part of the works of alteration were incidental alteration to the building which results from the carrying out of repairs or maintenance work.

50. We dismiss the appeal.
51. No order is made as to costs.