Neutral Citation Number: [2020] EWCA Civ 452

Case Nos: A3/2019/0793, A3/2019/0809

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
Mann J and Judge Herrington [2017] UKUT 484 (TCC)
Nugee J and Judge Herrington [2019] UKUT 2 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 March 2020

Before :

LORD JUSTICE FLOYD
LORD JUSTICE NEWEY
and
LORD JUSTICE ARNOLD

- -

Between:

LEISURE, INDEPENDENCE, FRIENDSHIP AND ENABLEMENT SERVICES LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

And between:

THE LEARNING CENTRE (ROMFORD) LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Jonathan Bremner QC (acting *pro bono* instructed by **Hogan Lovells LLP** acting *pro bono*) for **L.I.F.E Services Ltd**
Eamon McNicholas (instructed directly) for **The Learning Centre (Romford) Ltd**
Jonathan Davey QC and **Natasha Barnes** (instructed by **General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing dates: 12-13 February 2020

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Approved Judgment

Lord Justice Arnold:

Introduction

1. These two appeals by Leisure, Independence, Friendship and Enablement Services Ltd ("LIFE") and The Learning Centre (Romford) Ltd ("TLC") against two decisions of the Upper Tribunal (Tax and Chancery Chamber) ("the UT") raise two main issues. First, is LIFE a "state-regulated private welfare institution or agency" within Schedule 9 Group 7 Item 9 ("Item 9") of the Value Added Tax Act 1994 ("VATA 1994") which implements Article 132(1)(g) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ("the Principal VAT Directive")? This issue only arises on LIFE's appeal. Secondly, does Item 9 comply with the principle of fiscal neutrality in EU law? This issue arises on TLC's appeal. It also arises on LIFE's appeal if the first issue is decided adversely to LIFE.

2. In the first decision under appeal, by Mann J and Judge Timothy Herrington dated 18 December 2017 [2017] UKUT 484 (TCC) ("UT1"), the UT held that LIFE was not a "state-regulated private welfare institution or agency" within Item 9 and that Item 9 did comply with the principle of fiscal neutrality subject to a point concerning the effect of devolution within the UK which was left over for further argument. The further argument on that point was heard at the same time as a separate appeal to the UT concerning TLC in which the same question arose. In the second decision under appeal, by Nugee J and Judge Herrington dated 23 January 2019 [2017] UKUT 484 (TCC) ("UT2"), the UT held that the devolution arrangements did not mean that Item 9 breached the principle of fiscal neutrality. As a consequence, the UT allowed appeals by the Respondents ("HMRC") against two earlier decisions of the First-tier Tribunal (Tax Chamber) ("the FTT"): a decision concerning LIFE by Judge Charles Hellier and William Haarer dated 23 June 2016 [2016] UKFTT 444 (TC) ("FTT1") and a decision concerning TLC by Judge Barbara Mosedale dated 13 June 2017 [2017] UKFTT 492 (TC) ("FTT2").

3. The overall effect of the two UT decisions is to uphold HMRC's case that supplies of day care services to vulnerable adults by LIFE and TLC are subject to VAT at the standard rate. LIFE and TLC contend that their supplies are exempt from VAT.

EU legislation

4. Article 132(1)(g) sits within Chapter 2, headed "Exemptions for certain activities of public interest", of Title IX, headed "Exemptions", of the Principal VAT Directive. Article 132(1)(g) provides:

> "Member States shall exempt the following transactions:
>
> …
>
> (g) the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other bodies recognized by the Member State concerned as being devoted to social wellbeing".

5. The predecessor provision to Article 132(1)(g) was Article 13A(1)(g) of Council Directive 77/388/EC ("the Sixth VAT Directive"). Article 13A(1)(g) provided:

> "Without prejudice to other Community provisions, Member States shall exempt…:
>
> …
>
> (g) the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other organisations recognised as charitable by the Member State concerned."

Domestic legislation

6. Item 9 sits within Group 7, headed "Health and Welfare", of Schedule 9, headed "Exemptions", of VATA 1994. Item 9 states:

> "The supply by –
>
> (a) a charity,
>
> (b) a state-regulated private welfare institution or agency, or
>
> (c) a public body.
>
> of welfare services and of goods supplied in connection with those welfare services."

7. The Notes to Group 7 include the following:

> "(6) In item 9 '*welfare services*' means services which are directly connected with—
>
> (a) the provision of care, treatment or instruction designed to promote the physical or mental welfare of elderly, sick, distressed or disabled persons,
>
> (b) the care or protection of children and young persons, or
>
> (c) the provision of spiritual welfare by a religious institution as part of a course of instruction or a retreat, not being a course or a retreat designed primarily to provide recreation or a holiday,
>
> and, in the case of services supplied by a state-regulated private welfare institution, includes only those services in respect of which the institution is so regulated
>
> …
>
> (8) In this Group '*state-regulated*' means approved, licensed, registered, or exempted from registration by any Minister or other authority pursuant to a provision of a public general Act, other than a provision that is capable of being brought into

> effect at different times in relation to different local authority areas.
>
> Here 'Act' means –
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> (a) an Act of Parliament;
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> (b) an Act of the Scottish Parliament;
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> (c) an Act of the Northern Ireland Assembly;
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> (d) an Order in Council under Sch 1 to the Northern Ireland Act 1974;
>
> (e) a Measure of the Northern Ireland Assembly established under section 1 of the Northern Ireland Assembly Act 1973;
>
> (f) an Order in Council under section 1(3) of the Northern Ireland (Temporary) Provisions Act 1972;
>
> (g) an Act of the Parliament of Northern Ireland."

The facts found by the FTT: LIFE

8. I take the following account almost verbatim from FTT1 at [7]-[14].

9. LIFE is a limited liability company which is a profit-making organisation. It provides day care services for adults with a broad spectrum of disabilities, principally learning problems. Its clients include those with severe autism, Down's syndrome, severe behavioural difficulties, learning disabilities, and Crohn's disease.

10. The services are supplied at various locations provided by LIFE. The locations may change from day to day during each week. LIFE's clients are picked up from their houses early in the day and taken to the relevant location, and transported back home at the end of each day. Sometimes some help is provided at the time of pick up or return, but substantially all of LIFE's services are provided away from the residences of its clients.

11. While at LIFE's premises the clients engage, with more or less assistance from LIFE's staff depending on the nature of their disability, in a range of activities which vary from day to day and from client to client. These activities include cooking, forms of exercise (walking and swimming and sometimes horse riding often dressed up as games to make them more appealing), help with everyday living (such as learning to turn on a light switch), money skills, social skills, feeding, washing and personal hygiene, oral health, and toileting.

12. The services are provided to a client under a formal care plan agreed with the social services department of Gloucestershire County Council ("the Council") following an assessment of the client's needs and the setting of a personal budget for the provision of care and support pursuant to section 26 of the Care Act 2014 ("CA 2014").

13. If the individual is (or those who care for him or her are) able to manage money and certain other conditions are satisfied, the budgeted amount will be paid to him or her (or those who care for him or her) under sections 31 and 33 of CA 2014 (as explained below, such sums are referred to as "direct payments"). In that case, where LIFE provides services, it will invoice the individual and be paid by the individual or the person who holds the money. In this case the contract for LIFE's services will be between the individual and LIFE, although the Council will exercise "some oversight" of the arrangements and the services LIFE provides.

14. Where neither the individual nor anyone who cares for him or her is able to deal with money, the Council will manage the budget. In that case, the contract for LIFE's services will be between the Council and LIFE, although there will be a care plan setting out the individual's needs and the goals for their care which would be signed by LIFE, the Council and any carer. LIFE will invoice the Council which will make payment to LIFE.

15. LIFE also provides care services to individuals in residential homes, but as I understand it these services are not the subject of the present appeal.

16. The FTT found at [11] that the Council monitored and inspected LIFE's service provision under "guidelines which are similar to, and possibly more exacting, than those applied by the Care Quality Commission ('CQC')" and that LIFE's outcomes were "reviewed regularly" by the Adult Social Care Directorate of the Council. No doubt due to the nature of the case then being advanced by LIFE, the FTT did not specify what guidelines it was referring to or the legal basis upon which the Council monitored and inspected LIFE's services.

17. The FTT also found at [93] that LIFE was "registered with the local authority" and that "in relation to supplies to individuals, the [C]ouncil was involved in setting the terms of the care and inspected [LIFE] regularly". Again, the FTT was not more specific. By "registered with", FTT may have meant no more than LIFE's name appeared on a list (whether paper or electronic) of providers maintained by the Council.

Facts found by the FTT: TLC

18. I take the following account almost verbatim from FTT2 at [8]-[9], [19]-[21] and [29]-[30], except that I shall express it in the present tense.

19. TLC is a limited liability company. It provides day-care to vulnerable adults with learning difficulties, who were referred to as "students" by the company. Both its directors have relevant qualifications and a great deal of experience in providing the care which the company provides. In very brief summary, the company provides its students with education, activities, and entertainment during working hours Monday to Friday, providing meals and, where required, assistance with eating, administering medication, and personal care (such as helping students with intimate matters like toileting). It also provides the transport to bring the students to and from their homes and the facility. The education provided is geared towards teaching the students independent living.

20. TLC only accepts students who have been assessed by their local authority and have a care plan. TLC is situated within the London Borough of Havering, and so most of its students are residents of that borough, but TLC does have some students from neighbouring boroughs. Havering and a couple of other boroughs provided their students attending TLC with "direct payments" with which to pay TLC, whereas Redbridge pays TLC.

21. Local authorities make "direct payments" available by transferring the allocated funds to an account in the name of the student's parent/carer and the parent/carer will then pay the chosen day care provider, such as TLC, direct. The funds are provided on the condition that they are only spent on paying for the care specified in the care plan. The local authority will insist that the account used is a separate account used solely for direct payments, and if any funds are unspent at the end of the year they have to be returned to the local authority.

22. While all TLC's students have care plans, and most of TLC's fees ultimately derive from the local authorities, a small minority of the care provided by TLC is paid for out of the parent/carer's own funds. For instance, the local authority might only assess the vulnerable adult as requiring four days' care per week: the parent/carer might choose to pay privately for an additional day of care per week.

23. TLC was very reluctant for many years to accept that it was not regulated by the CQC under the Health and Social Care Act 2008 ("HSCA 2008"). It considered that day care of vulnerable adults needed to be regulated as much as residential care. Nevertheless, TLC did not argue before the FTT that it was regulated by the CQC. TLC argued that it was "state-regulated" within Item 9 because its staff were checked by the Disclosure and Barring Service and TLC could only employ staff who were checked. The FTT did not accept that argument, and it has not been pursued by TLC subsequently.

Issue 1: Is LIFE a "state-regulated private welfare institution or agency" within Item 9?

24. It is common ground that LIFE is a private welfare institution or agency and that its day care services are welfare services within Item 9. The issue is whether it is "state-regulated".

25. It is common ground that LIFE's day care services are not regulated by the CQC under HSCA 2008. LIFE contends that it is "approved" or "registered" by the Council pursuant to CA 2014, and that that amounts to being "state-regulated" within Note (8). HMRC dispute this. The UT held that LIFE was not "state-regulated".

26. It is pertinent to note before proceeding further that LIFE did not rely upon CA 2014 before the FTT, but only on the appeal to the UT. As stated above, it is no doubt for that reason that the FTT did not make more detailed findings as to the precise nature of the arrangements between LIFE and the Council. In those circumstances, it is not sufficient for LIFE merely to rely upon the fact that the FTT described LIFE as being "registered with" the Council. As counsel for LIFE accepted, LIFE must identify the provisions of CA 2014 which imposed a duty on the Council to approve or register LIFE, or gave it the power to do so, in a relevant manner.

27. As Floyd LJ pointed out in the course of argument, and as is implicit in the UT's reasoning (see UT1 at [74]), the words "approved, licensed, registered or exempted from registration by any Minister or other authority pursuant to a provision of a public general Act" in Note (8) must be construed in context. The context is that Note (8) provides a definition of "state-regulated" for the purpose of determining whether the supply by a private welfare institution or agency of "welfare services" is exempted by Item 9. Note (6) provides that, in the case of services supplied by a state-regulated private welfare institution (the words "or agency" evidently should have been added when Item 9 was amended to include them, but were not), "welfare services" includes "only those services in respect of which the institution is so regulated". It follows that what is required is that the institution or agency is "approved, licensed, registered or exempted from registration by any Minister or other authority pursuant to a provision of a public general Act" in respect of the supply of welfare services.

28. Counsel for HMRC sought to compare the provisions of CA 2014 with what the UT described as the "comprehensive regulatory regime" under HSCA 2008. The UT accepted that this was a relevant comparison and that it supported HMRC's case that the provisions of CA 2014 were "insufficient" to make LIFE "state-regulated" (UT1 at [70]). I disagree. The only question is whether the provisions of CA 2014 relied upon by LIFE satisfy the test laid down by Note (8). The existence of another statutory regime of regulation is not relevant to that question.

29. I turn therefore to the provisions of CA 2014. Counsel for LIFE began by referring us to section 5. Section 5(1) imposes a duty on local authorities to promote diversity and quality in the provision of services for meeting care and support needs, and section 5(5) requires local authorities to have regard to that duty in meeting an adult's needs for care and support or a carer's needs for support. Counsel for LIFE did not submit, however, that section 5 itself provided for the approval or registration of providers of welfare services by local authorities.

30. Section 13(1) of CA 2014 provides:

> "Where a local authority is satisfied on the basis of a needs or carer's assessment that an adult has needs for care and support or that a carer has needs for support, it must determine whether any of the needs meet the eligibility criteria."

Where it has made a determination under section 13(1), a local authority is required to meet the adult's needs for care and support, where certain further conditions are met: see, in particular, section 18(1) and (4). Again, counsel for LIFE did not submit that either section 13 or section 18 provided for the approval or registration of providers of welfare services by local authorities.

31. The key provision in CA 2014 for present purposes is section 8(2), which provides:

"The following are examples of the ways in which a local authority may meet needs under sections 18 to 20—

(a) by arranging for a person other than it to provide a service;

(b) by itself providing a service;

(c) by making direct payments."

32. As can be seen from sections 31 and 33 of CA 2014, the reference to "making direct payments" is a reference to providing budgeted funds to a person in need of care and support or their carer to enable that person or their carer to purchase services from one or more service providers.

33. It can be seen from the FTT's findings set out above that LIFE provides day care services pursuant to section 8(2)(a) (i.e. under contract with the Council) and 8(2)(c) (i.e. under contract with the service user or their carer from the budgeted funds provided by the Council under the rubric "direct payments"). Where services are provided under contract with the Council, it may be expected that the contract will make provision for monitoring and inspection of LIFE's services by the Council. Where services are contracted by the service user or their carer and paid for by means of "direct payments", that will not be the case, although the Council will no doubt be able to exercise what the FTT described as "some oversight" by virtue of its control of the budget.

34. Counsel for LIFE pointed out that section 79(1) of CA 2014, which is headed "Delegation of local authority functions", empowered a local authority to "authorise a person to exercise on its behalf a function it has under" various provisions of the Act, including section 8(2)(b). He submitted that LIFE was authorised by the Council to provide welfare services on behalf of the Council under sections 8(2)(b) and 79(1) of CA 2014, and that meant that it was "approved" or "registered" by the Council pursuant to those provisions for the purposes of Note (8).

35. I do not accept this submission for two reasons. First, I do not consider that it accurately characterises the basis upon which LIFE provides its services. The FTT made no finding that the Council had delegated its functions under section 8(2)(b) to LIFE, and its findings are inconsistent with that proposition. As explained above, it is clear from the FTT's findings that LIFE's services are provided pursuant to section 8(2)(a) and 8(2)(c). (In the case of TLC, it is evident that TLC's services are mainly provided pursuant to section 8(2)(c).) Neither section 8(2)(a) nor section 8(2)(c) requires or empowers the local authority to "approve" or "register" the service provider in respect of welfare services so as to make the provider "state-regulated" within Note (8).

36. Secondly, and in any event, I agree with the UT that a mere delegation of functions by a local authority to a service provider pursuant to section 79(1) of CA 2014 does not amount to approval or registration of that provider in relation to the provision of welfare services within the meaning of Note (8). As the UT pointed out, section 79(6) deems the acts and omissions of the local authority's delegate to be the acts and omissions of the local authority, but it is not suggested that the Council is itself regulated in relation to the provision of welfare services (UT1 at [74]). Even if the Council were itself "state-regulated" within Note (8), that would not mean that its delegate was approved or registered under CA 2014 in relation to the provision of welfare services. (The Council is, of course, exempt for a different reason, namely that it is a public body within Item 9(c).)

Issue 2: Does Item 9 contravene the principle of fiscal neutrality?

37. LIFE and TLC contend that Item 9 contravenes the principle of fiscal neutrality. LIFE contends that it does so for three reasons. TLC only relies upon the third contention.

The principle of fiscal neutrality

38. The principle of fiscal neutrality is a well-established principle in the jurisprudence of the Court of Justice of the European Union. It is sufficient for present purposes to cite what the Court said in Joined Cases C-259/10 and C-260/10 *Commissioners for Her Majesty's Revenue and Customs v The Rank Group plc* [2011] ECR I-10947:

> "32. According to settled case-law, the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes (see, inter alia, Case C-481/98 *Commission* v *France* [2001] ECR I-3369, paragraph 22; Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraphs 41 and 54; Case C-309/06 *Marks & Spencer* [2008] ECR I-2283, paragraph 47, and Case C-41/09 *Commission* v *Netherlands* [2011] ECR I-0000, paragraph 66).
>
> 33. According to that description of the principle the similar nature of two supplies of services entails the consequence that they are in competition with each other.
>
> 34. Accordingly, the actual existence of competition between two supplies of services does not constitute an independent and additional condition for infringement of the principle of fiscal neutrality if the supplies in question are identical or similar from the point of view of the consumer and meet the same needs of the consumer (see, to that effect, Case C-109/02 *Commission* v *Germany* [2003] ECR I-12691, paragraphs 22 and 23, and Joined Cases C-453/02 and C-462/02 *Linneweber and Akritidis* [2005] ECR I-1131, paragraphs 19 to 21, 24, 25 and 28).
>
> …
>
> 42. In order to determine whether two supplies of services are similar …, account must be taken of the point of view of a typical consumer (see, by analogy, Case C-349/96 *CPP* [1999] ECR I-973, paragraph 29), avoiding artificial distinctions based on insignificant differences (see, to that effect, *Commission* v *Germany*, paragraphs 22 and 23).
>
> 43. Two supplies of services are therefore similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other (see, to that effect, Case C-481/98 *Commission* v *France*, paragraph 27, and, by analogy, Joined Cases C-367/93 to C-377/93 *Roders and Others* [1995] ECR I-2229, paragraph 27, and Case C-302/00 *Commission* v *France* [2002] ECR I-2055, paragraph 23).
>
> 44. In accordance with settled case-law, as regards the levying of VAT, the principle of fiscal neutrality precludes any general distinction between lawful and unlawful transactions (see, inter alia, Case 269/86

> *Mol* [1988] ECR 3627, paragraph 18; Case C-158/98 *Coffeeshop 'Siberië'* [1999] ECR I-3971, paragraphs 14 and 21, and Joined Cases C-439/04 and C-440/04 *Kittel and Recolta Recycling* [2006] ECR I-6161, paragraph 50).
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> …
>
> 50. … in certain exceptional cases, the Court has accepted that, having regard to the specific characteristics of the sectors in question, differences in the regulatory framework or the legal regime governing the supplies of goods or services at issue, such as whether or not a drug is reimbursable or whether or not the supplier of a service is subject to an obligation to provide a universal service, may create a distinction in the eyes of the consumer, in terms of the satisfaction of his own needs (Case C-481/98 *Commission* v *France*, paragraph 27, and Case C-357/07 *TNT Post UK* [2009] ECR I-3025, paragraphs 38, 39 and 45)."

Case law of the Court of Justice concerning Article 13A(1)(g)

39. The Court of Justice has considered Article 13A(1)(g) of the Sixth VAT Directive in a number of cases. The Court's case law establishes the following propositions.

40. First, the objective pursued by Article 13A(1)(g) is to reduce the cost of welfare services and to make them more accessible to the individuals who may benefit from them: Case C-498/03 *Kingscrest Associates Ltd v Commissioners of Customs and Excise* [2005] ECR I-4427 at [30].

41. Secondly, the expression "charitable" in Article 13A(1)(g) is to be given an autonomous interpretation in EU law: *Kingscrest* at [27].

42. Thirdly, the expression "organisations recognised as charitable" does not exclude private profit-making entities: *Kingscrest* at [47]; and Case C-174/11 *Finanzamt Steglitz v Zimmerman* [EU:C:2012:716] at [57].

43. Fourthly, Member States have a discretion when laying down rules concerning the recognition of organisations other than bodies governed by public law as "charitable": Case C-141/00 *Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften I in Berlin* [2002] ECR I-6833 at [54]; *Kingscrest* at [49] and [51]; Case C-415/04 *Staatssecretaris van Financiën v Stichting Kinderopvang Enschede* [2006] ECR I-1385 at [23]; and *Zimmerman* at [26].

44. Fifthly, in order to determine the organisations which should be recognised as "charitable" for the purposes of Article 13A(1)(g), it is for the national authorities, in accordance with EU law and subject to review by the national courts, to take into account, in particular, the existence of specific provisions, be they national or regional, legislative or administrative, or tax or social security provisions; the public interest nature of the activities of the taxable person concerned; the fact that other taxable persons carrying on the same activities already enjoy similar recognition; and the fact that the costs of the supplies in question may be largely met by health

insurance schemes or other social security bodies: *Kügler* at [57]-[58]; *Kingscrest* at [53]; and *Zimmerman* at [31].

45. Sixthly, the exemption provided for in Article 13(A)(1)(g) may be relied upon by a taxable person before a national court in order to oppose national rules incompatible with that provision. In such cases, it is for the national court to establish, in the light of all relevant factors, whether the taxable person is an organisation recognised as "charitable" for the purposes of that provision: *Kügler* at [61]; and *Zimmerman* at [32]

46. Seventhly, where a taxable person challenges the recognition, or the absence of recognition, of an organisation as "charitable" for the purposes of Article 13A(1)(g), it is for the national courts to examine whether the competent authorities have observed the limits of the discretion granted by that provision whilst applying the principles of EU law, including, in particular, the principle of equal treatment, which, in the field of VAT, takes the form of the principle of fiscal neutrality: *Kügler* at [56]; *Kingscrest* at [52] and [54]; and *Zimmerman* at [33].

47. Eighthly, the principle of fiscal neutrality is not a rule of primary EU law against which it is possible to test the validity of an exemption provided for under Article 13A or which makes it possible to extend such an exemption. Accordingly, the principle of fiscal neutrality does not preclude Article 13A(1)(g) from making it unnecessary for public bodies to be recognised as "charitable" while requiring such recognition in the case of other organisations: *Zimmerman* at [50] and [53].

48. Ninthly, compliance with the principle of fiscal neutrality requires, in principle, that all the organisations other than those governed by public law be placed on an equal footing for the purposes of their recognition for the supply of similar services: *Zimmerman* at [43].

49. Tenthly, national legislation may not, in implementing the exemption provided for under Article 13A(1)(g), lay down materially different conditions for profit-making entities, on the one hand, and non-profit making legal persons, on the other: *Zimmerman* at [58].

50. Lastly, for the purposes of determining whether the limits of the discretion have been exceeded, the national court may, on the other hand, take into account in particular the fact that, under VATA 1994, entitlement to the exemptions provided for in Article 13A(1)(g) extends to all organisations registered under the Care Standards Act 2000, as well as the fact that that Act and VATA contain specific provisions which not only reserve entitlement to those exemptions to organisations supplying welfare services, the content of which is defined by those Acts, but also govern the conditions for providing those supplies, by making the organisations which provide them subject to restrictions and checks by the national authorities, in terms of registration, inspection and rules concerning both buildings and equipment and the qualifications of the persons authorised to manage them: *Kingscrest* at [57].

51. It is common ground that these principles are applicable *mutatis mutandis* to Article 132(1)(g) of the Principal VAT Directive, which substitutes the expression "devoted to social wellbeing" for the expression "charitable". The Care Standards Act 2000 ("CSA 2000") has been replaced by HSCA 2008.

LIFE's first submission

52. LIFE's first submission is that Item 9 breaches the principle of fiscal neutrality by imposing a differential VAT treatment as between two different types of private body, namely charities on the one hand and other private operators on the other. Under Item 9, all supplies by charities are exempt whether or not the charity is "state-regulated" within the meaning of Note (8), whereas other private welfare institutions and agencies are only exempt if they are "state-regulated".

53. In considering this submission, it seems to me that the starting point must be to consider whether Item 9(b) in itself contravenes the principle of fiscal neutrality. LIFE's complaint is that, as a matter of domestic law having regard to my conclusion on issue 1, its supplies do not qualify for the exemption because it is not "state-regulated". If that exclusionary criterion infringes the principle of fiscal neutrality, then LIFE can rely upon the direct effect of Article 132(1)(g) to claim the benefit of the exemption. In that event, it would be unnecessary to consider the effect of Item 9(a). If, on the other hand, Item 9(b) does not in itself contravene the principle of fiscal neutrality, it will be necessary to consider whether the inclusionary criterion in Item 9(a) makes a difference.

54. As can be seen from *Rank*, the principle of fiscal neutrality requires that supplies of goods and services which are similar, and therefore are in competition with each other, not be treated differently for VAT purposes. Supplies of services are similar where they have similar characteristics and meet the same needs from the point of view of consumers, so that their use is comparable, and where the differences between them do not have a significant influence on the consumer's decision to use one or the other.

55. As counsel for LIFE accepted, it is clear from the case law of the CJEU that consideration is not restricted to the characteristics of the services in themselves, but may extend to the context in which those services are provided. Accordingly, counsel for LIFE did not suggest that the mere fact that the requirement that a private welfare institution or agency be "state-regulated" was a criterion which applied to the context in which welfare services are provided, rather than a feature of the actual services themselves, meant that that criterion was impermissible. Rather, he submitted that the criterion was impermissible because state-regulation of the provider did not have a significant influence on the consumer's decision, or at any rate there was no evidence that it did have a significant influence.

56. Because of the procedural history of these cases, this question was addressed by the UT in both decisions, albeit in different contexts and by reference to different authorities.

57. In UT1 the UT addressed the issue by reference to *Kingscrest*, *Zimmerman* and the decision of this Court in *Finance and Business Training Ltd v Revenue and Customs Commissioners* [2016] EWCA Civ 7, [2016] 4 WLR 47.

58. In *Kingscrest* Kingscrest Ltd and Montecello Ltd formed a partnership which operated residential care homes in the UK. The partnership was a profit-making enterprise. Its care homes were all registered under CSA 2000, and it was common ground that the partnership was therefore a "state-regulated private welfare institution

or agency". As can be seen from the proposition from the CJEU's case law which I have set out in paragraph 50 above, the Court of Justice held that, in determining whether the United Kingdom had exceeded its discretion in recognising state-regulated private welfare institutions and agencies as being "charitable" for the purposes of Article 13A(1)(g), the national court was entitled to take into account, to put it shortly, the regulatory regime which was applicable to the provision of welfare services under CSA 2000 (now HSCA 2008). The CJEU did not decide that "state-regulated" *was* a permissible criterion, but it did decide that it *could be* (at least in so far it gave effect to that regulatory regime).

59. *Finance and Business Training* was a decision concerning the exemption for education services in Article 132(1)(i) of the Principal VAT Directive, the details of which it is unnecessary to go into for reasons that will appear.

60. Having considered *Kingscrest*, *Zimmerman* and *Finance and Business Training* the UT held in UT1 at [55] as follows:

> "Applying [the reasoning of Arden LJ in *Finance and Business Training* at [53]-[56]] to the present case, the conferring of the exemption on a regulated body is plainly a rational choice open to the United Kingdom. It is sufficiently certain, and paragraph 57 of *Kingscrest* demonstrates the acceptability and rationality of regulation as a criterion. There is no way in which LIFE can equate itself with entities which are subject to the sort of regulation regime which is applied to regulated bodies. Those bodies are obliged to conform to certain standards. For LIFE that is optional, even if it chooses for the time being to do so."

61. Counsel for LIFE advanced two main criticisms of this reasoning. First, he submitted that the UT had been wrong to rely on *Finance and Business Training* because, to put it shortly, the structure of Article 132(1)(i) was materially different to that of Article 132(1)(g), and therefore the reasoning of the Court of Appeal concerning the former was inapplicable to the latter. Secondly, he submitted that the UT had failed to ask itself the right question, which was whether regulation made any significant difference to the consumer. I accept the second submission, and therefore it is unnecessary to consider the correctness of the first submission.

62. At the second hearing, the UT was referred to, and discussed in UT2 at [58], a quartet of cases in which the Court of Justice has accepted in other contexts that differences in the regulatory framework or legal regime governing the supplies of goods or services may create a distinction in the eyes of the consumer: Case C-481/98 *EC Commission v French Republic* [2001] ECR I-3369; Joined Cases C-443/04 and C-444/04 *Solleveld and van den Hout-van Eijnsbergen v Staatsecretaris van Financiën* [2006] ECR I-3627; Case C-357/07 *R (oao TNT Post UK Ltd) v Commissioners for Her Majesty's Revenue and Customs* [2009] ECR I-3025; and Case C595/13 *Staatsecretaris van Financiën v Fiscale Eenheid X NV cs* [EU:C:2015:801]. The first and third of these were cited in *Rank* at [50].

63. In *Commission v French Republic* France charged VAT at a lower rate on medicines that were reimbursable under the French social security system than on medicines that were not reimbursable. The Court held that this was not a breach of the principle of

fiscal neutrality because the two categories of medicinal products were not in competition with each other. Inclusion on the list of reimbursable products meant that those products had, as the Court put it at [27], "a decisive advantage for the final consumer".

64. In *Solleveld* a psychotherapist and a physiotherapist complained that their supplies were not exempted under the Dutch legislation exempting medical care from VAT. So far as the principle of fiscal neutrality was concerned, the Court stated:

> "40. In order to determine whether medical care is similar, it is appropriate to take into account, concerning the exemption laid down in Article 13A(1)(c) of the Sixth Directive and having regard to the objective pursued by that provision, the professional qualifications of the care providers. In fact, where it is not identical, medical care can be regarded as similar only to the extent that it is of equivalent quality from the point of view of recipients.
>
> 41. It follows that the exclusion of a profession or specific medical-care activity from the definition of the paramedical professions adopted by the national legislation for the purpose of the exemption from VAT laid down in Article 13A(1)(c) of the Sixth Directive is contrary to the principle of fiscal neutrality only if it can be shown that the persons exercising that profession or carrying out that activity have, for the provision of such medical care, professional qualifications which are such as to ensure a level of quality of care equivalent to that provided by persons benefiting, pursuant to that same national legislation, from an exemption."

65. In *TNT* TNT complained that its postal services were not exempt from VAT whereas the Royal Mail's services were. The Court held that this was not a breach of the principle of fiscal neutrality because, as the provider of a universal service, Royal Mail supplied postal services under a substantially different legal regime to TNT, which was not the provider of a universal service.

66. In *Eenheid* the issue was whether a collective investment in real property could qualify as a "special investment fund" so as to benefit from an exemption from VAT for such funds given that the collective investment in real property was not regulated by the UCTIS Directive, whereas other kinds of investment fund were. The Court held at [48] that "only investment funds that are subject to specific state supervision can be subject to the same conditions of competition and appeal to the same circle of investors". It went on to hold at [63]:

> "In so far as investments, whether composed of transferable securities or immovable property, are subject to comparable specific State supervision, there is direct competition between those forms of investment. In both cases, what matters for the investor is the interest he derives from those investments. According to settled case-law, the principle of fiscal neutrality precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes …"

67. The UT held in UT2 at [59] that this quartet of cases showed that, "although in general the consumer is not interested in the regulatory regime which governs a supplier of services, there can be particular contexts where the regulatory framework or legal regime governing the supplies in question may create a distinction in the eyes of the consumer". Counsel for LIFE did not take issue with this statement of principle, although he stressed the CJEU's statement in *Rank* at [50] that such cases are "exceptional".

68. The UT went on at [60]:

> "We accept that in the case of welfare services, which are necessarily personal, services provided by regulated providers are of their nature different from services provided by unregulated providers, because the system of regulation provides a system of protections and guarantees which is absent in the case of unregulated services. We therefore consider that the UT in the first appeal in the LIFE case was right to say that providers such as LIFE (and TLC) cannot be equated with regulated providers. This is so even though (i) they may in fact be providing similar services to those that would be provided in Scotland and Northern Ireland by regulated bodies; and (ii) they in fact provide services to the same standard of care as would be required if they were regulated. They are not subject to the same level of state supervision. Nor is it an answer to say that the local authorities (Havering and Gloucestershire) with whom they respectively deal inspect and monitor the quality of service. This is no more than one would expect a responsible local authority to do, but this cannot be regarded as the equivalent of a statutory system of regulation."

Point (i) relates to LIFE's third submission which is considered below.

69. Neither of the criticisms which counsel for LIFE made of the UT's reasoning in UT1 applies to this reasoning. Although the UT did not use the word "consumer" in [60], it is clear from what the UT had said in [59] that it was considering the matter from the perspective of the consumer.

70. Counsel for LIFE submitted that this assessment was not open to the UT because there was no evidence to support it. There is no indication in any of the judgments of the CJEU in this field, however, that a national court requires evidence such as a consumer survey or expert report in order to determine whether services are regarded as similar by consumers for these purposes. While the case law does not rule out such evidence being admitted in cases of difficulty, it is clear that in most cases the national court is expected to make an assessment using its own experience of the world.

71. Counsel for LIFE also submitted that the UT's assessment was contradicted by the statement by the FTT in FTT1 at [92(3)] that "the activities of the charity People in Action was accepted [by counsel then appearing for HMRC] as evidence that there were other suppliers of similar services which would be exempt". This statement needs to be read in context, however. The context was reciting a submission that Item 9 satisfied the criteria laid down by the CJEU which the national authorities should take into account when exercising their discretion (see paragraph 44 above). Given

that context, it cannot be taken as conceding any more than that the services themselves (as opposed to the context in which they were provided) were objectively similar. It did not amount to a concession by HMRC, let alone a finding by the FTT, that charities and non-state regulated private welfare providers were perceived by consumers in the same way. Still less did it amount to a concession or finding that state-regulated and non-state regulated private welfare providers were perceived by consumers in the same way.

72. Counsel for LIFE also submitted that the UT had ignored the fact that, under Note (8), a private welfare body may qualify as "state-regulated" even if it is "exempted from registration". It is true that the UT did not refer to this. In my view this does not undermine its conclusion. The fact that a system of regulation may enable certain providers in certain circumstances to obtain exemption does not detract from the value that consumers will place on the existence of the system of regulation.

73. Accordingly, I consider that it was open to the UT to conclude that welfare services provided by state-regulated private welfare bodies are significantly different to those provided by non-state-regulated private welfare bodies in the eyes of consumers. Moreover, I agree with the UT's assessment.

74. Given my conclusion that the exclusionary criterion of "state-regulated" in Item 9(b) does not in itself contravene the principle of fiscal neutrality, does it make any difference that Item 9(a) exempts charities even though they are not "state-regulated" within the meaning of Note (8)?

75. The UT considered Item 9(a) in UT1 at [56]:

> "So far as being a charity is concerned, that too, in our view, is a rational criterion as contemplated by the CJEU in *Kingscrest*. Charities are, in their own way, regulated by the state and therefore controlled (though not in the same way as a regulated body). It also operates, as a charity, for the public benefit, in a way analogous to public law bodies. This is not to use the absence of profit as a criterion. It is to acknowledge the public benefit functions of a charity. Again, LIFE cannot say that it falls within the same class as a charity. It is not subject to the same constraints and regulation as a charity, and does not operate for the public benefit."

76. It can be seen from what the UT had said earlier in its decision at [52] that the UT was referring here to the requirement imposed on charities for VAT purposes under Schedule 6 paragraph 1(1) of the Finance Act 2010 that they be established only for "charitable purposes" as defined in section 2(1) of the Charities Act 2011 ("ChA 2011"). That in turn requires charities to be for one of the purposes specified in section 3(1) and for that purpose to be "for the public benefit" in accordance with section 4(1). To this one might add that charities are also subject to the supervision of the Charity Commission.

77. Counsel for LIFE criticised this reasoning on the same grounds as he criticised the UT's reasoning in UT1 at [55]. Again, I consider that at least the second criticism is justified. Moreover, the UT's reasoning does not really address what I consider to be the correct question, which is the question I have set out in paragraph 74 above.

78. In my judgment the answer to that question is that there is no contravention of the principle of fiscal neutrality. Item 9 distinguishes between private welfare bodies which are subject to some form of regulation and those which are not. The former may be either "state-regulated" or charities, which are not "state-regulated", but are required to be established solely for charitable purposes which are for the public benefit and are subject to supervision by the Charity Commission. I consider that, viewed through the eyes of the consumer, just as there is a significant difference between welfare services provided by private welfare bodies which are not "state-regulated" and those which are, so too there is a significant difference between welfare services provided by private welfare bodies which are not "state-regulated" and those which are provided by charities. Many third sector organisations are charities, and in my view consumers do see them differently to unregulated private providers. By contrast, I consider that the average consumer would see little relevant difference between services provided by charities and those provided by state-regulated private providers.

LIFE's second submission

79. LIFE's second submission is that Item 9 is incompatible with Article 132(1)(g) because it entitles charities to exemption regardless of whether they are devoted to social wellbeing.

80. The UT rejected this submission in UT1 for three alternative reasons. Its first reason assumed that the FTT was correct to conclude that many charities were not "redolent of social welfare". The UT held at [37]:

> "… That assumption does not mean that all charities would have the benefit of the exemption, contrary to the assumption apparently made by the FTT. Not all charities can properly make the supply of welfare services within the meaning of Item 9. It is only charities whose objects include such activities that could properly supply such things. A charity with such an object would, in our view, be 'devoted to social well-being' and therefore capable of being recognised pursuant to Article 132(1)(g). Those without such an object would not. So the constitutional ability to make the exempt supplies becomes the factor which divides charities which can have the benefit of the exemption from those which cannot. It is not the case that the reference to charities in Item 9 automatically includes all charities, irrespective of their objects."

81. Its second reason addressed the correctness of the FTT's assumption. The UT held at [44]:

> "… any body which is recognised under UK domestic law as a charity must be regarded as being a body 'devoted to social well-being' for the purposes of Article 132(1) (g) because any such body must operate to benefit the public, in the sense and manner referred to at [36] above and will therefore work to enhance, in some regard, the well-being of society. On this

> analysis the FTT erred in finding that some charities were not 'redolent of social welfare'. They all are."

82. Its third reason assumed that the UT was wrong in its first two reasons. The UT held at [58]:

> "… if we are wrong in our choice of the true construction [of Item 9(a)], and if that would mean that our analysis on fiscal neutrality would therefore fail, then we would have held that the exemption should be construed so as to conform [with Article 132(1)(g)] by saying it applies to charities whose objects include devotion to social well-being. Contrary to the submissions of [counsel for LIFE], that does not go against the grain of the legislation because it is clear that Parliament intended to exempt welfare services provided by charities, and accordingly it would not involve this Tribunal in making policy decisions."

83. Counsel for LIFE submitted that all three reasons were erroneous. It is convenient to start with the UT's second reason, namely that all charities are "devoted to social well-being". As counsel for LIFE pointed out, however, the charitable purposes recognised in section 3(1) of ChA 2011 include:

> "(c) the advancement of religion;
>
> …
>
> (f) the advancement of the arts, culture, heritage or science;
>
> (g) the advancement of amateur sport;
>
> …
>
> (k) the advancement of animal welfare;
>
> (l) the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services."

84. I agree with counsel for LIFE that none of these purposes, with the possible exception of the first, can properly be characterised as purposes "devoted to social wellbeing" in the sense in which that concept is used in Article 132(1)(g). The UT's reasoning focuses upon the public benefit test. As the UT explained, in *The Independent Schools Council v Charity Commission* [2011] UKUT 421 (TCC), [2012] Ch 214 the Upper Tribunal held at [44] that there are two related aspects of public benefit: the first is that the nature of the purpose itself must be such as to be a benefit to the community and the second is that those who may benefit from the carrying out of the purpose must be sufficiently numerous and identified in such a manner as to constitute a section of the public. But the fact that a charity's purposes must be for the public benefit in that sense does not necessarily mean that those purposes are "devoted to social wellbeing". "Social wellbeing" concerns the wellbeing of members of society.

That does not include such matters as promoting animal welfare or the efficiency of the armed forces.

85. Turning to the UT's first reason, counsel for LIFE pointed out that the CJEU has held that the principle of fiscal neutrality precludes any general distinction between lawful and unlawful transactions: see *Rank* at [44]. He submitted that it followed that whether, as a matter of private law, a charity was permitted to make the supplies in question was irrelevant to the VAT treatment of those supplies.

86. I do not accept this submission. In my judgment it is implicit in Item 9(a) that the exemption applies to charities whose supplies of welfare services are made in accordance with their objects, that is to say, the specific charitable purposes specified in their constitutions. I accept that it is theoretically possible, if highly improbable, that a charity might supply welfare services otherwise than in accordance with its objects; but such supplies would not be covered by the exemption. This is not a case of differentiating between lawful and unlawful supplies as such, but of construing the scope of the exemption.

87. Accordingly, I agree with the UT that Item 9(a) only extends to charities which are constitutionally permitted to supply welfare services as defined in Note (6). I am less sure, however, that all such bodies are "devoted to social wellbeing" within the meaning of Article 132(1)(g). It seems to me that it may be arguable that "devoted to social wellbeing" should be interpreted as meaning (as I understood counsel for LIFE in effect to submit) "exclusively concerned with social wellbeing". In saying that this may be arguable, I am not saying that I accept that the point really is arguable. The argument relies upon giving effect to the word "devoted" in the English text of Article 132(1)(g) (which is defined in the *Shorter Oxford English Dictionary* as meaning "vowed; dedicated; consecrated"). But that invites the question of whether the other texts of the provision contain similar wording. Since the hearing, I have noted that no equivalent word appears in the French, German or Italian texts; but I am not competent to check all the language versions. Moreover, this is a point that was barely argued on either side. If it was right, however, a charity whose objects included the provision of welfare services, but which extended to the provision of services which were not "devoted to social wellbeing", would qualify for exemption on the UT's interpretation of Item 9(a), but not on a proper construction of Article 132(1)(g).

88. If so, that would give rise to the question of whether Item 9(a) was capable of being construed consistently with Article 132(1)(g) applying the *Marleasing* principle: see Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135 at [8] and Cases C-397/01 to C-403/01 *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835 at [113]-[117]. This is a strong duty of interpretation. For a distillation of the relevant jurisprudence with regard to this duty, see *Vodafone 2 v Revenue and Customers Commissioners (No 2)* [2009] EWCA Civ 446, [2009] STC 1480 at [37]-[38] (Sir Andrew Morritt C).

89. My provisional view is that, even if "devoted to social wellbeing" in Article 132(1)(g) is properly to be construed as meaning "exclusively concerned with social wellbeing", it would be possible to interpret Item 9(a) consistently with that meaning by interpreting "charities" as meaning "charities whose objects are exclusively concerned with social wellbeing"; but it is not necessary to reach a conclusion on either point. The reason for this is that in my judgment it is immaterial to the resolution of LIFE's

appeal whether Item 9(a) wrongly extends to charities which are not "devoted to social wellbeing". If Item 9(a) did wrongly extend to such charities, it would mean that Item 9(a) was over-inclusive. That would have no bearing on LIFE's inability to rely upon Item 9(b) because it does not satisfy the exclusionary criterion of being "state-regulated". Counsel for LIFE submitted that LIFE could rely upon the direct effect of Article 132(1)(g), but I disagree. Relying upon the direct effect of Article 132(1)(g) would not, on this hypothesis, enable LIFE to overcome its failure to satisfy the exclusionary criterion in Item 9(b).

LIFE's third submission and TLC's contention

90. LIFE's third submission, and TLC's contention, is that Item 9 contravenes the principle of fiscal neutrality because of the differential treatment of providers of day care services in England and Wales on the one hand and providers of day care services in Scotland and Northern Ireland. This is because the provision of such services is a devolved matter under the United Kingdom's devolution arrangements. As discussed above, in England the provision of day care services is not "state-regulated", and in particular, it is not regulated by the CQC under HSCA 2008. The position is the same in Wales. It is common ground that, by contrast, the provision of day care services in Scotland and Northern Ireland is "state-regulated" by virtue of legislation passed by the devolved administrations in April 2002 and 2005 respectively. Accordingly, LIFE and TLC contend that there is a contravention of the principle of fiscal neutrality because day care providers in Scotland and Northern Ireland benefit from the exemption whereas day care providers in England and Wales do not.

91. The UT rejected this contention in UT2 at [48] for the following reasons:

> "It is accepted that the UK had a discretion. It is accepted, or has already been found, that the way in which it exercised that discretion in 2002 was rational and lawful. We see no basis on which it could be said that as introduced in 2002 it breached the principle of fiscal neutrality as it applied uniformly across the UK to all private suppliers of welfare services. To the extent that there is now a difference between such suppliers in England and Wales on the one hand, and Scotland and Northern Ireland on the other hand, this is not caused by any lack of neutrality in the VAT legislation, but by the fact that the UK has devolved regulation of this sector to the devolved nations and they have made different decisions in that respect, as they are entitled to do."

92. Counsel for LIFE submitted that this reasoning was wrong in law for two reasons. One of these I have already considered and rejected, namely that the UT was wrong to conclude that "state-regulated" private providers were not similar to non-state regulated private providers. The other reason advanced by counsel for LIFE was that the UT was wrong to focus exclusively on the effect of the VAT legislation. The UK, he submitted, was required by the principle of fiscal neutrality to ensure that similar services were accorded similar VAT treatment throughout the UK. In the present case the combined effect of the UK VAT legislation and the Scottish and Northern Irish regulatory regimes meant that similar services were treated differently.

93. I do not accept this submission. In my view the UT was correct to say that Item 9 does not discriminate between private welfare providers located in the different nations of the UK. It does discriminate between state-regulated providers and non-state regulated providers, but for the reasons given above that does not contravene the principle of fiscal neutrality. Given that it is not a breach of that principle to deny the benefit of the exemption to non-state regulated providers, the reason why certain providers do not qualify as being "state-regulated" is immaterial. Whether it is because they are located in a nation which does not regulate day care services, or for some other reason, the result is the same, namely that they are perceived by consumers as significantly differently to state-regulated providers.

94. Counsel for TLC supported the submissions of counsel for LIFE. He also made a number of other submissions which do not take matters further. It is only necessary to mention two of these. First, counsel for TLC placed considerable emphasis on the legislative history which the UT summarised in UT2 at [32]. As the UT rightly held, however, this is of little assistance in determining whether or not the current legislation breaches the principle of fiscal neutrality. Secondly, counsel for TLC complained that the UT had not considered the reasoning of the FTT in FTT2 or explicitly identified any error of law in that reasoning. There is nothing in this point. The issue before the UT was a question of law. In reaching a different conclusion to the FTT, the UT necessarily concluded that the FTT had erred in law.

95. Before leaving this issue, I should record for completeness that HMRC did not pursue on the appeal to this Court a contention which they had advanced before the UT to the effect that it is permissible under EU law for Member States to give effect to EU law (or at least Article 132(1)(g)) in a different manner in different regions (be they units of a federal state such as Germany or the devolved nations of a country like the UK). Accordingly, it is unnecessary to consider what the CJEU meant by saying that national authorities were entitled to take into account "regional" legislation (see paragraph 44 above).

Conclusion

96. For the reasons given above, I would dismiss both appeals.

Newey LJ:

97. I agree that the appeals should be dismissed, for the most part for the reasons given by Arnold LJ. However, I take a somewhat different view from Arnold LJ in relation to paragraphs 87-89 of his judgment, in which he says that it may be arguable that "devoted to social wellbeing" should be interpreted as meaning "exclusively concerned with social wellbeing" and addresses the implications of that.

98. If it were right that, to qualify for exemption under Article 132(1)(g), a body "recognised by the Member State concerned as being devoted to social wellbeing" had to be concerned *exclusively* with social wellbeing, that would have serious implications. A charity whose objects allowed it to pursue social wellbeing but also to do other things would not be entitled to exemption, and that, presumably, even if in practice it did nothing but provide welfare services. It is by no means unknown for a charity to have as its object any purpose recognised as charitable. A charity of that kind would be debarred from exemption, but so too would one with narrower objects

which, nevertheless, were not *only* concerned with social wellbeing. Nor, as I see it, would the effects be limited to charities. A non-charitable entity which provided care services in respect of which it was regulated would not, it appears, be eligible for exemption if it also did something else or its objects were broad enough to allow it to do so. VATA 1994 defines "welfare services" so that, in the case of services supplied by a state-regulated private welfare institution, the expression "includes only those services in respect of which the institution is so regulated". If, however, an organisation also provided services which did not advance "social wellbeing", or even if its objects enabled it to take that course, it should not be afforded exemption. Thus, a body supplying regulated day care services in Scotland would not necessarily benefit from exemption. That would depend on whether it undertook another kind of activity as well or was at least able to do so.

99. The meaning of an EU instrument such as the Principal VAT Directive falls to be determined "by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part" (see Case C-285/12 *Diakité v Commissaire Général aux Réfugiés et aux Apatrides* [2014] 1 WLR 2477, at paragraph 27 of the CJEU's judgment). The English text of Article 132(1)(g) does not state that a body must be *exclusively* "devoted to social wellbeing", and Arnold LJ has already pointed out that the French, German and Italian versions do not contain a word equivalent to the English "devoted". (Thus, the French text speaks of bodies "reconnus comme ayant un caractère social par l'État membre concerné" and the German of bodies "mit sozialem Charakter".) Moreover, the context and purposes of Article 132(1)(g) seem to me to confirm that it should not be construed as if it read "exclusively devoted to social wellbeing". I can see no reason why the provision should have been intended to produce arbitrary consequences such as those I have mentioned in the previous paragraph. The intention was evidently that a body should be "recognised … as being devoted to social wellbeing" in respect of the relevant transaction. It would make little sense to preclude a Member State from granting exemption in respect of a supply promoting social wellbeing just because the supplier also supplied, or had objects permitting it to supply, different services.

100. In short, I do not consider Article 132(1)(g) to require a body to be devoted *exclusively* to social wellbeing.

Floyd LJ:

101. I agree that the appeals should be dismissed for the reasons given by Arnold LJ. On the question which divides my Lords, Arnold and Newey LJJ, as to whether, as Arnold LJ considers, it may be arguable that to qualify for exemption under Article 132(1)(g), a body "recognised by the Member State concerned as being devoted to social wellbeing" has to be devoted *exclusively* to social wellbeing, or whether, as Newey LJ considers, exclusive devotion is not necessary, my provisional view would be that of Newey LJ, for the reasons he gives. This point is, however, not material to the resolution of LIFE's appeal for the reasons which Arnold LJ gives within paragraph 89, and with which I agree. Given that the point was not fully argued before us, I would prefer not to express a concluded view.