Neutral Citation Number: [2018] EWCA Civ 952

Case No: A3/2016/1253

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THEUPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mr JUSTICE BARLING and JUDGE BISHOPP
UTC/2014/0013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 May 2018

Before:

LORD JUSTICE PATTEN
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE MOYLAN

- -

Between:

WAKEFIELD COLLEGE	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondent**

- -
- -

Kevin Prosser QC (instructed by **Forbes Hall LLP**) for the **Appellant**
James Puzey (instructed by **the General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing dates: 7-8 February 2018

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Approved Judgment

Lord Justice David Richards:

Introduction

1. Wakefield College appeals against the decision of the Upper Tribunal (the UT), reversing the First-tier Tribunal (the FTT), that services provided to it in the construction of a new building, called the skillsXchange (the new building), were not zero-rated for VAT purposes. The issue depends on whether the provision of further education courses to students paying a fixed but publicly-subsidised fee amounts to carrying out an "economic activity" within the meaning of article 9 of the Principal VAT Directive (2006/112/EC) (the VAT Directive), to which domestic effect is given for present purposes by provisions in schedule 8 to the Value Added Tax Act 1994 (the 1994 Act).

2. Permission to appeal the decision of the UT was given following the decision of the Court of Justice of the European Union (the CJEU) on the interpretation of the relevant provisions of the VAT Directive in *Gemeente Borsele v Staatssecretaris van Financiën* (C-520/14) (*Borsele*) which was given four months after the UT's decision.

3. The 1994 Act provides, at group 5 of schedule 8, for the zero-rating of various supplies made in the course of construction of certain buildings including:

> "The supply in the course of construction of
>
> (a) a building … intended solely for use for … a relevant charitable purpose…
>
> of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity".

Note (6) to group 5 provides:

> "Use for a relevant charitable purpose means use by a charity… -
> (a) otherwise than in the course or furtherance of a business."

4. Therefore, although Wakefield College (the College) is a charity, if the new building was intended for use in the course or furtherance of a business, supplies made in the course of its construction would not be zero-rated.

5. Although the wording of the Act requires that, to attract zero-rating for construction services, a building must be intended "solely" for use for a relevant charitable purpose, otherwise than in the course or furtherance of a business, HMRC accept that up to 5% business use of the building can be ignored as *de minimis*. The College has conceded that the provision of courses to students paying full unsubsidised fees in the new building amounts to business use, but it represents a very small proportion of the activity within the building. If the provision of further education to students paying a fixed, subsidised fee is also, as HMRC submit, made in the course or furtherance of a business, then business use of the new building would exceed 5%.

6. Because a central issue on this appeal is the effect of the CJEU's judgment in *Borsele* both generally on the correct approach to the determination of whether an economic

activity is carried on and particularly on the decision of the UT in this case, I will start with a discussion of the legal issues, and particularly the effect of *Borsele* and other relevant decisions. I will then refer to the decisions of the FTT and the UT under appeal, followed by a discussion of the relevant facts of this case and the application of the legal principles to those facts.

7. This is a very long-running dispute. The College's appeal against HMRC's determination that the relevant construction costs were not zero-rated was first heard by the FTT as long ago as 2010. In December 2011, the UT allowed an appeal by the College and remitted the case to the FTT for the determination of two issues, one of which is the subject of the present appeal.

8. We were told that HMRC know of about 50 cases, involving approximately £120 million of VAT, that will be affected by the result in this case.

The law

9. The 1994 Act implements the VAT Directive and must therefore be interpreted in accordance with it. The phrase "in the course or furtherance of a business" in note (6) to group 5 of schedule 8 to the 1994 Act therefore has the same meaning as the words "economic activity" in article 9(1) of the VAT Directive.

10. The VAT Directive provides at art 2(1):

> "The following transactions shall be subject to VAT:
>
> …
>
> (c) The supply of services for consideration within the territory of a Member State by a taxable person acting as such."
>
> Art 9(1) provides:
>
> " "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."

11. The meaning of these provisions has been considered in a considerable number of European and domestic cases, including *Borsele*. At the heart of the issues of law arising on this appeal is the effect of *Borsele* on earlier decisions, particularly the decision of the CJEU in *Commission of the European Communities v Finland* (C-246/08) [2009] ECR I-10605 (*Finland*), on which the UT relied in the decision below, and the decision of the Court of Appeal in *Longridge on the Thames v HMRC* [2016] EWCA Civ 930 (*Longridge*).

12. I consider each of these cases, and then turn to the parties' submissions as to what the law is in light of these cases. By the end of the hearing before us the distance between the parties on the law had narrowed considerably, though differences remained.

13. The College's position in this appeal (which, by the end of the hearing, was accepted by HMRC) is that the European case law requires a two-stage test, assessing, first, whether there is "consideration" for a supply of goods or services within the meaning of article 2(1) and assessing, second, the different, and broader, question of whether there is "remuneration" for the purposes of article 9(1). "Remuneration" is not a term used in article 9 but the CJEU has used it as a test for economic activity.

14. When considering the CJEU cases, it is important to note that there is on occasions some inconsistency between the English and French versions of the judgments as to the use of the words "consideration" and "remuneration". In the text of the VAT Directive "consideration" is, in French, "à titre onéreux". This is the phrase used at some points in the French versions where the word "consideration" is used in the English judgments, but the words "rétribution" and "contre-valeur" are also used. Those are all occasions on which article 2 is under consideration. Where the word "rémunération" appears in the French versions, the equivalent in the English versions is in some places "consideration", as well as being in other places "remuneration". Given the distinct meanings of the words "consideration" and "remuneration" in this area of law, spelt out clearly and explicitly in the Opinion of Advocate General Kokott in *Borsele,* it is necessary, when reviewing the CJEU cases, to look at both the French and the English versions of the judgments.

15. As will be seen, "consideration" in article 2 means only some value given to the supplier in return for the goods or services by the person to whom they are supplied. It is this amount on which VAT is payable. It need not be full value or indeed bear any particular relation to the value of the goods or services supplied. By contrast, "remuneration" has a broader meaning, and may be said to encapsulate the concept of carrying on an economic activity "for the purposes of obtaining income therefrom on a continuing basis". Those words appear in article 9(1) as qualifying only the exploitation of tangible or intangible property, but it is established that they apply generally to "economic activity": *Landesantalt für Landwirtschaft v Götz* (Case C-408/06) [2007] ECR I-11295 at [18], *Finland* at [37]. It can readily be appreciated that goods or services may be supplied for "consideration" without the supplier doing so as an economic activity or for "remuneration". In that event, the supplier will not be supplying the goods or services as a "taxable person", so that VAT will not be payable on the consideration.

Borsele

16. I will first consider *Borsele*. It concerned the provision of school transport services by a Dutch local authority or municipality. Whether parents had to make a contribution to the service depended on the journey distance and, in some cases, on the parents' means:

    i) For journeys of up to 6 km the municipality did not cover the cost of transporting schoolchildren.

ii) For journeys of between 6 km and 20 km transport was provided in return for a fixed contribution (equal to the cost of public transport covering a distance of 6km).

iii) For journeys of more than 20 km, transport was provided in return for a payment which could not exceed the price of the transport and which was, in the case of each child, calculated taking into account the parents' income.

About one third of parents using the service were required to make contributions, and their contributions were equivalent to 3% of the amount paid by the municipality to fund the service. The municipality claimed that it was a taxable person, so that it was liable to pay VAT on payments made by parents and was entitled to deduct as input tax the VAT charged to it by the transport undertakings providing the service, and reclaim the balance of the input tax from the tax authorities.

17. The Dutch national courts referred three questions to the CJEU (set out at paragraph 16 of the judgment):

> "(1) Should Article 2(1)(c) and Article 9(1) of the VAT Directive be interpreted as meaning that, with regard to the transport of school pupils, on the basis of an arrangement as described in the present judgment, a municipality should to this extent be regarded as a taxable person within the meaning of that directive?
>
> (2) For the purpose of answering that question, should the arrangement as a whole be considered, or should this assessment be made for each transport operation separately?
>
> (3) If the latter is the case, should a distinction be made according to whether pupils are transported over a distance of between 6 and 20 kilometres or over a distance exceeding 20 kilometres?"

18. The CJEU held that the transport services provided by the local authority did not amount to "economic activity". Questions (2) and (3) were not explicitly addressed by the Court. The Court considered the activity as a whole, and did not make a distinction between pupils being transported between 6 and 20km and those being transported over 20km.

19. In her Opinion, Advocate General Kokott noted at [3] that the CJEU had looked at the definition of "economic activity" on a number of occasions but the "assessment criteria laid down by case law in this regard require further clarification". The Advocate General listed a large number of cases in a footnote, including *Finland*.

20. The Advocate General concluded at [37] of her Opinion that the municipality was supplying a service within the meaning of article 2.

21. The next question was whether the service was being supplied for consideration for the purposes of article 2. Basing themselves on *Finland*, the Netherlands and the Commission submitted that the service was not supplied for consideration, because the parents' contributions were not linked to the costs of providing the service. By contrast, the United Kingdom argued that *Finland* contradicted the decision in *Hotel*

Scandic Gasaback AB v Riksskatteverket (case C-412/03) [2005] STC 1311 (*Scandic*), in which the court held in terms that a payment lower than the cost price can constitute consideration.

22. The Advocate General stated at [44] that a distinction must be drawn between obtaining income, as required by article 9, and a supply for consideration, as required by article 2. She noted the two senses in which the court used the term "consideration" in *Finland*, which reference to the French version of the judgment made clear. When considering "remuneration" in the context of article 9, the court did not have in mind "consideration" as used in article 2. She continued at [49]:

> "Even though the same outcomes may often be expected, a strict separation must be observed between the determination of any consideration for the purposes of art 2 of the VAT Directive, on the one hand, and the question of whether any income is obtained that falls to be examined in the context of art 9 of that directive, on the other."

23. She said at [50] that, while it was true that where consideration within the meaning of article 2 was not sought, there was no income and therefore no economic activity,

> "the fact that a taxable person seeks in connection with an activity consideration within the meaning of the events chargeable to VAT is not sufficient for a finding, required by art 9(1) of the VAT Directive, that its activity is also carried out for the purpose of obtaining income or, therefore, to support the assumption that an economic activity is present."

24. At [52] – [54], the Advocate General concluded that the requirement in article 2 for the supply of services for consideration on the facts of *Borsele* was satisfied. It was settled case law that a supply for consideration "presupposes only that there is a direct link between the supply of goods or services and the consideration actually received by the taxable person". The link "is predicated only on the presence of a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance". In so far as a third of the parents had to make a payment for school transport, the requirement for a supply for consideration within the meaning of article 2 was clearly satisfied. The municipality did not organise school transport exclusively free of charge.

25. She proceeded to consider whether the municipality was thereby carrying on an economic activity for the purposes of article 9. She had earlier observed at [38] that it was the court's case law that an activity is to be regarded as economic only if it is carried out for the purpose of obtaining income on a continuing basis. The continuing basis of the municipality's activity was not in doubt. The issue was whether it was organising school transport "for the purpose of obtaining income or in return for remuneration within the meaning of the court's case law".

26. The Advocate General examined this issue at [55] et seq. She noted a number of similarities with the facts in *Finland*. The municipality sought only a part payment for the service. The amount of any payment was at least in part dependant on the income of the parents. The income covered only a fraction (3%) of the costs. Nonetheless, it

did not automatically follow that the municipality did not have in part the purpose of obtaining income because "it is important in particular not to confuse the purpose of obtaining income with the intention to make a profit".

27. She went on to consider "a specific, implicit condition that must be satisfied in order for an activity to be carried out for the purpose of obtaining income within the meaning of [art 9]: market participation". Although not explicit in *Finland*, she said that it ultimately informed the court's decision in that case. She concluded that the municipality was not a market participant in *Borsele*. It did not offer any services on the general market in transport services. In fact, it had "the appearance of itself being the final consumer of the services provided by the transport undertakings, whose transport services it makes available to the parents exclusively in the public interest, even though it sometimes levies a financial contribution for so doing." This was borne out by the recovery of only a small percentage of the costs of the service, which "was not the typical conduct of a market participant". There is "a certain link between the *level* of remuneration and the existence of an economic activity" (original emphasis), a link confirmed in *Finland*.

28. In its judgment, the CJEU followed the two-stage process set out in the Advocate General's Opinion. It addressed the requirement for a supply of services for consideration under article 2 at [22] – [27]. It noted at [24] that "a supply of services is effected for consideration, within the meaning of art 2(1)(c) of the VAT Directive, and is therefore taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration *[meaning consideration]* received by the provider of the service constituting the value actually given in return for the service supplied to the recipient". It did not matter that the price paid was higher or lower than the cost price. All that was required was 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" (reference being made to *Scandic* and *Apple and Pear Development Council v Customs and Excise Comrs* (Case 102/86) [1988] STC 221). It followed that the fact that approximately one-third of the parents made a payment permitted the inference that the transport service was provided for consideration by the municipality.

29. Turning to article 9, the Court confirmed at [29] that to be an economic activity the service must be supplied "in return for remuneration", and that, in order to determine whether that is so, "all the circumstances in which it is supplied" have to be examined.

30. It is useful to set out fully the following part of the judgment, in which the court considered the relevant circumstances:

> "30 Comparing the circumstances in which the person concerned supplies the services in question with the circumstances in which that type of service is usually provided may therefore be one way of ascertaining whether the activity concerned is an economic activity (see, by analogy, judgment of 26 September 1996 in *Enkler*, C-230/94, EU:C:1996:352, paragraph 28).
>
> 31 Other factors, such as, inter alia, the number of customers and the amount of earnings, may be taken into account along with others when that

question is under consideration (see, by analogy, judgment of 26 September 1996 in *Enkler*, C-230/94, EU:C:1996:352, paragraph 29).

32 While it is, of course, ultimately for the national court to assess all the facts of the case in the main proceedings, the Court, which is called on to provide answers of use to the national court, may provide guidance, based on the file in those proceedings and on the written and oral observations which have been submitted to it, which may enable the national court to give judgment in the specific case before it.

33 In that regard, it should be noted, first, that the municipality of Borsele recovers, through the contributions that it receives, only a small part of the costs incurred. The contributions at issue in the main proceedings are not payable by each user and were paid by only a third of the users, with the result that they account for only 3% of the overall transport costs, the balance being financed by public funds. Such a difference between the operating costs and the sums received in return for the services offered suggests that the parental contribution must be regarded more as a fee than as consideration *[in the French version: "une rémunération"]* (see, by analogy, judgment of 29 October 2009 in *Commission* v *Finland*, C-246/08, EU:C:2009:671, paragraph 50).

34 It therefore follows from that lack of symmetry that there is no genuine link between the amount paid and the services supplied. Hence, it does not appear that the link between the transport service provided by the municipality in question and the payment to be made by parents is sufficiently direct for that payment to be regarded as consideration *[in the French version: "une rémunération"]* for that service and, accordingly, for that service to be regarded as an economic activity within the meaning of Article 9(1) of the VAT Directive (see, by analogy, judgment of 29 October 2009 in *Commission* v *Finland*, C-246/08, EU:C:2009:671, paragraph 51).

35 It should be noted, second, that the conditions under which the services at issue in the main proceedings are supplied are different from those under which passenger transport services are usually provided, since the municipality of Borsele, as the Advocate General observed in point 64 of her Opinion, does not offer services on the general passenger transport market, but rather appears to be a beneficiary and final consumer of transport services which it acquires from transport undertakings with which it deals and which it makes available to parents of pupils as part of its public service activities.

36 It follows from all the forgoing considerations that, in answer to the questions submitted by the referring court, Article 9(1) of the VAT Directive must be interpreted as meaning that a regional or local authority which provides a service for the transport of schoolchildren under conditions such as those described in the main proceedings does not carry out an economic activity and is not therefore a taxable person."

Finland

31. The UT in the present case helpfully summarised the issue and facts in *Finland* at paragraph 21 of its judgment:

> "the question was whether Finland could legitimately treat as non-taxable (that is, outside the scope of VAT) supplies of legal aid provided by the public legal aid office while taxing similar supplies made by lawyers in private practice. The amount a recipient of legal aid was required to contribute to the cost of the legal aid with which he was provided was dependent upon his income and capital: some were required to pay nothing, some were disqualified because their income or capital, or both, exceeded certain thresholds, and others in between paid an amount up to 75% of the cost of the service. In most cases the public legal aid office, acting by its employed lawyers, provided the relevant service but it was possible for a recipient of legal aid instead to engage a lawyer in private practice. In the former case the contributions supplemented the office's income, most of which was derived from public funds. In the latter, the State paid for the lawyer's services, which were subject to VAT. It made no difference to the recipient's contribution if he instructed a private lawyer rather than the public office"

32. The issue depended on the application of articles 2 and 4 of the Council Directive 77/388 (the Sixth Directive), which were replaced without material differences by articles 2 and 9 of the VAT Directive.

33. Although the court set itself a single primary question, whether the legal aid services provided by the public offices in return for a part payment constituted economic activities within articles 2 and 4 of the Sixth Directive, it approached the issue by way of the two-stage process made clear in *Borsele*, although that is not entirely clear from a reading of the English version of the judgment alone.

34. The court addressed the application of article 2 at [43] – [46]. At [44], the court reiterated that a supply of services is effected "for consideration" within the meaning of article 2 "only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration *[French version: la rétribution]* received by the provider of the service constituting the value actually given in return for the service supplied to the recipient". At [45] the court stated that, under the court's case law, "a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive presupposes a direct link between the service provided and the consideration received, reference being made to *Apple and Pear Development Council v Customs and Excise Comrs* and other cases. On the facts of *Finland*, the court held at [46] that the legal aid services were supplied for consideration within the meaning of article 2 to those recipients who made some payment for them.

35. From [47] onwards, the court considered whether the supply of the legal aid services constituted an economic activity for the purposes of article 4 of the Sixth Directive. In

earlier paragraphs ([36] – [42]), the court had made some general observations about the nature of economic activities. I have earlier referred to [37] where the court said that as a general rule an activity is categorised as economic "where it is permanent and carried out in return for remuneration *[French version: contre une rémunération]* which is received by the person carrying out the activity". The receipt of a payment does not of itself mean that a given activity is economic in nature, but equally it is irrelevant that the activity consists in the performance of duties that are imposed and regulated by law, in the public interest and without any business or commercial objective. The question was whether, given that the legal aid services were supplied on a permanent basis, they can be regarded as provided "in return for remuneration".

36. At [47], the court noted that the payments made for the legal aid service were only part payments, not covering the whole amount of the fees set by national legislation, but ranging from 20% to 75% of that amount. A part payment might, depending on the recipient's assets, be supplemented by an additional contribution, but it was unlikely that it could result in full payment of the fees. Although the payment represented a portion of the fees, its amount was not calculated solely on the basis of the fees but also depended on the recipient's income and assets. It was the level of the income and assets, and not, for example, the number of hours worked by the public office or the complexity of the case concerned, that determined the portion of fees paid by the recipient. It followed that the part payment depended "only in part on the actual value of the services provided – the more modest the recipient's income and assets, the less strong the link with that value will be". That finding was borne out by the fact that the payments represented a small part of the gross operating costs of the public offices (in 2009, EUR 1.9m as against EUR 24.5m). This suggested that the payment made by a recipient "must be regarded more as a fee, receipt of which does not, per se, mean that a given activity is economic in nature, than as consideration *[French version; une rémunération]* in the strict sense".

37. The court concluded from these factors, at [51]:

> "Therefore, in light of the foregoing, it does not appear that the link between the legal aid services provided by public offices and the payment to be made by the recipients is sufficiently direct for the payment to be regarded as consideration *[French version: une rémunération]* for those services and, accordingly, for those services to be regarded as economic activities for the purposes of Article 2(1) and Article 4(1) and (2) of the Sixth Directive."

38. The English version of [51], if read alone, is capable of causing some confusion but, with the clarification supplied by the court in *Borsele* and reference to the French version, it can be seen that the court was directing itself to the question of economic activity under article 4 and not to the question of the supply of services for consideration under article 2. Reference is made to article 2, as well as to article 4, because the words "by a taxable person acting as such" in article 2 brings in the definition of "taxable person" contained in article 4 which is, of course, dependent on a finding of "economic activity".

39. The court's conclusion in *Finland* was therefore that, while there was a supply of legal aid services for consideration to those recipients who made payments for them for the purposes of article 2, the supply did not constitute economic activity for the purposes of article 4 of the Sixth Directive.

Longridge

40. The appellant taxpayer (Longridge) was a charity which operated an outdoor activity centre, mainly for young people. It charged for the use of its facilities but adjusted the charges to meet the ability of the users to pay. It had built a new training centre, and the issue was whether supplies made in the construction of the training centre should be treated as zero-rated.

41. The Court of Appeal unanimously dismissed the appeal. The leading judgment, with which Tomlinson LJ agreed, was given by Arden LJ. Morgan J gave a concurring judgment. The court drew heavily on the judgment in *Finland*. The Advocate General had given her Opinion in *Borsele* some four months before the hearing of the appeal in *Longridge*, while the CJEU's judgment in *Borsele* was given only three weeks after the hearing and some time before judgment was given. It is unfortunate that the court was not provided with the Advocate General's Opinion or the CJEU's judgment, all the more so as the United Kingdom had submitted observations to the CJEU in *Borsele*.

42. Arden LJ began her judgment with an overview, entitled "Do Longridge's activities amount to economic activity for VAT purposes?" This was indeed the issue in the case. Attention is therefore directed at article 9 of the VAT Directive. She summarised her conclusion, having referred to HMRC's original determination that Longridge was carrying on business activities:

> "5. Longridge successfully appealed this determination to the First-tier Tribunal ("FTT"). HMRC then appealed to the Upper Tribunal ("UT"). Both the FTT and the UT followed domestic authorities where the courts have looked at the wider context in order to determine whether the provision of services for a money consideration constituted an economic activity for VAT purposes.
>
> 6. The nub of HMRC's case is that this approach is not consistent with EU law. HMRC contend that the Court of Justice of the European Union ("the CJEU", in which expression I also include its predecessor the European Court of Justice) has recently clarified the test for determining whether there is an economic activity and that this now focuses on whether there is a direct link between the service which the recipient receives and the payment which he makes, not the wider context in which the payment was made. If the direct link is not present, there is no economic activity.

> 7. To answer this question, this court needs to examine many authorities. At the end of the day, and for the detailed reasons given below, I consider that HMRC are correct. The correct test is one of direct link. In this case, the FTT and UT misdirected themselves. In my judgment, the appeal should therefore, be allowed."

43. At [24], Arden LJ quoted from the judgment in *Finland* at [37], that an activity will be an economic activity where it is "permanent and is carried out in return for remuneration which is received by the person carrying out the activity". Using the CJEU's own words, she called this "the General Rule".

44. Arden LJ records HMRC as submitting that any analysis of prices charged by Longridge, their method of calculation and their relationship to costs was impermissible because it offended against the principle that activities can be economic even if they are not pursued for profit. HMRC further submitted that "where consideration was paid for services then there was a presumption that there was an economic activity unless there was some unusual feature to rebut the presumption". The key point in HMRC's case was that *Finland* demonstrated that "there will be economic activity unless there is no direct link between the service and the payment that the recipient of the service makes". HMRC further submitted that "remuneration" meant "consideration which is given for the goods and services", reference being made to *Apple and Pear Development Council v Customs and Excise Coms*. Arden LJ's summary of the submissions of HMRC is set out in 15 paragraphs starting at [29]. It is, I think, fair to say that no clear distinction is drawn in HMRC's submissions between "consideration" within the meaning of article 2 and "remuneration" for the purposes of article 9. The two terms are largely used as interchangeable.

45. Arden LJ examined decisions of the CJEU at [64] – [76], culminating with *Finland*. Despite the element of confusion between the concepts of "consideration" and "remuneration" found in HMRC's submissions, Arden LJ in the course of discussing *Finland* at [74] identified, it seems to me, the essential difference between them when she said:

> "All the factors which generally make a payment to the supplier of a service consideration for it, were present. There was a link in terms of reciprocity but the charge bore little relation to the actual cost, so the link was not sufficiently direct for there to be economic activity for VAT purposes."

46. However, some confusion comes in at [76] where Arden LJ said:

> "The activity must be carried out in return for remuneration and there must be a direct link between the service and the money received by the service-provider: the *Finland* case, paras 44-45. The CJEU held in the *Finland* case that there was no link between the services provided and the paying party."

47. Paragraphs 44 – 45 of the CJEU's judgment in *Finland* to which Arden LJ there refers were concerned with the supply of services "for consideration" within the meaning of

article 2. For those purposes, the CJEU held that there was the requisite direct link. It was the more wide-ranging enquiry conducted by the CJEU at [47] – [50] that led to its conclusion at [51] that the link between the services and the payments was not "sufficiently direct" for the payment to constitute "*une rémunération*" for the services and, accordingly, for the supply of the services to be regarded as an economic activity.

48. Having reviewed the decisions of the CJEU and of the domestic courts in this country, Arden LJ concluded that the domestic authorities had diverged from the CJEU decisions in the test for determining whether a supply of services constituted economic activity. No issue was taken with this conclusion by either party on this appeal, and their submissions were developed by reference to the CJEU authorities.

49. At [91] – [96], Arden LJ applied the CJEU case law, as it then stood, to the facts in *Longridge.* She said that the "starting point" was the "General Rule" that an activity will be an economic activity where it is "permanent and is carried out in return for remuneration which is received by the person carrying out the activity". This General Rule "can be displaced by evidence that there was no direct link between the service and the payment or by other evidence which shows that there was no economic activity… that evidence can be of varying kinds and involves the FTT when making its factual findings looking widely at the circumstances of the case".

50. Applying this to the circumstances of the case, Arden LJ found that there was a "direct link" because, even after deductions were made for available grants and donations, "the charge was more than nominal in amount and was directly related to the cost of the activity being provided". Other factors, such as that Longridge conducted and seriously pursued its activities on a regular basis, had prudent financial management, and operated in a market where similar services were supplied on a commercial basis, supported the impression of economic activity. The concessionary charges were not an indicator against the existence of an economic activity, because the economic activity springs from the receipt of income, not profit, and it was nothing to the point that the activity was in pursuit of its charitable objects because the test of economic activity is objective. Arden LJ therefore concluded that Longridge was carrying on business for VAT purposes.

The present state of the law

51. There was a good deal of agreement between the parties on the correct legal approach, following these cases, particularly *Borsele*. What follows is my analysis of the current legal position, but I will indicate any disagreements between the parties.

52. Whether there is a supply of goods or services for consideration for the purposes of article 2 and whether that supply constitutes economic activity within article 9 are separate questions. A supply for consideration is a necessary but not sufficient condition for an economic activity. It is therefore logically the first question to address. It requires a legal relationship between the supplier and the recipient, pursuant to which there is reciprocal performance whereby the goods or services are supplied in return for the consideration provided by the recipient: see, for example, the judgment in *Borsele* at [24]. That is what is meant by "a direct link" between the supply of the goods or services and the consideration provided by the recipient: see *Borsele* at [26] and contrast *Apple and Pear Development Council v Customs and*

Excise Comrs. There is no need for the consideration to be equal in value to the goods or services. It is simply the price at which the goods or services are supplied. This requirement was satisfied in both *Finland* and *Borsele.*

53. Satisfaction of the test for a supply for consideration under article 2 does not give rise to a presumption or general rule that the supply constitutes an economic activity. However, as Mr Puzey for HMRC pointed out, the Advocate General remarked in her Opinion in *Borsele* at [49], "the same outcomes may often be expected".

54. Having concluded that the supply is made for consideration within the meaning of article 2, the court must address whether the supply constitutes an economic activity for the purposes of the definition of "taxable person" in article 9. The issue is whether the supply is made for the purposes of obtaining income therefrom on a continuing basis. For convenience, the CJEU has used the shorthand of asking whether the supply is made "for remuneration". The important point is that "remuneration" here is not the same as "consideration" in the article 2 sense, and in my view it is helpful to keep the two terms separate, using "consideration" in the context of article 2 and "remuneration" in the context of article 9.

55. Whether article 9 is satisfied requires a wide-ranging, not a narrow, enquiry. All the objective circumstances in which the goods or services are supplied must be examined: see the judgment in *Borsele* at [29]. Nonetheless, it is clear from the CJEU authorities that this does not include subjective factors such as whether the supplier is aiming to make a profit. Although a supply "for the purpose of obtaining income" might in other contexts, by the use of the word "purpose", suggest a subjective test, that is clearly not the case in the context of article 9. It is an entirely objective enquiry.

56. In describing the relationship between the supply and the charges made to the recipients in the context of article 9, the CJEU has used the word "link". In *Finland* at [51], the court concluded that "it does not appear that the link between the legal aid services provided by public offices and the payment to be made by the recipients is sufficiently direct…for those services to be regarded as economic activities". Likewise, in *Borsele* at [34], the court adopted precisely those words in concluding that the provision of the school transport was not an economic activity.

57. Mr Prosser QC for the College submitted that whether there was "a sufficiently direct link" between the services and the charge made was an important circumstance, while Mr Puzey submitted that "direct link" does not feature in the analysis.

58. I regard this as a largely semantic point. The word "link", whether "sufficient" or "direct", is used as no more than shorthand to encompass the broad enquiry as to whether the supply is made for the purpose of obtaining income. It is not a separate test, or one of the factors to be considered when addressing the central question. For my part, I think it is apt to cause some confusion to use the same word for both article 2 and article 9 and I have not myself found it particularly helpful or illuminating in considering whether there exists an economic activity.

59. Each case requires a fact–sensitive enquiry. While cases concerning the supply of legal aid services or school transport will provide helpful pointers to at least some of the factors relevant to the supply of subsidised educational courses, there is not a

checklist of factors to work through. Even where the same factors are present, they may assume different relative importance in different cases. The CJEU made clear in *Borsele* at [32] that it was for the national court to assess all the facts of a case.

The FTT and UT Decisions

60. Although in its second decision the FTT found that the College was not carrying on an economic activity in the supply of courses to students paying subsidised fees, Mr Prosser accepted the view of the UT that the decision was "not altogether satisfactory". HMRC had challenged the decision before the UT partly on the grounds that the FTT had not considered or addressed HMRC's submissions. The FTT Decision does not contain findings of fact on any disputed issue, and it is not necessary to refer further to it.

61. The UT stated the scope of the issue before it, as it understood it to be, in its Decision at [5]: "The parties agree that the relevant provision is art 2(1)(c)". Mr Prosser candidly accepted before us that, without the benefit of *Borsele* (which had not been decided, nor had the Advocate General given her Opinion, by the time of the hearing), he had not appreciated that "consideration" and "remuneration" as used in *Finland* were distinct concepts. The UT went on to state at [7] that it was common ground that the College was "a taxable person", in other words that it was carrying on an economic activity in providing courses to those paying subsidised fees, and that the question that divided the parties was whether those fees amounted to consideration.

62. In the light of the decision in *Finland* that the fees paid for the legal aid services amounted to consideration within article 2, it is not perhaps surprising that the subsidised fees paid by students to the College were held by the UT to be consideration for the supply of courses to those students. The reasoning, however, reflected the confusion in the submissions to the UT between consideration under article 2 and remuneration under article 9: see [48] – [49], where reliance is placed on paragraphs in the judgment in *Finland* which are addressed to remuneration under article 9.

63. The position is therefore that the College has presented its appeal to this court on a quite different legal basis to that adopted in HMRC's appeal to the UT. The changed position results from the clarification provided in *Borsele*, as was clearly accepted by Henderson LJ when giving permission to appeal on a renewed oral hearing after the judgment in *Borsele* was given. Sensibly, and no doubt with an eye to the other cases which we understand may affected by the outcome of this appeal, HMRC were content for the appeal to be argued on this revised basis.

The facts

64. The 1994 Act refers to the "intended" use of the building. It is agreed by the parties that this can be ascertained from the actual use of the new building in the couple of years immediately following its construction. The new building was completed in

2009 and the evidence as to its use over the next two years may briefly be summarised as follows.

65. The College provided educational courses to around 10,000 students. This comprised both further (i.e. vocational) and higher (i.e. equivalent to university) education, although over 90% of its students were further education students. The College operated from three campuses, one of which was the new building. For the purposes of this case, we need be concerned only with the Building.

66. Mr Jason Pepper, the College's Director of Finance and Resources until 2009, gave evidence in a statement dated 27 August 2009, and we were also provided with an agreed note of his oral evidence before Judge Barlow of the First Tier Tribunal on 10 September 2010. Mr Pepper's evidence was not disputed. Mr Pepper explained that the Building "is primarily used for the provision of teaching to 14 – 19 year olds in the Wakefield region. [It] houses the College's provision in subjects like construction, motor vehicle, engineering, hair and beauty; information technology; and care… [It] contains specialised areas in respect of the provision of each of these core subject areas, such as the car and motorbike workshops… The building also contains a number of general teaching and computing rooms…". Mr Pepper further explained that the Building "is a 14-19 academy and vocational centre which caters for all ages" and that "[t]he vast majority [of students] attending… the skillsXchange come from a tight geographical area. More than 80% come from a catchment area with a radius of around 5 to 6 miles". It appeared from the documentation before us that in addition to the vocational courses taking place in the Building a small number of higher education courses also took place there.

67. Vocational education was, at the relevant time, subsidised by grants from the Learning and Skills Council ("LSC"). Some students qualified for full fee remission and paid no fees, in particular those aged 16 – 18, and also those who met certain criteria relating to factors such as the level of their existing qualifications and benefits entitlements. Those entitled to full fee remission formed about 73% of the College's student population. For the purposes of this litigation HMRC conceded that the provision of education to these students did not amount to carrying on a business.

68. Some courses, known as full cost courses, were not eligible for any government funding, meaning that students on those courses paid a fee that covered the cost of providing the course. For the purposes of this litigation the College conceded that provision of education to students on these courses did amount to carrying on a business.

69. Other students, who were taking courses which qualified for government funding, but who did not meet the criteria for full fee remission, paid a fixed fee listed in the College's prospectus. It is with these students that this appeal is concerned, with the College arguing that provision of education to these students does not amount to carrying on a business, and HMRC submitting that it does. The fees paid by these students were significantly less than the cost to the College of providing the courses, and were supplemented by LSC funding. The amount of funding received from the LSC in respect of these students was calculated in accordance with a formula, described in the paragraph below, and operated as a reduction on the amount of funding the LSC provided to the College in respect students entitled to full fee remission. The amount of the reduction was known as the "assumed fee income", the assumption being that the College would charge students not qualifying for full fee

remission this amount. However, it was up to the College to determine how much to charge these students, and it in fact charged around 70% of the assumed fee income. How the College decided what fee to charge may be relevant to the question of whether it was carrying on a business in respect of these students, and is considered later in this judgment.

70. Each course had a national base rate assigned to it. That base rate was then adjusted by the LSC to take into account various factors, including a programme-weighting factor recognising that some courses were more costly to put on than others, a success factor based on the College's retention and achievement rates, and a "disadvantage uplift" for providers in deprived areas. As Wakefield was a deprived area, the application of this factor increased the College's grant. In respect of students not qualifying for full fee remission, the grant was reduced by a fixed percentage of the national base rate, before adjustment. In 2007/2008 the reduction was 37.5%, though it subsequently increased.

71. Although the College charged students not entitled to remission less than the assumed fee income, it did not make a loss overall. Two particular factors contributed to this. The first is that courses run for foreign students, which took place on the College's other campuses, made a profit and subsidised some of the College's other activities. The second is that the percentage reduction applied to the national base rate before adjustment, meaning that the College's disadvantage uplift was not affected.

72. There were various other categories of students at the Building, such as those who were eligible for partial fee remission under a discretionary scheme operated by the College, but their numbers were sufficiently small that it was agreed that they could be ignored for the purposes of these proceedings.

73. Regardless of whether they paid fees or not, students were educated together. On many courses taking place in the Building there would have been, sitting side by side, an under-19 student paying no fees, an over-19 student paying no fees, and an over-19 student paying the prospectus fee.

The application of the law to the facts of this case

74. The parties were agreed that students paying subsidised fees provided consideration within the meaning of article 2 for the courses provided to them. In the light of the authorities discussed earlier, this is plainly right.

75. Turning to the contentious issue of economic activity, both parties drew attention to factors taken into account in *Finland* and *Borsele*, while accepting that ultimately each case depends on its own facts. Those factors were, first, that in *Finland* and, to an extent, in *Borsele*, the charges paid were fixed by reference to the means of the recipients. Second, and as a necessary corollary, the charges were only partly fixed by reference to the cost of the service. Third, the total amount raised by charges was insubstantial, both in absolute terms and relative to the cost of the service. Fourth, in *Borsele*, the municipality did not offer services on the general passenger transport market and appeared more to be the final consumer of the transport services provided by the transport undertakings engaged by it. Fifth, other factors mentioned in those cases were a comparison of the supply in question with the circumstances in which the relevant type of service is usually provided, and the number of customers.

76. It should be noted that the appeal in the present case was argued on the basis that the supply of courses to students paying subsidised fees was a separate activity and the issue was whether that supply was an economic activity for the purposes of article 9. In the same way, the parties had agreed that the supply of courses to students paying full fees and to students paying no fees were separate activities, with the former constituting an economic activity and the latter not doing so. It was nothing to the point that all three categories of student might attend the same course. This distinction between recipients was not made in the judgments in *Finland* and *Borsele*, nor was it commented on, although in *Borsele* the questions referred by the domestic court included asking whether a distinction should be made between transport of 6 to 20kms and transport of over 20kms. In his reply, Mr Prosser, no doubt in response to questions from the court on this question, suggested that the correct comparator for the income derived from the students paying subsidised fees was all the students on LSC-funded courses provided in the new building. In my judgment, it was too late for the case to be presented on this altered basis.

77. Mr Prosser submitted that a number of factors demonstrated that the supply of courses to students paying subsidised fees was not an economic activity. First, the fees paid by them amounted to a part payment only, representing some 25– 30% of the operating costs of the courses. Such a difference suggested that the subsidised fees should be regarded more as a contribution towards costs than a payment truly in return for the course, so that there was no genuine link between the amount paid and the service supplied. Second, the College deliberately charged less than the LSC permitted and

expected it to, because it wanted to serve the local area, which was categorised by the LSC as deprived. A deliberate decision to charge a lower fee so that it was affordable to poorer students pointed away from economic activity and was in effect a decision to fix the fees by reference to means, albeit on a generalised rather than an individual basis. Third, the subsidised fees, together with the small amount of other fees, accounted for only 6 – 8% of the total income from the new building.

78. I consider that overall the evidence establishes that the supply of courses to students paying subsidised fees is an economic activity being carried on by the College. I reach this conclusion for a number of reasons.

79. First, the sole activity of the College, in the most general terms, is the provision of educational courses. It is not comparable to the municipality in *Borsele* for whom the provision of school transport was very much ancillary to its principal activities.

80. Second, the provision of courses to students paying subsidised fees is a significant, albeit minority, part of the College's total undertaking.

81. Third, the fees paid by such students are significant in amount. Taking the example of the BTEC civil engineering course, the fee was £896 pa in 2007/08. The proportion of the cost of courses assumed by the LSC to be covered by fees was set to rise in the following years. The total fee income from courses run in the new building in 2009/10 was approximately £290,000, all but a small part of which was represented by subsidised fees.

82. Fourth, the subsidised fees made a significant contribution to the cost of providing courses to the students paying those fees, to the extent of some 25-30%.

83. Fifth, the level of fees was fixed by reference to the cost of the courses. The national base rate for a course, with an adjustment for a more costly course, may not have precisely equalled the cost to the College of providing the course but it was intended to reflect the cost of the course. It was by reference to that rate that the fee was fixed, although generally at a lower level than that assumed by the LSC.

84. Sixth, the fees were not fixed by reference to the means of the students or employers or others paying the fees. The fee was a fixed fee for each course, published each year in the College's prospectus. It may be the case that the College charged less than it was entitled to, as a response to the prevailing economic circumstances in its local catchment area, but that is a factor that any economic activity must take into account and is not comparable to an individual means-tested basis for fixing fees.

85. Seventh, it is undeniable that there is a market in the provision of further and higher education, whose viability is underpinned by a combination of grant aid and fees. There is no reason to suppose that the College is other than a typical participant in that market or that it provides courses to students paying subsidised fees on anything other than a typical basis, allowing no doubt for some variations between different institutions. If the College was in any way in a position that was unique or atypical, it was for the College to put evidence of it before the FTT.

86. After many years of this protracted dispute, the College was anxious for us to reach a final conclusion on whether the construction services were zero-rated, rather than

remitting the matter to the UT for determination. HMRC were more cautious but submitted that, if we were minded to reach a final conclusion, the evidence supported the conclusion that the services were not zero-rated.

87. I take the view that the evidence does enable us to reach a final conclusion. For the reasons given above, the provision of courses by the College to students paying subsidised fees was, in my judgment, an economic activity carried on by it for the purposes of article 9 of the VAT Directive and was therefore a "business" within the note in schedule 8 to the 1994 Act, with the result that the construction services for the new building were not zero-rated.

88. I would therefore dismiss the appeal, although on different grounds from those on which the UT's decision was made.

Lord Justice Moylan:

89. I agree.

Lord Justice Patten:

90. I also agree.