



**[2013] UKUT 0404 (TCC)**  
**Appeal number: FTC/55/2012**

*VAT — Exempt supplies — education — whether provided by “eligible body” — whether college of a university — tests to be applied — appeal dismissed*

**LONDON COLLEGE OF COMPUTING LIMITED**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY’S  
REVENUE & CUSTOMS**

**Respondents**

**TRIBUNAL: Judge Colin Bishopp  
Judge Charles Hellier**

**Sitting in public in London on 7 May and 20 May 2013**

**Michael Murphy, counsel, directly instructed by the Appellant, for the Appellant**

**Christiaan Zwart, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

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## DECISION

### JUDGE HELLIER

1. This appeal concerns whether the appellant (LCC) was an eligible body for the purposes of Item 1 Group 6 Schedule 9 VAT Act 1994 and in particular whether it is a college of a university. If it was then its supplies of education were exempt.

2. The First-tier Tribunal (the “F-tT”) (Judge John Walters QC and Ms Elizabeth Bridge) held that LCC was not an eligible body. At the forefront of the F-tT’s decision was a conclusion that, despite an arrangement (the “MU Arrangement”) between LCC and Middlesex University (“MU”) which permitted LCC’s students to progress to MU’s degree programmes and to receive credits for diplomas obtained at LCC, it was not convinced that LCC’s students “typically progressed” to courses leading to an MU degree. As a result the F-tT said that it was unable to find that the arrangements with MU were rendered realistically substantial by the students’ careers or that the fundamental purpose of LCC was to provide education services leading to the award of an MU degree. Thus the F-tT found that LCC was not a college of a university, and so not an eligible body.

3. LCC appeals against that decision on the grounds (1) that the F-tT erred in making the test of “typical progression” a condition for a conclusion that the LCC was a college of MU, and (2) that the F-tT erred in failing to conclude on the facts it had found that the arrangement with MU was rendered realistically substantial. Permission to appeal was not given in relation to the factual findings of the tribunal.

### 25 **The Legislation**

4. The relevant statutory provisions are in Articles 132 and 133 of Directive 2006/112/EC (which replaced article 13A(1) and (2) of the Sixth Directive) provide:

#### *The Directive*

30 5. Articles 132 and 133 provide:

“132(1). Member States shall exempt the following transactions: ...

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

133. Member States may make the granting to bodies other than those governed by public law of each exemption provided for in point ... (i) ... of article 132 (1) subject in each individual case to one or more of the following conditions:

40 (a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;”

[(b), (c) and (d) provided for other conditions relating to voluntary management, charges made and distortion of competition].

### *Domestic Legislation*

6. There is no dispute that Group 6 Schedule 9 VAT Act 1994 was enacted in pursuance of the U.K.'s obligations under these provisions. Supplies within Schedule 9 are exempt from VAT by virtue of section 19. Item 1 of Group 6 of that Schedule specifies the following supplies: -

“Item 1. The provision by an eligible body of -

(a) education;

10 (b) research when supplied by an eligible body; or

(c) vocational training”

7. Note (1) defines “eligible body” as:

(a) a school within the meaning of certain education Acts, :

15 “(b) a United Kingdom university, and any college, institution, school or hall of such a university.”

(c) relates to bodies defined by the Higher Education Acts,

(d) specifies government departments, local authorities and public bodies with similar functions;:

“(e) a body which:

20 (i) is precluded from distributing and does not distribute any profit it makes; and

(ii) applies any profits from supplies of the description within this Group to the continuance or improvement of such supplies.

25 (f) A body not falling within paragraphs (a) to (e) above which provides the teaching of English as a foreign language.”

8. Note (2) provides:

“2) A supply by a body, which is an eligible body only by virtue of falling within Note 1(f), shall not fall within this Group in so far as it consists of the provision of anything other than the teaching of English as a foreign language.”

30 This Note prevents the supply from being exempt, not the body which makes it from being eligible.

9. These provisions gave rise to the following issues:

(1) what is meant by “similar objects” in Article 132(1)(i);

35 (2) to what extent may UK exercise the discretion not to recognise as eligible bodies those which have “similar objects”;

(3) what, as a matter of purely domestic interpretation, is the meaning of college of a university in Note (1)(b);

(4) having regard both to the EU principles and to domestic legislation, what conditions must a body satisfy in order to fall within Note (1)(b). In

particular what is the relevance of the “fundamental purpose” of the body and of the “typical progression” test adopted by the F-tT?

(1) *Interpretation of the Directive - “Similar objects”*

10. There is a distinction in Article 132 between the “aim” of public bodies, and the “similar objects” which are required of other organisations.

11. In this context Mr Murphy submits that the test of “similar objects” is a lower one than that of “aim”. He notes that to qualify public bodies must have one “aim”, whereas non public bodies must have similar “objects”. “Similar”, he says does not mean identical; coupled with the use of the plural, “objects”, a looser test is indicated. Indeed he suggests that so long as some object is similar the body may qualify.

12. Mr Zwart says that the test is different, not lower. He accepts that “similar objects” does not require exclusively educational objects (and that must be right for otherwise a profit-making object would automatically disqualify a body, and that, as we note below, is not the case); but he says the more, and the more diverse, a body’s objects, the more difficult it will be for it to qualify as having “similar objects”. Mr Zwart accepts that “similar” does not mean the same. He says it requires a resemblance in nature or that the objects be chiefly the same. He accepts that the objects of the body may be similar to the aim of a public body even if they include matters outside that aim, but he says that if the other objects are too important or perhaps too numerous the objects would no longer be similar.

13. The language of the directive distinguishes between the “aim” of a body governed by public law and the “objects” of a defined body. It seems to me that to some extent this reflects the fact that the freedom of a public law body to act may be governed by the statute by which it is constituted, so that an enquiry into that statute will establish its aim; by contrast a body not governed by public law will generally have greater theoretical freedom and as a result the term “object” is used as indicating an enquiry into the idea or thing to which the actions or intentions of the body are *in fact* directed. Thus, it seems to me that an enquiry into the body’s “objects” for this purpose may encompass an enquiry into what it actually does as an objective indication of the ends to which its actions are directed. In particular, it seems to me that the Directive imposes an objective test, and that a mere subjective intention of a body would not necessarily be an “object” for these purposes: EU VAT principles require assessment by reference to objective criteria.

14. Paragraph 17 of the Schedule to the Universities of Oxford and Cambridge Act 1923 provided that in making statutes for those universities and their colleges regard was to be had to the “interests of education, learning and research”. The activities of universities elsewhere in Europe are not limited to education (see for example *EC Commission v Germany* [2002] STC 982 in which the research activities of German universities were held not to be within the exemption). The statutory aims of many universities, and the activities they conduct, will not always be limited to “education”. It is possible therefore that many universities will not have the singular “aim” of supplying education. To the extent that is the case it is clear that the Directive intends that, if they do not qualify as having the

aim of making educational supplies, they may be capable of being recognised by Member States under the “similar objects” limb of Article 132 (1)(i). That indicates that “aim” may not mean sole aim, and, on any view, that “similar objects” is not confined to bodies with the sole aim of making supplies of education.

15. On the other hand the word “similar” indicates some restriction on the bodies which may qualify.

16. I therefore agree with Mr Zwart: whilst “similar” does not mean the same, it does not encompass any set of objects of which education is one. It is a matter of degree.

*(2) The discretion given to Member States*

17. Article 132 gives a discretion to Member States to define bodies other than those governed by public law whose supplies of education may benefit from the exemption. The exercise of this discretion however, like other discretions given by Article 132 is circumscribed by its purpose and the principles of equality and neutrality. Article 132 provides a list of exemptions of which specified education is one. In many of these exemptions the Member State is given a discretion to “recognise” or “define” the providers whose supplies benefit from the exemption. The case law of the CJEU shows that in exercising any such discretion Member States must have regard to the objectives pursued by the exempting provision and the principles of equality and neutrality inherent in the common system of VAT (see e.g. *Solleveld v Staatssecretaris van Financien* [2007] STC 71 [35-51] in relation to medical profession as defined in paragraph 1(c), *LuP* [2008] STC 1742 at [42 to 48] in relation to the recognition of hospitals within paragraph 1(b), and *C&E Comms v Zoological Society of London* [2002] STC 521, and the hesitation of Schiemann LJ in *Pilgrim Language Courses Ltd v Customs and Excise Commissioners* [1999] STC 874, at 886c - d as to whether member states were at liberty not to “define” bodies which had similar objects.)

18. In specifying the requirement of “similar objects” in article 132(1)(i) the Directive is, in my judgment, directing attention to the quality or nature of the education provided by the relevant body. In order for a non public education provider to benefit from the exemption a member state is entitled to require that the nature or quality of the education provided is of the kind provided by a body which has its aims governed by public law. Thus, the member state is entitled to limit the bodies which are eligible to those which provide the same nature or quality of education even if that means excluding some bodies which have “similar objects”. A limitation of the exemption to an entity which is linked academically to, or in some way part of, a university appears to be justifiably directed to that purpose. If the provider of the educational services is not one from whom the requisite quality can be expected the principle of neutrality is not infringed by denying it the benefit of the exemption.

19. But a Member State may not recognise a body which does not have similar objects. If such a condition is not express in the domestic legislation it should, if possible, be construed to include it.

(3) *Interpretation of the Domestic provisions : a college of a university*

20. Article 133 permits a Member States to restrict the bodies eligible for the exemption to those which satisfy conditions in relation to non profit-making, voluntary management, prices charged and competition. The ability to impose these restrictions, and the specific restriction to non profit-making entities in other headings of article 132, indicates that such restrictions are not implicit in the other headings of exemption in article 132. Thus, the bodies which a member state may define the purposes of article 132(1)(i) need not be non profit-making or voluntarily managed etc. In *Comms of C&E v School of Finance and Management (London) Ltd* [2001] STC 1690 (“*SFM*”) Burton J found that in the definition adopted by the UK in Note 1(b) it had not taken advantage of article 133, and that it had not “made an [article 133] condition as to the non profit-making in relation to every organisation other than those governed by public law”. I gratefully adopt that conclusion. There was thus no requirement that LCC be non profit-making.

21. The meaning of institution of a university was considered in *Customs and Excise Commissioners v University of Leicester Students Union* [2002] STC 147. This case related to whether the Leicester University students’ union was itself an eligible institution or actually part of the university. (The Court of Appeal gave its judgement on 21 December 2001. Three weeks before, on 30 November, in *SFM*, Burton J (at [21]) had accepted that “any” college in note 1 (b) could not mean “any old college” but said that the use of “any” did not support the proposition that colleges were limited to those within the Education Act definition so that connected or affiliated colleges were not ruled out.)

22. In *University of Leicester* Peter Gibson LJ (with whom Morland J wholly agreed) said:

“36. Note 1(b) on its face refers to five entities, a United Kingdom university, and four entities of such a university. The conjunction connecting “a United Kingdom University” with the four other entities is the word “and”, not “including”, further, the four other entities are alternative to each other as can be seen by the conjunction “or” between “school” and “hall”. On the ordinary and natural meaning of the words used in Note 1 (b) I would construe them as covering both a university itself and, in those cases where there are separate entities which are nevertheless parts of that university, any of those separate entities. Furthermore, the common characteristic of all those four entities in my opinion is that they are suppliers of education. Thus, to take London University as an example, colleges like University College London, and schools like the School of Oriental and African Studies, are all of London University. Again, to take Oxford University as another example, it has colleges and halls (which are what some entities later to become colleges called themselves when formed). Accordingly, just as Note 1 (a) covers schools supplying primary and secondary education, so Note 1(b), in my view, covers universities and other entities supplying university education. ... the Union...does not come within ‘a United Kingdom university’, being distinct from the university, nor is it an institution of the university supplying , as it does, no education.”

23. In this passage Peter Gibson LJ describes the four types of institution as “parts” of a university. He also draws a distinction between Note 1 (a) (school education), and Note (1)(b) (university education) indicating that the UK had framed its definition restrictively. Whereas article 132 permits the UK to define as

eligible a body whose object was to supply both university and elementary education (in any proportions) if, as Peter Gibson LJ suggests, Note 1(b) is intended to cover entities supplying university education only, bodies which supply a mixture (but otherwise potentially capable of being included in the definition) would fall outside the definition. I note, however, that the distinction drawn by Peter Gibson LJ was not essential to his conclusion, namely that the student union was not eligible because it was not supplying education (university or otherwise).

24. In the same case Arden LJ took a different approach, holding that the links between a body and a university necessary for the former to be an institution of the latter had to be academic links:

“55. Note 1 (b) uses the expression ‘the university’ and ‘of the university’. In the latter expression the word ‘of’ cannot mean ‘belong to’ or ‘form part of’ since the former is not the case with regard to the Oxbridge colleges (which are presumably intended to be covered) and the latter is included within the expression ‘university’. In other words, the expression ‘of the university’ seems to need to denote a state of affairs whereby the university is in some sense an umbrella organisation which provides education and related services in conjunction with other bodies or where in the body in question has some form of status under the University statutes, for example to present candidates for matriculation.

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

25. Peter Gibson and Arden LJJ were addressing the question as to whether the students’ union was part of, or an institution of, the university. But it seems to me that the legislation intends no distinction in approach between a college and an institution or hall or school “of” a university. Their comments seem relevant to the question of what is a college of a university. Indeed, as the VAT tribunal in *SFM* suggested, the phrase “any college, institution, school or hall of such a university” may sensibly be regarded as a composite one.

26. Peter Gibson LJ described eligible institutions as parts of the university. It seems to me that by this he was not intending that such an institution be merely a

division of the university but part of the umbrella organisation of the type described by Arden LJ. His very description of the “entities” indicates that he had in mind separate legal persons.

27. Arden LJ’s criticism of Gibson LJ’s test is that it confines “college” etc to  
5 bodies providing education. But Peter Gibson LJ’s comments do not provide an explanation of the definition but a necessary condition for a body to qualify. It seems to me that even if it is necessary for a body to supply education for it to be eligible, Arden LJ’s tests illuminate the kind of connection to a university (or for  
10 being in a loose sense part of the university) which is necessary to satisfy that requirement that the restrictions imposed by the UK’s definition are justified by the objects of the Directive.

28. Further, if a body supplies university education that may well provide at least part of the academic link which Arden LJ requires; by contrast, if, for  
15 example, it supplies only vocational education, it is unlikely to have the kind of link necessary to make it a college of the university; whereas the body supplying university education may well have sufficient academic integration with the university to fall within Arden LJ’s description.

29. The requirement that a college be “of” the university indicates that some adequate link or measure of integration is required between the body and the  
20 University. Given the differing ways in which universities and their institutions are organised the question of whether there is an adequate link or adequate integration will depend upon the circumstances. It will be a matter of weighing the relevant facts. That would generally involve both the consideration of the organisation of the university and the role played by the college. Sometimes the  
25 formal links - the constitution of the university – may be enough to conclude the issue, in other cases the nature of the body may be more relevant. But it is clear that the link must be sufficiently substantial. It may not be necessary for the whole of the body’s activities to contribute to the university but it is necessary that a substantial portion of them can be said to be part of the life of the university, and  
30 that the university plays a part in the life of the body.

#### *(4) Combining the EU and domestic requirements*

30. As I have described it the definition adopted by the UK of eligible body does not appear to fall outside the purpose of Article 132 (1) (i) or fail to have  
35 regard to the principles of equality and neutrality. The limitation of eligible bodies to those with an adequate link to, or integration with a university has the object of ensuring that nature or quality of the education provided would be comparable with that provided by a public educational institution.

31. The Directive permits member states to recognise bodies only if they have similar objects. To the extent that such a requirement is not part of being a college  
40 of a university it does not run against the grain of Group 6 to read that requirement into Note (1): it will be seen that that note is predominantly concerned with bodies whose objects are the provision of education, and that paragraph (e) may take that flavour from its companions.



32. Thus, properly understood a body is eligible as a college or institution where two requirements, which may overlap to some extent, are met:

- (1) it must have “similar objects”; and
- (2) it must be sufficiently integrated with the university.

5 33. Against that background I turn to the two tests which were prominent in the F-tT’s decision: (a) fundamental purpose and (b) typical progression.

*(a) Fundamental purpose*

10 34. In *SFM* the parties put forward 15 factors as indicators relevant to the question of whether *SFM* was a college of the University. The VAT tribunal had conducted a detailed weighing of all the factors. Burton J considered that the weighing exercise conducted by the tribunal was the correct approach. He then said:

15 “I conclude that the tribunal was entitled, after weighing up the factors, to be influenced at the end of the day by the fact that the fundamental purpose of [*SFM*] is to provide education leading to the award of a university degree”.

35. This latter test of “fundamental purpose” loomed large in the F-tT’s reasoning in this appeal. The inability of the tribunal to find that *LCC* had the requisite fundamental purpose was part of the reasoning for its conclusion that *LCC* was not a college of a university.

20 36. I note that Burton J said neither that the fundamental purpose was a necessary condition, nor that it was a sufficient condition for *SFM* to be a college of a university: he said merely that the tribunal was right to be influenced by *SFM*’s fundamental purpose.

25 37. The fundamental purpose of the body will illuminate consideration of whether it has “similar objects”: if a body’s fundamental purpose is the provision of university education it will have “similar objects” to the aims of a public educational institution. But the fundamental purpose test does not replace the “similar objects” test: bodies with other objects may potentially satisfy the “similar objects” test even if they do not have the fundamental purpose of providing education. Thus, the “fundamental purpose” test is not a necessary condition. Further, a body with the fundamental purpose of providing education or even university education may not be sufficiently integrated with the university to be a college of that university: the test is therefore not a sufficient condition for eligibility.

35 38. Factor (ix) of the 15 factors considered by Burton J was “having a similar purpose to that of the university. That is the provision of university education to its students”. That factor has something in common with the formula for fundamental purpose. In *Westminster College of Computing Ltd v Commissioners for Customs and Excise* [2012] UKFTT 579 (TC) a submission was made by Mr Zwart (who there also appeared for HMRC) [38 (9) & (10)] that this purpose must be to award a degree, not merely to provide education in preparation for or towards a degree. The tribunal said:

5 “It seems to us that whether this factor is present depends upon how broad interpretation is given to ‘similar’. We note that it was not suggested in *SFM* that the purpose of the university was the awarding of degrees. We think that is too restrictive. We consider the purpose of university is to provide a university level education. We find that the college had the same purpose ...”

10 39. It seems to me that the tribunal in *Westminster* was right in relation to the question whether the body has “similar objects”. The objects of which article 132 speaks are those similar to the aim of public bodies making supplies of education. A degree may be the result of that supply, but the aim of the body and thus the object, must relate to the supply itself.

40. But in relation to the question of whether the body is a college of a university, those bodies whose purpose is that their students are awarded a degree may have a greater connection with the university whose degree is awarded.

*(b) Typical Progression*

15 41. The F-tT said, at [45]:

20 “If ... we are not persuaded that LCC’s students typically did progress to courses leading to a degree at MU, but instead dropped out, went to a different university or otherwise did not progress to MU as envisaged by the AAs then we would not conclude that the ‘fundamental purpose’ of LCC was, as a matter of fact, to provide education services *leading to the award of an MU university degree* (our emphasis).”

25 42. The F-tT regarded this as an attempt to “assess realistically the function which LCC was fulfilling against the background of the burden of proof in the appeal, which is on LCC to persuade us on the balance of probabilities that LCC’s students did typically progress to courses leading to a degree at MU.”

43. It is difficult not to read these passages as setting out a proposition of law that it was a condition for a body such as LCC to be eligible that its students must typically progress to a university degree.

30 44. Mr Murphy submits that any test as to whether a body is eligible must not depend upon what will happen in future. Legal certainty requires that a taxpayer should know the status of his supply when he makes it. He says that the test cannot depend upon what will happen in the future to a body’s students.

35 45. I agree that the test must be capable of determination of the time the supply is made. What is required is the ability to make an assessment at the time of the supply as to whether the criteria are satisfied. I agree that it is not permissible to apply that test as a necessary condition for a body to be eligible because of its retrospective character.

46. To the extent that the F-tT so applied such a test it made an error of law.

*Interpretation: Conclusions*

40 47. I draw the following conclusions. For an organisation to qualify as a college of the University for the purposes of Note 1 (b):

(1) it must have objects similar to those of public bodies whose aim is to supply school, university or vocational education.

Those objects should be determined by objective factors. What a body does is evidence of its objects.

5 I accept that the body's objects need not be limited to making such supplies but the more diverse its objects the less similar they will be as a whole to the requisite aim.

If the fundamental purpose of the body is to provide education of one of the specified types it will satisfy the similar objects condition; if it is not then it may not do so; and

10 (2) it must have some close link to, or association with, the university so that in a loose sense it may be called part of the university. The fact that it must be a college "of" the university indicates the degree of integration with the university's life. The link may be an academic link in which the university provides education in conjunction with the body, or the body may have some status under the university's constitution. Each must be involved in the other.

The investigation of this issue must encompass both what the body does (its activities) and how it or its activities are linked with the university.

20 Whether this test is satisfied requires consideration of all the relevant facts. Those in the lists considered in SFM and in subsequent decisions are helpful but are neither exhaustive nor need always be relevant.

If the fundamental purpose of the body (determined by objective factors) is to provide university education, that will not on its own satisfy this test.

25 (3) it is not a requirement that the body's students typically progress to a degree at the university; if they do however that may be a fact which may point to integration with the university.

**The F-tT's decision.**

48. The evidence given to the F-tT was limited:

30 (1) there was some evidence of the courses offered by LCC. These included:

(a) the diplomas which permitted progression to MU;

(b) English as a foreign language ("EFL");

(c) courses leading to accountancy qualifications;

35 (d) short courses in computer and IT related subjects;

(2) there appeared to have been no documentary evidence of the scope and contents of these courses throughout the period of the appeal, although there was material dating from a few months after the last of the relevant VAT periods;

40 (3) there was some evidence of the numbers of students studying with LCC from Mr Kohn, its director, and from Miss Azim, who had given immigration and visa advice to students. Both gave evidence relating to the

numbers who progressed to MU. There was no related documentary evidence;

5 (4) there was evidence of a link between MU and LCC in the form of a letter of 17 July 2006 and later “articulation agreements” (together the “MU Arrangements”), the use (among a dozen or so other emblems) of the MU logo on LCC’s notepaper and of the use by at least some of LCC’s students of the library and campus of MU;

(5) there was evidence that two particular students had successfully progressed from LCC to MU degrees.

10 49. Although the appellant’s skeleton argument for the F-tT addressed seriatim the 15 factors discussed in SFM, the F-tT’s fact-finding in its decision was limited principally to two areas:

(1) the MU Arrangements; and

15 (2) an analysis of the evidence of the numbers of students studying at LCC and how many of that number progressed to a degree at MU.

20 50. In connection with these areas the F-tT also found (at [19 and 20]) that the MU Arrangement enabled overseas students who signed up for LCC courses to obtain visas to come to the UK to study, and that LCC’s ability to attract and teach such students ceased when the UK Border Agency suspended LCC’s tier 4 licence in August 2011. The F-tT said that LCC’s intake of overseas students was fundamental to its trade so that, after the suspension of its licence, it ceased to trade. The vast majority of its students came from overseas.

25 51. From paragraphs [15] to [18] of its decision the F-tT discusses the terms and the effects of the MU Arrangements. The tribunal found that under these documents “LCC students were entitled from the time they were accepted as LCC students, to progress to related courses at MU, subject to fulfilling the necessary academic conditions”.

30 52. From paragraphs [21] to [23] and [27] to [38] the tribunal records the evidence in relation to the numbers of LCC’s students and the number of them progressing to MU. From [47] to [56] and [58] to [59] the F-tT sets out its conclusions on this evidence. On the limited evidence available to it, it concluded that in the relevant period LCC had had thousands of overseas students though perhaps not as many as 5700. It concluded that the evidence of Mr Kohn, LCC’s director, suggested that only a small proportion of the students progressed to a degree at MU and that the evidence did not support the conclusion that its students typically progressed to an MU degree.

35 53. The only other express factual findings of the F-tT related to the addresses at which LCC operated, which were not remote from MU, and the fact that some students used the MU library and other MU campus facilities while they were LCC students.

40 54. At paragraph [43] the F-tT set out the start of its conclusions. It said:

“We are satisfied that the [MU Arrangement] established a legal relationship between LCC and MU sufficient to constitute LCC (in its [various manifestations])

as a college of MU within the definition in paragraph (b) of Note 1 Group 6, Schedule 9, VATA ... provided that the arrangements envisaged in [the MU Arrangements] were as a matter of fact rendered a reality by the student careers of LCC's students, taken as a whole."

5 55. The reasoning in this statement drove the F-tT's later conclusion. I have  
noted that it concluded that the evidence did not satisfy it that LCC's students  
typically progressed to MU. As a result it concluded at [59]: "we are not  
persuaded by the evidence before us that sufficient of LCC's student body in fact  
10 progressed to degree courses at MU to enable us to find that those arrangements  
were rendered realistically substantial by the student careers of LCC's students,  
taken as a whole. We cannot therefore find that the 'fundamental purpose' of LCC  
was to provide education leading to the award of an MU degree." For those  
reasons it concluded that LCC was not a college of MU.

### **Appraisal**

15 (a) *Was LCC an eligible body?*

56. I have formulated the test to be applied as having two limbs which may  
overlap to some extent: (1) whether the body has "similar objects", and (2)  
whether the body was sufficiently integrated with the university to be capable of  
being called a college of a university.

20 57. In my judgement the only conclusion the F-tT could have reached on the  
evidence before it was that LCC was not an eligible body. That is for the  
following reasons.

#### (1) Similar Objects

25 58. The requirement is that the body have objects similar to the aims of a public  
body supplying school or university education or vocational training. There was  
evidence before the F-tT that LCC supplied: some vocational training in the form  
of accountancy courses; some education similar to school education in the form of  
EFL courses; and university education in the form of the diploma courses which  
carried credits towards an MU degree. But LCC also provided other courses.  
30 What was missing was evidence that the courses of school, university or  
vocational education were a sufficiently substantial part of LCC's activities to be  
able to conclude that it had similar objects to the aims of those public bodies  
making the requisite supplies.

35 59. In particular, whilst there was evidence that some students took the courses  
which could take them on to MU there was nothing which showed that those  
courses were such a significant part of LCC's activities that LCC's objects could  
be viewed as similar to those of a public educational body.

40 60. The F-tT's consideration of whether LCC's students typically progressed to  
MU can be viewed as an attempt to fill this gap in the evidence. If the majority of  
the students did progress to MU it would have been a permissible inference that  
before progression they had been engaged in university education and thus that  
the activities and objects of LCC were predominantly those of the requisite nature.  
But the tribunal was unable so to conclude on the evidence before it. From this

perspective – viewed as an attempt to infer the substance of LCC’s activities, rather than as a legal condition for eligibility, I would not criticise the F-tT for this use of the typical progression test.

5 61. Mr Murphy says that the evidence before the F-tT should have led it to conclude that the bulk of LCC’s resources were taken up with the provision of the education for the diplomas which counted towards MU degrees, and that this, and the fact that, as the tribunal found, without the MU Arrangement, LCC could not have commenced or continued its business, showed that the principal object of LCC was the provision of university education.

10 62. This argument is based on the F-tT’s finding at paragraph [20] where, having accepted that the MU Agreement was fundamental to LCC’s ability to take in overseas students because they could not obtain visas without it, the F-tT said:

15 “Mr Kohn states that ‘a small part of LCC’s resources were taken up by teaching British students, and that only about 5% of those students actually went on to MU’ and that ‘a small minority of the overseas students were not signed up to do an MU degree’”.

20 63. Mr Murphy says that this paragraph shows that the great majority of LCC students were signed up to an MU degree. He accepts that LCC also provided other non diploma courses but he says that the obvious conclusion from the F-tT’s finding is that those who were signed up to do an MU degree would have taken the diploma courses which led to that degree. Those courses required substantial teaching input by LCC. Thus, the vast majority of its students would have been studying on Diploma courses, and so the vast majority of LCC’s resources would have been expended on such education.

25 64. I do not agree. The MU Arrangement did not sign students up to an MU degree, MU merely agreed that those students who obtained specified diplomas would be accepted into MU’s second or third year degree courses. There was no evidence before the F-tT of any general commitment of its students to pursue those diploma courses. Thus the F-tT was not bound to conclude that the majority of LCC’s resources were expended in teaching of those courses. (Again the F-tT’s enquiry into typical progression can be seen as a attempt to fill a gap with an inference from other evidence: if it could have been satisfied that in most years most of LCC’s students went on to MU, the F-tT might have inferred that LCC’s principal activity was the supply of the diploma courses, that is to say mainly supplying university education for MU courses. That was a conclusion it was unable to reach.)

30 65. As a result I could not conclude on the basis of the F-tT’s findings of fact that LCC satisfied the “similar objects” test.

## (2) A College of a University

40 66. Even if the LCC’s fundamental purpose had been shown to be the provision of university education or otherwise that the “similar objects” test was satisfied, LCC had in addition to show that it was a college of a university.

67. For the reasons which follow, and for those more eloquently expressed by Judge Bishopp at 88 to 94 below, it seems to me that, even if, as the F-tT put it, the MU Arrangement “were rendered a reality by the student careers of LCC’s students taken as a whole”, that arrangement did not make, or would not have made, LCC a college of MU. In this respect I disagree with the beginning of the F-tT’s conclusions at [43]. Mr Murphy suggested that the F-tT’s finding in this respect was one of fact; in my opinion it was one of law subject to review by this tribunal – being a conclusion as to the application of the statutory words to the facts found by the F-tT.

10 (1) The MU Arrangement was one under which on successful completion of certain diploma courses taught by LCC, students could progress to computer science programmes at MU on making formal application and subject to an English Language qualification. LCC students were not accepted as MU students when they started at LCC, nor was their education in any way provided by MU; instead it was a provision of education by LCC which enabled the students to go on to MU in the second or third year. That points to LCC being separate from, rather than part of the university.

15 (2) The agreement provided for LCC to provide MU with opportunities to meet students, and for MU to maintain an advisory and monitoring role to ensure compatibility between the programmes. Mr Kohn’s evidence to the F-tT was that MU had approved the content of LCC’s courses (and that as a result they had not changed), that MU had reviewed LCC’s rules and procedures and that in the first year it had commented on teachers’ CVs and sat in on some classes. These actions to my mind are more akin to those of a regulator than a participant.

20 (3) The terms of the MU Arrangement are the terms of an arm’s length relationship between parties which did not involve LCC in the academic or other life of MU, subject it to the university’s jurisdiction, or make it part of the university’s constitutional framework. Apart from some monitoring, advice and LCC’s obligation to communicate results to MU there was no evidence of participation of MU in LCC, or of LCC in MU.

25 (4) The F-tT found that LCC students were entitled to use the MU library and other campus facilities, and that some did. That suggests a degree of intertwining but it is not enough to make LCC “of” the university.

30 (5) The MU Arrangement related only to some of the activities of LCC: it did not affect its offering of accounting courses, EFL, or other IT courses. One could not conclude that the LCC was “of” the university unless persuaded that at least some material or substantial part of LCC’s activities were enmeshed with MU.

35 (6) If Peter Gibson LJ can be taken as saying that Note(1)(b) is limited to bodies which supply only or mainly university education the facts found by the FTT did not permit the conclusion that such was LCC’s main supply.

40 68. Mr Murphy argues that as the bulk of LCC’s resources were taken up with MU education, its fundamental purpose was the provision of education in association with MU, and thus that it was a college of MU.

45

69. This argument rests on an inference from the tribunal's findings in paragraph [19] that the bulk of LCC's resources were taken up with MU education. At [19] the F-tT said:

5           “The evidence of Mr Kohn and Miss Azim (which was not challenged, and which we accept), was that without agreement with MU or a similar university LCC would never have commenced its business. Without the prospect of a three-year MU degree qualification, LCC students, most of which were from overseas, would not have secured visas to come and study in the UK. LCC provided students with a copy of MU's letter ... to be sent by them to the UK Border Agency with their visa applications. The UK Border Agency accepted the relationship between LCC and MU as the basis for granting LCC's students the necessary visas. Furthermore, the content of the LCC courses ties in with the content of the related MU degree courses. We find that LCC students were entitled from the time they were accepted as LCC students to progress to related degree courses at MU, subject to fulfilling the necessary academic conditions ...”

70. Even if satisfaction of the fundamental purpose test were a sufficient condition for eligibility, which in my view it is not, I am unable to draw Mr Murphy's inference from this passage. It seems to me that whilst LCC may have been dependent upon the MU Arrangement that does not show that it provided university education to those who obtained visas on the strength of it or that it was in any way part of MU. Such students may have been entitled to proceed to MU if they took appropriate courses at LCC (and passed the exams), but what was lacking was evidence that they or most of them did take those courses. The tribunal had evidence that LCC offered a wide variety of courses but no evidence that its students pursued predominantly the diploma courses. Thus, the necessity of the MU agreement does not enable me (and did not enable the F-tT) to conclude that what LCC did was substantially part of the university life of MU. Further, although LCC needed the MU agreement for its business, that necessity did not mean it was integrated with MU: a taxi driver is not “of” the taxi licensing authority because his business depends upon having a licence.

71. Mr Murphy also relies on paragraph [23] of Burton J's judgement in *SFM*:

35           “23. It is important and right to point out that there was no suggestion at all in this case that the MOC agreement, or the relationship between SFM and ULH, was a sham or constructed simply for the purposes of evading or avoiding VAT. If it is considered, as was urged on me, that a decision in favour of SFM could open the floodgates for artificial relationships said to be based upon the outcome of this case, that will not necessarily follow, because each case must be decided on its own facts ...”

72. Mr Murphy says that there was in this appeal no suggestion by the F-tT that the MU agreement was a sham, and it follows that if the F-tT decided that the fundamental purpose of LCC was similar to that of the university, it would be a college of the university.

73. I do not think that [23] will bear this weight. All Burton J was saying was that the equivalent agreement in SFM was not a sham and could be relied on. The MU Arrangement in this appeal was not a sham. But it was not determinative of LCC's status. That depends on an overall assessment of LCC's relationship with MU and its objects. Mr Murphy relies upon the F-tT's findings at [20] that the



MU Arrangement was fundamental. But this is not a finding of integration with the university but of dependence on an agreement with it.

74. I am thus not deterred by Mr Murphy's submissions from the conclusion that LCC was not an eligible body.

5 (b) The grounds of appeal against the F-tT's decision

75. Permission to appeal was granted on two grounds: (1) to argue that in applying the typical progression test the F-tT had erred in law, and (2) to argue that the F-tT had erred in law in concluding that, because it was not satisfied on the typical progression test, the MU Arrangements were not rendered realistically  
10 substantial.

76. The F-tT described, at [46], its approach as "an attempt realistically to assess the function LCC was fulfilling". In making its assessment the tribunal asked whether students typically progressed to MU. I have said that in my judgment a test of typical progression as a necessary condition for eligibility is  
15 impermissible.

77. But in the absence of other compelling evidence that test could be a useful indicator of what LCC *actually* did. The F-tT was faced with the possibility that only a small proportion of LCC's activities consisted of providing education on its diploma courses which interlocked with and formed part of the university  
20 education of MU. Evidence as to what typically happened to students was a useful tool for the evaluation of what LCC actually provided and the degree of its integration with MU. If for a particular year almost all of LCC students had gone on to MU taking with them degree credits from the LCC diplomas, then it could be a permissible inference LCC's activity was the provision of education  
25 associated with MU courses. That would not preclude, and could support, a conclusion that LCC was a college of MU.

78. The tribunal was not able to conclude that LCC's students typically progressed in that way. That left unanswered - and unproved - the question as to whether the substance LCC's activity was "of" the university. To the extent that  
30 the tribunal considered the typical progression test as necessary to a conclusion that the body be eligible, it made an error of law, but it was or would have been, in the circumstance of a lack of other compelling evidence, justified in concluding that the evidence of progression did not support the conclusion that LCC was adequately linked to, or integrated with, MU.

79. In relation to the second ground of appeal - the conclusion that it was not shown that the MU arrangements were rendered realistically substantial - Mr  
35 Murphy says that on the facts found by the F-tT a minimum of hundreds of students would have progressed to MU and that, the MU Arrangement itself and the evidence of its implementation was enough to conclude that the arrangements were realistic and substantial.  
40

80. In this context it must be remembered that the test is whether there was sufficient integration to make LCC a college of MU. If only a small part of LCC's activities meshed with MU then there would not be sufficient integration. Even if

the F-tT's factual findings supported a conclusion that hundreds out of the thousands of LCC's students went on to MU that would not compel a conclusion that the integration was substantial, indeed it would suggest the reverse. The F-tT cannot be criticised for concluding that the MU Arrangements were not realistically substantial.

### **Conclusions.**

81. The tribunal was wrong to the extent that it cast typical progression to university as a condition for eligibility, but on the evidence before it, the F-tT were entitled to conclude that the failure to meet its "typical progression" test meant that there was doubt as to the nature of LCC's activities i.e. whether they were substantially the provision of university education or adequately enmeshed with MU. As a result the F-tT were entitled to conclude that LCC was not an eligible body.

82. For the reasons I have set out, which differ in some respects from those of the F-tT, I find that LCC was not an eligible body.

### **JUDGE BISHOPP**

83. I gratefully adopt the exposition of the facts relevant to this appeal which Judge Hellier has provided. I agree with him on the outcome, which is that the appeal must be dismissed, but I arrive at that conclusion by a slightly different route which I think it worth explaining. The essence of LCC's attacks on the F-tT's decision, as Judge Hellier has said at para 75 above, is that it was wrong to adopt the "typically progress" test, and that, having nevertheless applied that test, it was wrong to conclude that it was not met in this case. HMRC argue that the F-tT should not have concluded that LCC (an acronym I use, as did the F-tT, to include all the appellant's trading names) was a college of MU at all and, if that is so, the "typically progress" test does not arise; but if it does, the F-tT applied it correctly and arrived at the right answer. One should not, however, lose sight of the fact that the underlying question is whether LCC was an eligible body and specifically (since no other means of qualifying as such was suggested or is apparent) whether it was a college of MU.

84. Judge Hellier has said, at para 56 above, that in order to succeed in its appeal to the F-tT LCC needed to demonstrate two things: that it had "similar objects" to a body governed by public law and providing education; and that it was sufficiently integrated with it to be capable of being considered a college of MU. While I agree that both of those things are relevant and important, I am not sure that is the correct way of articulating the test.

85. In art 132(1)(i) of the Principal VAT Directive the phrase used is "other organisations recognised by the member State concerned as having similar objects", and in the UK's domestic legislation this part of the article is implemented by extending the scope of the exemption to supplies of education made by, among other institutions, a college of a university. This manner of implementation, as I see it, proceeds from the assumption that any United Kingdom university making supplies within the scope of Group 6 satisfies the requirements of art 132(1)(i), and that a college of such a university will have

objects similar to those of the university. If it were otherwise the UK would not have implemented the Directive correctly: see *Christoph-Dornier-Stiftung für Klinische Psychologie v Finanzamt Gießen* (Case C-45/01) [2005] STC 228. The rationale for that proposition was given by the Court in *Staatssecretaris van Financiën v Stichting Kinderopvang Enschede* (Case C-415/04) [2007] STC 294 at [13]:

“As a preliminary point, it should be noted that, according to the case law of the Court, the exemptions provided for in art 13 of the Sixth Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (see, in particular, *Kingscrest Associates Ltd v Customs and Excise Comrs* (Case C-498/03) [2005] STC 1547, [2005] ECR I-4427, para 29, and *Diagnostiko & Therapeftiko Kentro Athinon-Ygeia AE v Ipourgos Ikonomikon (Ygeia)* (Joined cases C-394/04 and C-395/04) [2006] STC 1349, [2005] ECR I-10373, para 15). Those exemptions constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one member state to another (see, in particular, *EC Commission v France* (Case C-76/99) [2001] ECR I-249, para 21, and *Ygeia* [2006] STC 1349, [2005] ECR I-10373, para 15).”

86. It follows from that proposition, married with the structure of the domestic legislation, that if an institution is to bring itself into the class of eligible bodies providing education within the scope of art 132(1)(i) and Group 6 by demonstrating that it is a college of a university within the meaning of Note (1)(b), construed in a manner which is consistent with the Directive, it must show that it shares the university’s objects, or at the least the object of providing university education. It is possible, as Arden LJ explained in *University of Leicester* at [56], that an institution might be a college of a university without, itself, supplying any education; but if it made no supplies of education such a college would not be seeking to bring itself within the class of eligible bodies in order to benefit from the exemption conferred by Group 6. It is only in the case of an institution which does wish to benefit from it that the question of similar objects arises. However, the similarity of objects is not, in my view, a discrete test, but only one, albeit perhaps the most important, of the facts the institution must establish if it is to succeed in showing that it is a college of a university. That, as I understand it, is essentially the argument set out by Burton J at [14], and accepted by him at [19] and [20], in *SFM*.

87. The F-tT appreciated (see [7] and [8] of its decision) that the question it had to answer was whether LCC was an “eligible body”. It follows from what I have said that I agree that that was the correct and, in the circumstances of this case, the only question. It also recorded, as was undisputed before us, that LCC could properly be regarded as an eligible body only if it could show it was a college of MU. Unfortunately, in my judgment, the F-tT approached that issue in the wrong manner and in doing so committed an error of law.

88. At [15] the F-tT set out the text of the letter sent by MU to LCC on 17 July 2006, and at [18] it listed the salient features of the Articulation Agreements (the “AAs”). It then set out the evidence before it of the rationale for LCC’s entry into the AAs, which was, in essence, that the overseas students it aimed to attract

would be able to secure the visas necessary for their entry into the United Kingdom only if LCC could demonstrate a close link with MU or a similar university. The grant of a visa, the F-tT found, was dependent on the intending student's prospect of a degree. The tribunal then embarked on an examination of the numbers of LCC students who progressed to MU courses (a point to which I shall return) and mentioned, rather briefly, the judgment of Burton J in *SFM* and another decision of the F-tT. Its conclusion on the primary question appears at [43]:

“We are satisfied that the letter from MU to Mr Kohn dated 17 July 2006 and the subsequent AAs established a legal relationship between LCC and MU sufficient to constitute LCC (in its manifestations as the London College and Bickenhall College of Computing) as a college of MU within the definition in paragraph (b) of Note 1 to Group 6, Schedule 9, VATA (which we must construe purposively in the context of the general legislative intention to exempt supplies of UK university education), provided that the arrangements envisaged in that letter and the AAs were as a matter of fact rendered a reality by the student careers of LCC's students, taken as a whole.”

89. In my judgment that conclusion reveals a failure on the F-tT's part to examine and analyse the terms of the AAs in order to determine what it was for which they provided. The tribunal appears to have been diverted from that task by its concentration on the fact that there was a legal relationship between LCC and MU (which is plainly the case) and by LCC's desire to show that it provided access to a degree course in order that its prospective students could secure visas. But it is a considerable leap from that position to the conclusion that the AAs constituted LCC as a college “of” MU; and analysis of the AAs shows, to my mind, that they did not, and were not intended to have, that object or result.

90. It is necessary when conducting such an analysis to recognise that there are several ways in which an institution may be, or become, a college of a university, ranging from formal constitution as a college to something less well-defined. The lack of precise definition was what led to *SFM*, and as Arden LJ said in *University of Leicester*, also at [56], and Judge Hellier has pointed out at paragraph 29 above, the relations between colleges and the universities of which they are properly to be regarded as colleges may take a variety of forms, with the consequence that one must consider the circumstances of each case. It follows that Note (1) must be construed pragmatically and, for the reasons I have given at paragraph 86 above, purposively. But purposive construction can be taken only so far, and it cannot be used (as the F-tT seems to have used it) as a means of concluding that, because (as it determined) LCC and MU had similar objects, the former must be a college of the latter, subject only to the proviso the F-tT identified.

91. As Judge Hellier has mentioned, the AAs were arm's length agreements, and in my view they were intended to, and did, maintain an arm's length relationship. They referred to the “progression of [LCC's] students ... to University programmes”; to MU's obligation to “offer students entry onto the Middlesex programmes” on successful completion of the diploma course; to students who could “transfer to Middlesex”; and to “students applying to the University”. There is nothing in the AAs, or in the letter of 17 July 2006, which could conceivably be construed as being intended to constitute LCC as a college

of the university. Students enrolling with LCC did not become members of MU; those undertaking the diploma course had no more than the contingent right to transfer to MU on its successful completion. Others were able to apply for admission, but their applications were to be considered individually—thus they  
5 obtained no special privilege by reason of their enrolment at LCC. The agreement amounted to nothing more than an arrangement by which LCC could “feed” certain of its students to MU. The fact that the diploma counted towards the degree, in that it conferred a number of credits (see the F-tT’s decision at [18], iii and iv), does not seem to me to affect that conclusion, since it is plain from the  
10 terms of the AAs that on entry or transfer the students were embarking on a new course, and not continuing one they had already begun.

92. The term used in the Note is college “of” a university, a construction which implies at least some degree of integration. That was also the view of Peter Gibson LJ (at [31] to [36]) and Arden LJ (at [55]) in *University of Leicester*.  
15 Integration is a feature entirely lacking in this case: MU had supervisory rights respecting the quality and content of the diploma course, as an obvious safeguard designed to ensure that only students with an appropriate level of attainment were able to transfer, but had no influence over any of the other courses offered by LCC, over its governance or in any other way; and LCC had no right to participate  
20 in the governance of MU (as one might expect in the case of a constituent college), or to provide input into its course content or in any other respect. There should also, one might think, be some evidence of the recognition by the university of the other institution as a college of itself. I do not see how it can plausibly be argued that an institution such as LCC is, or is to be regarded as, a  
25 college of a university which does not acknowledge it as such. There was no evidence before the F-tT of MU’s perception. That is not, in itself, fatal; but where, as here, there is no hint in the documentary evidence that MU intended that LCC should become a college of itself the task of showing that it did is inevitably rendered more difficult.

93. The F-tT seems to have been greatly influenced by the observation made by the VAT and Duties Tribunal in *SFM*, and endorsed by Burton J at [22], that SFM’s “fundamental purpose” was “to provide education services leading to the award of a university degree”. The F-tT cited these words twice, at [40] and [45].  
35 The difficulty with the F-tT’s application of such a test here is that it failed to take account of the significant factual differences between the two cases. Indeed, the contrast between the facts of this case and those of *SFM* (which, it should be remembered, was a borderline case) is instructive. Whether or not SFM was a college of the university as a matter of law, the evidence showed that the relationship was consensual, in that both parties had the same understanding of it.  
40 Burton J set out the evidence from a former senior member of the university that SFM was regarded by it as an “associate college”; the question was whether that relationship was sufficient to satisfy the statutory requirements.

94. Students who enrolled with SFM were simultaneously registered with the university, which is very different from the position in this case. SFM did not  
45 offer a diploma which gave access to a degree course, as here, but itself offered the entirety of the course which led to the granting of a degree by the university. The agreements between SFM and the university provided that SFM was to deliver the university’s courses. It did so by supplying all of the necessary tuition

to students of the university who, on successful completion of the course, were awarded a degree by the university. LCC did not do that; it provided diploma-level tuition to its own students who, on successful completion of the diploma, became entitled to admission to a university course. The tuition offered by LCC could never lead to the award of a university degree; its former students had to complete courses which LCC did not offer before they became eligible for such an award. It does not seem to me that in this feature LCC differed in any material respect from a school whose students satisfy the matriculation requirements of a university. These are not merely differences of degree; the relationship between SFM and the university was far closer, and plainly of a quite different character, from that found by the F-tT in this case.

95. In my judgment, in concluding as it did the F-tT misunderstood the “fundamental purpose” test, or alternatively applied it incorrectly to the facts before it. The finding that LCC was a college of MU, even with the proviso the F-tT identified at the conclusion of [43], cannot stand. The finding is the result of an error of law, in the application of the statutory provisions to the facts found, but even if, as LCC argued, it was a finding of fact it is in my opinion one which was contrary to the evidence and not open to the F-tT. That being so, it is susceptible to challenge in accordance with the principles laid down by the House of Lords in *Edwards v Bairstow* [1956] AC 14. LCC was not a college of MU, and the appeal must be dismissed on that ground.

96. It follows from that conclusion that I do not need to consider the “typically progress” test which the F-tT applied, but as Mr Murphy criticised it in strong terms I should add some brief observations.

97. The F-tT introduced the test at [43], which I have set out at para 88 above. It then expanded on it:

“[44] By this proviso [*viz.*, that the arrangements envisaged were as a matter of fact rendered a reality by the student careers of LCC’s students, taken as a whole], we echo the concern expressed in [the] decision letter dated 24 August 2010 that the arrangement between LCC and MU would not ‘seem to be substantial’ if the number of LCC’s students who transferred to MU was very low, with the consequence that in that case LCC ‘cannot be acting as mainly a college of a university’, that is, LCC would not, as a matter of fact, realistically be a college of a university for relevant purposes.

[45] If it is the case that despite the legal relationship between LCC and MU established by the letter of 17 July 2006 and the AAs (which, we accept, enabled overseas students to obtain the visas necessary for a 3 year course of university-level educational study), we are not persuaded that LCC’s students typically did progress to courses leading to a degree at MU, but instead dropped out, went to a different university or otherwise did not progress to MU as envisaged by the AAs, then we would not conclude that the ‘fundamental purpose’ of [LCC] was, as a matter of fact, to provide education services leading to the award of an MU university degree.”

98. There are two observations to be made about this approach. First, it underlines the fact that LCC’s students were not students of MU, but merely earned the right to progress, or transfer, to its courses. Second, it appears to put the cart before the horse. The fact that, as the case may be, large or only small

5 numbers of students of the college are realistically expected to progress to the  
university may well be one of the factors (albeit not one identified in *SFM*, in  
which it would not have been a relevant consideration) to be taken into account in  
deciding that the college is, or is not, a college “of” the university. I can agree  
with the F-tT, too, that an institution of whose students only (say) 10% are  
10 expected to progress to the university while the other 90% are not (and, perhaps,  
never hoped or intended to do so) is unlikely to have the same “fundamental  
purpose” as (or, to the extent that the two phrases are not synonymous, “similar  
objects” to) the university. One would expect these points to be considered before  
15 a conclusion that the college is, or is not, a college of the university is reached.  
The F-tT, however, concluded that LCC was such a college before going on to  
determine whether, because of small numbers of transferring students, that finding  
was undermined.

15 99. Nevertheless, I do not detect any error which warrants interference by this  
tribunal. The F-tT may have considered the factors in an odd order; but the  
“typically progress” test was not irrelevant, and the tribunal was entitled to give as  
much weight to it as it considered the evidence justified. I am not persuaded, as  
Mr Murphy argued, that the F-tT misunderstood the evidence on the point; it  
20 analysed it carefully and in some detail and came to conclusions on it which in my  
judgment were fully supported by its analysis. I would dismiss the appeal on this  
ground had I not already done so on the other ground.

**DISPOSITION**

100. We dismiss the appeal.

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**COLIN BISHOPP**

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**CHARLES HELLIER**

**UPPER TRIBUNAL JUDGES  
RELEASE DATE: 16 AUGUST 2013**

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