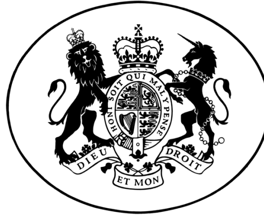

Appeal number: TC/2012/09989

VAT – whether building intended for use solely for a relevant charitable purpose – appellant intending to lease building to second charity – intention that second charity use building as fee-paying school – whether either or both an economic activity – whether receipt of remuneration gives rise to a presumption of economic activity – whether profit motive and/or intention to maximise returns required – **Floridienne, Banque Bruxelles Lambert** *and* **Yarburgh** *discussed – whether the "predominant concern" factor in* **Lord Fisher** *is inconsistent with CJEU case law – whether the rent was intended to be "concessionary" –* **Commission v France** *considered – appeal dismissed*

FIRST-TIER TRIBUNAL
TAX CHAMBER

FRENCH EDUCATION PROPERTY TRUST LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ANNE REDSTON
SHAMEEM AKHTAR

Sitting in public in the Royal Courts of Justice on 16, 17 and 18 June 2015

Roger Thomas of Counsel, instructed by PricewaterhouseCoopers LLP, for the Appellant

Jonathan Bremner of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. French Education Property Trust Limited ("FEPT") is a registered charity. At some point its name changed to KT Educational Trust Limited, but in this decision we refer to it as FEPT.

2. In 2009 FEPT acquired and subsequently renovated a listed property in Holmes Road, Kentish Town, London ("the Property"), issuing VAT zero-rate certificates to its contractors. FEPT leased the Property to another charity, the College Français Bilingue de Londres ("CFBL"). CFBL operates a fee-paying school ("the College") from the Property.

3. It was common ground that zero-rating is only available if the Property was intended for use solely by a charity "otherwise than in the course or furtherance of a business" and that the term "business" has the same meaning as "economic activity."

4. HMRC decided that FEPT had not been entitled to issue the zero-rate certificates to its contractors, because it intended to lease the Property to CFBL for use as a fee-paying school. FEPT appealed that decision. For the reasons given below, we dismiss the appeal.

The evidence

5. The Tribunal was provided with several files of documents, which included the following:

(1) correspondence between the parties and between the parties and the Tribunal;

(2) the Articles of Association of FEPT and of CFBL;

(3) documentation relating to the acquisition and renovation of the Property and the opening of the College, including certain board minutes of both FEPT and CFBL;

(4) the loan facility agreement between FEPT and its lenders ("the Facilities Agreement"). The version provided to the Tribunal was neither signed nor dated, but as the money was paid over by the lenders, and as neither party sought to argue that the final text was in any way different, the Tribunal has accepted that the terms of the document provided to it are those which were agreed between the parties;

(5) a letter dated 18 February 2013 from BNP Paribas to FEPT relating to the Facilities Agreement;

(6) a lease agreement between FEPT and CFBL for the Property, dated 3 July 2013 ("the Lease Agreement");

(7) a valuation of the Property's market rent carried out for CFBL by GeraldEve LLP as at 11 February 2013 ("the Valuation");

(8) FEPT's statutory accounts for 2010-11 and CFBL's statutory accounts from 2009 to 2014 inclusive;

(9) FEPT's Summary Information Return to the Charity Commission for 2011, and CFBL's Summary Information Returns for 2011 and 2012;

(10) a list of donations made to FEPT in connection with the renovation of the Property purchased;

5 (11) a resolution of FEPT's trustees dated 25 January 2014 and a letter dated 28 February 2014 to FEPT's trustees.

6. In addition, a schedule was handed up on the second day of the hearing ("the Schedule"). This was headed "what would the position have been had the Jonap insolvency not intervened." The reference to "Jonap" is to John O'Neill and Partners, 10 FEPT's main contractor, who went into liquidation part way through the Property's refurbishment.

7. Some of the documents were in French, but where this was the case, a written translation was helpfully provided.

8. The following witnesses for FEPT provided witness statements, gave oral 15 evidence and were cross-examined by Mr Bremner:

(1) Mr Richard Fairbairn, a director of FEPT since its incorporation and a trustee of the FEPT charitable trust;

(2) Mr Remi Bourette, a trustee of CFBL and the Vice-Chairman and treasurer of the College from 24 November 2010 to the date of the hearing. Mr 20 Bourette also provided a short supplementary Note;

(3) Mr Anthony O'Grady, the College's financial and administrative manager (bursar) since 21 August 2012, who provided two witness statements;

(4) Mr Olivier Rauch, headmaster of the Lycée Français Charles de Gaulle ("the Lycée") since 1 September 2012;

25 (5) Ms Mary Langford, a consultant at the Good Schools Guide;

(6) Ms Isabelle Faulkner, co-founder and Head of Administration of the Ecole Internationale Franco-Anglaise ("EIFA").

9. On the basis of the evidence provided to us, we find the following facts. We make further findings of fact later in our decision.

30 The facts

10. In recent years, the number of French residents in the UK has increased. Mr Fairbairn said that London is now "the sixth largest French city with its own representative at the Assemblée Nationale." He explained this by saying that French expatriates living in Northern Europe form a constituency of the French National 35 Assembly and the vast majority of those expatriates live in London.

French schools

11. The French government sets a national curriculum which applies to all state schools in France. Overseas schools can choose to follow that curriculum. Schools

which follow the French national curriculum are called “French schools” in this decision. The curriculum is prescriptive: Ms Langford told us that on a particular day a French school abroad will be on page 37 of the same history book as all schools in France.

12. Ms Langford’s unchallenged evidence was that, because of the French national curriculum, “entry into French higher education is complicated for students who have left to study outside the official system even for a short period of time.” As a result, French nationals working in the UK, who intend to return to France, usually prefer their children to continue to be educated at a French school. This is particularly the case with secondary education; with younger children parents may be more willing to “dabble” in non-French teaching.

13. Although most French parents want their children to be educated in a French school, other factors also influence their decision. These include the fees charged; the reputation of the establishment; the location of the school and the facilities available for pupils.

14. Because of the importance to French parents of the French curriculum, together with the increasing numbers of French people working in the UK, French schools in the UK are oversubscribed. As a result, many children of French parents are enrolled in UK state and private schools as a matter of necessity, although some parents refuse to accept posts in the UK if they cannot obtain a place in a French school. Others leave their families in France and commute to the UK. A minority actively choose an English education over that provided in a French school. Some non-French nationals also seek to educate their children in a French school, although as priority is given to the children of French nationals, it is even more difficult for these children to obtain places.

15. The French government provides financial support for some French schools, usually through the Agence pour l’Enseignement Français a l’Etranger (“AEFE”). The amount of support depends on the type of French school.

(1) The first type is directly managed by the AEFE. These schools are known as Etablissements en Gestion Direct (“EGD”). The only EGD in the UK is the Lycée, which receives around 30% of its operating budget from the French government.

(2) The second type is the Ecole Conventionée. These schools operate as separate legal entities and manage their own finances, but enter into a “convention” with the AEFE setting out the parties’ obligations and requirements, which include the provision by the AEFE of some financial support for the school.

(3) The third type is the Ecole Partnenaire or Partner School. These have less oversight and normally do not receive financial help from the AEFE, but still follow the French national curriculum.

16. Although Mr O’Grady’s witness statement referred to the College as a Partner School, he corrected this in oral evidence: it is an Ecole Conventionée.

Establishing FEPT and setting up the College

17. In 2008 the Lycée was the only French school in the UK providing secondary education. It had two primary school annexes, one in Ealing and one in Wandsworth. Several other French schools provided nursery and/or primary education. One was L'Ile aux enfants, which was established as a company but was also a registered charity: it provided education for children aged from 4 to 11.

18. In 2008, the French embassy in London launched an initiative called "Plan Ecole," under which an independent group was tasked with assessing the shortage of school places in French schools and suggesting solutions. On 19 June 2008, the Plan Ecole group published a Report recommending that (a) a further 2,500 places be created in UK-based French schools and (b) a number of working groups be set up to achieve that goal.

19. On 20 October 2009, the minutes of a meeting about Plan Ecole record that:

(1) a school was available in Kentish Town and the deadline for exchange of contracts was 28 October 2009, with completion one calendar month later;

(2) the purchase price was estimated to be £8.4m, with a further £8-10m for renovation and £2m for payments to "intermediaries";

(3) an "entité propriétaire ('Prop Co')" was to be established; this was translated as "owning entity." The minutes state that the Prop Co could be both a limited company and a charity;

(4) an "entité opérationelle ('Op Co')" would also be established; this was translated as an "operational entity." Op Co would be a school;

(5) Op Co's resources would consist of school fees to cover (a) the running costs of the school and (b) the rent payable to Prop Co;

(6) Prop Co would at first be financed with a bank loan; donors and institutional investors would subsequently become shareholders of Prop Co;

(7) the donations "would reduce the bank loan and consequent interest and capital payment obligations which are passed on to the tenant Op Co, and in turn therefore reduce the level of school fees."

20. On 26 October 2009 FEPT was established as a company limited by guarantee. The Articles of Association describe FEPT as "the charity" and Article 4 states that its objects are "specifically restricted to the following":

> "to advance for the public benefit in the United Kingdom the education of pupils in the french education system, in particular without prejudice to the generality of the foregoing, to provide premises and facilities for schools offering a French or broader bilingual curriculum or to provide assistance in establishing, maintaining, carrying on, managing and developing such schools."

21. Article 6.1 provides that "the income and property of the charity shall be applied solely towards the promotion of the Objects."

22. On 18 March 2010, FEPT was registered as a charity by the Charity Commission. FEPT's trustees had regular meetings, supplemented by telephone conferences when required. They took professional advice from Lewis Silkin and PriceWaterhouseCoopers ("PwC"). FEPT was managed on a day to day basis by Mr Frédéric de la Borderie of Turenne Consulting.

23. On 28 October 2009, contracts for the purchase of the Property were exchanged: the deposit of £800k was provided by way of loan to FEPT by the trustees of the French Embassy Trust.

24. On 24 November 2009, the French Ambassador wrote to a Senateur des Français établis hors de France (a member of the Upper House of the French Parliament who represented French people living overseas). The Ambassador asked for his support in obtaining a French government guarantee for the commercial loan being negotiated by FEPT to fund the purchase and refurbishment of the Property, which was. The Senateur was advised that the absence of a French government guarantee was likely to increase the interest rate charged, so that FEPT would be required to find a further £1.3m.

25. The French Ministry of Foreign Affairs subsequently provided FEPT with £1.05m, which was deposited with the Association Nationale des Ecoles Françaises à l'Etranger ("ANEFE"). That body then provided FEPT with the guarantee.

26. On 26 November 2009, FEPT's directors met and approved the terms of the Facilities Agreement between FEPT and three banks: BNP Paribas, Calyon and Société Générale, under which a £21m sterling revolving facility was provided to FEPT. The interest rate was fixed at 5.06% for the 25 year period of the loan.

27. Paragraph 3.6 of the minutes of the directors' meeting states that:

> "it was noted that, once the Property had been refurbished, the Company intended to grant a lease of the Property for a term of 25 years to an operational company which would thereafter carry on the business of the school. It was noted that it was a requirement of the Facilities Agreement that the Company enter into an OpCo agreement for Lease with the form of Lease to be granted attached within a certain period of time from completion of the Facilities Agreement and hereafter that the Lease would be granted to the OpCo on the Delivery Date with the term of the lease commencing on the Delivery Date."

28. The Facilities Agreement reflected the terms set out in those minutes. The purchase of the Property was completed on 30 November 2009.

29. The Property is a Grade II listed Victorian building. Planning consent for the renovation works was granted in spring 2010 and FEPT appointed Jonap to carry out the building work. On 21 July 2010, Mr Fairbairn signed a "certificate for zero-rated and reduced rated building work" in his capacity as a director of FEPT, and provided the certificate to Jonap. The renovation began in June 2010.

30. On 22 June 2010, a new board of trustees was appointed for L'Ile aux enfants. Six trustees were elected by parents and six were appointed on the recommendation of the French Chamber of Commerce.

31. On 24 November 2010, L'Ile aux enfants changed its name to CFBL Ltd. The accounts for the year to 31 December 2010, which were signed on 26 May 2011, say:

> "**Future Developments**
>
> The Trustees are planning a move to the new premises situated in Holmes Road NW5 in September 2011. the Trustees are negotiating a lease with FEPT which will commence in September 2011. The annual commitment is expected to be £1.2m a year. The school's education offer will be expanded to include the provision of secondary education up to the age of 15 and the aim is to increase the number of pupils to 360 for the primary and 340 for the secondary…"

32. The same accounts state that the charity's objects were:

> "the advancement of education for boys and girls, and in particular to promote, maintain and conduct, for the benefit of the public in the UK, a French school for the nursery and primary education of children, irrespective of the nationality of the children or their parents."

33. An undated document, headed "Articles of Association of the CFBL Ltd" shows that the objects of the charity were later changed to:

> "to promote, maintain and conduct for the benefit of the public in London, or elsewhere in the United Kingdom a school offering a French or broader bilingual curriculum for the general primary or secondary education of pupils whether of French nationality or otherwise."

34. In June 2011 FEPT was informed that Jonap was likely to go into liquidation. On 16 June 2011, FEPT's trustees had an urgent telephone conference. The minutes of that call say that the additional costs as a result of the liquidation "are estimated at £1.7m on a worst case scenario." However, as FEPT had already raised £700k more donations than expected, the net shortfall was expected to be around £1m. The trustees agreed that FEPT should seek further donations. A funding drive was launched, and a further £402k raised.

35. In early August 2011, Jonap went into liquidation. FEPT subsequently engaged Jonap's subcontractors directly and issued them with zero-rating certificates. It also began renegotiating the Facilities Agreement.

36. The College opened on 16 September 2011 as planned, although the number of students was lower than expected, possibly because of rumours about problems with completing the building. Part of the planned building work was delayed and took place later.

37. On 16 November 2011, the French Ambassador was told that FEPT's financial situation "remains precarious." Various solutions were suggested, including the

transfer to FEPT of legal title to the primary school in Ealing, so that FEPT could raise funds on the security of that property, which was valued at £4m.

38. The minutes of a conference call between FEPT's trustees and others, dated 27 January 2012, state that:

5 "the negotiation with the banks, although difficult and on-going, has been made possible by the diversification of FEPT's assets through the transfer of the Ealing property."

39. From the above we find that legal title to the Ealing school was transferred to FEPT at some date between 16 November 2011 and 27 January 2012.

10 *The Lease Agreement*

40. There are various references in the documents to an "Agreement for Lease" between FEPT and CFBL, but no copy of that document was provided to the Tribunal. From the minutes of a meeting of CFBL's trustees, held on 13 December 2012, we find as facts that the Agreement for Lease was signed on 23 December 2011

15 and set the initial rent at £1.2m, with "a new principal rent" to be agreed between FEPT and CFBL once the works had been completed.

41. The Lease Agreement itself was not signed until 3 July 2013, almost two years after the College opened. It states that the 25 year term began on 1 September 2011. We consider at §107 whether the agreement does have this retrospective effect.

20 42. Clause 1.2 of Schedule 2 of the Lease Agreement provides that the rent will increase annually by the retail price index ("RPI"), subject to a cap of 4% and a collar of 2.5%.

43. Meanwhile, on 18 February 2013, BNP Paribas had confirmed to FEPT in writing that providing (a) the terms of the Lease Agreement included the terms set out

25 in the previous paragraphs and (b) CFBL complied with those terms, the rent would be sufficient to repay both the capital borrowed and the related interest by the end of the 25 year lease term. We accept that evidence.

The rent

44. FEPT's main item of income was the rent payable by CFBL for its occupation

30 of the Property. We have already found that CFBL's 2010 accounts (signed on 26 May 2011) and the Agreement for Lease (signed on 23 December 2011) both show that FEPT and CFBL understood that the original rent would be £1.2m.

45. CFBL's trustees met on 13 December 2012. The minutes of that meeting say:

"the base rent

35 It was noted that the initial annual rent agreed in December 2011, was £1.2m which amount had been indexed at the RPI rate of 2.9% on 1 September 2012 to £1,234,00…The new principal rent was intended to be payable from 1 September 2013."

46. We therefore find that, on 1 September 2012, CFBL's trustees understood that the base rent would be increased by RPI for the 2013-14 academic year, to £1.234m, an increase of 2.8%. As we have seen, the Lease Agreement provides for the rent to increase each year by RPI, subject to a cap of 4% and a collar of 2.5%. We infer from these minutes that the same term was included in the Agreement for Lease and we so find.

47. At the same meeting, Mr de la Borderie told CFBL's trustees that "FEPT now requires a new principal rent of £1,350,000, payable from 1 January 2013." He explained the reason for the increase as follows:

> "the £1,350,000 amount represented exactly the amount of repayment required by the lending banks following the refinancing of FEPT consequent to the Jonap (main contractor) insolvency."

48. We were not told when FEPT decided to increase the rent from £1.234m to £1.35m. Given the close relationship between the two charities, we find it implausible that FEPT had had that intention for any length of time without sharing it with CFBL.

49. Mr de la Borderie went on to say that:

> "FEPT also require, as additional rent, an indemnity for its expenses incurred in the management and administration of the lease, including:
>
> - the lending bank agent (BNP) charge of £25,000 per annum;
> - the ANEFE fee for the debt guarantee (0.3% of the principal amount, at present £63,000pa); and
> - a management fee set at £50,000 but which has been reduced to £18,000 for 2013 and to £43,000 for 2014.
>
> It was noted that under the Agreement for Lease, FEPT would insure the building and CFBL would reimburse FEPT for the annual premium, which presently stood at £30,000pa…
>
> The initial rent had been calculated purely on the interest repayment and as FEPT had not been invoiced at the outset, they had decided not to recharge CFBL under the Agreement for Lease.
>
> The intention from the outset had been that CFBL would cover all the costs incurred by FEPT in procuring the premises to the school (on a back-to-back basis but with the exclusion of equity investments) which was the reason why these costs needed to be included in the lease."

50. We therefore find that FEPT had intended "from the outset" that it would recover all its Property-related costs from CFBL, and that these were expected to include (a) the repayments to the banks and (b) further sums totalling £138k, being the BNP and ANEFE fees and a £50k management charge and (c) the costs of insuring the Property, currently £30k.

51. These extra charges are also reflected in CFBL's 2012 statutory accounts, which say that, in addition to the "base rent," the College:

> "is also committed to pay as additional rent various ancillary costs including the building's insurance costs and a management fee."

52. For that year, the accounts show that £1.31m was payable to FEPT, being the rent of £1.2m plus further sums of £110k. The amount payable for 2013 was £1.45m, being £1.35m of rent plus further sums of £100k. These sums are lower than the expected £168k, partly because of the lower management charges in both years.

53. On 25 January 2014, a majority of FEPT's trustees signed a written resolution recording that their "current intention" once the bank loan was repaid in 2034 was to reduce CFBL's rent to a "nominal amount" sufficient to cover FEPT's net operating costs.

The Valuation

54. The Valuation was carried out by GeraldEve and dated 11 February 2013. It stated that the Property's market rent was £1.4m pa, but noted that the demand for institutional property was more limited than that for residential and commercial property, which "makes it more difficult to accurately assess its value."

55. The Valuation was calculated in two stages:

(1) The market rent was £43 per square foot; as the Property covered 29,783 square feet the market value was £1.28m.

(2) However, GeraldEve had been informed that fixtures, fittings, furniture and equipment ("FFE") owned by FEPT to the value of £624k had been included in the Property. The Valuation stated that FFE is normally a tenant's responsibility, and the amount would be depreciated over a five year period. GeraldEve therefore increased the annual market rent by £124.8k (£624k divided by 5) to reflect the fact that CFBL had the benefit of FFE provided by FEPT. Adding this additional £124.8k to the £1.28m already calculated produces the £1.4m shown as the market rent.

56. The Valuation also states that GeraldEve had been told that the Property was to be let under a "full repairing and insuring lease." It follows that the Valuation was carried out on the basis that the tenant was responsible for repairs and insurance.

Donations

57. As already mentioned, FEPT solicited donations to help finance the development of the Property. Most donors were French companies. The first donation of £25,000 was received by FEPT on 24 November 2010. By 31 October 2013 a total of £4,398,999 had been received.

58. There is currently no scope for further donations, both because of the limited number of donors who are interested in supporting French schools, and because another new French school, in Wembley, is also soliciting donations. Donors have priority access to a percentage of school places, see §66.

Management of the College

59. The College is divided into a primary and a secondary school. The former includes a nursery section while the latter takes pupils up to around age 15.

60. The College is managed by its headmaster and the bursar (Mr O'Grady), both of whom report to CFBL's trustees. The head of the primary school and the deputy head of the secondary school both report to the headmaster. CFBL's statutory accounts show that in 2011 there were 33 teachers and 18 administrative staff; the following year the number of teachers had increased to 43 while administrative staff numbers remained the same.

61. About half the teachers are in the primary school and half in the secondary school. They are paid according to seniority and experience, using the UK pay scale for state schools but adding around 3%.

62. Mr O'Grady's job involves oversight of finance, administration, IT, catering and health and safety. He has a team of "a dozen people" of whom around five are in finance and administration. The catering is subcontracted.

63. The College works to a detailed three year plan, called a Projet d'Etablissement. At the time of the hearing, Mr O'Grady said that he was currently preparing that for 2016-18. The Projet sets out the College's aims, and includes a review of previous objectives.

The pupils

64. The College has the capacity to teach 700 pupils. As at 31 December 2011, there were 600 pupils; a year later this had increased to 680. The College is now over-subscribed: in the 2014-15 academic year there were 748 applications for 148 places. There are around 30 pupils in each class, rising to 32-34 for older pupils.

65. The College operates a selection process under which preference is given to French citizens, followed by: siblings of children at the school; children from French schools abroad; children from French schools in France and other French-speaking children.

66. In addition, CFBL is required by FEPT to give priority to a pool of pupils who are the children of individual donors or of those working for donor organisations, subject to the following conditions: (a) the children must otherwise meet the school's admission criteria; (b) the number of such children must not exceed 30% of the total; and (c) siblings of existing pupils must be given priority over these "donor" children. CFBL's obligation to set up and operate the pool in this way is set out at Clause 18.8 of the Lease Agreement.

67. As a result of the College's admissions criteria, about 84% of the pupils are French nationals, about 6% are British, and 10% are from other countries.

The fees charged to the parents

68. The fees charged for primary and secondary pupils were £5,400pa in 2011-12; £5,910pa in 2012-13 and £6,673pa in 2013-14. The costs of lunch and a "contribution" to sports were additional: together these totalled £520 in the first year and £1,020 in the second year, in each case for secondary pupils (the cost to primary students was a little less).

69. Parents are contractually obliged to pay the fees charged by the College, but French parents can apply for a means tested bursary from the AEFE. Bursaries are paid directly to the College, so if a parent is awarded a bursary, the amount billed to them reduces; if no bursary is awarded, the parent is liable for the full fees. In the year to December 2012, bursaries of £521,037 were received by CFBL.

70. On 28 February 2014, Mr Bourette (the College's treasurer and a trustee of CFBL) wrote to FEPT's trustees saying that "a decrease in the principal rent…would result in lower school fees, all other costs and factors remaining equal." He ended the letter by saying that he "cannot speak on behalf of the future board of CFBL" but that the College's policy was "not to make any surplus exceeding the School's financial requirements."

CFBL's income and expenditure

71. CFBL's main item of expenditure is the rent and related costs due to FEPT, as set out above. Most of its income comes from the fees charged to parents. In 2011-12 its fee income was £4,753,315 rising to £5,171,761 in 2012-13.

72. The budget and actual figures for the first three years were as follows:

Year ended	Budget	Actual
	£	£
2011	(187,751)	286,583
2012	(231,053)	306,296
2013	(247,000)	(63,376)

73. The differences between budgeted and actual figures was partly caused by the AEFE subsidies. In 2011-12, AEFE paid for the Head Teacher and several members of staff, saving CFBL £574,000. In 2012-13 and 2013-14 the value of the AEFE contribution dropped to £317,000 and £310,740 respectively. In addition, the French government provided equipment to the value of £355,000 to assist the College. Although CFBL expected some contribution from the AEFE, the exact value of that contribution was not clear at the time the budgets were drawn up.

74. Another reason for the differences was that, in the early years of the College's operations, it was difficult to make reliable estimates, so budgets included a degree of prudence to take account of that higher margin of error.

75. CFBL was mindful of the Charity Commission's recommendation to accrue some funds as reserves. The Board Minutes dated 13 December 2012 refer to a target level of reserves equal to one term's operating costs. In these early years of the College's operations, it was not possible to accrue those reserves.

5 76. The CFBL Parents Association was set up as a separate charity in 2009. This contributed varying amounts to the College's smaller projects. It raised £24k in the 2011-12 academic year and £48k the following year.

Ecole Internationale Franco-Anglaise

77. EIFA was put forward by the appellant as a comparator to the College. The two 10 schools have some similarities but there are also a number of differences.

78. EIFA was established by Ms Faulkner and Ms Dehon in 2013. It is an international school which provides bilingual (French and English) education to children aged from 3-11 years old. Classes are based on the French national curriculum. It does not benefit from AEFE subsidies. Class sizes are small, at around 15 20 pupils per class.

79. EIFA sets its fees "at a competitive rate" to attract pupils. Ms Faulkner researched the fees charged by independent schools and fixed EIFA's fees at a slightly lower level, as the school was new and had no reputation in the market place. EIFA currently charges £4,800 per term for primary students. It expects to increase 20 the fees over time so they are on a par with those charged by other independent schools.

80. EIFA is not a charity and no funds are sought via donations from parents or others. Instead, money is raised from investors who receive shares in EIFA Limited, which runs EIFA. There is an expectation that investors will receive dividends in the 25 future. All the company's incoming resources are from school fees or investors. EIFA's biggest cost is staff – around 80% of the total budget. It operates from a Georgian House under a lease agreement, which has a five year rent review clause. An increased rent is likely when that review takes place. EIFA Limited made a small loss initially but expects to make a profit this year.

30 *The decision under appeal and the correspondence with the tribunal*

81. As already stated, following Jonap's liquidation, FEPT engaged Jonap's subcontractors directly. One of those subcontractors was Raytell Electrical Co Ltd ("Raytell"). On 7 October 2011, Raytell contacted HMRC to ask whether it was able to zero-rate its supplies, as FEPT had said was the case.

35 82. On 12 October 2011, HMRC replied, saying that as the Property was to be used as a fee-paying school, all invoices were to be standard rated. On 16 November 2011, HMRC wrote to FEPT, saying that it understood FEPT had been issuing zero-rate certificates to contractors; that these had been incorrectly issued, and asking for details.

83. Correspondence ensued between PwC and HMRC relating to the issuance of the certificates. PwC also provided HMRC with a copy of the certificate issued to Raytell, dated 20 October 2011.

84. On 21 May 2012 HMRC issued a formal decision that the supplies were not zero-rated, and again asked for details of all certificates which had been issued. On 31 August 2012, the decision was upheld on review.

85. On 10 September 2012, PwC asked HMRC to look again at the decision. By letter dated 20 September 2012 HMRC informed PwC that it was not able to carry out a second review and that if FEPT remained dissatisfied it must appeal to the Tribunal. PwC Legal LLP appealed to the Tribunal on behalf of FEPT on 29 October 2012.

86. On 28 January 2013 the Tribunal informed PwC Legal that (a) the appeal had been classified as complex, advising that if FEPT wished to opt out of the costs regime, an application must be received within 28 days, and (b) the appeal had been filed out of time. No opt-out was received, and on 5 February 2013, HMRC told the Tribunal it had no objection to the late appeal.

The late appeal

87. We considered the principles set out by Morgan J in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) and in particular the questions posed at [34] of that decision. We found that the period of delay had been short; that the reason for the delay was that PwC had asked HMRC to consider the decision again; that the prejudice to FEPT in not being able to appeal the decision significantly outweighed the prejudice to HMRC if the appeal was allowed to proceed, and that HMRC had not objected to the late appeal.

88. We found that it was in the interests of justice to allow the appeal to proceed.

The legislation

The Principal VAT directive

89. The Principal VAT Directive ("the PVD"), so far as relevant to this decision, provides at Article 2(1) that:

> "The following transactions shall be subject to VAT:
>
> (a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such.
>
> (b) …
>
> (c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such."

90. Article 9(1) of the PVD provides that:

> "'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

> Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity.' The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."

91. Some of the case law to which we later make reference refers to the similar phraseology used in Article 4(2) of the Sixth Directive. The only material difference is that the Sixth Directive does not include the words "in particular" in the sentence "The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall *in particular* be regarded as an economic activity." However, neither party sought to argue that anything turned on that difference in wording.

92. Article 24(1) of the PVD provides that "supply of services" means "any transaction which does not constitute a supply of goods."

93. Title XI sets out exemptions from VAT. It opens with Article 131, which provides that:

> "The exemptions provided for in Chapters 2 to 9 shall 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."

94. Article 132 provides that "member states shall exempt the following transactions." Included in the list which then follows are the following:

> "(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;
>
> (j) tuition given privately by teachers and covering school or university education…"

UK legislation

95. The PVD is, for the most part, implemented under UK law by the Value Added Tax Act 1994 ("VATA"). VATA s 4 provides:

> "Scope of VAT on taxable supplies
>
> (1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
>
> (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply."

96. VATA Sch 9, Group 6 provides, *inter alia,* that education provided by an "eligible body" is exempt from VAT. The term "eligible body" is defined to include both independent and state schools (Note 1(a) to Group 6).

97. VATA s 30 provides for certain supplies by a taxable person to be chargeable at the zero rate. Sch 8, Group 6, Item 2 provides for the zero-rating of 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."

98. VATA Sch 8, Group 6, Item 3 provides that 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" is also zero-rated.

99. VATA s 98(9) provides that Schedule 8 "shall be interpreted in accordance with the Notes contained therein." So far as relevant to this appeal, Note 1 to Group 6 defines a "protected building" as:

> "a building which is...intended for use solely for…a relevant charitable purpose after the reconstruction or alteration and which…is:
>
> (a) a listed building…"

100. Note 3 to Group 6 provides that Notes (1), (4), (6), (12) to (14) and (22) to (24) of Group 5 also apply to Group 6, subject to any appropriate modifications. Note (6) to Group 5 provides that:

> "Use for a relevant charitable purpose means use by a charity in either or both 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."

101. Note 12 provides, so far as relevant to this case, that:

> "(12) Where all or part of a building is intended for use solely for...a relevant charitable purpose
>
> (a) …
>
> (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."

102. It was common ground that "business" in VATA is the same as "economic activity" under EU law (*Institute of Chartered Accountants in England and Wales v C&E Commrs* [1999] STC 398 ("*ICAEW*") at [404] *per* Lord Slynn).

The issues in dispute

103. Since the Property is a listed building, and as FEPT did not argue that it was to be used as village hall or similarly, the only issue between the parties was whether the Property was "solely" to be used "otherwise than in the course or furtherance of a business."

104. If HMRC's view of the matter is correct, there may be further consequences for FEPT, such as an assessment. No such further consequence was before this Tribunal. We were only asked to consider the issue in the previous paragraph.

105. The parties had agreed that, were the Tribunal to allow FEPT's appeal, HMRC would then consider whether or not the alterations to the Property were "approved alterations" falling within Note 6 to Schedule 8. In view of the Tribunal's decision, no such further consideration is required.

Preliminary legal points

106. We first consider two preliminary legal points:

(1) the status of the Lease Agreement; and

(2) whether the statutory test depends on (a) FEPT's intention, at the date the certificates were given, as to how it was expecting to use the Property, or (b) the Property's actual use, if different.

The Lease Agreement

107. As stated at §41 above, the Lease Agreement was not signed until 3 July 2013, almost two years after the College opened. Both HMRC and FEPT accepted that it was effective from 1 September 2011, which was the "term commencement date" stated on the face of the Lease Agreement.

108. We agree. In *Northern & Shell plc v John Laing Construction* [2003] EWCA Civ 1035 the Court of Appeal upheld the decision of Thornton J at first instance, summarised at [18] of Nelson J's judgment:

> "Whether or not parties intended a contract or deed under seal to take effect retrospectively depended upon the intention of the parties. Such intention could be provided for by the words of the contract or deed itself or by way of necessary implication from surrounding circumstances and business efficacy."

109. It is clear on the facts that the parties intended the Lease Agreement to take effect from 1 September 2011 and we find that it was therefore retrospective to that date.

Intended for use?

110. Mr Thomas submitted that the issue before the Tribunal was the intended use of the Property at the time the certificates were given, and not the actual use, if different.

111. He referred to *HMRC v Fenwood Developments Ltd* [2006] STC 644 ("*Fenwood*"). In that case HMRC had decided that the zero-rated certificates had been wrongly given because the building was a hospital or prison and they issued an assessment. Sir Andrew Morrit upheld the decision of the VAT tribunal that the building was not a hospital or a prison. He also found, albeit *obiter*, that the HMRC officer had considered only the building's actual use and not its intended use, and the assessment could not therefore have been made to the officer's best judgement.

112. Mr Thomas did not submit that HMRC had in this case failed to base their decision on the intended use, but rather that the Tribunal had to have regard to the position at the time the certificates were issued, rather than at some later date.

113. We concur. Note 1 to Group 6 defines a "protected building" as "a building which is...intended for use solely for…a relevant charitable purpose" and Note 12, which deals with the zero-rate certificates, also refers to "intended for use." Having said this, we also agree with Sir Andrew Morritt when he said, at [36] of *Fenwood*, that actual use may be the best evidence of intended use in the absence of any indication to the contrary.

114. In order to establish the intended use, we first need to know when the certificates were issued. We have, however, been provided with only two certificates: that issued to Jonap on 21 July 2010 and that issued to Raytell in October 2011.

115. We have therefore taken it that FEPT issued the certificates between July 2010, when Jonap was appointed, to 21 May 2012, the date of HMRC's decision, and we have called this "the relevant period". In setting that end date we take into account the fact that although the College opened in September 2011, not all the planned works were completed by then; some were carried out later.

116. There was no dispute that FEPT intended, at all times in the relevant period, to lease the Property to CFBL for it to be used as a fee-paying school.

The approach to be taken

117. For HMRC, Mr Bremner's position was that FEPT must show that both the granting of a lease to CFBL and CFBL's use of the building as a fee-paying school, were otherwise than in the course or furtherance of a business, because the statutory test is only met if the Property is intended for use <u>solely</u> for a relevant charitable purpose.

118. Mr Thomas invited the Tribunal to take a different approach. In his skeleton argument, he had said that "the relationship between FEPT and CFBL is extremely close: effectively FEPT exists solely for the purpose of making the school premises available to CFBL."

119. This submission was further developed on the second day of the hearing, after FEPT's witnesses had given evidence, when Mr Thomas said that FEPT and CFBL should be regarded as a single entity on the basis that the only reasons for there being two limited companies were (a) to satisfy the requirements of the lending banks and

(b) to separate the risks of the College from those of FEPT. He asked the Tribunal to find, in the light of the close relationship between the two charities, that FEPT was simply a channel through which CFBL pays off the borrowings necessary to purchase and refurbish the College.

5 120. Mr Bremner prefaced his response by pointing out that he would have been better placed to address this submission, including asking further questions of the appellant's witnesses on cross-examination, had it been clearly made in Mr Thomas's skeleton. He submitted that, in any event, the argument was flawed, because:

(1) the intention at the outset had been that there would be both a PropCo and
10 an OpCo, and that FEPT, the PropCo, would borrow to invest in other schools; it was only later that this approach changed; and

(2) the two companies were separate legal entities and there was no basis under VAT law to treat them as transparent.

Discussion

15 121. Although Mr Thomas invited us to find that "effectively FEPT exists solely for the purpose of making the school premises available to CFBL", we agree with Mr Bremner that this was not the position during the relevant period.

122. Instead, we find as a fact that FEPT's intention was that it should act as PropCo for future schools, as can be seen from the following:

20 (1) The note from FEPT's trustees to the French Ambassador dated 18 November 2011, which says that FEPT "was initially set up for the Kentish Town project but with the aim of acquiring, renovating and building schools for any French teaching institution in the United Kingdom."

(2) In FEPT's Summary Information Return for the year ended 31 October
25 2011, filed with the Charity Commission on 2 August 2012, Question 7 asks "What are your charity's main objectives for next year?" FEPT replied "searching for new school premises for a secondary school for 1,000 pupils; finishing the extension of the new built element in the Kentish Town School."

(3) As already set out at §39 above, ownership of the site of the Ealing school
30 was transferred to FEPT before 27 January 2012.

(4) The minutes of CFBL's trustees meeting, dated 10 October 2012, which record that a site for a new secondary school had been identified in Brent and go on to say that "the Brent project would be financed by FEPT through a bank loan requiring a French State guarantee."

35 (5) The minutes CFBL's trustees meeting, dated 13 December 2012, which say that "the cost of another project would not be transferred to CFBL but kept separate by FEPT."

(6) The letter from FEPT to CFBL dated 25 January 2013, which refers to the purchase and refurbishment of CFBL as being FEPT's "first project."

123. We accept that it was subsequently decided to establish a separate legal structure for the funding of each new school, including the Brent project, and that the Ealing site was also be transferred away from FEPT. Although we were not told when this change of mind occurred, we find as a fact, based on the evidence set out in the preceding paragraph, that it was after 25 January 2013.

124. Turning to the law, there is, as Mr Bremner submitted, no statutory basis for treating the two companies as if they were one. Under Article 11 of the PVD, EU member states "may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links." It is therefore left to national law to decide whether two such entities can be treated as one for VAT purposes. There is no UK provision under which two independent charities, which do not satisfy the VAT grouping requirements, can be treated as a single entity.

125. We also note the approach taken in *HMRC v Yarburgh Children's Trust* [2002] STC 207 ("*Yarburgh*"). In that case a building owned by the trustees of the Yarburgh Children's Trust ("the Trust") was refurbished and leased to another charity, the Yarburgh Community Playgroup ("the Playgroup"), for £2,800 pa. The issue was whether supplies of building works to the Trust should be zero-rated. Patten J decided that HMRC would succeed "if either the lease by the Trust or the activities of the Playgroup constitute a form of economic or business activity" and that both activities had to be considered, see [5]-[7] of the decision. Patten J structured his judgment by first considering the lease, and then the occupation of the property by the Playgroup.

126. We respectfully agree that this is the right approach to analysing the instant case. FEPT must therefore show that *both* the granting of a lease to CFBL and CFBL's use of the Property as a fee-paying school, were otherwise than in the course or furtherance of a business, and that if FEPT fails on either point, the appeal must be dismissed.

127. We therefore consider first FEPT's letting of the Property to CFBL and then its use by the College. But first we set out some of the relevant case law.

Case law on the meaning of "economic activity"

128. There is extensive CJEU case law on the meaning of "economic activity," as well as a considerable body of UK law on the meaning of "business."

129. The CJEU case law repeatedly states that the scope of "economic activity" in Article 9(1) of the PVD is "very wide" and that, in deciding whether or not there is an economic activity, the term is "objective in character, in the sense that the activity is considered *per se* and without regard to its purpose or results" – see for example *Commission v Netherlands* [1987] (C-235/85) ECR 1471 at [8]; *Commission v Greece* [2000] (C-260/98) ECR I-6537 at [26] and *University of Huddersfield* [2006] (Case C-223/03) ECR I-1751 at [47], all cited in *Commission v Republic of Finland* (Case C-246/08) [2009] ECR I-10605 ("*Finland*") at [37].

130. In *Yarburgh* at [23] Patten J summarised the approach to be taken:

> "I accept Miss Whipple's submission [for HMRC] that the motive of the person who makes a supply of goods or services is not relevant to and more particularly cannot dictate the correct tax treatment of that transaction…But the exclusion of motive or purpose in that sense does not require or in my judgment allow the Tribunal to disregard the observable terms and features of the transaction in question and the wider context in which it came to be carried out. This is because the transaction if looked at in isolation will not usually enable the Court to decide whether it was carried out in the course or furtherance of a business which is the test under VATA 1994 s 4(1)…This test necessitates an enquiry by the Tribunal into the wider picture. It will need to ascertain the nature of the activities carried on by the person alleged to be in business, the terms upon which and manner in which these activities (including the transaction in question) were carried out and the nature of the relationship between the parties to the transaction. This is not intended to be an exhaustive or particularised list."

131. The requirement that, in deciding whether or not there is an economic activity, the Tribunal must consider "the wider picture", can also be seen in *C&E Comrs v Morrison's Academy Boarding Houses Association* [1978] STC 1 ("*Morrison's Academy*") at page 5, where the Lord President, Lord Emslie, said:

> "The answer is to be found by looking at the whole activities carried on by the association to see if those activities constitute a "business" within the meaning of Part I of the 1972 Act."

132. Similarly, in *C&E Commrs v Lord Fisher* [1981] STC 238 ("*Lord Fisher*") Gibson J concluded at page 252 (emphasis added):

> "The tribunal, as I understand their decision, saw their task, having determined the primary facts, as deciding, in the light of the authorities cited to them, whether, after considering the organising of the taxpayer's shoot <u>in all its aspects</u>, they found it to be a business carried on by him or not. They found that it was not a business. In my judgment, the tribunal are not shown to have committed any error of law in reaching that conclusion."

133. In *HMRC v Langridge on the Thames* [2015] STC 672 ("*Longridge*"), Rose J said that it was for the tribunal in that case to decide whether or not there was an economic activity "on the basis of all the facts before it."

134. In this appeal both parties tried to persuade us, in terms, that one or more case law authorities allowed us to short circuit that "wider picture" enquiry. For HMRC, Mr Bremner sought to convince us that there was "a general presumption that where there is consideration paid for services then there is an economic activity absent some unusual feature that overturns that presumption." For FEPT, Mr Thomas submitted that a profit motive and/or the maximisation of returns was required before there could be an economic activity. In the next sections of this decision, we set out and discuss each of these submissions.

135. We then go on to consider two other points on which we were briefly addressed by both Counsel: whether the charitable status of both CFBL and FEPT and/or the existence of a VAT exemption for educational supplies by schools should be regarded as decisive factors in coming to our decision.

5 **A presumption of economic activity if carried out in return for remuneration?**

136. In arguing for the existence of a general presumption that there is an economic activity where there is consideration paid for services, absent some unusual feature that overturns that presumption, Mr Bremner relied in particular on the following passage from *Finland* at [37]:

10

> "An activity is thus, as a general rule, categorised as economic where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity (*Commission v Netherlands*, paragraphs 9 and 15; and Case C-408/06 *Götz* [2007] ECR I-11295, paragraph 18)."

15 137. There was no dispute, on the facts of this case, that the activities in question were intended to be "permanent"; the parties' submissions therefore focused on whether the receipt of remuneration gives rise to a presumption that the person is carrying out an economic activity.

138. Mr Bremner acknowledged that HMRC had put the same argument in 20 *Longridge* without success: Rose J said at [42]:

> "Neither the Court in *Götz* nor the Court in *Finland* regarded the existence of a payment in return for services as determinative of the issue…Both judgments support Longridge's contention that the assessment should be based on a wider investigation of the intrinsic 25 nature of the activity."

139. Mr Bremner pointed out that *Longridge* was under appeal to the Court of Appeal, and invited us, instead, to follow the decision of Collins J in *Riverside Housing Association Ltd v HMRC* [2006] STC 2072 ("*Riverside*"), which at [83] had, he said "approved and endorsed" the first instance decision of the VAT tribunal 30 under reference 19341. The relevant paragraph of that tribunal decision is set out at [17] of *Riverside*:

> "It was evident from the terms of the Directive that the scope of business, or economic, activities was wide, so that there must be a presumption that any supply of goods or services, in return for 35 consideration, amounted to an economic activity."

140. In deciding whether to follow *Yarburgh* or *Riverside* we considered two cases which establish general principles. The first is the Court of Appeal decision in *R (Kadhim) v Brent LBC Housing Benefit Review Board* [2001] QB 955, where the court said at [33]:

40

> "We therefore conclude, not without some hesitation, that there is a principle stated in general terms that a subsequent court is not bound by a proposition of law assumed by an earlier court that was not the subject of argument before or consideration by that court."

141. That principle is relevant because it is clear from both the tribunal and the High Court decisions in *Riverside* that the existence of a presumption was assumed and not argued.

142. The second is *Minister of Pensions v. Higham* [1948] 2 KB 153 ("*Higham*"), where Denning J (as he then was) set out at page 155 the "general rule" that:

> "…where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred if it is reached after full consideration of the earlier decision."

143. This approach was endorsed in relation to conflicting Court of Appeal decisions by Lord Neuberger MR in *Patel v SSHD* [2012] EWCA Civ 741 at [59].

144. Mr Bremner did not refer to *Higham,* but he made the same point when he submitted that Rose J did not consider *Riverside,* as it is not referenced in her decision and that as a result we could rely on that case rather than following *Longridge*. In other words, although *Longridge* is a later decision, it is not to be preferred because it was not reached after full consideration of *Riverside.*

145. Although we accept that Rose J made no reference to *Riverside*, the First-tier Tribunal ("FTT") had already heard and considered the same argument about presumption, see [2013] UKFTT 158 (TC) ("*Longridge FTT*") at [74] and [88]. In the latter passage the FTT said:

> "Mr Jones [HMRC's counsel] also argues that in determining the nature of an activity, there is a presumption that if the activity comprises a supply of goods or services for consideration, then the activity amounts to an economic activity. There may be such a presumption by reason of Article 2 and also implicit in the terms of Article 9(1), but it is no more than a presumption, and is not the defining characteristic in determining the nature of an activity. As Patten J says in the *Yarburgh Trust* case (at [22]): 'It seems to me that the balance of authority is against treating a transaction or activity as economic or as part of a business merely because it results in a consideration or produces income.' He later says (at [23]) that the fact that a service was provided at a price 'is the beginning not the end of the inquiry' as to whether activities comprise an economic activity."

146. The FTT went on to discuss Patten J's judgment in *Yarburgh* and in particular the requirement that the FTT look at "the wider picture." That approach, as we have seen, was explicitly upheld by Rose J in *Longridge*.

147. Thus, although Rose J did not refer to *Riverside* in her judgment, (a) that case had been fully explored at first instance in the context of *Yarburgh* and (b) Rose J upheld the FTT's reliance on the approach taken in *Yarburgh.*

148. We therefore conclude that, although remuneration is a *sine qua non* before there can be an economic activity, its receipt does not create a presumption that an economic activity exists. Instead, the Tribunal must enquire into the nature and status of the activity in the context of the whole picture.

Does this answer change where a property has been leased?

149. Article 9(1) of the PVD includes as its second sentence that "the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity." Mr Bremner submitted that, as a result, the letting of a property in exchange for regular rental payments was deemed to be an economic activity.

150. He relied in particular on *van Tiem v Staatssecretaris van Financien* (Case C-186/89) [1993] STC 91 ("*van Tiem*"). In that case the CJEU answered two questions, the first of which was:

> "Must the second sentence of art 4(2) of the Sixth Directive be interpreted as meaning that the relinquishment by the owner of immovable property of the use of that property to another person for a specified period in return for a sum to be paid periodically, by the grant to that person for such period and in return for such payment of a right in rem to use the immovable property, such as building rights, constitutes exploitation of tangible property for the purpose of obtaining income therefrom on a continuing basis, within the meaning of that provision of the directive?"

151. The CJEU's answer was (emphasis added):

> "In that respect it should first of all be underlined that art 4 of the Sixth Directive confers a very wide scope on value added tax (VAT), comprising all stages of production, distribution and the provision of services (see the judgments of the court in *EC Commission v Netherlands* (Case 235/85) [1987] ECR 1471 at 1487, para 7, and in *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën* (Case 348/87) [1989] ECR 1737 at 1752, para 10).
>
> 18. Second, in accordance with the requirements of the principle that the common system of VAT should be neutral, the term 'exploitation' refers to all transactions, whatever may be their legal form, by which it is sought to obtain income from the goods in question on a continuing basis.
>
> 19. Therefore, the grant by an owner of immovable property to a third party of a building right over that property <u>must be deemed to be an exploitation of the property if that right is granted in return for a consideration for a specified period.</u> That condition must be deemed to be satisfied when, as is the case in the main proceedings, the building rights are granted for a period of 18 years in return for an annual consideration.
>
> 20. Consequently, the reply to the first question must be that the grant by an owner of immovable property to another person of building rights in respect of that property, by authorising that person to use the immovable property for a specified period in return for a consideration, <u>must be regarded as an economic activity</u> involving the exploitation of tangible property for the purpose of obtaining income

> therefrom on a continuing basis, within the meaning of the second sentence of art 4(2) of the Sixth Directive."

152. However, in *Yarburgh* HMRC's counsel also relied on *van Tiem,* see [14] of that decision, but Patten J decided at [25] that:

> "In the case particularly of an isolated letting as opposed to one by a property company or other concern with a recognisable letting business it is relevant as I have said to consider the wider circumstances of the grant including the identity and nature of the parties."

153. In coming to this conclusion Patten J had considered both *Wellcome Trust Ltd v C&E Comrs* (Case C-155/94) [1996] STC 945 ("*Wellcome*"), where the CJEU found that income from the sale of shares by that Trust was not an economic activity, and *ICAEW,* where the House of Lords decided that the Institute was not carrying on a business, even though it was charging fees. As we have seen, in *Longridge* Rose J refused HMRC's invitation to find that *Yarburgh* was "no longer good law."

154. Here, FEPT's intention at the relevant time was to act as PropCo for other schools, see §122, so it was not to be "an isolated letting." But its charitable status and its links to CFBL nevertheless mean that it is not a typical property company with a recognisable letting business.

155. Both *Yarburgh* and *Longridge* are binding on us. We also respectfully agree with Patten J's conclusion, in the light of the authorities he cited. We therefore find that the second sentence of Article 9(1) does not compel a finding that there has been an economic activity simply on the basis that there has been the letting of a property for rent. Instead, the wider circumstances must be considered.

Is there a profit motive, and if not, is that decisive?

156. For his part, Mr Thomas submitted that a profit motive and/or the maximisation of returns was required before there was an economic activity. We first consider whether FEPT had a profit motive, and then review the case law on which Mr Thomas relied.

Whether FEPT had a profit motive

157. Mr Fairbairn's evidence was that FEPT did not have a profit motive but had set the rent charged to CFBL so as to allow FEPT to recover its costs after taking the donations into account, rather than by reference to the rent which could be obtained in the market.

158. That evidence is supported by the following facts:

(1) when Mr de la Borderie explained the 2012 rent increase and the charging of other costs on 13 December 2012, he said these were required to cover FEPT's Property-related costs;

(2) the Lease Agreement has no provision for upward open market rent reviews, unlike the EIFA lease;

(3) the Valuation was not received until 11 February 2013 and there is nothing to indicate that any earlier valuation had been obtained.

159. We also note that HMRC did not base any part of its case on FEPT having a profit motive.

160. We find as a fact that FEPT set the rent and charges to cover the interest on the bank loans and other costs related to managing the Property, and not to make a profit.

The case law on which Mr Thomas relied

161. In *Floridienne SA v Belgium* (Case C-142/99) [2000] STC 1044 ("*Floridienne*") the CJEU held at [28] that (Mr Thomas's emphasis):

> "Where a holding company makes capital available to its subsidiaries, that activity may of itself be considered an economic activity, consisting in exploiting that capital with a view to obtaining income by way of interest therefrom on a continuing basis, provided that it is not carried out merely on an occasional basis and is not confined to managing an investment portfolio in the same way as a private investor (see, to that effect, *Wellcome Trust Ltd v Customs and Excise Comrs* (Case C-155/94) [1996] STC 945 at 959-960, [1996] ECR I-3013 at 3042, para 36; and *Enkler v Finanzamt Homburg* (Case C-230/94) [1996] STC 1316 at 1332, [1996] ECR I-4517 at 4544, para 20) and provided that it is carried out with a business or commercial purpose characterised by, in particular, a concern to maximise returns on capital investment."

162. That passage was then relied on by Advocate General Maduro when he gave his Opinion in the case of *Banque Bruxelles Lambert SA v Belgian State* (C-8/03) [2004] STC 1643 ("*BBL*"). At [10] AG Maduro said (Mr Thomas's emphasis):

> "According to that judgment [i.e., *Floridienne*], 'economic activity' must therefore be construed as meaning an activity likely to be carried out by a private undertaking on a market, organised within a professional framework and generally performed in the interest of generating profit."

163. However, both *Floridienne* and *BBL* concerned intangible property and so engaged the second sentence of Article 9(1). In contrast, the first sentence of the Article explicitly states that a person shall be regarded as carrying on an economic activity "whatever the purpose or results of that activity."

164. AG Colomer made the same point when he gave his Opinion in *Finland.* At [39] he said:

> "this passage [from *Floridienne*] seeks to specify the circumstances in which there is an economic activity of 'exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis', but it cannot be extended to all the other situations covered in Article 4(2) of the [Sixth] Directive. Any other interpretation would undermine the objective nature of the concept..."

165. In his capacity as counsel for the company in *Longridge,* Mr Thomas sought to persuade Rose J that AG Colomer had been incorrect to "to limit the relevance of the income generated by an activity to cases where the activity in question was the exploitation of tangible or intangible property," see [41] of that decision.

166. As we read her judgment, Rose J did not address that point head-on, but at [42] said she did not consider AG Colomer to have "narrowed the test that had previously prevailed in a way which leads to the conclusion that the *Yarburgh* or *St Paul's* cases are no longer good law" and that CJEU case law including *Finland* supported the approach taken in those cases of carrying out a "wider investigation of the intrinsic nature of the activity" in order to decide if it constituted an economic activity.

167. We therefore find that, where the final sentence of Article 9(1) is not engaged, there is no support in the case law for a finding that a profit motive is required before there can be an economic activity.

168. Moreover, such a finding would be entirely counter to the words in the first sentence of Article 9(1), which provide that there can be an economic activity "whatever the purpose or results of that activity."

Is the position different when the final sentence of Article 9(1) is in issue?

169. The letting of the Property by FEPT to CFBL falls within the final sentence of Article 9(1). Is Mr Thomas right that the letting can only be an economic activity if FEPT (a) has as a purpose "to maximise returns on capital investment" (*Floridienne*) and/or (b) carries out the leasing "in the interest of generating profit" (*BBL*)?

170. In order to answer that question, we considered those two judgments in more detail.

Floridienne

171. In *Floridienne* the appellant companies supplied their subsidiaries with loan finance as well as administrative, accounting and IT services. The subsidiaries paid dividends and loan interest to the companies.

172. The substantive question before the CJEU was whether the dividends and interest were consideration for taxable supplies and therefore to be taken into account when attributing input tax.

173. The CJEU considered, as a preliminary issue, whether the dividends and loan interest were consideration for an economic activity. It found that the dividends were not, because there was no direct link between the activity carried out by the appellants and their receipt of dividends, see [20-23] of the judgment.

174. In relation to the loans, the Court first considered the case of *Régie Dauphinoise – Cabinet A Forest SARL v Ministre du Budget* (Case C-306/94) [1996] STC 1176 ("*Régie Dauphinoise*"), see [26]-[27] of *Floridienne*.

175. *Régie Dauphinoise* concerned a property management company which had invested money received from customers. It was entitled to retain the interest earned, although it was obliged to return the capital in due course. The CJEU found that the interest was "the direct, permanent and necessary extension" of the company's taxable activity, and so arose from an economic activity.

176. The CJEU in *Floridienne* then moved on to consider two loan interest cases where there was no economic activity. The paragraph was set out at §161 but is repeated here for ease of reference:

> "[28] Where a holding company makes capital available to its subsidiaries, that activity may of itself be considered an economic activity, consisting in exploiting that capital with a view to obtaining income by way of interest therefrom on a continuing basis, provided that it is not carried out merely on an occasional basis and is not confined to managing an investment portfolio in the same way as a private investor (see, to that effect, *Wellcome Trust Ltd v Customs and Excise Comrs* (Case C-155/94) [1996] STC 945 at 959-960, [1996] ECR I-3013 at 3042, para 36; and *Enkler v Finanzamt Homburg* (Case C-230/94) [1996] STC 1316 at 1332, [1996] ECR I-4517 at 4544, para 20) and provided that it is carried out with a business or commercial purpose characterised by, in particular, a concern to maximise returns on capital investment."

177. In *Enkler* the activities were carried on only occasionally; in *Wellcome* the CJEU had found that the charitable trust was not carrying on an economic activity, but was "managing an investment portfolio in the same way as a private investor," see [36] of that judgment.

178. The CJEU in *Floridienne* has therefore taken *Wellcome* as the paradigm example of a loan interest case which falls on the "private investor" side of the line.

179. At [34] of *Wellcome* the CJEU set out the trust's activities (our emphasis):

> "Now, the trust manages the assets it holds, consisting in part of its shareholding in the foundation and of other financial instruments. Its investment activities, as described above, consist essentially in the acquisition and sale of shares and other securities with a view to maximising the dividends and capital yields which are destined for the promotion of medical research."

180. The CJEU in *Floridienne* cannot therefore be saying, in the final sentence of [28], that maximising returns on capital investment is a defining feature of an economic activity, because the trust in *Wellcome* possessed the very same characteristic.

181. The CJEU can only have been distinguishing those operating as private investors from those carrying on an economic activity, on the basis that the latter had a "business or commercial purpose."

182. We therefore do not accept Mr Thomas's submission that in *Floridienne* the CJEU is making a general point that the final sentence of Article 9(1) is *only* satisfied where the person's purpose is "to maximise returns on capital investment." On the contrary, it must follow from its reliance on *Wellcome* that this characteristic is one which can be shared with private investors.

BBL

183. The preliminary issue in *BBL* was whether certain SICAVs (sociétés d'investissement à capital variable, or open-ended investment companies) were carrying on an economic activity. In the passage cited at §162, AG Maduro first derived from *Floridienne* the principle that an economic activity is "generally performed in the interest of generating profit."

184. He then expanded that principle at [13] of his Opinion, saying that the SICAVs were "motivated by the objective of maximising returns on capital investment" and that:

> "What distinguishes a SICAV from a holding company is rather the intention which motivates them and their conduct which is peculiar to them: whereas a holding company, in general, conducts itself like an owner, interested only in obtaining the yield from its property, a SICAV conducts itself like a businessman by seeking to obtain the highest yield possible, having regard to the investment policy adopted, from its investments on the financial markets."

185. However, when the CJEU came to decide the issue, it made no reference to *Floridienne* or to [13] of AG Maduro's Opinion. Instead, the Court held that the SICAVs were carrying out an economic activity because they went "beyond the compass of the simple acquisition and the mere sale of securities and…aim[ed] to produce income on a continuing basis." That is clear reference to the final sentence of Article 9(1), which uses the word "income" rather than "profit."

186. The CJEU therefore did not decide that there must be a profit motive before the exploitation of an asset can be regarded as an economic activity.

Conclusion on Floridienne and BBL

187. Having considered both *Floridienne* and the CJEU judgment in *BBL,* we do not accept Mr Thomas's submission that these cases mean that a lessor is only carrying out an economic activity if (a) its purpose is "to maximise returns on capital investment" and (b) it is carrying out the activity "in the interest of generating profit."

188. That is an unsurprising conclusion, as the final sentence of Article 9(1) provides that "the exploitation of tangible or intangible property for the purposes of obtaining income therefrom" is an economic activity. Were Mr Thomas to be right, case law would have narrowed that legislative provision, replacing "income" with "profit."

Charitable status

189. Both FEPT and CFBL are charities and we need to establish whether that is relevant (or even determinative) of the questions before us. The same issue was

discussed in *Longridge FTT* where the tribunal considered *Yarburgh* and *CCE v St Paul's Community Projects Ltd* [2005] STC 95 ("*St Paul's*") before concluding at [93] that those authorities:

> "…do not hold that a charitable activity cannot be an economic activity where a supply is made for a price. They do hold that an activity whereby a supply is made for a price is not necessarily an economic activity; that it is necessary to identify in objective terms what the activity is in order to determine whether it is an economic activity; and that to identify what in truth that activity is it is necessary to look, not at purpose or results, but at the entirety of what it is and the context in which it is carried out. Those propositions, we respectfully consider, are entirely consistent with the relevant case law."

190. When that case reached the Upper Tribunal, Rose J said at [44] that:

> "Looking at the Decision as a whole, it is clear that the Tribunal understood that the charitable purpose of Longridge was not relevant to its consideration. The test that the Tribunal applied, as set out in paragraph 93 of the Decision cited earlier, was the correct one..."

191. We respectfully concur with the approach in *Longridge FTT* which was endorsed by Rose J. We find that the charitable purposes of FEPT and CFBL are not relevant *per se,* but, as Rose J said at [38]:

> "…it is possible and indeed necessary to take into account the charitable nature of the activity as part of its 'observable terms and features' whilst avoiding the twin heresies of taking account of the purpose for which the activity is conducted or regarding an activity as not 'economic' because it is non-profit making."

Is the educational exemption determinative?

192. The provision of education by schools is exempt from VAT. It is implicit in the existence of the exemption that the provision of education can be "a supply of services for consideration within the territory of a Member State by a taxable person acting as such."

193. However, as Rose J said in *Longridge* at [47]:

> "The existence of the exemption shows that some non-profit supplies of educational…services to young people are economic activities and may therefore seek to rely on the exemption. But it does not mean that every organisation meeting that description is carrying on an economic activity."

194. In other words, it is first necessary to establish whether or not an activity is "economic" before considering whether or not it is eligible for exemption. The mere existence of the exemption does not decide the matter.

The factors to be taken into account

195. Having decided that there is no short cut to deciding this case, and that we must look at the wider picture, guidance as to the factors we should consider was given in *Lord Fisher.*

196. At page 245, Gibson J set out the *indicia* put forward by HMRC's counsel in the light of previous authorities, particularly the *dicta* of the Inner House of the Court of Session in *Morrison's Academy*:

> "(a) whether the activity is a 'serious undertaking earnestly pursued' or 'a serious occupation, not necessarily confined to commercial or profit-making undertakings';
>
> (b) whether the activity is an occupation or function actively pursued with reasonable or recognisable continuity;
>
> (c) whether the activity has a certain measure of substance as measured by the quarterly or annual value of taxable supplies made;
>
> (d) whether the activity was conducted in a regular manner and on sound and recognised business principles;
>
> (e) whether the activity is predominantly concerned with the making of taxable supplies to consumers for a consideration;
>
> (f) whether the taxable supplies are of a kind which, subject to differences of detail, are commonly made by those who seek to profit by them."

197. At page 246, Gibson J said in relation to these *indicia*:

> "As I understand their judgments, the learned judges in the Court of Session did not thereafter set out to lay down principles which, if satisfied, would in all cases demonstrate that an activity must be regarded as a 'business' within those provisions. Those aspects of an activity, to which their Lordships drew attention, and on which counsel for the Crown has relied in formulating the *indicia* listed above, plainly describe the main attributes of any activity which will be regarded as falling within the concepts of 'business' and 'trade, profession or vocation', and clearly they are useful tools, some perhaps more useful than others, for the analysis of an activity and for the comparing of it with other activities which are unarguably 'businesses.' The courts, however, cannot, by the formulation of tests and by the expounding of *indicia*, substitute any test or phrase different from that set out in the statutory provision and I am sure that their Lordships had no intention of doing so."

198. We therefore approach these *indicia* as "useful tools" but not as determinative. Both parties agreed that this was right; they also agreed that factor (e) "whether the activity is predominantly concerned with the making of taxable supplies to consumers for a consideration" should be read as including also the making of exempt supplies.

199. However, Mr Bremner submitted that the reference to "predominantly concerned" in that factor was incorrect, following AG Lenz's Opinion in *Wellcome Trust*, where he said at [39] that:

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> "in order to determine whether an activity is an economic activity... it is not appropriate to consider whether the activity is of predominant concern."

200. The context of that citation is as follows:

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> "[38] According to the appellant, this question relates to national case-law on the issue whether an activity is of predominant concern. Thus, the United Kingdom also submits in its written observations that it is useful to consider, in all the questions submitted in this case, whether the activity to be assessed is of predominant concern.
>
> [39] The Commission, in contrast, points out that the notion of 'predominant concern' is not used in the VAT Directive. Under the Directive, it is the inherent nature of the activity itself that is the vital consideration, not whether that activity is or is not predominant. I also take the view that, in order to determine whether an activity is an economic activity for the purposes of Article 4(2), it is not appropriate to consider whether the activity is of predominant concern. To illustrate this point, I would refer to the activities of the Wellcome Trust in respect of which it is registered as a taxable person. These relate to the sale of books, photographs and so forth, none in any event an activity which is of predominant concern. That notwithstanding, these activities must be regarded as being economic activities for the purpose of the Sixth VAT Directive, whereas the principal occupation of the Trust, namely the management of assets, cannot be regarded as an economic activity within the meaning of the Sixth VAT Directive."

201. It seems to us that there has been a subtle but important shift from factor (e) in *Lord Fisher* to the concept discussed in AG Lenz's Opinion. The illustration he
30 gives, based on *Wellcome Trust*, indicates that he understands the question to be: "is the activity the predominant concern of the *person*." However, factor (e) asks whether "the predominant concern of the *activity* is the making of taxable supplies for consideration."

202. Given that misunderstanding, it is not surprising that the CJEU followed AG
35 Lenz's Opinion when they came to decide *Wellcome,* holding at [40] that:

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> "whether or not the sale of shares and other activities is the predominant concern of the activity in the course of which the sales in question took place cannot affect the classification, for the purposes of art 4 of the Sixth Directive, of the investment activity of the claimant in this case."

203. In any event, Mr Bremner accepted that the Upper Tribunal and the High Court have continued to apply the "predominant concern" factor (see, for example, *Yarburgh* at [30] and *St Paul's* at [38] and [48]), and that this Tribunal is bound by those decisions.

204. We have continued to have regard to factor (e) when making our decision, both because of the Upper Tribunal and High Court precedents, and also because it seems to us that AG Lenz misunderstood that factor.

205. We move on to considering, as Issue 1, the letting of the Property to CFBL, and as Issue 2, the Property's use by the College.

ISSUE 1: WHETHER THE LETTING WAS AN ECONOMIC ACTIVITY

Mr Thomas's submissions on behalf of FEPT

206. Mr Thomas said that FEPT was in a similar position to the Trust in *Yarburgh.* In both cases the leases were not at full market rent and their purposes were to facilitate the use of a new building by a second charity. In *Yarburgh* Patten J had agreed with Mr Thomas's submission that "the lease could not be looked at in isolation from the circumstances and full terms upon which it came to be granted," see [17] and [23] of *Yarburgh.*

207. Mr Thomas also relied on *Commission v France* (C-50/87) [1988] ECR 4797. This concerned infraction proceedings against France, because it had restricted the right of a property owner to recover input tax where his annual letting income was less than 1/15th of the capital value of the property. Mr Thomas said that the CJEU:

> "concluded that a letting at a concessionary rent for social reasons 'must necessarily be regarded as **not** constituting an economic activity' despite the fact that it involved the receipt of consideration from another for the provision of the service of making accommodation available to the recipient."

208. In reliance on the Schedule handed up at the hearing, he said that the rent charged to CFBL would have been only £1,033k in 2013 had it not been for Jonap's liquidation, and this was only 73.8% of the market rent in that year. The intended rent was therefore a concessionary rent, and it followed from *Commission v France* that FEPT was not carrying on an economic activity. The position was similar to that in *Yarburgh,* where a concessionary rent was charged by the Trust to the Playgroup.

209. Mr Thomas accepted that the *indicia* in the *Lord Fisher* case were satisfied by FEPT, other than factor (e). He said that when it granted the lease to CFBL, FEPT was not "predominantly concerned with the making of taxable supplies to consumers for a consideration".

210. This can also be seen from the following wider "circumstances" which the Tribunal should take into account when making its decision:

(1) FEPT sought to maximise the amounts of grants and donations it received in order to reduce the rental charge to CFBL. There was a parallel with *St Paul's*, where the nursery was funded by grant income topped up by fees from parents. Evans-Lombe J had found that the nursery was not carrying on a business.

(2) The lease in *Yarburgh* was required solely to satisfy the requirements of the National Lottery, which had provided most of the funding for the

refurbishment. Similarly, the Lease Agreement was required only to satisfy the banks.

(3) FEPT's rental charge to CFBL was not determined by reference to the Property's market rent, but only by the net amount required to repay the loan finance. This was not consistent with the way it would have operated had it been a business.

(4) The Lease Agreement had no rent review provisions, which would normally be expected in a commercial lease, and can be seen in that signed by EIFA.

(5) FEPT has indicated to CFBL that once the loan has been discharged, it will reduce the rent on the Property to the minimal amount required to cover its maintenance and the related administration.

211. Mr Thomas also submitted that FEPT's lack of a profit motive was, if not determinative, at least "highly relevant," relying on Gibson J's dictum in *Lord Fisher* at page 247 that:

> "there are many activities in which a potential taxpayer may supply services for a consideration but which will be so different from the ordinary concept of 'business' that the presence or absence of the purpose of gain would be highly relevant to the determination of the question whether he was carrying on a business"

212. He also said the charitable status of both FEPT and CFBL must be taken into account, relying in particular on *Longridge,* where Rose J had said that it is "possible and indeed necessary to take into account the charitable nature of the activity."

213. Finally, FEPT and CFBL were two "very closely related charitable entities" only brought into existence to satisfy an "unrequited need" for education which followed the French national curriculum. In *Yarburgh,* Patten J said that the tribunal's wider enquiry must consider "the relationship between the parties to the transaction" and the same was true in this case.

Mr Bremner's submissions on behalf of HMRC

214. Mr Bremner said that all the *Lord Fisher* factors were satisfied. He drew the Tribunal's attention to the following, both in the context of those *indicia* and more generally:

(1) FEPT's trustees approached their task of obtaining the Property and structuring the funding with considerable thought and care; they took professional advice and had regular meetings to discuss the acquisition, the finance and the letting. The Facilities Agreement and the Lease Agreement both contain detailed terms and conditions and were professionally drafted by well-known law firms.

(2) The original rent payable by CFBL under the Lease Agreement was £1.2m per annum, which was "very substantial." Mr Bremner submitted that it would be "very surprising" to conclude that leasing a property for more than £1m a year was not an economic activity.

(3) The rental income forms a continuous supply which will have to be paid for a period of 25 years.

(4) It is essential that FEPT obtain this rental income in order to service the substantial loan it has taken out, so there is a "commercial imperative" that the rent be received.

215. Mr Bremner submitted that the test was not whether the rent was, or was not, below a market rent, relying on *Hotel Scandic* v *Riksskatteverket* (Case C-412/03) [2005] STC 1311 ("*Scandic*") where the CJEU concluded at [22]:

> "the fact that the price paid for an economic transaction is higher or lower than the cost price is irrelevant to the question whether a transaction is to be regarded as a 'transaction effected for consideration'. The latter concept requires only that there be a direct link between the supply of goods or the provision of services and the consideration actually received by the taxable person..."

216. Furthermore, even if the Tribunal did not agree with him on this, Mr Bremner said that FEPT had not shown the rent to be below market rent. The only evidence relating to market value is the Valuation, which is dated 11 February 2013, almost three years after the renovation commenced and some 18 months after the College opened. Even if the Valuation were taken as correct in relation to the relevant period, the initial rent was £1.2m, which is 89% of the Valuation.

217. Moreover, on 1 January 2013 the rent increased to £1.35m, being 96% of the Valuation, and the accounts show that CFBL paid other sums to FEPT, bringing the 2013 total to £1.45m, which was over 103% of the Valuation. Mr Bremner submitted that these were very high percentages and that "something has gone badly wrong" if a person can charge more than the market rent and still succeed in demonstrating that he is not carrying out an economic activity.

218. He said that *Commission v France* was not in point, because there was no "concessionary rent" here. Neither was *Yarburgh* relevant, because the facts were so different: the rent charged to the Playgroup was only £2,800 per year, described at [4] of that judgment as "nominal."

219. In response to Mr Thomas's submissions on the lack of a profit motive in *Lord Fisher,* Mr Bremner relied on the *ratio* of that case at page 251, which says that "the sharing of the costs of a sporting or other pleasure activity does not by itself turn an activity of pleasure and social enjoyment into a business." There is no parallel or similarity with the present case: FEPT is engaged in the exploitation of the Property to obtain an income; this is not a hobby or other pleasurable activity.

Discussion and decision on the letting of the Property

220. Our starting point is the final sentence of Article 9(1), which provides that "the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."

221. As the CJEU made clear in *Van Tiem* at [18] set out at §151, the word "exploitation" refers to "all transactions, whatever may be their legal form, by which it is sought to obtain income from the goods in question on a continuing basis." A lease at rent is therefore the "exploitation" of a property.

5 222. The question we have to decide is whether FEPT's exploitation of the Property by letting it to CFBL was "for the purpose of obtaining income therefrom on a continuing basis."

223. As we have already found, we are required to consider the wider circumstances. These include the *indicia* listed in *Lord Fisher,* although we bear in mind they are not
10 determinative.

224. Both parties accepted that factors (a)-(d) and (f) apply to FEPT's intention to lease the Property to CFBL, and we concur:

(a) It is a "serious undertaking earnestly pursued." As Mr Bremner says, FEPT's trustees went about their task with "considerable thought and care" and took
15 professional advice.

(b) The rental payments under the Lease Agreement are regular and will continue for 25 years. The activity is to be "actively pursued" with "recognisable continuity."

(c) The activity had more than "a certain measure of substance."

20 (d) The leasing was to be conducted in a regular manner and on sound and recognised business principles.

(f) The receipt of rent under a lease is a supply which is "commonly made by those who seek to profit" from the letting of property.

225. The factor which does require consideration is (e), namely whether the activity
25 is predominantly concerned with the making of supplies to consumers for a consideration.

226. There is no doubt that "consideration" is received, but is the receipt of that consideration the "predominant concern" of the activity, where "the activity" is FEPT's letting of the Property to CFBL? We emphasise that the question is not: what
30 was FEPT's predominant concern when purchasing the property, or what was its predominant concern when raising funds; or what were FEPT's underlying concerns (as expressed in its charitable objects) with which its activities must be consistent.

227. We agree with Mr Bremner that there is a "commercial imperative" that FEPT receive the rent so it can service the substantial loan. From this we find that its
35 predominant concern in leasing the property to CFBL and requiring the further charges to be paid was to obtain an income sufficient to cover its obligations under the Facilities Agreement and to ensure it was able to pay its other Property-related costs.

228. The Lord Fisher *indicia* are, however, simply a useful tool. We have gone on to take a wide view of the other "observable terms and features" of the FEPT's letting of the Property to CFBL, and we make the following findings.

The lack of a profit motive

229. We have already found as fact that FEPT does not have a profit motive, but rejected Mr Thomas's submission that this means there is no economic activity.

230. Nevertheless, the lack of a profit motive is one of the "observable terms and features" of the supply, and a pointer away from there being an economic activity, as Patten J found in *Yarburgh* at [30].

The way the rent was set

231. Mr Thomas submitted that FEPT set the rent so as to repay its borrowings and not by reference to the Property's market value. We agree, and have already found this to be a fact, see §160.

232. He went on to submit that this was inconsistent with how FEPT would have operated had it been a business. We accept this only to the extent that it is a restatement of the previous point, namely that FEPT did not have a profit motive. It does not carry FEPT any further. FEPT always intended to set the rent and other charges to recover all its costs. It did this in a business-like and commercial way, using a formal lease agreement and specified further charges.

233. We agree with Mr Bremner that this is a world away from Lord Fisher asking his friends to share the costs of running a shoot. Letting the Property is not something "so different from the ordinary concept of 'business' that the presence or absence of the purpose of gain would be highly relevant to the determination of the question whether he was carrying on a business," as Gibson J said in that case. Rather, it is closer to the opposite end of the spectrum.

Case law on market rent and concessionary rent

234. Mr Bremner submitted, in reliance on *Scandic,* that whether rent was above or below a "market rent" was not a relevant consideration. Mr Thomas's submission in Reply was that in *Scandic* the issue was "whether there was a supply for consideration" not "whether there was an economic activity." We agree, and find that *Scandic* does not take us any further.

235. We therefore need to consider Mr Thomas's submission, in reliance on *Commission v France* at [21], that if the rent was "concessionary" there was no economic activity.

236. The background to *Commission v France* was that the French government had passed a law preventing landlords who let properties for less than 1/15 of the market value from recovering all their input VAT. The government had introduced the law because it regarded the VAT repayments as effectively a subsidy from central to local government, allowing the latter to provide social housing at less than market rent.

237. The CJEU decided that France had breached its Treaty obligations. If landlords are carrying on an economic activity, they are entitled to a VAT refund under Article 17(1) of the Sixth Directive, see [14] of the judgment.

238. Of course, if landlords are not carrying on an economic activity at all, they are not entitled to reclaim any input VAT. But if a person who has properly claimed an input tax deduction subsequently ceases to carry out an economic activity, part of the VAT already repaid could be clawed back under Article 20.

239. At [20] of the *Commission v France* judgment, the CJEU explains the problem faced by the French government and why it had thought the new law was necessary. It continues at [21], with the words relied on by Mr Thomas emphasised:

> "In that connection, however, it must be stated that in order to deal with situations such as those referred to by the French Republic, Article 20 of the Sixth Directive provides for a system of adjustment. Where, because of the amount of the rent, the lease must necessarily be regarded as involving a concession and not as constituting an economic activity within the meaning of the directive, the deduction initially made is adjusted and the time-limit for that adjustment may be extended up to 10 years."

240. Read in context, the CJEU is not making a statement of principle to the effect that letting at a concessionary rent for social reasons "must necessarily be regarded as not constituting an economic activity," as Mr Thomas submitted.

241. Rather, the Court is reminding the French government that if the concessionary letting by local authorities is not an economic activity (because of the amount of the rent) then Article 20 allows some or all of the VAT already repaid to be clawed back, so the government does not need its new law.

242. We therefore find that *Commission v France* does not establish the principle on which Mr Thomas relies.

243. However, we accept that letting a property at a concessionary rent is a pointer towards there being no economic activity, and move on to consider whether FEPT's intention was to let the Property at a concessionary rent.

The Schedule

244. On the first day of the hearing, Mr Fairbairn was robustly cross examined by Mr Bremner about the market value of the rent FEPT had charged CFBL. The following day, the Tribunal and HMRC were provided with the Schedule, which was headed "what would the position have been had the Jonap insolvency not intervened."

245. The Schedule begins by stating that the total grants and donations received by FEPT were £6.248m. There was no analysis of that figure, but we understand it to be (a) the donations of £4.398m (b) the loan of £800k from the French Embassy used as a deposit when the Property was purchased, and (c) the capital of £1.05m provided to secure the AEFE guarantee. If we are right, the last two amounts are not of course donations, but loans.

246. According to the Schedule, FEPT intended to spend £8m to buy the land plus construction costs of £8.74, making a total of £16.74m. However the minutes of the Plan Ecole meeting on October 20 2009 record that the purchase price of the Property was estimated to be £8.4m, with a further £8-10m for renovation and £2m for payments to intermediaries. From those minutes it would be reasonable to conclude that in October 2009 the total expected expenditure was between £18.4-£20.4m. That is consistent with the Facilities Agreement, which provided for a revolving £21m loan. Furthermore, on 13 December 2012 when Mr de la Borderie informed the CFBL trustees of the extra charges, he said that the ANEFE fee for the debt guarantee was "0.3% of the principal amount, at present £63,000pa." Extrapolating from those figures gives a principal amount of £21m.

247. The Schedule also states that the total extra Jonap costs were £3.2m. However, on 16 June 2011, some six weeks before the liquidation, the minutes of an FEPT trustee meeting record that the extra Jonap costs were expected to be around £1m on a "worst case" basis, and that further donations would be sought. An extra £402,000 was subsequently raised, from which it would follow that Jonap's liquidation caused extra costs of around £600k.

248. The Schedule then says that, absent the Jonap liquidation, only £10.49m would have been borrowed from the banks, being the £16.74m of expected expenditure, less the donations of £6.248m. Instead, borrowings were a total of £13.7m: £10.49m plus the extra £3.2m said to be consequential upon Jonap's liquidation.

249. The Schedule then calculates that expected borrowing was 76.57% of the actual borrowing (£10.49m compared to £13.7m).

250. Had the borrowing been £10.49m, then, according to the Schedule, the amount charged to CFBL would have proportionately reduced from the £1.35m actually charged in 2013, to only 76.57% of that figure, or £1.033m.

251. This was only 73.78% of the 2013 £1.4m market rent, and on that basis Mr Thomas submitted that FEPT expected to charge a concessionary rent.

252. The Schedule only gave figures for 2013, presumably to facilitate the comparison with the Valuation which was carried out that year. However, as Jonap went into liquidation before the College opened (ie before any rent was paid) if the assertions on the Schedule are right, it follows that the £1.2m of rent for the period from September 2011 to December 2012 would have been proportionately reduced to 76.57% of that figure, or £900k.

Our findings on the expected rent

253. As is clear from §246 and §247, we have difficulties with the figures included on the Schedule for (a) FEPT's intended expenditure and (b) the extra Jonap costs.

254. However, there is no need for us to make findings on either point, because we only need to establish the level of rent which, during the relevant period, FEPT had intended to charge CFBL.

255. As regards the period from September 2011 to the end of 2012, we have already found as a fact, based on contemporaneous evidence, that FEPT's intention was to charge £1.2m, see §44.

256. Furthermore, that figure was unaffected by Jonap's cessation of business. We know this because CFBL's 2010 accounts, which were signed on 26 May 2011, before the first mention of Jonap's possible liquidation, say that "the annual commitment is expected to be £1.2m a year," see §31.

257. The Agreement for Lease, signed on 23 December 2011, shortly after the school opened, stated that "a new principal rent" was to be agreed between FEPT and CFBL once the works were completed. But the contemporaneous minutes of the CFBL trustee meeting held on 13 December 2012 show that, until that date, CFBL's trustees expected that the £1.2m would be increased in line with RPI, see §46.

258. At that meeting CFBL's trustees were told by Mr de la Borderie that the rent for 2013 would be increased from the expected £1.234m (being the original rent of £1.2m plus RPI) to £1.35m, an increase of £110k or 9%.

259. The Tribunal is required to identify FEPT's intentions, not those of CFBL, during the relevant period which ended on 21 May 2012. As we have already found, the close relationship between the two charities means that FEPT would have informed CFBL fairly quickly of its plans to increase the rent, and certainly would not have withheld that information for over six months (ie from the end of the relevant period to the date of the December 2012 meeting).

260. Based on contemporaneous evidence, which we prefer as being more reliable than the Schedule, we have found as facts that during the relevant period, FEPT expected to charge £1.2m initially, with that figure increased by RPI in subsequent years, subject to (a) the 2.5% collar and 4% cap and (b) an as yet unknown adjustment so as to create a "new principal rent" on which future increases will be based.

261. It follows that we reject Mr Thomas's submission based on the Schedule and find that, had Jonap remained in business, the expected rent in the relevant period would have been no lower than £1.2m in 2011-12 or £1.234m in 2013.

262. We move on to considering whether the expected rent was "concessionary."

A concessionary rent?

263. We can see no way (and none was suggested to us) of working out whether the rent is "low" or "concessionary" without making a comparison with the market rent. There are two possible difficulties with the Valuation.

(1) It is dated 2013, after the end of the relevant period. There is no way of knowing what the valuation would have been in 2011, although we take judicial notice of the fact that property prices generally have risen between 2011 and 2013.

(2) The second is that the Valuation was increased from the original £1.28m to £1.4m so as to include the value of FFE which GeraldEve had been told was owned by FEPT. We were unable to find any other reference to the FFE in the documents provided to the Tribunal, but the figure was not challenged by HMRC.

264. We have therefore taken the market rent of £1.4m as our comparator, while noting that the figure may have been lower, particularly in 2011 and 2012.

265. As already noted earlier in this decision, the Valuation was on the basis that the Property was let under a "full repairing and insuring lease" so the insurance would be additional to the rent. To compare like with like, we must therefore ignore the insurance cost charged by FEPT to CFBL.

266. The expected (and actual) rent throughout the relevant period was £1.2m. In addition, it had always been FEPT's intention to collect the extra costs of the BNP and ANEFE fees from CFBL, together with a £50k management charge. These extra costs totalled £138k pa, see §50.

267. Once those costs are included, the total amount payable to FEPT would have been £1.338m in 2012, which is 95.5% of the £1.4m market value.

268. We have also considered FEPT's intentions during the relevant period, in relation to 2013. The rent it anticipated receiving was £1.234m; when the expected extra costs of £138k are added, the total is £1.372m. This is 98% of the £1.4m market value.

269. There is an element of estimation in any valuation process. It is underlined in this case by the statement in the Valuation that the demand for institutional property was more limited than that for residential and commercial property, making it "more difficult to accurately assess its value."

270. Taking that inherent uncertainty into account, we find that FEPT's expectations as to the amount of rent and related costs approximated to the Property's market rent. The amount which FEPT intended to charge was not in any sense "concessionary."

271. It follows that we also reject Mr Thomas's submission that there is any similarity to the rent in *Yarburgh*, where the refurbishment cost £100,000, but the Playgroup's rent increased by only £100, reflecting inflation (see *Yarburgh FTT* at [9]).

The terms of the letting

272. Mr Thomas submitted that there was a direct parallel between the terms of the Lease Agreement and the lease between the Trust and the Playgroup in *Yarburgh,* which Patten J described at [26] as "a relatively informal arrangement between closely connected organisations in conformity with their respective aims."

273. It is true that there are the following similarities:

(1) FEPT and CFBL were also closely connected charities;

(2) the lease in *Yarburgh* was for 21 years, not dissimilar to the 25 year term here; and

(3) although the Lease Agreement is a complex legal document, the *Yarburgh* lease also included "fairly standard terms", see [9(3)] of that judgment.

274. However, key terms of the *Yarburgh* lease were not enforced. The FTT found as facts (see [13]) that:

> "the usual covenant by the lessee to pay and discharge and keep the lessor indemnified against all existing and future rates taxes duties and charges and the covenant in clause 4.3 to repay to the lessor on demand a fair and reasonable proportion of the sums and expenses laid out in relation to the repair and maintenance of the building. The Tribunal found as a fact that the Trust did not seek to enforce either of these two covenants."

275. We considered whether there was any similar tolerance in this case. We noted that at CFBL's trustees meeting on 13 December 2012, Mr de la Borderie advised that the initial rent of £1.2m "had been calculated purely on the interest repayment and as FEPT had not been invoiced [the extra charges] at the outset, they had decided not to recharge CFBL under the Agreement for Lease."

276. It is clear from what follows, however, that this did not reflect FEPT's intention. The minutes continue

> "The intention from the outset had been that CFBL would cover all the costs incurred by FEPT in procuring the premises to the school (on a back-to-back basis but with the exclusion of equity investments) which was the reason why these costs needed to be included in the lease."

277. In other words, these extra costs had previously not been charged to CFBL in 2012 because they had not been invoiced to FEPT; now that this had happened, FEPT required CFBL to pay the extra money in line with the original intention.

278. We find that the relationship between the parties was not "a relatively informal arrangement" as had been the case in *Yarburgh*.

279. Mr Thomas also submitted that the lease was uncommercial because it did not contain a rent review clause. We do not agree. FEPT intended that CFBL pay an amount which roughly equates to market value, and which will increase each year by the retail price index, subject to a cap of 4% and a collar of 2.5%. We see nothing uncommercial in this methodology, which is explicitly designed to cover FEPT's costs over time.

The reason for the Lease Agreement

280. Mr Thomas sought to draw a further parallel with *Yarburgh* in that the National Lottery had required that there be a lease, and here the banks had placed a similar obligation on FEPT.

281. However, there are again significant differences. In *Yarburgh,* the Trust had owned the property since 1925. It had previously granted the Playgroup a licence to use the premises. The Lottery was seeking to support the activities of the Playgroup by improving the premises from which it operated. To ensure that the Playgroup had security of tenure, the Lottery required that the licence be replaced by a formal lease, see [3] of the judgment. In other words, the Lottery wanted to ensure that the Playgroup continued to benefit from the renovations it had funded.

282. Turning to FEPT and CFBL, Mr Fairbairn's evidence was that "the lending banks required the property to be owned by a separate entity to CFBL which would generate sufficient rental income from the school to make its loan repayments." The reason for this dual structure was not explained. It could be, for example, that it allowed FEPT to borrow more money, because it was legally separated from the commercial risks of running the College, but that is speculation. All we know is that that the PropCo/OpCo split was put forward at the Plan Ecole meeting on 20 October 2009, before FEPT had been established, the Facilities Agreement signed or the Property purchased. Mr Thomas conceded in oral submissions that the position "was not entirely clear as to the thinking of the banks."

283. We were therefore unable to make any findings as to the purpose of the dual structure, why it was required by the banks, and whether it was related to the amount of money lent or to other factors.

284. We see no parallel between (a) the requirement of the Lottery that the Playgroup have security of tenure in relation to premises already owned by the Trust, but which had been renovated for the benefit of the Playgroup, and (b) the requirement of the banks that there be a PropCo/OpCo structure, the purpose of which was not explained to the Tribunal.

The donations

285. The Plan Ecole minutes also record that PropCo would borrow the capital needed for the new school and then raise funds by way of donations; the donors would become shareholders in PropCo and the money raised would be used to reduce the borrowing costs and "therefore reduce the level of the school fees."

286. FEPT was incorporated some six days later, and after it became a charity it was clearly impossible for donors to become shareholders. However, they obtained priority access to 30% of school places, and so received a non-monetary reward. Donors were mostly large French companies, whose staff will directly benefit from a highly valued and limited resource. It is reasonable to infer that, at least in part, the donations were given in exchange for an enhanced right of access to school places.

287. We also infer that Mr de la Borderie's statement, in December 2012, that costs would be recharged "on a back-to-back basis but with the exclusion of equity investments" is a reference to the role played by the donations in reducing the recharges made to CFBL.

288. Mr Thomas submitted that there is a parallel between these donations and the government grants in *St Paul's*. The decision in that case makes it clear that St Paul's was funded by government grants which were insufficient to meet the nursery's operating costs. The shortfall was met by fundraising, topped up by fees to parents. That is a very different picture from one-off capital contributions made at least partly to secure priority access to school places, which are regarded as "equity investments" by the recipient.

289. Although we accept that, absent the donations, the amount borrowed by FEPT would have been higher and the rent charged to CFBL increased, it would then have been well above market value. In other words, FEPT would then have been charging CFBL significantly more than a commercial landlord.

Future position

290. We place no reliance on the statement signed by FEPT's trustees as to their intention to reduce the rent to a nominal amount in 2034. We must consider the intentions of the trustees at the relevant time, not in January 2014, when that document was signed.

291. We also find that stated intention difficult to reconcile with that which can reasonably be inferred from documents in existence at the relevant time. FEPT's Articles of Association, which are dated 26 October 2009 and remain unchanged, say (emphases added) that its objects are to:

> "provide premises and facilities <u>for schools</u> offering a French or broader bilingual curriculum or to provide assistance in establishing, maintaining, carrying on, managing and developing <u>such schools</u>."

292. FEPT's Summary Information Return for the Charity Commission, filed in August 2012, said that one of its main objectives for the following year was "searching for new school premises for a secondary school for 1,000 pupils." We therefore find that the intention of FEPT's trustees at the relevant time was to fund and support French schools.

293. Given that intention, it would be surprising if they were also planning to reduce CFBL's rent to a nominal level so as to allow the College to charge very low fees and so advantage those students and their parents. It would be more consistent with their stated objectives to continue to charge rent, and use that rent to support the development of other French schools, and we so find.

Charitable status

294. Of course, both CFBL and FEPT are charities, and as Rose J said, it is "possible and indeed necessary to take into account the charitable nature of the activity" when deciding whether or not FEPT's letting of the Property is an economic activity.

295. We therefore take the charitable status of both FEPT and CFBL into account when making our decision. However, we also remind ourselves that the statute itself makes it clear that it is not enough to be a charity: Note 6 provides that use is only for

a “relevant charitable purpose” if it is “otherwise than in the course or furtherance of a business” or “as a village hall or similarly.”

Overall view

296. FEPT is a charity and in letting the Property to CFBL it does not have a profit motive. But it has granted a 25 year lease in order to recover all the costs incurred in the Property’s acquisition, refurbishment and management, other than the part covered by the donations discussed above.

297. All the *Lord Fisher* factors are met – the letting was intended to be a serious undertaking earnestly pursued, with recognisable continuity and more than a certain measure of substance. It operates on sound and recognised business principles and in a regular manner.

298. The facts are far adrift from those in *Yarburgh.* This was not “a relatively informal arrangement” with a lease “substantially below” full market rent. Neither was it, at the relevant time, expected to be “an isolated letting”; instead the plan was for FEPT to be a PropCo for other French schools.

299. It is very different from the shooting parties run by Lord Fisher for his friends and there is no parallel between the donations in this case and the fundraising in *St Paul’s.*

300. Taking these factors into account along with the further detail discussed in earlier paragraphs of this decision, we find that the observable terms and features of FEPT’s letting to CFBL show that the Property was not “intended for use solely for…a relevant charitable purpose after the reconstruction or alteration” but was, instead, intended for use by FEPT in the course of an economic activity.

301. As a result, FEPT cannot succeed in its appeal and it is not strictly necessary for us to consider the use of the Property by CFBL. But as that Issue was fully argued, and in case there is a further appeal, we set out the submissions and our conclusions in the next part of our decision.

ISSUE 2: WHETHER THE USE OF THE PROPERTY BY THE COLLEGE WAS AN ECONOMIC ACTIVITY

A new issue?

302. Mr Thomas said in his skeleton argument that the College’s use of the Property was not an economic activity because the College is not operating in a market.

303. However, that point was not made in FEPT’s grounds of appeal. Mr Bremner submitted, as a preliminary point at the beginning of the hearing, that had it been included, HMRC would have considered whether expert evidence on the nature of the educational market was required. FEPT should have applied to amend their grounds of appeal and he invited the Tribunal to refuse to consider the point.

304. Mr Thomas did not agree that an application was required; he said that the fact that the College was not operating in a market was one of the “observable terms and

features" of the arrangements. The Tribunal should therefore consider this point along with other relevant facts.

305. Mr Bremner responded by saying that Mr Thomas's proposition was, in any event, not supported by the evidence and therefore it "didn't matter" if the Tribunal considered his arguments.

306. The Tribunal must deal with cases fairly and justly. We need to balance the need to consider all relevant issues against the possible prejudice to HMRC of allowing FEPT to raise a new point at such a late stage. We have, however, taken Mr Bremner's statement that the point "didn't matter" as acceptance that HMRC would not be prejudiced. We have therefore considered Mr Thomas's "no market" argument.

307. We have dealt with this before the parties' other submissions, because if Mr Thomas is right that the College is not operating in a market, we would agree that this is a strong indicator that it is not carrying on an economic activity.

The "no market" argument

308. Mr Thomas said that the Lycée is the only other French school in the UK providing secondary education and that two schools were insufficient to create a market place in which the College was competing for pupils.

309. In reliance on *Donaldson's College v C&E Commrs* [2005] VATTR 19258 ("*Donaldson's College*"), and two separate decisions with the same appellant, *Quarriers v C&E Commrs* [2008] VATTR 20660 and VATTR 20670, Mr Thomas said that where a charity is not in competition with others in the provision of its services, it is highly likely that it is not engaged in an economic activity.

310. He also referred to the Opinion of AG Maduro in *BBL* (see §162) that an economic activity must "be construed as meaning an activity likely to be carried out by a private undertaking on a market." It followed that if there is no market there can be no economic activity.

311. Mr Bremner said that this was wrong on the facts. The College offered nursery, primary and secondary education. Although there was only one other UK French secondary school, several French schools provided nursery and/or primary education. Moreover, although the majority of French parents preferred French schools, especially at the secondary stage, the College was part of a wider market for education.

312. He drew our attention in particular to oral evidence given by Ms Langford, consultant to the Good Schools Guide. Ms Langford had said in her witness statement that:

> "A French Education provides unique benefits which cannot be received in other schools, including International Schools. For this reason, CFBL and the Lycée cannot be said to be in competition with

> other schools, including International Schools, for their core pupil body."

313. However, in cross-examination, Ms Langford had answered "yes" to Mr Bremner's question: "CFBL is in that market [ie for education] as much as anyone else; it has unique attributes but it is a player, isn't it?" She had also accepted that "in economic terms" it was "true" that CFBL was in competition with other schools, although she qualified this by saying that "in terms of French parents, it is not the same."

The "no market" argument: discussion

314. We first considered the three tribunal cases on which Mr Thomas had relied. *Donaldson College* concerned a specialist school for the severely hearing impaired. The tribunal had found as a fact that the college "is unique. There is no competition for the provision of their services nor any likelihood of any such competition."

315. The first of the *Quarriers* judgments concerned an appeal against HMRC's refusal to allow Quarriers, a charity, to issue zero-rating certificates for the construction of a new epilepsy assessment centre to replace an existing building known as Hunter House, constructed in 1969. At [6] of their decision, the tribunal found as facts that:

> "Before 1969 there were no such centralised facilities in Scotland for the assessment and treatment of epilepsy sufferers. The facilities provided at Hunter House in Scotland are unique. There is no competition for the provision of such services in Scotland. In particular, there is no competition with the National Health Service in any part of the United Kingdom. There is an assessment centre in Buckinghamshire (operated by a charity), but there is no element of competition between it and Hunter House. Nor would there be any such competition between the proposed new centre and any other facility or centre in the United Kingdom."

316. The second *Quarriers* judgment concerned a school called Seafield. At [3] of their decision, the tribunal found the following facts:

> "Seafield is unique in West and Central Scotland in as much as it provides for children of both primary and secondary school age with severe emotional difficulties…Seafield is not in competition with other similar institutions."

317. In each of these three cases the services provided are "unique" and there is no competition with other providers.

318. The position here is different. Other schools provide nursery, primary and secondary education. Although most French parents strongly prefer to send their children to a French school, we have found as a fact that other criteria are also relevant, such as fees, location, reputation and facilities provided by the school. And as Mr Bremner says, at nursery and primary level there are a number of French schools.

319. We note that Ms Langford accepted that the College was "a player" in the market place albeit one with "unique attributes." There is a significant difference between a "unique" service, such as that provided by Seafield or Hunter House, and a school which has "unique attributes." Many operators in a market place have "unique attributes" which differentiate them from other providers, but they are not thereby placed in a "class of their own" in the same way as Donaldson College, Hunter House or Seafield.

320. We find as a fact that the College is operating in a market, and we move on to consider the parties' other submissions.

Mr Thomas's submissions

321. Mr Thomas said that the CFBL is not carrying on an economic activity for the following further reasons:

(1) It is merely carrying out its charitable objects.

(2) It does not fix its fees by what the market will bear, but to recover its costs. Its fees are below the market rate, as can be seen from those charged by EIFA. Given the demand for places in French schools, the College could set its fees above the market rate.

(3) The College seeks to reduce its fees as far as possible. As a result of its Conventionée status, the AEFE subsidises both teaching and equipment, and gives low income parents access to bursaries.

(4) Mr Bourette's letter of 28 February 2014 stated that CFBL trustees had "the declared intention" to reduce school fees "as far as possible once the School ceases to be responsible to pay the rent under the lease from FEPT."

(5) There were strong similarities between the facts of this case, and those in *Yarburgh* and *St Pauls.* In particular, the Playgroup was run "on a voluntary basis by an elected committee of parents" and in *St Pauls* "parents were involved in the day-to-day activities of the nursery to a significant extent" (see [5] and [1(7)] of those decisions). Here, the parents elect the trustees and raise funds for the College.

322. The Tribunal asked Mr Thomas if he had any submissions on *C&E v St Dunstan's Educational Foundation* [1999] STC 381 ("*St Dunstan's*"). St Dunstan's Foundation is a charity which runs a fee-paying secondary school near Lewisham. It had obtained lottery funding to build a sports hall on condition that there was "community use" of the new building. In *St Dunstan's* Vinelott LJ said that "as the college was a fee-paying school, use by the college was not 'use otherwise than in the course or furtherance of a business.'"

323. Mr Thomas said that the issue decided by in *St Dunstan's* was whether the building was to be used "as a village hall or similarly" and Vinelott LJ's dictum was merely something "said in passing." Furthermore, the same was true of the other "school" cases to which Mr Bremner had made reference in his skeleton argument; they all turned on whether the building in question fell within the "village hall" exception.

Mr Bremner's submissions

324. Mr Bremner said that "it was well established that the provision of education in return for fees constitutes the carrying on of a business for VAT purposes," relying on both *St Dunstan's* and *Leighton Park School v C&E Commrs* [1992] VATTR 932 ("*Leighton Park*").

325. He said that Vinelott J's statement that use by a fee-paying school was an economic activity was not *obiter* but part of the *ratio* of the case. The message "couldn't be clearer or more general."

326. He submitted that an independent school only falls outside this general proposition where there is something unusual about the way it is organised. For example, in *Sheiling Trust v C&E Commrs* [2005] VATTR 19472 ("*Sheiling Trust*"), which concerned a Steiner school based in Ringwood ("the RW School"), the tribunal had concluded that the Trust was not carrying on an economic activity because of the "particular" and "unusual" manner in which the RW school was organised, being based on community principles involving the whole family. It said at [71] of the decision:

> "the basis on which each family determines the amount of its promised contribution, and the basis on which the RW School seeks such contributions, is distinctive and quite different in character from the process and relationship (financial and otherwise) involving parents and a conventional fee-paying school in respect of determining and paying school fees."

327. There was nothing comparable in the College's case and it is no surprise that its activities satisfy all the *indicia* in *Lord Fisher*:

(a) The activity of running the College is a "serious undertaking earnestly pursued," being managed in a highly organised and competent fashion.

(b) The activity is clearly pursued with recognisable continuity.

(c) It is a substantial concern, teaching between 600 and 700 pupils. Its fee income for the year ended 31 December 2012 was £4,753,315.

(d) The activity was conducted in a regular manner and on sound and recognised business principles. Mr O'Grady had a team of "a dozen people," of whom around five are in finance and administration.

(e) Although in his submission the "predominant concern" factor should not be considered, in any event the College's predominant concern is providing educational services for a consideration;

(f) Many independent schools are run by those who "seek to profit" from them; EIFA is an example.

328. Mr Bremner drew the Tribunal's attention to the fact that the College did in fact have an operating surplus in 2011 and 2012.

329. Although the College was a charity, that did not mean that it was not carrying on a business. Mr Bremner cited *The Royal Academy of Music v C&E Commrs* (1994) VATTR 105 ("*Royal Academy*"), as one example of a charity which charged fees for tuition but was nevertheless found to be carrying on an economic activity. At [29] of that judgment Stephen Oliver QC said:

> "…That the person providing the services might have been motivated by, for example, the terms of a governing charter, a charitable objective or even the obligation to carry out a statutory function, will not of itself take the activity out of the scope of Article 4.2. (I emphasise 'of itself' because some other provisions such as Article 4.5 may do so.) It seems to me therefore that the Academy can not rely on its charitable objectives or even on the assertion that it is performing a quasi-governmental function as the basis for its contention that it is not carrying out economic activities. To summarise at this stage, I think that the Academy's provision of musical education in return for tuition fees amounts, in the words of the Court of Justice, to the carrying out of 'a permanent activity of providing services for a consideration'. The connection with 'economic life' in this instance lies in the fact that the Academy exists to provide musical education for reward, it charges fees for tuition and it would be economically 'unviable' if it did not charge them."

Discussion

330. We begin with Mr Thomas's submission that *St Dunstan's* and the other school cases to which Mr Bremner referred were all "village hall" cases and can be disregarded for that reason. We cannot agree. Vinelott J clearly deals with the "economic activity" question under the heading "the first issue" at page 394 of his judgment. In *Royal Academy* the appellant's main argument was that it was not carrying out an economic activity. There is no mention of "village hall" in *Leighton Park.*

331. However, we are also uncomfortable with Mr Bremner's submission that, absent some unusual feature "it was well established that the provision of education in return for fees constitutes the carrying on of a business for VAT purposes." This is too sweeping. As we have already said, in a case like this, the answer to the economic activity question can only be found by considering the whole picture. Or, to put it another way, once we have established what is meant by "economic activity" as a matter of law, whether the intended use of the Property by the College is an economic activity is, as Evans Lombe J said in *St Pauls* at [17], a "pure question of fact." While the judgments of other courts and tribunals are helpful in that they show how similar analyses have been carried out, none are binding on us.

332. That is true even of *St Dunstan's*: Vinelott J's statement that use by a fee-paying school was "not otherwise than in the course of a business" is not a binding authority which would require us to find that the College is carrying out an economic activity because it is a fee-paying school.

333. However, that is not to deny that there is a consistent theme in the case law, from *Leighton Park* in 1992, through *Royal Academy* in 1994 to *St Dunstan's* in 1999.

This is because the "observable terms and features" of the activities carried out by an independent fee-paying school frequently, albeit not invariably, lead to the conclusion that it is carrying on an "economic activity."

334. Turning to the facts of this case, we agree with Mr Bremner's analysis of the *indicia* set out in *Lord Fisher* (other than his primary case on "predominant concern" which we have already discussed at §§199ff). We add that:

(1) the school works to a detailed three year plan, called a Projet d'Etablissement, which is relevant to factors (a) and (d);

(2) in 2011 there were 33 teachers and 18 administrative staff, with the former increasing to 43 in 2012, which is relevant to factors (c) and (d);

(3) parents are contractually obliged to pay the fees charged by the College, which is relevant to factor (e), the making of supplies to consumers for consideration.

335. All the *Lord Fisher* factors point in the same direction. We have however gone on to consider the other "observable terms and features" of the activity.

336. The fees charged by the College were significantly lower than those of EIFA. We were provided with comparative figures for 2013, when the College charged £6,673 a year for primary students and EIFA's fees were £4,800 per term (or £14,400 per year).

337. As staff salaries are a major part of a school's overheads, it is true that the extra fees charged by EIFA in part reflect the difference in class sizes, with 30-34 pupils per class at the College compared to 20 pupils per class at EIFA. However, EIFA set its fees by reference to those charged by independent schools in the market place, fixing them at a slightly lower level. We therefore find that the fees charged by the College are also below the market rate charged by independent fee-paying schools.

338. We agree with Mr Thomas that the College was not aiming to make a surplus on its operations, because:

(1) the fees were lower than the market rate;

(2) as there is a strong demand for places in French schools it was reasonable to expect that the College would quickly become oversubscribed. CFBL could easily have planned to increase its fees to more than the market rate;

(3) the College obtains subsidised teaching staff and means-tested bursaries from the AEFE and uses these to reduce the costs charged to parents;

(4) although there were surpluses in two of the three years, they were the accidental result of result of the AEFE uncertainties together with prudent cost estimates at the beginning of the College's operations; and

(5) the College intends to accumulate only those reserves necessary to satisfy the Charity Commission's guidelines.

339. We also agree with Mr Thomas that the lack of a profit motive and the deliberate setting of fees below the market rate can indicate that there is no economic activity. But as we have already found, it is not determinative, see the discussion at §§161ff.

340. We also take into account CFBL's charitable status and the fact that it is carrying out its charitable objects by running the College. These too are pointers away from there being an economic activity. But again they are not conclusive: we refer back to our earlier comments at §294 and we also agree with the *dicta* from *Royal Academy* set out above.

341. There is no real parallel with the parental involvement seen in *St Pauls* and *Yarburgh.* In the former "parents were involved in the day to day activities of the day nursery to a significant extent" see [1(6)] of that decision. Here, all the teaching and administrative staff are professionals. Patten J described the position in *Yarburgh* at [30] of his judgment:

> "The overwhelming impression which one gets from considering the evidence before the Tribunal is that this is a co-operative venture run by trained staff with the benefit of help provided by parents under the control of a committee on which parents predominate."

342. The overwhelming impression from the evidence before this Tribunal is that the College is a professionally run business, managed by the Headmaster and the bursar and controlled by the trustees. That finding is not displaced simply because parents elect half of CFBL's trustees, or because they raise small sums of money for the College (£24k in the 2011-12 academic year and £48k the following year). Those are minor factors.

343. Although the lack of a profit motive, the setting of the fees below the market and the charitable status of both FEPT and CFBL are all pointers away from there being an economic activity, they are insufficient in our judgment to offset the many indicators in the other direction: namely that the College is a substantial, professionally-run, well-managed school with fee income of over £4m paid in exchange for the provision of education.

344. We find that the activity of running the College does not fall outside the "very wide" meaning to be given to the term "economic activity," see the case law cited at §129.

345. For completeness we record that we place no reliance on Mr Bourette's letter of 28 February 2014. It was written after the relevant period and in any event adds little to the picture of the College's operations.

Overall decision, costs and appeal rights

346. For the reasons set out above, we refuse FEPT's appeal.

347. We are most grateful to both Counsel for their helpful written and oral submissions.

348. This case was classified as complex under Rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"). This allows the Tribunal to make an order for costs under Rule 10(1)(c). Both parties asked for their costs if they were successful. The next step is for HMRC to make a formal costs application together with the schedule specified in Rule 10(3)(b). Of course, the parties may be able to agree costs between themselves, but if not, HMRC are reminded that under Rule 10(4)(a) any such application must be received by the Tribunal no later than 28 days from the date this decision is issued.

349. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Anne Redston

TRIBUNAL JUDGE
RELEASE DATE: 1 December 2015