Neutral Citation Number: [2017] EWCA Civ 1116

Case No: A3/2016/2439

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
Judge Colin Bishopp and Judge Guy Brannan
[2016] UKUT 0193 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 July 2017

Before :

LORD JUSTICE PATTEN
LADY JUSTICE BLACK
and
LORD JUSTICE SALES

- -

Between :

SAE EDUCATION LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Melanie Hall QC and **Elizabeth Kelsey** (instructed by **Gordon Dadds LLP**) for the Appellants
Sarabjit Singh (instructed by the **General Counsel and Solicitor to HM Revenue and Customs**) for the Respondents

Hearing dates : 27-29 June 2017

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Approved Judgment

Lord Justice Patten :

1. The common system of value added tax (VAT) was introduced into the EC as a general tax on the supply of goods and services. It is calculated by reference to the price of the goods and services in question and operates irrespective of the number of transactions which take place in the production and distribution process before the stage at which tax is charged. The tax is payable by the person making the supply after the deduction of the amount of VAT borne directly by the various cost components of the supply.

2. These basic features of VAT were first set out in Article 2 of the First Council Directive of 11 April 1967 (67/227/EEC) which explained in its recitals the need to achieve harmonisation in turnover taxes and to eliminate, as far as possible, factors which may distort competition. This included the perceived need to harmonise both rates of and exemptions from tax across the EC. The effect on competition of exemptions from VAT was recognised in the Second Council Directive of 11 April 1967 (67/228/EEC) which recited that:

> "Whereas the system of value added tax makes it possible, where appropriate, for social and economic reasons, to effect reductions or increases in the tax burden on certain goods and services by means of a differentiation in the rates, but the introduction of zero rates gives rise to difficulties, so that it is highly desirable to limit strictly the number of exemptions and to make the reductions considered necessary by applying reduced rates which are high enough to permit in normal circumstances the deduction of the tax paid at the preceding stage, which moreover achieves in general the same result as that at present obtained by the application of exemptions in cumulative multistage systems;"

3. Article 10 of the Second Directive exempted the supply of goods and services to places outside the relevant member state and the importation of goods and services. But member states also retained the right to determine the other exemptions which they considered necessary. The Second Directive was not more specific than that in identifying what other exemptions might be granted. Provisions for exemption from VAT have been carried through to the Principal VAT Directive (PVD) (2006/112/EC) but are now set out in considerably more detail than in the original EC legislation. In Article 132 one finds what are described as exemptions for certain activities in the public interest. These include in Article 132(1)(i):

> "the provision of children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects;"

4. The exemptions provided for in Article 132 are stated in Article 131 to apply:

> "without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse."

5. Examples of the type of conditions which a member state might choose to impose are contained in Article 133. These relate to exemptions conferred on bodies other than those governed by public law and therefore to the "other organisations" referred to in Article 132(1)(i) above. They include the requirement that the body in question should not systematically aim to make a profit; should be managed and administered on an essentially voluntary basis and should charge prices which are approved by public authorities or which do not exceed such approved prices; or must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.

6. The United Kingdom has chosen to implement Article 132(1)(i) not by imposing one or more of the Article 133 conditions but by identifying in domestic legislation the public or other bodies which it recognises as qualifying under Article 132(1)(i). Exempt supplies of goods and services within the United Kingdom are specified in Schedule 9 to the Value Added Tax Act 1994 (VATA 1994). The exemptions relating to education are contained in Group 6. Item 1 is:

> "The provision by an eligible body of—
>
> (a) education…"

"Eligible body" is defined in Note (1). It includes a long list of different types of school and higher education establishments but we are concerned on this appeal with paragraph (b):

> "a United Kingdom university, and any college, institution, school or hall of such a university;"

7. The issue on this appeal is whether SAE Education Limited ("SEL") was properly assessed to VAT for the periods from 1 May 2009 to 29 February 2012 in respect of supplies of education. It claims that the supplies were exempt on the basis that, since at least 1 May 2009, it has been a college of Middlesex University ("MU") and therefore an eligible body within the meaning of Item 1 of Group 6. The First-tier Tribunal ("F-tT") (Judge Clark and Dr James MBE) allowed its appeal against the assessments but its decision was reversed by the Upper Tribunal (Tax and Chancery Chamber) ("the Upper Tribunal") (Judge Colin Bishopp and Judge Guy Brannan) in a decision released on 25 April 2016: [2016] UKUT 0193 (TCC).

8. The decision of the Upper Tribunal is challenged on a number of different grounds including that the Upper Tribunal was wrong to interfere with what was a multi-factorial assessment by the F-tT that could not be said to be wrong as a matter of law. But the principal reason that permission for a second appeal has been granted by the Upper Tribunal is to allow the meaning of the phrase "college of a university" to be considered by the Court of Appeal and I propose to begin with this issue.

9. VAT was introduced in the UK by the Finance Act 1972 (FA 1972) and became chargeable on 1 April 1973. Exempt supplies were those set out in Schedule 5 to the 1972 Act which included as Group 6, Item 1:

> "The provision of education if—
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> (a) it is provided by a school or university ; or
>
> (b) it is of a kind provided by a school or university and is provided otherwise than for profit."

10. Note (3) to Item 1 provided a definition of "university" in these terms:

> ""University" includes a university college and the college, school or hall of a university."

11. At the time these provisions came into effect the relevant EC provisions on exemptions were those contained in Article 10 of the Second Directive which, as mentioned earlier, gave each member state (subject to consultations with the EC Commission) a broad discretion as to what other exemptions to create. The language of Item 1 in FA 1972 was not therefore intended to transpose equivalent provisions in the Directive into domestic law and it must be taken to represent what Parliament considered in 1972 should constitute the scope of the exemption for the supply of education by a "university".

12. The phrase "college, school or hall of a university" has an obvious meaning in the context of UK universities as they operated in 1972. Both Oxford and Cambridge (to take the most obvious examples of universities which operate on a collegiate basis) have been organised for centuries on a federal system under which the colleges and private halls, although legally independent and self-governing, have provided the undergraduate and graduate students of the university and have assumed the primary responsibility for their tuition. The universities themselves are corporations now regulated by statute with their own separate legal identity and status. Their statutes govern such matters as admission to degrees, the giving of lectures and student discipline. The universities remain responsible for the administration of their academic and research departments but operate in terms of governance through Congregation (in the case of Oxford) and the Regent House (in the case of Cambridge) which are made up of university officers, heads and fellows of the colleges; and other academic, research and administrative staff. In each case the governing body of the university has the power to amend its statutes and regulations and to determine policy issues affecting the operation of the university. The colleges and private halls are therefore an integral part of the structure of the university and their members make up the university's teaching staff and students. No student member of a college or hall is not a member of the university or takes a course of study which does not, if successful, lead to the conferment of a university degree.

13. The system which I have described is mirrored in the Education (Listed Bodies) (England) Order 2010 ("the 2010 Order") which contains a schedule of the bodies and other organisations which are authorised to grant recognised awards as defined by s.214(2) of the Education Reform Act 1988 ("the 1988 Act"). The Act makes it an

offence to grant or offer to grant a degree that is not a recognised award. Section 214(2) defines a "recognised award" as:

> "(a) any award granted or to be granted by a university, college or other body which is authorised by Royal Charter or Act of Parliament to grant degrees;
>
> (b) any award granted or to be granted by any body for the time being permitted by any body falling within paragraph(a) above to act on its behalf in the granting of degrees;"

14. Any body referred to in these provisions is defined as a "recognised body": see s.216(4).

15. Section 216(2) of the 1988 Act requires the Secretary of State to compile and publish by order a list of the names of the bodies which appear to him to fall for the time being within s.216(3) which provides:

> "A body falls within this subsection if it is not a recognised body and either—
>
> (a) provides any course which is in preparation for a degree to be granted by a recognised body and is approved by or on behalf of the recognised body; or
>
> (b) is a constituent college, school or hall or other institution of a university which is a recognised body."

16. In relation to s.216(3)(b) the schedule to the 2010 Order lists all the colleges and halls of the Universities of Cambridge, Durham, Oxford and the Queen's University of Belfast together with the Institutions constituting the School of Advanced Study in the University of London: for example, the Institute of Advanced Legal Studies.

17. The provisions of s.216(3)(b) are all but identical to those of Group 6, Item 1 of FA 1972 in defining what is included within a university. There is nothing to indicate whether the draftsman of the 1988 Act consciously adopted the language of Item 1 but it seems unlikely that the similarity between the provisions was accidental. The statutory context and purpose of the two provisions is of course very different but both sets of provisions are seeking in terms to identify the constituent parts "of a university" and to that extent there is an identity of purpose between them. Moreover the definition of an "eligible body" in Note 1(b) to Group 6, Item 1(a) in VATA 1994 now includes the reference to an institution.

18. I have set out the provisions of the 2010 Order not because they are in any sense binding in determining what constitutes an eligible body for the purposes of the domestic VAT legislation but rather because they provide a useful illustration of how the statutory language has come to be interpreted and applied albeit in the context of the regulation of degrees. Ms Hall QC for SEL submitted that the definition contained in Note 1(b) in VATA 1994 differed not only in form but also in substance from the earlier provisions contained in Note (3) in FA 1972. In particular, she points

to the use of the word "and" in Note 1(b) in VATA 1994 which she says should be read as extending the definition of an eligible body to institutions which may not qualify as colleges of a university on the application of a more structural or constitutional test. Her argument (which I shall come to later in more detail) is that the words should be read as including any body which can reasonably be called a college of the university having regard to the degree of co-operation (or integration) between them in the *de facto* running of degree and other courses validated by the university. This is, she submits, a multifactorial test which falls to be applied in this case against a long-established background of shared educational aims which have materialised and been given effect to in the various agreements between MU and SEL which again I will come to.

19. For the moment I need only say that I do not accept her submission that the scope of the exemption for university education has been extended by the provisions of Note 1(b) in VATA 1994. Although there are stylistic differences between Note 1(b) and the definition of a university in Note (3) in FA 1972, those differences do not seem to me to effect a change in the substance of the provisions. The exemption created by FA 1972 in exercise of the power conferred by Article 10 of the Second Directive was in respect of the provision (or supply) of education by a university. It was therefore necessary to define a university so as to bring within the exemption the bodies which in the case of universities run on a collegiate system like Oxford, Cambridge and Durham might be said to supply education in their own right and not as part of the university. The matter was put beyond doubt by Note (3).

20. The current exemption for university education is contained in Article 132(1)(i) PVD and first appeared in that form in Article 13A(1)(i) of the Sixth Directive (77/388/EEC). Notwithstanding the introduction of these express provisions, Parliament chose to implement them by defining what it recognised as "other organisations … having similar objects" in terms of the definition in Note 1(b) of an eligible body. The use of this form of drafting rather than a direct reference to a university as in FA 1972 meant that it was necessary as a matter of language to include both a UK university "and" any college, institution, school or hall of "such a university" within the Note 1(b) definition. But I can see nothing in these stylistic and grammatical changes to justify giving what is essentially the same language a much wider meaning. More particularly there is nothing in the relevant provisions of the Sixth Directive to justify such an interpretation.

21. As I explained earlier, Article 13A(1)(i) (now PVD Article 132(1)(i)) preserves the right of each member state to determine which other organisations it recognises as having similar objects to an educational body governed by public law. There is therefore nothing in the EC legislation which compelled member states to cast the scope of the exemption more widely than in the case of the UK it had previously chosen to do. One also needs to take into account (as is common ground on this appeal) that most (if not all) UK universities are not bodies governed by public law: see *University of Cambridge v HMRC* [2009] EWHC 434; [2009] STC 1288. They are not identified in EC law as part of the public administration of the relevant member state even though they are in receipt of public funds. This is why both the university and its colleges are grouped together in the definition of an eligible body for the purpose of giving effect to Article 132(1)(i). It seems to me that this supports the view that the focus of Note 1(b), like Note (3) before it, is on identifying the

constituent parts of the university rather than applying the exemption from VAT to a much wider and less related group of institutions. The phrase "of a university" is common to both statutes and in my view is determinative of this question.

22. With those preliminary observations on the scope of the exemption I can turn now to the authorities. A convenient starting point is the decision of this Court in *Customs and Excise Commrs v University of Leicester Students' Union* [2001] EWCA Civ 1972; [2002] STC 147. The issue on the appeal was whether the supply of soft drinks by the students' union was exempt from VAT under Group 6 of Schedule 9 VATA 1994 because they were made by an eligible body and were closely related to the supplies of education: see Group 6, item 4. The students' union did not contend that it was a college or institution of the university and therefore an eligible body in its own right under Note (1)(b). Its case was that it was an integral part of the university so that the supplies of drinks which it made fell to be treated as supplies made by the university which was an eligible body.

23. The Court of Appeal rejected this argument on the basis that the union was a separate educational charity distinct from the university and that it provided no supplies of education. The fact that the union occupied university premises was immaterial. The Court did not therefore have to decide whether the union was (e.g.) an institution of the university or any issue about the scope of the definition of an "eligible body". But in his judgment (with which Morland J agreed) Peter Gibson LJ did offer some guidance about the meaning of Note 1(b):

> "[36] Note 1(b) on its face refers to five entities, a United Kingdom University, and four entities of such a University. The conjunction connecting "a United Kingdom University" with the four other entities is the word "and", not "including". Further, the four other entities are alternative to each other as can be seen by the conjunction "or" between "school" and "hall". On the ordinary and natural meaning of the words used in Note 1(b) I would construe them as covering both a university itself and, in those cases where there are separate entities which are nevertheless parts of that university, any of those separate entities. Furthermore, the common characteristic of all those four entities in my opinion is that they are suppliers of education. Thus, to take London University as an example, colleges like University College London, and schools like the School of Oriental and African Studies, are all of London University. Again, to take Oxford University as another example, it has colleges and halls (which are what some entities later to become colleges called themselves when formed). Accordingly, just as Note 1(a) covers schools supplying primary and secondary education, so Note 1(b), in my view, covers Universities and other entities supplying university education. If it had been intended that Note 1(b) should cover entities with functions and purposes other than the supply of education, such as a students' union, I would have expected that to have been made explicit. These are provisions conferring exemptions and must be construed restrictively. On that

> construction, I reject Mr Baldry's submission that the Union is an eligible body within Note 1(b). It does not come within "a United Kingdom University", being an entity distinct from the University, nor is it an institution of the University, supplying, as it does, no education."

24. Arden LJ disagreed with the majority as to whether a college or institution of the university within the meaning of Note 1(b) had to be a supplier of education but she did not in terms dissent from the proposition that they had to be part of the university:

> "[56] In respectful disagreement with Peter Gibson LJ I do not consider that a college, institution or hall of a university for the purposes of note 1(b) has itself to be a supplier of education in the sense of supplying systematic instruction. Some colleges and halls at Cambridge, for instance, as I understand the position, accept only postgraduate students who receive their education almost exclusively from the University. At least one college at the older universities, namely All Souls in Oxford, (according to my understanding) as a college provides no teaching. Within the United Kingdom the structure of universities is diverse. Some have colleges, some do not. Some have colleges which are the constituent parts of the university, as for example in the case of the Universities of Wales and London (see *The Colleges in the University of Cambridge*, PR Glazebrook [1993] Camb LJ 501). Others, like Oxford, Cambridge and Durham are collegiate universities: the functions of the colleges and halls on the one hand, and the University on the other, are separate but interrelated. There are thus many variations in the organisation of universities in the United Kingdom and that indicates that there must be some flexibility of approach to the word "institution". The key to being an "institution" within note 1(b), as it seems to me, is whether the body in question has academic links of some kind with the university and recognition accordingly from the university. If it does, it comes within note 1(b) whether it supplies education (in the sense given above) or not. However, in the context of note 1(b) the links must be of an academic nature rather than pastoral or recreational or for the purpose (however valuable) of providing representation for one section of the university community on organs of the university, and thus in my judgment the Students' Union in this case cannot bring itself within the term "institution" as used in note 1(b)."

25. The judgment of the Court of Appeal in the *Leicester University* case was handed down on 21 December 2001 shortly after judgment was given by Burton J in *Customs and Excise Commissioners v School of Finance and Management (London) Ltd* [2001] STC 1690 ("*SFM*"). The decision in *SFM* does not appear to have been brought to the attention of the Court of Appeal. It is a case which is much closer on its facts to the present appeal. SFM Ltd, like SEL, provided degree courses to fee-paying students which led to the award of a university validated degree. It did so

pursuant to a memorandum of co-operation under which SFM and the University of Lincolnshire and Humberside offered in partnership with each other a number of university approved courses. SFM provided the courses at its own premises which were an approved centre for those purposes and undertook the assessment of students' work subject to moderation by university staff. Students enrolled on the courses were bound by university regulations in force at the time but did not have the right to be automatically transferred to courses delivered by the university itself. They did, however, have a right of access to university guidance services and a right to an interview for any further courses they applied for at the university. The awards relating to the courses run by SFM were subject to the university's quality control and assurance procedures and the agreement to validate the degree courses was for a period of 5 years.

26. SFM Ltd sought exemption from VAT for the supplies of education it made on the basis that it was an eligible body as a college of the university within the meaning of Note (1)(b). The VAT and Duties Tribunal held that it was eligible for exemption. On appeal Burton J held that the Tribunal had been right to weigh up all the relevant factors such as the relationship between the university and SFM and the way it operated in relation to the education of the students and that the decision disclosed no error of law.

27. At the hearing of the appeal both the Commissioners and SFM put forward a number of factors or conditions which they said needed to be satisfied in order to determine that SFM was a college of the university. Those suggested by the Commissioners were: (i) the presence of a foundation or constitutional document establishing the college as part of the university; (ii) an absence of independence on the part of the college; (iii) financial dependence or interdependence on the university; (iv) the absence of distributable profit; (v) entitlement to public funding; (vi) permanent links between the college and the university; (vii) physical proximity between the two; and (viii) an obligation to offer a minimum number of university places. The Commissioners argued that the first four were necessary conditions which had to be satisfied.

28. SFM accepted that all the above factors were arguably relevant factors (but not necessary conditions) but suggested seven more of its own: (ix) having a similar purpose to that of the university; (x) providing courses leading to a degree from the university; (xi) having the courses supervised by the university and quality standards regulated by the university; (xii) admitting students as members of the university with university identity cards; (xiii) submitting those students to disciplinary regulations and requirements of the university; (xiv) entitling successful students to receive a degree from the university at a university degree ceremony; and (xv) being described as an associate/affiliated college of the university. The Commissioners in turn accepted that all those were relevant factors to consider.

29. Burton J endorsed this wide multi-factorial approach to the determination of whether SFM was a college of the university for VAT purposes:

> "[21] I note that the words used in note (1) (b) are 'any college'. I accept Mr Hyam's submission that this cannot mean 'any old college', but it does support at least the following: (i) that

> colleges are not limited to those within the Education Acts; (ii) that an associated or affiliated college is not ruled out.
>
> [22] Thus I conclude that the weighing exercise is and was the correct approach. It is obvious that the tribunal was influenced by the *always speaking doctrine*, which it is now agreed was inapt, but was its decision wholly flawed as a result and must the tribunal's conclusion fall away? (i) I do not conclude that the first four factors set out in [16] above, which the commissioners relied upon as necessary pre-conditions of a college being *of a university*, are indeed such. They are plainly necessary pre-conditions if the question is whether the college is governed by public law and/or within the Education Acts, but on the question as to whether a particular college is a college of a university, I conclude that they are, albeit important features, simply four of the factors to be considered. (ii) Given my conclusions that no words are to be read into note (1)(b), I consider that the tribunal was amply entitled to decide, on the balancing of the 15 features to which I have referred, that, on the facts of this case, SFM was a college of the university. I do not in the event consider that I need to decide which side's arguments as to restrictive construction are the more apt, on the one hand the limitations on the eye of the needle through which all exemptions must pass, and on the other hand the obligation on the member state (subject to any conditions it may impose) to give the exemptions to those providing supplies in the public interest, such as education. There would in my judgment be no objection had the United Kingdom imposed a different or more restrictive test, but, given that the test that they have set down is one simply as to whether a particular college is a *college of a university*, I conclude that the tribunal was entitled, after weighing up the factors, to be influenced at the end of the day by the fact that the 'fundamental purpose of [SFM] is to provide education services leading to the award of a university degree' by the university. (iii) Applying the *Edwards* (*Inspector of Taxes*) *v Bairstow* test, I do not consider that the only reasonable conclusion on the facts found is inconsistent with the determination to which the tribunal came."

30. The result of the decision in *SFM* has been that in subsequent cases tribunal hearings have been taken up with an extensive and open-ended examination of whether and, if so, to what extent any one or more of the listed factors is a feature of the relationship between the university and the taxpayer body which seeks to establish its status as a college of the university. No one or more of the factors has been treated as decisive. An example of this is the decision of the VAT and Duties Tribunal in *HIBT Ltd v HMRC*: Decision No. 19978 of 17 January 2007.

31. Subsequently attempts have been made to refine the test in *SFM*. In *London College of Computing Ltd v Revenue and Customs Commissioners* [2013] UKUT 404 (TCC);

[2014] STC 404 ("*LCC*") the Upper Tribunal rejected a claim for exemption as a college under Note 1(b). Having considered the authorities Judge Hellier said:

> "[47] I draw the following conclusions. For an organisation to qualify as a college of the University for the purposes of Note 1(b):
>
> (1) it must have objects similar to those of public bodies whose aim is to supply school, university or vocational education.
>
> Those objects should be determined by objective factors. What a body does is evidence of its objects.
>
> I accept that the body's objects need not be limited to making such supplies but the more diverse its objects the less similar they will be as a whole to the requisite aim.
>
> If the fundamental purpose of the body is to provide education of one of the specified types it will satisfy the similar objects condition; if it is not then it may not do so; and
>
> (2) it must have some close link to, or association with, the university so that in a loose sense it may be called part of the university. The fact that it must be a college 'of' the university indicates the degree of integration with the university's life. The link may be an academic link in which the university provides education in conjunction with the body, or the body may have some status under the university's constitution. Each must be involved in the other.
>
> The investigation of this issue must encompass both what the body does (its activities) and how it or its activities are linked with the university.
>
> Whether this test is satisfied requires consideration of all the relevant facts. Those in the lists considered in *SFM* and in subsequent decisions are helpful but are neither exhaustive nor need always be relevant.
>
> If the fundamental purpose of the body (determined by objective factors) is to provide university education, that will not on its own satisfy this test.
>
> (3) It is not a requirement that the body's students typically progress to a degree at the university; if they do however that may be a fact which may point to integration with the university."

32. In his own judgment Judge Bishopp concentrated on the nature of the links between college and university The reference to MU is to Middlesex University which also features in the present appeal:

> "[90] It is necessary when conducting such an analysis to recognise that there are several ways in which an institution may be, or become, a college of a university, ranging from formal constitution as a college to something less well-defined. The lack of precise definition was what led to *SFM*, and as Arden LJ said in *Customs and Excise Comrs v University of Leicester Students' Union* [2001] EWCA Civ 1972, [2002] STC 147, also at [56], and Judge Hellier has pointed out at [29] above, the relations between colleges and the universities of which they are properly to be regarded as colleges may take a variety of forms, with the consequence that one must consider the circumstances of each case. It follows that Note (1) must be construed pragmatically and, for the reasons I have given at [86] above, purposively. But purposive construction can be taken only so far, and it cannot be used (as the FTT seems to have used it) as a means of concluding that, because (as it determined) LCC and MU had similar objects, the former must be a college of the latter, subject only to the proviso the FTT identified.
>
> …
>
> [92] The term used in the Note is college 'of' a university, a construction which implies at least some degree of integration. That was also the view of Peter Gibson LJ ([2002] STC 147 at [31] to [36]) and Arden LJ (at [55]) in *University of Leicester*. Integration is a feature entirely lacking in this case: MU had supervisory rights respecting the quality and content of the diploma course, as an obvious safeguard designed to ensure that only students with an appropriate level of attainment were able to transfer, but had no influence over any of the other courses offered by LCC, over its governance or in any other way; and LCC had no right to participate in the governance of MU (as one might expect in the case of a constituent college), or to provide input into its course content or in any other respect. There should also, one might think, be some evidence of the recognition by the university of the other institution as a college of itself. I do not see how it can plausibly be argued that an institution such as LCC is, or is to be regarded as, a college of a university which does not acknowledge it as such. There was no evidence before the FTT of MU's perception. That is not, in itself, fatal; but where, as here, there is no hint in the documentary evidence that MU intended that LCC should become a college of itself the task of showing that it did is inevitably rendered more difficult."

33. The most recent decision in which Note 1(b) has been considered is that of this Court in *Finance and Business Training Ltd v Revenue and Customs Commissioners* [2016] EWCA Civ 7; [2016] STC 2190 ("*FBT*"). The taxpayer company provided courses leading to the grant of degrees by the University of Wales. Its claim to be a college of the university was rejected by the F-tT on the basis that the provision of university education was only a small part of its activities and the link with the university was purely commercial and short-term. Its appeal to the Upper Tribunal was dismissed. Permission for a second appeal was granted solely in order for the F−tT to raise an argument based on European law to the effect that a provider of university courses should be entitled to exemption from VAT in the same way as a university even if not so entitled under domestic law. This argument was based on the principles of fiscal neutrality and legal certainty which feature in the current appeal. The appeal was dismissed on the basis that the UK had exercised its powers under Article 132(1)(i) PVD in an EU law compliant manner. But for present purposes the judgment of Arden LJ is principally of interest for what she says about the content of Article 132(1)(i):

> "[53] All Ms Hall's submissions proceed on the basis that Parliament has not set conditions for the education exemption in compliance with EU law. It is now clear from *MDDP* [*Minister Finansow v MDDP,* Case C-349/13, EU:C:2015:84, ECJ; [2014] STC 699] that a member state can and should set the conditions for bodies which are not governed by public law which are to be entitled to the education exemption ('non-public bodies'). How it sets those conditions is a matter for national law.
>
> [54] No one has suggested that Parliament had to use any particular form of words to set these conditions. In my judgment, it was therefore open to Parliament to exercise the UK's option by deciding which non-public bodies were to qualify and then including a list of them in the relevant legislation. That is what Parliament has done in note (1)(b).
>
> [55] Parliament is obviously constrained by art 132(1)(i) as to what bodies it can include. In those circumstances, it has taken the view that the body must be one which provides education in like manner to a body governed by public law, that is, there must be a public interest element in its work. It has decided to draw the line, in the case of universities to those colleges, halls and schools which are integrated into universities and which are therefore imbued with its objects.
>
> [56] For FBT to show that its exclusion from this group is a breach of the fiscal neutrality principle would require it to say that it belongs to the same class as those institutions which meet the integration test in note (1)(b). Neither of the tribunals made any findings that would support that conclusion and this court is hearing an appeal only on a point of law.

> [57] FBT contends that Parliament has not met the requirements of the EU law principle of legal certainty by setting out criteria which are to apply to determine when non-public bodies seek to enjoy the education exemption. The criteria have to be 'neutral, abstract and defined in advance'. In my judgment, this is achieved by the combination of note (1)(b) and the *SFM* factors. These factors are neutral, they are abstract and defined in advance. By applying them, it is possible to know what supplies and which suppliers qualify for exemption."

34. Having considered the various views expressed in the authorities I remain of the opinion that the test of eligibility set out in Note (1)(b) is considerably more hard-edged than the approach adopted in *SFM* and the subsequent tribunal decisions. It is of course correct, as Ms Hall emphasised in her submissions, that for both economic and to some extent technological reasons university education is now provided in many different ways. But it is important to emphasise that the exemption from VAT is not granted either under Article 132(1)(iv) or under Schedule 9 VATA 1994 in respect of the provision of university education *simpliciter*. Exemptions from VAT are narrowly construed and it is evident from the language of Article 132(1)(i) that the type of body which the draftsman of the Sixth Directive (and now the PVD) had in mind was very restricted. We are also not concerned on this appeal with the issue of whether the provision of degree courses by a university through the medium of some other entity falls to be treated as the provision of educational services by the university itself. SEL seeks exemption from VAT in respect of the courses it runs on the basis that it is itself an eligible body within the meaning of Note (1)(b) and its sole qualification for that exemption is its claim to be a college of the university.

35. In my view, in order to succeed, it must establish that it is what Peter Gibson LJ described in the *Leicester University* case as part of the university in the sense of being a constituent part of the university with all the rights and privileges for its students and other members which that entails. Inherent in that concept is the need to demonstrate some legal relationship between the university and college which establishes and confirms the status of the latter. Whether this is a formal foundation or constitutional document as opposed to some other binding arrangement seems to me to be a matter of form rather than substance. Nor would I treat the word "college" as confined to a body or institution within a university run on a collegiate basis. It would apply even if (as in the present case) there was only one institution (apart from the university itself) which provided some of the university education services. But the arrangement must, as I see it, be one which in a real sense makes the college a part of the university and not simply a suitable educational provider to whom the university has outsourced the courses which it has been unable for whatever reason to provide itself.

36. For these reasons I would reject the approach taken by Burton J in *SFM* which has been adopted with the slight change of emphasis I have mentioned in later tribunal decisions. I think Mr Singh is right to say that there must be a high degree of integration between college and university and that factor (i) in the list put forward in *SFM* encapsulated and will ordinarily be decisive of the issue. The other factors are of course relevant in the sense that many of them will be consistent with and a

reflection of the collegiate status of the taxpayer and its relationship with the university. But some of them need to be treated with care. A college may have a considerable degree of self-governance and independence yet be clearly part of the university. Most Oxford and Cambridge colleges fall into that category. Similarly financial independence is not inimical to the college being part of the university. Factors (ix)-(xv) are all common features of a college which is part of a university but they do not in themselves make the body in question a college of the university where they are simply terms of an otherwise arm's length contractual relationship designed to provide students with an external route to a university degree. In other cases they are present because the college is part of the university with, as I have said, the rights which go with that. The starting point in every case is to look at the core legal relationship between the college as an institution and the university.

37. It follows that I would not endorse the statement in [42(2)] of Judge Hellier's judgment in *LCC* insofar as he treats the status of the college and its academic links with the university as alternatives. The reference to academic links is derived from the dissenting judgment of Arden LJ in *Leicester University* and, as I read it, is simply a way of describing the various types of arrangement under which a college can be part of the structure of the university. It is not an alternative to that requirement.

38. In his own judgment in *LCC* Judge Bishopp refers to there usually being some evidence of the recognition of the college as such by the university. This point has featured in the Upper Tribunal decision in the present case for reasons which I will come to. But the judge is, I think, doing no more than to make the obvious point that if the college and the university are in the necessary type of relationship that will inevitably be reflected in the university's own understanding of the position. The important point is that for that understanding to exist there must be the necessary relationship between them.

39. I can now turn to the facts of the present case. We were taken in some considerable detail to the underlying documents but the contractual and other arrangements between the university and SEL are not really in dispute and I can take the salient facts from the decision of the F-tT.

40. SEL is an English company and is a subsidiary of SAE Technology Group BV ("SAEBV"), a Dutch company. Both are part of the SAE group ("SAE") which trades worldwide under the name "SAE Institute". SAE is an acronym for "School of Audio Engineering". The parent company of the SAE group is now Navitas Limited, an Australian company. SAE has for many years provided educational training in audio and digital media technologies and has an established reputation in that field.

41. Since 1985 SAE has operated in the UK through a succession of English subsidiaries of which SEL is the most recent. Since 29 April 2009 (when it took over from SAE Educational Trust Limited ("SETL")) it has operated under a licensing agreement of that date with another SAE company, SAE Licensing AG. On 1 May 2009 the assets and business of SETL were transferred to SEL and SETL went into liquidation. Until 2008 the headquarters of SAE Institute was its Australian campus at Byron Bay in New South Wales. But in July 2008 it acquired premises at Littlemore near Oxford which is now used as its global headquarters and what is described in its literature as the central hub for its educational and infrastructural operations.

42. The relationship between SAE Institute and MU has existed since 1998 when the first Memorandum of Co-operation was signed on 19 January of that year. This was a contractual document which provided for BA courses in Recording and Multimedia Arts to be taught by "SAE Technology College" at specified campuses as "validated collaborative programs" of MU.

43. Subsequently MU and SAE Institute have entered into further Memoranda of Co-operation ("MOC") which have replaced the earlier agreements and provided for the validation of additional courses. The parties entered into a new MOC with effect from 1 April 2007 which provided for the validation by MU of three SAE programs comprising BA (Hons) degree courses in Applied Multimedia, Interactive Animation and Games Programming. This was superseded with effect from 1 September 2009 by a further MOC described in the evidence as a consolidation in a common framework of the SAE programs previously validated in 1998 and 2007.

44. The 2009 MOC was for a period of 6 years and provided for its terms to be reviewed in the event that SAE Institute was granted accredited status by MU which would enable it to validate its own degree courses. It sets out the terms on which MU agreed to validate the courses referred to including the admission requirements for students. They were to be selected by SAE Institute using procedures agreed by MU and the admission requirements imposed by SAE Institute were to conform to the university's general entrance requirements. Students were to be enrolled with SAE Institute as candidates for one of the university's qualifications and be subject to the SAE Institute's normal rules and regulations. Students enrolled on the validated courses were to be "considered members of [MU]" but were not entitled to receive university student ID cards.

45. Tuition was to be provided by SAE Institute subject to quality assurance safeguards. SAE Institute was to provide library, computer and other facilities but clause 10 provided that SAE students would not normally be entitled to access or use what are described as the University's Learning and Resource Services unless negotiated at extra cost. Nor were they to be entitled to access MU's accommodation and other social welfare services or to apply for financial support from the University's Access to Learning Fund. They were entitled to access MU's Disability Support Services but again at an additional cost.

46. The MOC set up a board of study for the validated programs including link tutors for both institutions and MU retained responsibility, in liaison with staff from SAE Institute, for the resolution of any quality enhancement issues. But for the validated courses the assessment of students was the responsibility of SAE Institute subject to MU's assessment regulations. Students who successfully completed the programs received a BA/BSc (Hons) degree certified by MU and were to be eligible for consideration for entry to a postgraduate level course at MU.

47. In addition to the various MOCs, the parties also entered into Partnership Agreements which provided for the establishment of a Joint Liaison Group which included the Chief Executive of SAE and the Deputy Vice-Chancellor of MU. A new Partnership Agreement was entered into with effect from 1 July 2009 which provided for three yearly meetings of a Steering Group consisting of senior executives from SAE and MU. The parties recorded their agreement to work in partnership and collaboration

on undergraduate and postgraduate courses of study and other possible areas of mutual co-operation.

48. An important development in and facet of the parties' relationship was the decision by MU to grant SAE Institute accredited status. On 22 September 2010 an instrument of accreditation was signed under which SAE Institute was accredited to validate, monitor and review courses of study leading to MU undergraduate awards in Recording Arts, Film Making, Digital Film Animation and Multimedia Arts. This gave SAE Institute the ability to validate the specified programs itself although MU staff would continue to be involved in the assessment of the programs. The evidence of Professor Klich was that this represented a further stage in the development of what he described as a close and trusted association between the two partners and indicated that SAE Institute had satisfied the key academic staff at MU that it had the systems necessary to ensure high academic standards were delivered. It was, he said, a vote of confidence by MU in the academic quality assurance processes of SAE Institute and demonstrated that it was capable of operating as a trusted long-term partner of the university.

49. The accreditation of SAE Institute was to be subject to six-yearly reviews but MU reserved the right to withdraw the accreditation if at any time it had concerns about quality or standards issues to which SAE Institute had not responded satisfactorily. Clause 5 of the instrument of accreditation permitted graduating students to attend graduation ceremonies at the SAE Institute but they could also attend an annual graduation ceremony at MU if they so wished. The parties also entered into a further MOC which as previously anticipated set out the detailed arrangements for operating the system of accreditation. The MOC provided for the appointment by MU of an Accreditation Tutor who would be a member of the Joint Liaison Group and be responsible for communications between the two parties in relation to accreditation. The MOC confirmed that it did not affect the "independent status" of SAE Institute "which shall retain its own Governing Council, Academic Board and full responsibility for its own financial management". Clause 7 provided:

> "All students registered with the University shall be regarded as Institute students and subject to Institute regulations for admissions, assessment, appeals, discipline, grievance and other matters. Students shall also be subject to course regulations of the Institute for its taught awards which have been approved by the University."

50. In July 2011 the parties entered into what is described as a Special Associate College Agreement ("SACA"). The agreement records that the parties had successfully collaborated for over 14 years in the provision of higher education courses including programs leading to MU undergraduate and graduate awards. Accredited status had been given after an extensive assessment by MU of SAE quality assurance processes. The SACA continued as follows:

> "2. As a further extension of that special relationship in the context of higher education in the United Kingdom, the University and SAE Education, UK (hereinafter referred to as SAE-UK) have agreed a long-term Partnership, which is

detailed below. This builds upon the existing status of SAE-UK as a Middlesex University Associate College.

3. In February 2011, SAE became a part of the Navitas Group, and SAE-UK in the context of this agreement shall be taken to include any subsequent entity which may be created by Navitas to replace SAE Education UK. Prior agreements between the University and SAE Institute shall remain in operation for all jurisdictions previously agreed other than the United Kingdom, and this agreement shall apply specifically to SAE-UK and its campuses in the United Kingdom.

4. The purpose of this agreement is to further strengthen the degree of collaboration and interdependency in the United Kingdom, and to designate a higher level of integration of SAE-UK operations with those of Middlesex University to ensure that enrolled students of SAE-UK are in every way possible also considered fully as students of Middlesex University.

5. SAE Education UK undertakes, as part of this special relationship in the United Kingdom, that it will, as has been the case over the last 14 years, continue to collaborate only with Middlesex University to the exclusion of other possible partners in higher education in the United Kingdom.

6. Middlesex University undertakes, as part of this special relationship, to ensure that enrolled higher education students of SAE-UK are in every way possible also considered and shall be treated fully as students of Middlesex University from initial enrolment through to course completion and graduation.

7. The effective commencement date for this agreement is 1st August 2011, and the duration is for a period of six years, renewable by mutual agreement.

8. The University and SAE-UK agree that:

a) SAE-UK prospective higher education students who meet the defined criteria and are selected for entry shall be made an offer which ensures that they would become students of both Middlesex University and SAE-UK;

b) relevant student information for SAE-UK students enrolled in approved higher education programs in the United Kingdom shall be maintained in the University administrative and record systems:

c) SAE-UK students enrolled in approved higher education programs shall receive MU student Identity cards;

> d) SAE-UK students enrolled in approved higher education programs shall have access to the same range of services as other University students, including access to library and other support services as appropriate;
>
> e) graduates of SAE-UK approved higher education programs shall become alumni of Middlesex University;
>
> f) graduates of SAE-UK approved higher education programs shall access the same benefits as graduates of MU courses in the United Kingdom including the opportunity to attend appropriate graduation ceremonies;
>
> g) students of SAE-UK in approved higher education courses shall be subject to similar rules and regulations as other MU students operated under specified delegations by SAE-UK as approved by Middlesex University.
>
> …..
>
> 10. While academic oversight of validated programs will remain with the University under the relevant approved regulations, the University may delegate academic oversight to SAE-UK of selected higher education academic programs under accredited status as duly approved.
>
> …..
>
> 12. The partners agree that the new status of the MU-SAE relationship in the United Kingdom will be appropriately publicized and promoted in relevant informational documents and websites."

51. A proposal to designate SAE Institute as an Associate College of MU was first made in about 2008 and the MU website included a reference to this at least from the time in 2010 when SAE Institute received accredited status. The F−tT said at [190] of its decision:

> "We find that there is some acknowledgment by MU of the status of SAE Institute, and that the entity in the UK which carries that status is SEL. The extent of that acknowledgment is limited, in that SAE has been designated since 2010 (or possibly earlier) as an Associate College, and since September 2010 as an accredited institution. On the basis of the evidence, we find on the balance of probabilities that SAE Institute was regarded informally by MU as an associated college as early as 1 May 2009, the date on which SEL acquired the business of SETL."

52. The issue of recognition relates to the point made by Judge Bishopp in his judgment in *LCC* about it being necessary to identify evidence that the university in question

recognises the taxpayer as one of its colleges. No representative of MU gave evidence at the F-tT hearing but in relation to this point the F-tT was asked to consider notes made of two meetings between HMRC officials and representatives of MU. In each case the notes were submitted for approval and correction by MU. The first note is of a meeting held on 28 November 2009 at which the MU representatives included Mr Baillie, the University's International Partnerships Manager, and Ms Caroline Hinch, the Assistant Academic Registrar for Collaborative Programs. This first meeting therefore pre-dates both accreditation and the SACA. According to the note, MU identified various bodies (described as Associate Colleges) with which it had a "strategic relationship" in relation to the delivery of higher education. SAE Institute was not included in this category. It was described as a partner institution which designed and delivered to its students at its own venue validated programs for which (like all validated programs) MU was answerable to the QAA. Students on the courses did not have access to MU learning support or student welfare unless negotiated for an additional fee. Validated programs were said to "maintain the greatest distance between MU and its partner" because, subject to validation, they were designed and delivered by the partner institution. MU has its own Schools in the form of academic departments but according to the note the MU representatives said that SAE Institute was not regarded as one of them. Its programs were very specialised, niche products.

53. The second meeting was held on 19 July 2012 following a letter to HMRC from Dr Terry Butland, the then Deputy Vice-Chancellor International of MU, in which he set out the history of the relationship between MU and SAE Institute which he described as a prestigious and long-standing associate college of MU. The note of the 2012 meeting records Mr Melvyn Keen, MU's Deputy Chief Executive, as saying that the SACA was a unique document and that MU did not have such an agreement with anyone else. It had been put in place as the *quid pro quo* for an increase in the amount paid by SAE Institute to MU for the validation of its courses. The main differences were the additional facilities for students referred to in section 8 of the agreement such as the use of MU's library. But the SACA was described by Mr Keen as a "fairly bland document" which merely repeated what was in the instrument of accreditation.

54. The F-tT was reluctant to place much, if any, weight on this evidence. They said that there was no evidence verifying the accuracy of the 2009 note although, as I have said, it was in fact sent to MU for approval and correction. But these notes were the only indication (beyond the MOCs and other agreements themselves) as to how MU regarded the status of SAE Institute and Mr Singh for HMRC of course relies on them as negating any suggestion that SAE Institute was regarded at the relevant time as anything but a course provider. They are, he submits, in any event inconsistent with the finding of recognition in [190] of the F-tT decision which I have quoted above.

55. The F-tT's reasons for its conclusion that SEL is a college of MU are set out in [288]-[294] of its decision as follows:

> 288. We are satisfied that SEL, as the UK arm of the SAE Institute, has been an Associate College of MU since 1 May 2009. The appropriate documentation does not appear to have been entered into, but both SAE and MU have proceeded on the basis of this status having continued for some time. There is a

degree of dependence of SAE Institute on MU, and SAE Institute is also financially dependent on MU. SAE does not fulfil the "absence of distributable profit" test. SEL is entitled to public funding, but of a more limited amount. The links between SAE Institute and MU are of a long-term nature, as demonstrated by the length of the relationship; there is no reason to assume that either party would wish to terminate this existing relationship. The operations of SAE and MU are carried out on separate campuses, but two of the SAE campuses are reasonably close to those of MU. SAE is not under an obligation to offer a minimum number of university places. We have found that SAE Institute, and thus SEL, has similar purposes to those of a university. SAE provides courses leading to a degree from MU. Most of SAE's courses are supervised by MU and the quality standards of such courses are regulated by MU. Students are admitted as members of MU, but do not receive MU identity cards as such. The SAE identity cards acknowledge the relationship between SAE and MU. Students are not directly subject to the disciplinary requirements of MU. Students receive their degrees from MU at MU degree ceremonies. SAE Institute has been described by MU as an Associate College, but the extent of MU's acknowledgment of that status was, at least initially, limited.

289. Taking all our findings into account, we consider that there was a substantial degree of integration of SAE Institute within MU, although as a separate commercial entity, SAE inevitably retained elements of separation and independence. A major factor in terms of integration was MU's decision to advance SAE Institute to accredited status. The fact that SAE was one of only three institutions on which such status had been conferred by MU demonstrated the closeness of the relationship between SAE Institute and MU.

290. In argument, Mr Singh sought to suggest that SEL had taken various steps to bolster the argument that it was a college of MU, in order to avoid having to charge VAT. He characterised the process of drafting and entering into the SACA as a selfserving attempt to achieve this.

291. We do not accept Mr Singh's argument on this issue. He referred to Melvyn Keen's comments on the SACA as "a fairly bland document which merely repeated what was in the Accreditation Agreement". Further, Mr Singh stated later in his argument that the SACA "did not fundamentally change the relationship". In our view, if the SACA was of such little effect, it would not have amounted to a sufficient justification for a claim to exemption.

292. We consider that the SACA has to be viewed as a small part of the development of the long-standing relationship

> between SAE Institute and MU. The extent of that relationship and of the integration of SAE Institute within the MU structure fall to be considered by reference to a much wider range of factors than a single document. We have considered Mr Singh's arguments that there had been a history of SEL and its predecessors seeking to manipulate matters with a view to ensuring availability of VAT exemption. Although those companies and their advisers appear to have considered the VAT position, we do not accept that the development of the SAE-MU relationship can be regarded as a process of seeking VAT exemption.
>
> 293. The factors which we consider to carry the greatest weight are:
>
> (1) Status of Associated College, combined from September 2010 with status of Accredited Institution.
>
> (2) Long-term links between SAE Institute and MU. Similar purposes to those of a university, namely the provision of higher education of a university standard.
>
> (3) Courses leading to a degree from MU, such courses being supervised by MU, which regulated their quality standards.
>
> (4) Conferment of degrees by MU, received by SAE students at MU degree ceremonies.
>
> 294. On the basis of the substantial evidence presented to us, and of our findings set out above, we find that SEL as the representative of SAE Institute in the UK is, and has been since 1 May 2009, a college of MU."

56. The Upper Tribunal took a different view. In its decision it noted that all of the MOCs and other agreements up to the SACA were entered into with SAE Institute rather than with SETL or SEL. It described the F-tT's contractual analysis under which the negotiations and agreements with SAE Institute resulted in obligations being imposed on SETL and later SEL as surprising. It had not been suggested that SAE Institute was acting as an agent for the UK operating companies and the more obvious analysis was that SAE Institute undertook obligations to provide courses in accordance with the relevant standards which it was therefore required to ensure were carried out through its operating subsidiary. Ms Hall described the contractual arrangements as difficult to interpret coherently. She accepted that SAE Institute as such had no legal personality and therefore no capacity in which to contract. But the answer to the question whether SEL was a college of MU was not to be found, she said, in the formal contractual documentation but in the way in which the parties operated in tandem during the relevant period.

57. The difficulty about that submission is that without reference to the contractual arrangements, it is impossible to determine what the legal relationship between MU and SEL actually was. It is clear from the evidence including the agreements

themselves that the SAE group has always presented itself as SAE Institute both for the purposes of the agreements validating the courses run in conjunction with MU and for similar collaborations with universities in other parts of the world. This suggests that the contracting party was SAEBV rather than one of the operating subsidiaries which, as I mentioned earlier, have changed from time to time in the UK without any perceived need to replace the existing contractual arrangements. In the end, however, it may not be necessary to identify who was the contracting party under the relevant MOCs and the instrument of accreditation. What the documentation indicates and what the F-tT accepted is that it was not SEL and that the first agreement to which SEL was a party was the SACA.

58. The Upper Tribunal examined these matters in the context of whether MU and SEL (as opposed to any other SAE entity) shared a common understanding that they were in a relationship of university and college. The Upper Tribunal in setting out what it considered to be the correct legal approach returned to what Judge Bishopp had said in *LCC* about recognition:

> "109. In our view it is necessary to adopt a multi-step evaluation of the relationship between the two bodies. The first step is to ascertain whether the university and the college had a common understanding of it. If they did not, the enquiry is likely to end there. Second, the common understanding must be that they are in a relationship of university and college, and not some different relationship, such as partnership. As Judge Bishopp said in *LCC*, it is difficult if not impossible to see how an institution could properly be considered a college of a university which does not recognise it as such. The same would, of course, be true of a college which does not consider itself to be part of a university. The third step is that one must examine whether the relationship is sufficiently close that the college is a college "of" the university – this was the question in *SFM* and it is only at this point that most, though not all, of the *SFM* factors become relevant: the evidence in that case showed that the university and the college had a common understanding, but that understanding alone did not answer the question whether the statutory test was satisfied.
>
> 110. The last step is to consider whether the college satisfies the requirement that it supplies education; this step is reflected in the ninth of the *SFM* factors, which is derived from the art 132.1(i) requirement that the college must have "similar objects" to those of the university; absent similar objects it would not satisfy the supply test (which is why the union failed in *University of Leicester*). Whether, as has been said in other cases, the "similar objects" requirement is met only if the "fundamental purpose" of the college is to supply university-level education is not an issue we need to decide in this case since it is accepted that SEL does satisfy this part of the test, however it is articulated. We merely add that if it is right, as Arden LJ said in *FBT* at [33], that an institution may be a

> college of a university without making exclusively exempt supplies "fundamental purpose" may overstate what must be shown.
>
> 111. The error into which the F-tT fell, in our judgment, is that they did not undertake the first and second of the steps we have identified correctly.
>
> 112. It is clear that the F-tT attempted, from rather sparse evidence, to determine whether MU's perception of the relationship between it and SEL coincided with SEL's perception, even though they did not put the exercise they were undertaking in quite that way. It is true that the FtT's task was made more difficult because no representative of MU gave evidence. This can be contrasted with the position in *SFM* where a representative of the university gave evidence from which it was clear that SFM and the University had a common understanding of their relationship. In this case, the F-tT were confined to limited documentary evidence in seeking to ascertain MU's understanding of its relationship with SEL.
>
> 113. We agree with Mr Singh that the F-tT's conclusion, that there was a common understanding that SEL became a college of MU from the moment it took over SAE's UK business in May 2009, is difficult to sustain in the light of the documentary evidence and indeed the F-tT's own analysis of it at [165] and [167], in which they discussed SAE Institute's status and concluded by observing that "there is no specific evidence to show an effective date for SAE's attainment of Associated College status, despite the recommendation which had been made at the Sydney conference in February 2002." It is plain from its context that the reference to SAE in that observation was to the worldwide organisation. We also agree with Mr Singh that it was not appropriate for the F-tT to treat the minutes of the meeting on 26 November 2009 (see para 55 above) with caution; they were the best available evidence of MU's perception at the time."

59. As I indicated earlier, I accept the obvious force of the point that if the taxpayer institution is a college of the university one would expect that to be evidenced in some way by the university's recognition of its status. But I am doubtful whether that justifies the imposition of what on one reading of [109] is a sequential test nor do I accept that the fact of recognition should be treated as in any way conclusive of the status which the college in fact enjoys.

60. The Upper Tribunal placed emphasis on the fact that the majority of the relevant agreements with MU were made by SAE Institute rather than SEL. This was said to be inconsistent with a treatment or recognition of SEL as a college of MU and it is inconsistent. But in my view even had the MOCs, the instrument of accreditation and the SACA all named SEL as the relevant counterparty it would have made no difference. Ms Hall's argument is that the various agreements simply recognise the

long-established relationship between MU and SAE Institute conducted through SETL and now SEL in the provision of validated degree courses which result in MU qualifications. She emphasised in considerable detail the closeness of the working relationship (which she described as unique in terms of MU's collaborative activities) and the degree of confidence placed in SAE Institute for the delivery of academic standards. There had been a QAA endorsement of this relationship which was described as strong. She pointed to the organisational links between the two bodies generated as part of these arrangements including the steering and joint liaison groups I mentioned earlier. MU and SAE Institute had shared objects manifested in their collaboration over a period of more than 14 years.

61. Ms Hall drew our attention to what has been said in cases about the content of university education. In *Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v Staatssecretaris van Financiën* (Case C-434/05; [2008] STC 2145) AG Sharpston at [49] of her Opinion gave the content of Article 13A(1)(i) of the Sixth Directive a wide meaning:

> "49. … as the Commission pointed out at the hearing, the 'education, vocational training or retraining' which students receive in an educational establishment is not merely what is provided by teachers from their own knowledge and skills. Rather, it includes the whole framework of facilities, teaching materials, technical resources, educational policy and organisational infrastructure within the specific educational establishment in which those teachers work."

62. College and university must therefore provide an environment, Ms Hall says, in which this framework existed and that has been provided in the present case through the arrangements between MU and SEL which the F-tT summarised in [293]-[294] of its decision.

63. I have no doubt that she is right to submit that education for the purposes of what is now Article 132(1) PVD should be given a liberal interpretation as in the *Horizon College* decision. Nor do I have any doubt that SAE Institute delivers quality teaching and promotes high academic standards in the courses which it provides in collaboration with MU. But none of this is in issue on this appeal or is relevant to its determination. The question is not the quality of the education which SEL delivers but whether it does so as a college of MU. The answer to that question depends, as I explained earlier in this judgment, on a much more hard-edged test than that previously suggested in the cases which have followed *SFM*.

64. The word "college" is derived from the Latin word "collegium" meaning a partnership. It denotes a group of people organised as an institution usually (but not necessarily) in the field of education. The use by SAE Institute of the word "college" to describe its Littlemore campus could not therefore be said to be a misuse of language, but whether it can properly be described as a college of MU is a different question which cannot in my view be answered simply by reference to a document under which the University agreed that SEL should be called an "associate college" of MU or the fact that for a long time the two bodies have collaborated in the delivery of a limited range of degree courses leading to an MU qualification.

65. The test is whether SEL (or SAE Institute) is or was part of the University in the constitutional or structural sense described earlier. That test is not satisfied in this case for a number of reasons. The only document which arguably gives SEL the right to call itself a "college" of MU is the SACA. But it is clear that this agreement merely recognised and "built on" the "special relationship" between the parties in relation to the courses which SEL provides. Neither SAE Institute nor SEL is in any legal sense a composite part of MU. They have always been and remain separate companies operating in the educational field and in particular in relation to audio and digital media technologies. They were chosen because of their expertise in this field to provide a limited number of special courses which would qualify successful students for an MU degree. For that purpose it was necessary for the courses to be validated by the university in terms of qualitative assessment but that would have been and is necessary in the case of any university degree course which is outsourced to an external provider. The accreditation of SAE Institute with its concomitant ability to validate its own courses was undoubtedly, as Professor Klich observed, a vote of confidence in SAE Institute's ability to set and assess its own courses but I do not accept that this in any way altered the constitutional or structural relationship between the two bodies.

66. The fact remains that SAE Institute through SEL provides only a very small number of highly specialised courses for MU. It is not accredited to run all the degree courses available at the university and the students enrolled on the courses have strictly defined rights in terms of the use of MU facilities rather than becoming full members of the university by virtue of their acceptance as an SAE Institute student. This is merely reflective of the fact that SAE Institute is not part of the university with corresponding general rights of admission for all its students. It remains a separate commercial organisation which MU, for perfectly legitimate economic and other reasons, has chosen to provide some of its external degree courses. This is recognised by the inclusion of SAE Institute in Part 1 of the Schedule to the 2010 Order as one of the bodies which provides courses in preparation for a degree awarded by a recognised body under s.216(3)(a) of the 1988 Act but not as a college of a university under s.216(3)(b). The contractual arrangements with SAE Institute are subject to periodic review and can be terminated in the event of concerns about academic standards. The SACA is for a period of 6 years. Again none of this is consistent with SEL being institutionally part of the university.

67. I can turn now to the grounds of appeal. Ground 1 challenges the test introduced by the Upper Tribunal in [109] of its decision based on a common understanding between university and college about the status of the taxpayer. Ms Hall submitted that the test contravened the EU principles of legal certainty, fiscal neutrality and proportionality because SEL's status as a college of MU was a matter to be ascertained on an objective basis and not by reference to MU's perception of its relationship with SEL. Exemptions from VAT are autonomous concepts under EU law and must be interpreted strictly: see Case C-91/12 *Skatteverket v PCF Clinic AB* ECLI:EU:C:2013:198; [2013] STC 1253. To introduce a subjective element into the test breaches the principle of legal certainty: see *BLP Group Plc v C & E Commissioners* [1996] 1 WLR 174; [1995] STC 424. There would also, Ms Hall submits, be a breach of the principle of fiscal neutrality since two objectively identical relationships may be taxed differently depending on the parties' understanding of it.

68. Had the Upper Tribunal intended to make the status of the college dependent on the university's subjective opinion of that matter then there would be some force in this criticism. But my own reading of [109] is that the Upper Tribunal were seeking to emphasise the point made by Judge Bishopp in *LCC* that if a body is a college of a university one would expect that fact to be recognised by the university itself. Because I do not regard this as the critical test to be applied, it is not necessary to take the point any further. I accept that the test is an objective one and, on that basis, Ms Hall's criticisms fall away. She accepts that the existence of exemptions from VAT may have an adverse effect on competition as the authors of the Second Directive also recognised. But, if properly defined, they do not breach the principles of legal certainty or fiscal neutrality as the decision of this Court in *FBT* recognised.

69. Ground 2 is that the Upper Tribunal failed to appreciate that the SAE Institute had no legal personality and therefore lacked the capacity to enter into any legal relationship. It therefore disregarded the evidence that SAE Institute was merely the name used by SAE group of which SEL was a part.

70. There is nothing in this criticism. The Upper Tribunal was clearly aware that SAE Institute was the trading name used by the SAE group of companies. This was the basis of its criticism of the F-tT for treating the agreements made with SAE Institute as imposing contractual obligations on SEL. The real point being made by the Upper Tribunal was that the recognition by MU of SAE Institute and therefore the SAE group as its trading partner was inconsistent with SEL's claim to be a college of MU in its own right.

71. Grounds 3-5 are really aspects of grounds 1 and 2 and I need say no more about them. Grounds 6-8 criticise the Upper Tribunal for having set aside what was a multi-factorial assessment by the F-tT in respect of which an appeal court would not ordinarily interfere. Some decisions by the F-tT in a VAT context undoubtedly fall within this category. A notable example can be found in the decision of this Court in *Procter & Gamble UK v Revenue and Customs Commissioners* [2009] EWCA Civ 407; [2009] STC 1990 where the question was whether Pringles fell within the exception from zero rating in Item 5 of Group 1 for "potato crisps … and similar products made from the potato, or from potato flour, or from potato starch". The Court of Appeal held that the Upper Tribunal had been wrong to set aside the decision of the F-tT absent some clear error of law. Mummery LJ said:

> "73. The Tribunal's decision in favour of HMRC was not an absolute answer to a pure question of fact or to a pure question of law. It was a judgment of mixed fact and law on the classification of Regular Pringles for VAT purposes. "Similar to" and "made from" are loose textured concepts for the classification of the goods. They are not qualified by words such as "wholly" or "substantially" or "partly" which have crept into the legal arguments. Those words are not in the legislation itself. The Tribunal's conclusions were on matters of fact and degree linked to comparisons with other goods and related to the composition of the goods themselves. Some aspects of the similarity of Regular Pringles to potato crisps are close to the centre, others are on the fringes. This exercise in judgment is pre-eminently for the specialist Tribunal entrusted by

> Parliament with the task of fact finding and with using its expertise to make the first level decision, subject only to appeal on points of law.
>
> 74. For such an appeal to succeed it must be established that the Tribunal's decision was wrong as a matter of law. In the absence of an untenable interpretation of the legislation or a plain misapplication of the law to the facts, the Tribunal's decision that Regular Pringles are "similar to" potato crisps and are "made from" the potato ought not to be disturbed on appeal. I cannot emphasise too strongly that the issue on an appeal from the Tribunal is not whether the appellate body agrees with its conclusions. It is this: *as a matter of law, was the Tribunal entitled to reach its conclusions?* It is a misconception of the very nature an appeal on a point of law to treat it, as too many appellants tend to do, as just another hearing of the self-same issue that was decided by the Tribunal."

72. I have already explained why I consider that the test to be applied in this case is not one of that kind and in my view, by adopting the approach set out in the decision in *SFM*, the F-tT has erred in law. None of the factors identified by the tribunal in [293] of its decision were sufficient either individually or collectively to support a finding that SEL was at the relevant time a college of MU.

73. For these reasons, which are not the same as those of the Upper Tribunal, I would dismiss this appeal.

Lady Justice Black :

74. I agree.

Lord Justice Sales :

75. I also agree.