Appeal ref: UT/2014/0070

VALUE ADDED TAX — exempt supplies — education — PVD arts 131-133 — Note (1)(b) Item 1 Gp 6 Sch 9 Value Added Tax Act 1994 — whether education provided by "eligible body" — whether respondent a college of a university — tests to be applied — role of the Upper Tribunal — appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Appellants**

- and -

SAE EDUCATION LIMITED **Respondent**

Tribunal: Judge Colin Bishopp
Judge Guy Brannan

Sitting in public in London on 1 and 2 December 2015

Sarabjit Singh, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the appellants

Melanie Hall QC and Elizabeth Kelsey, counsel, instructed by Gordon Dadds LLP for the respondent

DECISION

Introduction

1. This is an appeal by Her Majesty's Revenue and Customs ("HMRC") against a decision of the First-tier Tribunal ("the F-tT") (Judge Clark and Dr James MBE) by which they allowed the appeal of the present respondent, SAE Education Limited ("SEL"), against various assessments to VAT, covering the periods from 1 May 2009 to 29 February 2012 and amounting to about £1.3 million. The F-tT also allowed SEL's appeal against some related penalties, imposed because of SEL's failure to register for VAT. The details are unimportant for present purposes.

2. The underlying question is whether supplies of education made by SEL are, as it contends, exempt or, as HMRC maintain, standard-rated. The answer to that question depends in turn upon whether SEL is to be treated as an "eligible body" within the meaning of Note (1)(b) to Item 1 of Group 6 of Schedule 9 to the Value Added Tax Act 1994 ("VATA").

3. The starting point for the consideration of that issue is arts 131 to 133 of the Principal VAT Directive (Council Directive 2006/112/EC) ("the PVD"). Article 131 sets the scene:

> "The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse."

4. Chapter 2 includes art 132.1 which, so far as relevant to this appeal, provides that:

> "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 concerned as having similar objects …."

5. Article 133 expands on art 131 by providing some examples of the conditions Member States might impose. Those given relate to bodies which do not set out to make profits, or whose charges are regulated by the state, and they allow the Member State to refuse exemption if it would lead to distortion of competition. The United Kingdom has not chosen to implement the exemption of educational provision in quite that way, and in particular has not limited the exemption of educational supplies to non-profit making bodies; others may also make exempt supplies of education provided they fall within the UK's implementation of the description "other organisations recognised by the Member State concerned as having similar objects" to those of bodies governed by public law.

6. The term used in UK law for such an organisation is "eligible body". Thus the relevant part of art 132(1) is reflected in Item 1 of Group 6, which provides for the exemption of:

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

7. The meaning of "eligible body" is given by Note (1). It lists a number of such bodies, but it is common ground that the only relevant description in this case is that to be found in paragraph (b):

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

8. SEL's original case was that it was a non-profit making organisation (which, if correct, would have brought it within the scope of paragraph (e) of Note (1)), but it later abandoned that case (which the F-tT said, at [205], they would have rejected in any event) and argued instead that it satisfied paragraph (b) because it is, or at the material time was, a college of Middlesex University ("MU"), and the question whether it was such a college was, in substance, the only issue in the appeal. The F-tT, after a lengthy consideration of a considerable volume of evidence and numerous authorities relating to the interpretation of the statutory requirements, concluded that SEL was right, that it was throughout the period assessed a college of MU, and that its supplies of education were correspondingly exempt. They therefore discharged the assessments and the penalties. HMRC now challenge their conclusion, essentially on the basis that the F-tT's finding that SEL was a college of MU and therefore an eligible body was not one open to it on the evidence interpreted in accordance with the relevant authorities.

9. Before us, HMRC were represented by Mr Sarabjit Singh and SEL by Mrs Melanie Hall QC, leading Ms Elizabeth Kelsey. In what follows, numerals in square brackets, unless otherwise indicated, are references to the corresponding paragraphs of the F-tT's decision.

The facts

10. We take the following summary of the facts from the F-tT's decision supplemented by an examination of several documents to which we were taken during the course of the hearing. The primary facts are in any event the subject of only limited controversy; rather, the question is the interpretation to be placed upon them. We shall deal with some additional matters of detail when we come to the parties' arguments.

11. SEL is a wholly-owned member of the SAE corporate group, whose origins are Australian; "SAE" is taken from the initials of the School of Audio Engineering. The SAE group was acquired by the Navitas Group in early 2011. It has continued to trade worldwide, commonly as "SAE Institute", in the provision of education and training in audio and digital media technologies and production. It began trading in the UK in 1985. At that time the UK trading entity was SAE Education Trust Ltd ("SETL"), a subsidiary of a Dutch member of the group. In early 2009, for reasons of which we are unaware, SETL found itself in some

financial difficulty. Its business was acquired by SEL on 1 May 2009, following which SETL was liquidated.

12. It is common ground that MU is "a United Kingdom university" within the meaning of Note (1)(b). It is also common ground that MU has, and has had, no financial interest in SEL or the SAE group, and neither has representatives on the other's governing body or plays any direct part in the governance of the other.

13. The relationship between the SAE group, SETL and SEL on the one hand and MU on the other has developed incrementally, and has been documented in a number of agreements. The relationship has throughout been exclusive—that is to say, the SAE group has had no arrangements with any other university within the UK (although it has had arrangements with universities in other countries), and MU has had no arrangements with any other institution offering courses similar to those provided by SEL.

14. The agreements consisted of seven Memoranda of Cooperation (in each case a "MoC"), concluded in 1998, 1999, 2003, 2007, 2009, 2010 and 2011, two Partnership Agreements concluded in 2003 and 2009, an Instrument of Accreditation entered into in September 2010 and a Special Associate College Agreement ("SACA") of August 2011. The evidence before the F-tT was that the word "special" qualified "agreement" rather than "college". All of the agreements which preceded the SACA were made between MU and SAE Institute (sometimes a different term was used but it is clear that the SAE entity was the worldwide body) rather than with SETL or SEL. At [168] and [169] the F-tT recorded that in February 2009 SETL's director, Mr Matthias Postel, had told HMRC that "All agreements with MU are with SAE Institute … There are no individual agreements between SETL and MU". It emerged before the F-tT that MU had not been told of the transfer of SAE group's UK business from SETL to SEL, but there was evidence on the matter in the form of an email sent in August 2012 by the former Deputy Vice Chancellor of MU with responsibility for international relations, Dr Terry Butland, in which he said that it had been unnecessary for MU to be told of the transfer "because our agreement was with SAE as a whole, and not with an individual unit in a given country."

15. At [173] the F-tT said:

> "Mr Singh argued that the negotiations carried on in the name of 'SAE Institute' were intended to result in legal relations being entered into; he referred to certain obligations involving an indemnity being given by SAE. We accept that there was an intention to enter into legal relations; however, our interpretation of the results of the negotiations is that they were intended to result in legal obligations being undertaken by whichever was the SAE entity operating in the jurisdiction concerned, despite the direct commitment being between the 'umbrella organisation' and MU. As a result, we find that the result of the negotiations between SAE Institute and MU was that first SETL, and subsequently SEL, became bound by the terms of the various agreements between SAE and MU so far as operations within the UK were concerned. We also find that the negotiations between SAE and MU were intended to have general international effect, with the arrangements for any particular jurisdiction binding the particular operating subsidiary in that country or area, and (where appropriate) with any obligations being

> underwritten or undertaken by other companies within the SAE group. We base this view on records of discussions between SAE Institute and MU concerning operations or potential operations in a wide range of countries around the world."

16. We find that a rather surprising interpretation of the contractual relations between MU and SAE Institute. We were not taken to any evidence which might suggest that SAE Institute was entering into the various agreements as agent for its subsidiaries; rather, the available evidence points towards the conclusion that the nature of the obligation imposed on SAE Institute was to procure compliance by the local subsidiary for the time being with the terms of each agreement so far as they related to activities carried on by that subsidiary. If that is correct it explains why Dr Butland was unconcerned about the transfer of the business.

17. The MoCs provided for the validation of certain of the courses provided by SAE, through the medium of SETL or SEL. Validation amounted, in essence, to the recognition by MU of those courses as ones which, on successful completion, entitled the student to the award of an MU degree or (from August 2011) diploma. The validation process involved an assessment by MU of the programme's curriculum as well as the application of SAE's quality assurance regime and various other criteria. The MoCs also dealt with ancillary matters relating to admissions, programme monitoring and the management and approval of programmes.

18. The MoCs, too, were incremental. Thus the 1998 MoC provided for a SAE-named entity to teach only two validated courses, but that number had grown to five by the time of the 2009 memorandum. The 2011 MoC additionally provided for the validation of SAE Institute's MA and MSc programmes, which were not covered by the Instrument of Accreditation to which we come shortly.

19. The 2003 Partnership Agreement was a high-level agreement relating to the relationship between SAE and MU, and was less detailed than the MoCs which related to particular programmes. It recorded the intention of the parties to work in partnership to develop, validate and award undergraduate and taught graduate MU degrees to students of SAE Institute at its centres worldwide. It also noted the intention of the parties that within five years MU would consider an application from SAE Institute for MU "accreditation". Accreditation would allow SAE Institute to validate for itself programmes which led to the award of undergraduate degrees by MU; if accreditation were granted it would extend worldwide. That intention was not, however, realised and when the 2003 Agreement, which had a six-year term, was replaced at its expiration by the 2009 Agreement, the intention was repeated. Now, however, the note was of MU's willingness to consider an application from SAE Institute for accreditation within the next 12 months. It is clear from the terms in which the agreement is written that it remained the intention that SAE Institute, rather than any UK entity, was to be accredited.

20. The process of accreditation did then begin and on 22 September 2010 SAE Institute and MU signed an Instrument of Accreditation. This allowed SAE Institute (and, again, it is clear that SAE Institute rather than any UK entity was intended) to validate, monitor and review programmes of study leading to taught undergraduate awards of MU in Recording Arts, Film-Making, Digital Film

Animation, Multimedia Arts and related areas. A further MoC was entered into on the same date, referring to the Instrument of Accreditation and setting out detailed arrangements for the provision of reports and documentation in pursuance of the Instrument.

21. The SACA was the last and perhaps most significant of the relevant agreements. It took effect from 1 August 2011, and therefore from the beginning of the 2011-12 academic year, for a renewable term of six years. At [168] the F-tT said that the SACA was entered into between SEL and MU. That statement too is not, we think, quite accurate. The agreement had plainly not been prepared by a trained legal draftsman and is rather unstructured but it was quite clearly between MU and SAE Institute, who were identified in clause 1 as "the partners to this agreement". The same clause referred to the antecedent 14 years of collaboration between MU and SAE Institute in the provision of higher education, and mentioned too that SAE Institute had "Accredited Status"; there can be no doubt that the SAE body meant here is also SAE Institute as a whole, and not the UK entity.

22. However, it is apparent from what followed that the SACA's principal purpose was to govern future relations between MU and SAE Institute's UK entity, by this time SEL although it was referred to in the agreement as "SAE Education, UK" or "SAE-UK". Clause 2 recited that MU and SAE Education UK "have agreed a long-term Partnership". It added—a provision the F-tT found to be of great significance—that the partnership "builds upon the existing status of SAE-UK as a Middlesex University Associate College". Clause 3 made it clear that the agreement was to apply, without more, to any successor to SAE-UK, or SEL, to which Navitas Group might decide to transfer SEL's activities in the UK. It added that did not affect any earlier agreements between SAE Institute and MU, but was to "apply specifically to SAE-UK and its campuses in the United Kingdom".

23. Clause 4 recited that the purpose of the agreement was "to further strengthen the degree of collaboration and interdependency in the United Kingdom, and to designate [*sic*] a higher level of integration of SAE-UK operations with those of Middlesex University". A further provision the F-tT found to be of significance was at clause 6:

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

24. Clause 8 provided that "SAE-UK prospective higher education students who meet the defined criteria and are selected for entry shall be made an offer which ensures that they would become students of both Middlesex University and SAE-UK". The agreement did not specify what the defined criteria were. The same clause expanded upon that commitment by providing for details such as the ability of students of SAE-UK to use MU facilities, to be provided with MU student identity cards and, following graduation, to be treated as alumni of MU.

25. Clause 12 of the agreement provided that "The partners agree that the new status of the MU-SAE relationship in the United Kingdom will be appropriately publicised and promoted in relevant informational documents and websites". In his August 2012 email, to which we have already referred, Dr Butland explained that "SAE wanted a closer relationship with MU … involving validation by MU of more of their programmes, and to assist in their response to the changing higher education landscape in the UK and the consequent preparation for recognition by the UK Quality Assurance Agency and the UKBA [UK Border Agency]. MU was happy to do this, because SAE had been a close and important partner for many years, and because it extended MU's business with SAE."

26. The F-tT's decision also records various meetings between MU and SAE Institute—again meaning the worldwide organisation—from February 2002 to June 2010, particularly meetings of their Joint Liaison Group and Steering Group. The topics of discussion included some of the various agreements to which we have referred. For present purposes, the particularly significant fact to emerge from the F-tT's decision is that in February 2002 at a meeting between senior representatives of SAE Institute and MU, held in Sydney, it was recommended that SAE Institute should be granted "associate college" status. Here too it is clear from an examination of the minutes of the meeting that the proposal related to SAE Institute, described as MU's "global partner", and not specifically to the Institute's operation in the UK or indeed any other country.

27. The recommendation was left to senior representatives to progress. It is apparent from the F-tT's narrative that there was little immediate change from the perspective of SETL, at that time the trading entity in the UK, because at a meeting of the Joint Liaison Group on 15 June 2006 "SAE asked whether their London campus could be given a more official status by MU, such as being made an Associate College" (see [30]). MU agreed to look further at the request. We deduce, although the F-tT did not say so, that it was this request which ultimately led to the Instrument of Accreditation in September 2010 (by which time SEL had become the UK trading entity) and to the SACA in August 2011.

28. Before August 2011 SETL and later SEL offered a variety of courses, some of further (or vocational) education, others of higher (university or equivalent standard) education. The higher education courses can be divided into three broad categories, all of which were taught exclusively by SEL.

29. The first category consisted of courses described as "short courses" or "taster courses" which we deduce (the F-tT said very little about them) were, as the names imply, of short duration and intended to provide those embarking on them with some experience of the tuition before they committed themselves to a full course. The short courses were not validated by MU, and were effectively unrecognised by it: they did not provide students who successfully completed the course with an MU award, or with any form of credit toward a later award by MU. The students were likewise not recognised by MU as MU students.

30. The second category consisted of diploma courses; the diploma was awarded to successful students by SEL, and at this time these courses too were not validated by MU, although MU's quality assurance, monitoring and review procedures were applied to them and they had been assessed by MU as higher

education courses. At [244] the F-tT said that the diploma courses "constitute higher education of university standard" and that conclusion was not challenged before this tribunal. Although MU did not validate the courses, a student who successfully completed a diploma course became entitled to credit towards an MU-validated degree programme, and to the award of an MU degree following a further 12 months of study ("the top-up year") (provided, of course, the student was successful in the relevant examinations). The credit was of 180 points towards the 360 points required for an MU undergraduate degree. In substance, therefore, MU treated the diploma courses as equivalent to its own programmes, save that they did not lead to an MU award. Diploma students could not, however, register with MU and were not treated as members of MU.

31. The third category consisted of the top-up year which, for successful students, led to the award of an MU degree. Thus, SEL's students could achieve the award of an MU degree after two years of study in contrast to the usual three years required for a first degree. The degrees were awarded at MU degree ceremonies.

32. The position from August 2011 onwards was simpler: the diploma courses were validated by MU and the awarding body for all the diploma and degree programmes was MU [249]. The teaching of all the courses continued to be provided by SEL alone.

33. From [242] to [245] the F-tT dealt with further evidence about the numbers of SEL's students who were undertaking MU-validated courses. That evidence came primarily from Professor Zbys Klich, a senior member of SAE Institute's academic staff and for part of the relevant time SEL's managing director. We have found the F-tT's analysis of the numbers a little confusing, but the essence of their conclusion, at [245], is that since the 2005-06 academic year SEL's higher education students have represented about 90% of the total student population, and that over 90% of SEL's courses (we take this to mean by numbers of students) "provided credits which led directly to MU university degrees". We do not think the slight confusion we have mentioned matters for present purposes; it is sufficient to record that the F-tT concluded that, by 2005-06, the great majority of SEL's students were undertaking courses which at least had the potential to lead them to an MU degree.

34. However, it is also apparent from the F-tT's decision that there were greater numbers of students undertaking the diploma course than undertaking the degree course (the latter representing only about 30% of the total student population), from which it follows that some students, between 30 and 40% of the total, who had successfully completed the diploma course did not proceed to the top-up year and to the degree. Therefore, before August 2011 no more than 30% of SEL's students were studying on courses which led directly to awards from MU (although the diploma courses did, as we have said, give credit towards an MU degree if a student opted to complete the top-up year). We were told that the diploma was recognised as a valuable qualification in its own right and that for this reason some students elected not to embark on further study.

35. MU and SEL had their campuses at different locations. SEL's campuses were in London, Oxford, Liverpool and Glasgow, and two of its London sites

were fairly close to MU's campuses in Hendon and Archway. There had been some discussion of the possibility that SEL and MU might share a UK site at a meeting of the Joint Liaison Group on 15 June 2006 but it appears that nothing came of the discussion, either then or later.

36. Between [266] and [273] the F-tT dealt with the relationship of SEL's students to MU. At [266] they quoted a clause from the 2007 MoC to the effect that students on a particular validated course should be considered members of MU, but that they would not be entitled to receive MU identity cards. They would, however, be entitled to apply to become associate members of MU's Students' Union. In the 2009 MoC the same clause appeared, save that the entitlement to apply to become associate members of the Union was omitted. The information given to students was to the same effect, although it did indicate that a card would be provided bearing the statement that the student was engaged on a course leading to an MU qualification. Despite what was said in the SACA, a revised version of the student information pack issued in 2011 was in materially the same terms. The students were, however, also told, in 2009 and 2011, that they were full student members of MU. Nevertheless, as the F-tT found at [280] (and as the SACA expressly provided), SEL's students were subject to its own disciplinary procedures, and not those of MU.

The F-tT's reasoning

37. Although the F-tT examined a significant number of other authorities, to some of which we shall refer later, their primary focus was upon only four, and they were also the focus of the arguments before us. The four cases are, in chronological order, *Customs and Excise Commissioners v School of Finance and Management (London) Ltd* [2001] STC 1690 ("*SFM*") (Burton J in the High Court); *Revenue and Customs Commissioners v University of Leicester Students Union* [2001] EWCA (Civ) 1972, [2002] STC 147 ("*University of Leicester*"), a decision of the Court of Appeal (Peter Gibson, Arden LJJ and Morland J); *London College of Computing Ltd v HM Revenue and Customs Commissioners* [2013] UKUT 404 (TCC), [2014] STC 404 ("*LCC*"), a decision of this tribunal (one of us, Judge Bishopp, was also a member of the panel in that case; the other was Judge Hellier); and *Finance & Business Training Ltd v Revenue and Customs Commissioners* ("*FBT*"), initially by reference to a decision of the F-tT: [2012] UKFTT 382 (TC) (Judge Scott and Mr Marsh). The decision in *LCC* was released after the F-tT began hearing SEL's appeal; they resumed the hearing at a later stage in order to receive the parties' further submissions, including those relating to *LCC*. Later still they received written submissions on this tribunal's decision (Morgan J) upholding the F-tT's decision in *FBT* ([2013] UKUT 0594 (TCC), [2014] STC 900).

38. We shall need to examine all of those authorities, together with the judgment of the Court of Justice of the European Union in *Minister Finansów v MDDP sp z oo Akademia Biznesu, sp komandytowa* (Case C-319/12) [2014] STC 699 ("*MDDP*") – the F-tT referred to the Opinion of Advocate General Kokott but do not appear to have had the judgment available to them – and to the judgment of Arden LJ (with which Gloster and Sharp LJJ agreed) upholding the decisions of the F-tT and this tribunal in *FBT*, but on different grounds derived in part from the

judgment in *MDDP*: see [2016] EWCA Civ 7. That judgment was handed down after the conclusion of the hearing before us but both parties told us they did not wish to wait for it to be handed down, and neither has volunteered further submissions in the light of the judgment.

39. The question in *SFM* was whether the VAT and Duties Tribunal was correct to conclude that the appellant, described by the University of Lincolnshire and Humberside as an "Associate College", and which taught the University's degree courses, the degree being awarded to successful students by the University, was a college of the University within the statutory meaning. Burton J conducted an analysis of the statutory framework and then considered 15 factors which had been identified by the parties rather than himself as indicative, in that by their presence or absence they tended to show that a body was, or was not, a college of a university. He took care to observe, at [22], that although the factors should be considered the essential task before the tribunal is to conduct a weighing exercise. It is, indeed, apparent from the manner in which he expressed himself that he did not think that the 15 factors represented an exhaustive list, or that they would arise in every case. Rather, they were factors which arose for consideration in that case. It is conspicuous that although he provided lists of the factors identified respectively by HMRC and SFM he conducted only a brief examination of them.

40. Despite Burton J's observations and his approach the 15 *SFM* factors have achieved a measure of acceptance as a helpful guide and they are frequently referred to in cases of this kind. They were also implicitly approved by the Court of Appeal in *FBT* at [57]. The F-tT in this case, too, dealt with them in some detail. Mr Singh challenges parts of their analysis, and we shall examine his challenge in the course of describing his submissions.

41. Before they reached the *SFM* factors the F-tT examined what was said in *University of Leicester* and in *LCC*. In the former, the students' union of the university argued that its supplies of soft drinks were exempt from VAT on the basis that the union was an institution of the university within the meaning of Note (1)(b) and was therefore an "eligible body". Peter Gibson LJ and Morland J held that in order to fall within Note (1)(b) a body must supply education services. In that case, the students union did not supply education and its appeal failed for that reason; Arden LJ differed in her reasoning though not in the result. In the present appeal, it is not disputed that SEL was making supplies of education and the cases can be distinguished in that respect. The judgments in *University of Leicester*, including the dissenting judgment of Arden LJ, are, however, helpful in considering the question whether a body is an institution "of" a university, a concept which, as we shall explain, is of some importance.

42. In *LCC* the tribunal was required to decide whether LCC's agreement with (as it so happened) MU, which permitted LCC's successful diploma students to earn credits towards and progress to MU's degree programmes, was sufficient to constitute it a college of MU. The F-tT found that only a very small percentage of the thousands of LCC students did in fact progress to an MU degree course and for that reason it could not be considered a college of MU. There was a much greater disparity in *LCC* than here between the numbers of students who were, and who were not, undertaking courses which might lead to an MU degree. There

is also a difference from both this case and *SFM* in that although LCC provided the tuition for the diploma it did not teach any of the degree courses. The premises from which LCC operated were not remote from MU and some LCC students used the MU library and other MU campus facilities, but until they had progressed to a degree course they were not, and were not treated as, members of the University. The decision was upheld by this tribunal, but on rather different grounds with which we shall deal later.

43. In *SFM* the VAT and Duties Tribunal introduced the concept of the "fundamental purpose" of the institution which was advancing the argument that it was a college of a university. The "fundamental purpose" to be identified, it said, is that of providing university-level education. The same concept featured in the F-tT's decision in *LCC*, and was the subject of further discussion in this tribunal's decision in the same case. The F-tT in this appeal, between [47] and [129], dealt in some detail with the parties' submissions on the point in the course of their examination of *SFM* and *LCC*. We shall need to say more later on this topic.

44. At [133] the F-tT set out their perception of the approach to be adopted:

> "In summary, we find that we are required to apply these principles in evaluating the evidence:
>
> (1) The *SFM* factors may be helpful in determining whether a body is a college of a university, but that list of factors is not exhaustive and factors within that list may not always be relevant;
>
> (2) It is necessary to consider the particular circumstances and specific facts of each individual case, which may involve considering factors other than those listed in *SFM*;
>
> (3) In considering any particular factor, it must be determined whether that factor is compliant with EU law. If it is not, that factor must be put aside and not taken into account in reviewing the evidence;
>
> (4) The 'fundamental purpose' test does not replace the similar objects test, but has something in common with *SFM* factor (ix) (having a similar purpose to that of the university);
>
> (5) There must be at least some degree of integration of the body with the university concerned;
>
> (6) It is inappropriate to follow a 'check list' or 'tick box' approach. The cumulative effect of the relevant factors must be assessed to derive an overall impression, weighing the factors in the balance: some factors may carry more weight than others."

45. Nevertheless, between [137] and [287], the F-tT undertook a lengthy and detailed examination of the evidence available to it in relation to each of the 15 *SFM* factors. We shall refer to certain of their findings as we deal with the parties' arguments; at this point we need to set out only their conclusions:

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

time. [There then followed a summary of the F-tT's findings on the *SFM* factors.]

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

…

[292] We consider that the SACA has to be viewed as a small part of the development of the long-standing relationship between SAE Institute and MU. The extent of that relationship and of the integration of SAE Institute within the MU structure fall to be considered by reference to a much wider range of factors than a single document …

[293] The factors which we consider to carry the greatest weight are:

(1) Status of Associated College, combined from September 2010 with status of Accredited Institution.

(2) Long-term links between SAE Institute and MU. Similar purposes to those of a university, namely the provision of higher education of a university standard.

(3) Courses leading to a degree from MU, such courses being supervised by MU, which regulated their quality standards.

(4) Conferment of degrees by MU, received by SAE students at MU degree ceremonies.

[294] On the basis of the substantial evidence presented to us, and of our findings set out above, we find that SEL as the representative of SAE Institute in the UK is, and has been since 1 May 2009, a college of MU."

HMRC's challenge to the F-tT's decision

46. Although, as we explain below, Mr Singh took issue with some of the details of the F-tT's approach, his main focus was upon one question, namely whether there was sufficient integration of SEL with MU for the former to be capable of falling within the description "college of a university". He acknowledged that his challenge amounted in large part to an attack on the F-tT's findings of fact, or at least on the conclusions it drew from those facts but, he said, the findings he challenged were not supported by the evidence, were based on a misunderstanding or an incorrect interpretation of certain *SFM* factors or are attributable to a failure by the F-tT to take account of pertinent features of the relationship between SEL and MU. The extent of the F-tT's errors was such, Mr Singh said, that the recognised restriction on the interference by an appellate tribunal with findings of fact was overcome, and it was not only legitimate but necessary for this tribunal to remake the decision.

47. For that proposition he relied upon the observations of Lord Carnwath in *Pendragon plc v Revenue and Customs Commissioners* [2015] UKSC 37, [2015] STC 1825 at [50]:

> "… Having found errors of approach … by the First-tier Tribunal, it was appropriate for [the Upper Tribunal] to exercise their power to remake the decision, making such factual and legal judgments as were necessary for the purpose, thereby giving full scope for detailed discussion of the principle and its practical application. Although no doubt paying respect to the factual findings of the First-tier Tribunal, they were not bound by them. They had all the documentation before the First-tier Tribunal, including witness statements, and transcripts of the evidence and submissions, and detailed written and oral submissions…."

48. Mr Singh's primary argument related to the F-tT's failure, as he argued it was, to reach a proper conclusion about what the phrase "college of a university", as it is used in Note (1)(b), implied and to apply that conclusion to the facts before them. Their failure to undertake that task had the consequence that, in view of what was said in *Pendragon*, it is for this tribunal to decide for itself what is meant by the phrase and then to evaluate what are essentially undisputed facts in the light of the conclusion it reaches—in other words, re-make the decision. A proper evaluation, he continued, could lead only to the conclusion that SEL was not a college of MU.

49. The starting point of this argument lay in observations in *LCC*. At [29] Judge Hellier said:

> "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 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 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 that the university plays a part in the life of the body."

50. Although, as Mr Singh accepted, there were differences between this case and *LCC* he argued nevertheless that the requisite features were absent in this case as they were there. The level of integration was insufficient, and was reflected in the recognition by MU of SEL only as an associate college, a term which implied a degree of distance between the two institutions. The requirement is that the institution concerned be a college *of* the university, and not a college associated with it.

51. It is also not enough that the college considers itself to be a college or similar part of the university; there must be mutuality of understanding. In *LCC* Judge Bishopp said, at [92], that

> "There should also, one might think, be some evidence of the recognition by the university of the other institution as a college of itself. I do not see how it can plausibly be argued that an institution such as LCC is, or is to be regarded as, a college of a university which does not acknowledge it as such."

52. There was, Mr Singh said, no live evidence before the F-tT from MU of its perception of SEL's status, and no other evidence which indicated that MU regarded SEL as a college of itself in the statutory sense, rather than a body with some degree of association. Rather, the documentary evidence showed that SAE and MU themselves recognised that their relationship fell short of integration and, indeed, SETL's own position before 2009 was that it was not a college of MU.

53. At a meeting on 26 November 2008, attended by representatives of SETL and HMRC, those attending on behalf of SETL, including Mr Postel, are recorded to have said that SETL did not regard itself as a college of MU, and that MU "would regard SETL as a 'collaborative partner'. The relationship between them was that of two independent partners." The F-tT dealt with this meeting at [175] and [176]. They indicated that they were treating these minutes (it appears that they were prepared by HMRC officers) with some caution in part because, as they put it, there was no evidence that they had been agreed between the parties (by which we presume they meant SETL and HMRC, although we were told that the note had also been sent to MU which had suggested some corrections) and because it had been raised at a late stage in the hearing giving Professor Klich, who was SEL's only witness, no opportunity to deal with it as he gave evidence. The F-tT did not return to the meeting and we deduce that they attached little or no weight to the minutes.

54. Mr Singh's argument was that they were wrong to do so because the note of that meeting is consistent with what Mr Postel is recorded to have said in early 2009 (see para 14 above) namely that all of the relevant agreements with MU had been entered into by SAE Institute in Australia and that SETL had no agreements of its own with MU. SETL's perception of its arm's length relationship with MU, drawn from these documents, was consistent with and borne out by the fact that when it found itself in financial difficulties in early 2009 it did not call upon MU for any assistance and did not even feel it necessary to tell MU of the forthcoming transfer of its UK activities to SEL; it was, Mr Singh said, telling that SEL did not immediately tell MU that it had acquired the UK business. The reason given by Dr Butland for the lack of any need for notification (that MU's agreements were with SAE as a whole) was consistent with the proposition that SEL and SETL before it had no special relationship with MU.

55. Mr Singh referred us also to the minutes of a further meeting which took place on 26 November 2009, and therefore about six months after SEL had become the UK-based trading entity of the SAE group. On this occasion, the meeting was between HMRC officers and officials of MU; no officer of SAE or SEL attended. The minutes, prepared by HMRC, had been submitted to MU for approval, and several corrections had been suggested. The copy note produced to us was of the original draft, and MU's suggested corrections are set out in an email of which we also had a copy. The F-tT said that they treated this note too with caution, because it had no evidence to verify its accuracy and because it was

not clear what the standing of the various MU officials who attended was. The author of the corrective email, Mr David Woodcock, is described as MU's finance manager (rather than director). Mr Singh said that, contrary to the F-tT's understanding, those attending the meeting must be taken to have been senior members of MU's staff: its International Partnerships Manager, Assistant Academic Registrar for Collaborative Programmes and its Collaborative Manager for Finance. Their job titles made it clear that they could speak with authority.

56. They are recorded to have said that MU maintained the "greatest distance" between itself and its partners, including SEL, and when specifically asked whether SEL was a college of MU they would go no further than to say that it was a partner. The note also recorded MU's statement that it had three kinds of what it described as "institutional relationship" with other organisations. The first was with associate colleges, UK-based, and predominantly local to MU. The second was with consortium colleges, referred to as "The MU Higher & Further Education Consortium", working together in order to develop the quality of higher education. The third, described as "other UK partners" are said by the note to be "neither associate nor consortium colleges. SAE is in this category." No correction to that remark was suggested by Mr Woodcock's email.

57. It was not permissible, Mr Singh said, for the F-tT to treat the note of the meeting with caution, as they did. It had been sent to MU to be checked, and although MU had suggested some changes, no comment was made about these passages. They were the best available evidence of MU's perception of the relationship at that time. SEL had not sought to introduce any evidence to counter what was said in the note and the F-tT could not rationally disregard it as they had done. It was true that they had gone on, at [181], to observe that the relationship developed over time, and to refer to other discussions which "eventually resulted in SAE being formally designated as an associated college and ultimately an accredited institution" but it is impossible to understand, Mr Singh argued, how they could conclude, despite the note, that SEL became a college of MU from a date six months before the meeting.

58. The note was, in addition, consistent with a further email sent in February 2010, which the F-tT did not mention, in which Mr Woodcock again told HMRC that all of the agreements between MU and SAE hitherto were with SAE Institute rather than SETL or SEL, and with Dr Butland's August 2012 email (see para 14 above). Mr Singh was able to point to various other communications in the same vein. Similarly, when the Instrument of Accreditation was entered into in September 2010 it, like its predecessors, was an agreement between MU and the SAE Institute, and it is conspicuous that it allowed SAE Institute, and not specifically SEL, to validate various courses.

59. A closer examination of the MoCs showed, Mr Singh continued, that they related merely to the teaching of various courses, were not specific to SETL or SEL and were not even confined to UK-based institutions. The 1998 MoC, for example, provided for the teaching of certain courses by SAE Technology College at campuses in London, Sydney and Munich but it did not apply to the UK campus in Glasgow. The 2003 MoC provided for the validation by MU of an MA award in Creative Media Practice, but in respect of a course which at that time

was offered only at one of SAE's Australian campuses. The 2007 and 2009 memoranda were both between MU and the SAE Institute—in 2007, with an Australian address and in 2009 "SAE World Head Office" in Oxford—and they related to courses which SAE could teach throughout the world, except that certain of the UK campuses, albeit not London, were excluded. The July 2009 Partnership Agreement made no reference to SEL (now the UK trading entity) but again related to the provision by SAE Institute of education leading to MU awards in various centres throughout the world. It was, said Mr Singh, difficult to see how agreements of that kind supported the proposition that SEL was, or was to be regarded as, a college of MU.

60. That SEL was merely an associate college, meaning a college with a cooperative relationship with MU but no more, was also reflected in the fact that it played no part in the governance of MU or *vice versa*, a factor which Judge Bishopp had identified in *LCC* as a crucial consideration which was significant by reason of its absence. It was undisputed that in this case neither played any part in the governance of the other. The F-tT's failure even to consider the point was, Mr Singh said, a material error of law. Had they done so they would have been driven to conclude that the absence of any mutuality of governance was a strong pointer against the proposition that the necessary degree of integration between SEL and MU existed.

61. Mr Singh referred us in addition to an extract from MU's website, as it was in September 2010, containing lists of "Associate Colleges", "Middlesex University Higher and Further Education Consortium" organisations and "Other UK Partners"; SAE appeared only in the last of those categories. It had changed its status by November 2010, when it appeared in the list of "Associate Colleges"; this change alone, Mr Singh said, showed that the F-tT cannot have been right in its conclusion that SEL became a college of MU as early as 1 May 2009. SAE's own publications were consistent with those of MU. A brochure, undated but clearly produced in or after 2010 and addressed to prospective students, contained the statement that SAE Institute (rather than specifically SEL) delivered "degree programmes validated by our global partner Middlesex University" and made no claim that SAE or any of its constituent bodies was a college of MU.

62. Mr Singh went on to criticise some aspects of the F-tT's approach to five of the *SFM* factors. The first was factor 1, the presence or absence of a foundation document establishing the college as part of the university. It is accepted by SEL, and indeed the F-tT found at [139], that there was no document which could be described as a foundation document but just as importantly, said Mr Singh, there was no other form of relationship, whether or not documented, which could be treated as of equivalent value. In fact, until the SACA was entered into in 2011 there were no agreements between MU and the SAE group which sought to establish a particular relationship between MU and any UK-based SAE entity which was relevant to this factor. Even so, SEL's own witness, Professor Klich, accepted (contrary to what was set out at clause 12 of the SACA—see para 25 above) that the SACA was a largely administrative measure and that it did not confer any new status on SAE or on SEL; rather, as he put it in his witness statement, "it recognised SAE's status as an associate college and also an institution with accredited status". That perception was borne out by the fact that

in September 2011, after the SACA had been entered into, SAE UK's website merely stated that its courses were validated by MU, and again made no claim that it was a college of MU.

63. The F-tT dealt between [182] and [186] with a further meeting in July 2012 between HMRC and MU, on this occasion represented by Mr Melvyn Keen, MU's Deputy Chief Executive. Again, Mr Singh placed some reliance on the notes of the meeting although the F-tT indicated at [186] that they did not find the note helpful in deciding whether or not SEL was a college of MU. Mr Singh's argument was that they were wrong to discount the note and in particular Mr Keen's observation recorded in it that the SACA was "a fairly bland document which merely repeated what was in the Accreditation Agreement"; thus MU took the same view as Professor Klich, that the SACA did not change SEL's status (and, again, despite what was said at clause 12). The note also showed, from further remarks made by Mr Keen, that MU's motivation for entering into the SACA was its need to generate income to make up for cuts in government grants; it was to receive 7.5% of the revenues generated by SEL from the courses covered by the agreement. The true position, Mr Singh said, was that SAE's UK trading entity had never regarded itself as a college, properly so-called, of MU and MU could not be said to have regarded SEL, in any real sense, as a college of itself. Just as in *LCC*, the agreements documented an arm's length commercial arrangement between MU and SAE.

64. The F-tT had themselves recognised that there was no clearly articulated agreement showing that SEL was, and was accepted by MU as being, a college of MU. At [190] they said:

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

65. That conclusion, said Mr Singh, was impossible to reconcile with what the F-tT had said at [165] and [167], following an analysis of the documents and meetings to which we have referred, and also of the changes to MU's website which, they said, was not kept entirely up to date. At [165] the F-tT observed "that SAE's accredited status was shown in June 2013 … but there is no evidence to show whether or not that status was acknowledged at an earlier stage", and at [167] they observed that "there is no specific evidence to show an effective date for SAE's attainment of Associated College status, despite the recommendation which had been made at the Sydney conference in February 2002". When the material available to the F-tT is properly examined, Mr Singh continued, it becomes clear that there was no evidence within the various agreements that MU regarded SAE or its UK entity for the time being as any kind of college of itself before the SACA in 2011, and even then it was described as no more than an associate college. The only evidence that MU might have considered it an associate college before then came from the website change of November 2010. It

was not permissible to reach the conclusion that it was even an associate college before that date because of its listing in September 2010 as one of MU's "Other UK Partners".

66. It followed, said Mr Singh, that the conclusion at [190] was not one open to the F-tT on the basis of their own analysis of the facts. It represented an error of law in the sense identified by Briggs J in *Megtian Ltd v Revenue and Customs Commissioners* [2010] EWHC 18 (Ch), [2010] STC 840 at [11]:

> "There are numerous authoritative statements of the precise meaning of the concept that a finding of fact involves an error of law when it is based upon non-existent or inadequate evidence. … The question is not whether the finding was right or wrong, whether it was against the weight of the evidence, or whether the appeal court would itself have come to a different view. An error of law may be disclosed by a finding based upon no evidence at all, a finding which, on the evidence, is not capable of being rationally or reasonably justified, a finding which is contradicted by all the evidence, or an inference which is not capable of being reasonably drawn from the findings of primary fact."

67. Moreover, Mr Singh added, even if the FTT was right to find that from 1 May 2009, or some later date, SEL was an associate college of MU that was not enough. The test is not whether there is some sort of association between the college and the university, but whether the college is a college *of* the university. Association implies a relationship short of the integration which the use of the word "of" implies.

68. Mr Singh's next argument was that the F-tT's analysis and conclusion in relation to the third of the *SFM* factors was also flawed. That factor relates to the question whether there is financial dependence of the college upon the university. Burton J refined that factor by observing, at [16], that it might not be necessary for the college to show that it was financially dependent on the university, and that some degree of financial interdependence could be sufficient. The F-tT's conclusion in this case appears at [203]:

> "… SEL needs the involvement of MU in order to provide courses of the appropriate standard in order to attract students to pursue those courses. In our view SEL is financially dependent on MU, as Mrs Hall submitted."

69. As Mrs Hall accepted before us that this factor cannot be determinative, we can take the point shortly. Mr Singh's argument is that the F-tT's conclusion is based upon a fundamental misunderstanding of what is implied by this factor. What the F-tT had focused on was simply the trading relationship between SEL and MU, a relationship which, moreover, benefited MU by reason of the 7.5% share of the student fees which it took, but did not benefit SEL in the same way, true though it was that, without its relationship with MU, it would not be able to offer MU-validated courses. The test, however, is not whether the two organisations are in a financial relationship, but whether there is some intermingling of their financial affairs. Mrs Hall did not seriously challenge that proposition; she merely argued that the F-tT's finding was one open to them.

70. At [207] and [208] the F-tT found that SEL satisfied the fifth of the *SFM* factors, that is it was entitled to some public funding, because its students or some

of them were eligible for and took student loans. Mr Singh's argument was, again, that this conclusion was based upon a misunderstanding: the test is not whether the students receive public funding, but whether the institution claiming to be a college receives direct public funding. As SEL itself accepts, it does not receive any such funding of its own. Thus, according to Mr Singh, the F-tT's conclusion at [288] (set out in part at para 45 above) that "SEL is entitled to public funding" was simply wrong.

71. The eleventh of the SFM factors was put by Burton J, at [17], as "having [the college's] courses supervised by the university, and quality standards regulated by the university." The F-tT's conclusion in respect of this factor appeared at [265]:

> "We are satisfied that, throughout the period covered by SEL's appeals, the degree courses were supervised by MU, which also regulated quality standards either directly, or (after commencement of accreditation) indirectly but with overall supervisory rights in respect of the degree programmes."

72. That conclusion, Mr Singh argued, also did not address the test correctly. It was undisputed that MU did not validate or otherwise supervise the courses SEL offered which did not lead to an MU award; at best, at least before August 2011 and just as in *LCC*, it satisfied itself of the quality of the diploma courses which allowed successful students credit towards the MU degree course on which they might or might not embark. The F-tT's finding also failed to take account of the fact that no more than about 30% of SEL's students were enrolled on degree courses (rather than diploma courses from which they might later progress to a degree course). The supervision or validation by MU of a minority of SEL's courses, as was the position before 2011, could not be taken as an indication that SEL was a college of MU. Regardless of MU's involvement in the courses SEL offered, as Professor Klich put it in his witness statement, SEL retained "the maximum possible autonomy".

73. Factor 12 of those identified in *SFM* relates to the admission of the college's students as members of the university, with university identity cards. Here, Mr Singh said, the evidence showed that only those of SEL's students who were undertaking MU validated programmes and who were registered with MU had any right to use MU facilities; the remaining students could not use them at all. But even those who were permitted to use the facilities could not do so on the same terms as MU's own students. In the students' handbook for the 2004-05 academic year it was made clear that certain facilities would be made available to SEL's students only if resources permitted, and the position remained similar in 2009, when SEL's students had no access to certain services available to MU's own students, did not receive MU identity cards, and could be admitted only to associate membership of MU's students' union. There was no material change in the position of SEL's students throughout the relevant period.

74. The F-tT did not make their conclusions in relation to this factor entirely clear at [273]:

> "We find that students on the degree programmes were, throughout the periods to which the appeals relate, admitted as members of MU, but that they were not provided with MU student identity cards. Instead, they were

> provided with identity cards by SAE Institute; these cards confirmed that the students were studying for the relevant programme leading to a qualification of MU, namely the relevant degree for the particular programme on which they were enrolled. The question of student union membership does not appear to us to be relevant to this SFM factor; further, Professor Klich stated in evidence that MUSU [the students' union] was an entity separate from MU. We accept his evidence on this issue."

75. Mr Singh's particular criticism was that this finding, which the F-tT seem to have treated as a factor supporting SEL's case, not only failed to take account of the differences between the rights granted to SEL's students and MU's own students, but that it also failed to take any account of the fact that only a minority of SEL's students were granted even the reduced rights to use MU facilities.

76. A proper analysis of the facts, Mr Singh concluded, would have shown that there was very little integration, in organisational terms, between MU and SEL. Their relationship extended no further than joint liaison and academic groups, but arrangements of that kind would be necessary between any two independent organisations working in conjunction. A comparison of the facts of this case with those of *SFM* showed that the ties between the university and SFM were much closer than those between MU and SEL. For example, SFM's student prospectus contained a foreword from the university's Vice Chancellor. Here, SEL's prospectus went no further than to mention, and in a footnote at that, that its degrees were validated by MU. The proper conclusion was that the two institutions were collaborative partners in the delivery of certain courses, but that the relationship went no further.

SEL's arguments

77. Mrs Hall began by emphasising that in *Pendragon* Lord Carnwath had made it quite clear that the Upper Tribunal could not re-make a decision of the F-tT unless it was first satisfied that there was a material error of law in that decision. HMRC's attack, however, was based not upon a supposed error of law but upon the proposition that the F-tT could not reasonably have made the findings of fact it did make. It had long been clear, from *Edwards v Bairstow* [1956] AC 14 and the extensive line of authority following it, that if such an attack was to succeed it must be shown that there was no evidence to support the findings, that they were contrary to the evidence, or that they were irrational; but when it was properly analysed HMRC's attack amounts, she said, to nothing more than an attempt to re-argue the case they ran before the F-tT.

78. The restriction was not limited to findings of primary fact, but extended also to the inferential findings reached after a weighing exercise of the kind the F-tT had undertaken in this case. This tribunal must be extremely cautious before interfering with the outcome of an evaluative process of that kind: see, for example, the observations of the Upper Tribunal itself in *Revenue and Customs Commissioners v Arkeley Ltd* [2013] UKUT 393 (TCC) at [28]:

> "Where a decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, that will fall within the class of case in which an appellate court should not reverse the lower tribunal's decision unless it has erred in principle (*Proctor & Gamble*

> *UK v Revenue and Customs Commissioners* [2009] STC 1990, per Jacobs J at [9]–[10]; *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416, per Lord Hoffman at p 2423)."

79. That observation is entirely apposite in this case: the task before the F-tT was to apply an imprecise legal standard to a set of factors which it was for the F-tT to evaluate. Intervention by this tribunal is permissible, Mrs Hall said, only if the F-tT erred in principle; but HMRC do not identify any such error.

80. She laid considerable emphasis on the proposition that the *SFM* factors do not represent a statutory checklist. They were identified by the parties in that case as relevant considerations, but the F-tT were right to say at [133] that it does not follow that they are necessarily relevant or of assistance in other cases, and other factors which did not fall for consideration in that case may assume equal or greater importance in other circumstances. It is plain from what they said at [133] that the F-tT were very conscious that the factors could constitute no more than a guide. Thus Mr Singh's attack on the F-tT's assessment of each factor, even if he was right (which, she said, he was not) was not enough to upset their overall conclusion following the careful balancing exercise they conducted.

81. Mrs Hall did not disagree with Mr Singh's argument that integration is an important consideration but, she said, it is not enough to put the question of integration at the heart of the argument, as he did, and then claim that the F-tT did not deal with it correctly. One of the material considerations which the F-tT set out at [133] was that "There must be at least some degree of integration of the body with the university concerned"; from that it is plain, contrary to Mr Singh's argument, that even though HMRC had not advanced the argument before the F-tT as they do before this tribunal, the F-tT did address the point and had the correct test in the forefront of their minds. Moreover, when it is properly analysed their decision shows that they evaluated the relevant evidence on this point and considered it fully.

82. In any event, even though the degree of integration is a relevant consideration, it is not correct to attach as much weight to it as HMRC seek to do. The same point was addressed in *University of Leicester*, in which Arden LJ made the following observation, at [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 Oxbridge colleges (which are presumably intended to be covered) and the latter is included within the expression 'the university'. In other words, the expression 'of the university' seems to me 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 wherein the body in question has some form of status under the university statutes, for example to present candidates for matriculation."

83. There is nothing inconsistent with that observation in the F-tT's conclusion at [289] (set out at para 45 above). HMRC, however, attack the finding by arguing that it was based on no evidence, was contrary to the evidence, or was for some other reason irrational. But there was a significant volume of evidence before the F-tT, with which they dealt in detail, and summarised at [292] and [293] (also set

out at para 45). The relevant evidence consisted of a letter of 5 March 2002 recording the agreement that SAE was to progress to associate college status; the 2007 MoC, which provided for the establishment of link tutors and the exchange of information between SAE and MU; the evidence of Professor Klich that his conversations with Dr Butland all took place on the basis of a mutual assumption that SAE already had associate college status; his further evidence that he believed that by late 2008 SETL (then the UK entity) was already, "in loose terms", an associate college of MU; the Instrument of Accreditation of September 2010, which authorised SAE to validate, monitor and review various study programmes, an authorisation which was extended in January 2011 to a postgraduate programme; the listing of SAE on MU's website as an Associate College from a date sometime between September and November 2010; and the confirmation of that status in the minutes of a meeting between SAE and MU in July 2011, coupled with a note in the minutes that the term "Associated College" should be used in further agreements between the two organisations.

84. All of those events culminated in the SACA of August 2011, the title of which (Special Associate College Agreement) spoke for itself. The specific statements in its recitals that it "builds upon the existing status of SAE-UK as a Middlesex University Associate College", and that its purpose was "to further strengthen the degree of collaboration and interdependency in the United Kingdom, and to designate a higher level of integration of SAE-UK's operations with those of Middlesex University" clearly spoke of an existing state of affairs. Later evidence included a letter written by Dr Butland in January 2012 to HMRC in which he confirmed that MU had "consistently treated SAE Institute in the United Kingdom as an associated college since the first partnership agreements … SAE Institute is a prestigious and long-standing associate college of MU"; and the email sent by Dr Butland in August 2012 in answer to questions raised by HMRC in which he again confirmed that SAE was an Associate College.

85. The F-tT referred to all of those features of the evidence and it is plain, said Mrs Hall, that they contributed to their conclusion that there was sufficient integration of SEL with MU. This evidence also answered HMRC's arguments about perception; it made it perfectly clear that unlike in *LCC*, SEL and MU had a common understanding of SEL's status as a college of MU.

86. The F-tT dealt with HMRC's argument that the term "associate college" denotes a degree of distance between the college and the university at [293]. They coupled SEL's position as an associate college with its status as an accredited institution and identified that combination as one of the factors of greatest importance. They were right to do so; the evidence clearly showed that accreditation was only rarely awarded to MU's partner organisations and the combination of associate collegiate status and accreditation demonstrated MU's high level of confidence in SEL as an educational institution. The addition of "associate" to "college" was immaterial; the question was whether SEL was a college of MU, not whether it was a particular type of college. In any event, SEL's VAT status was determined by the true nature of the relationship between it and MU, and not by the label the parties had chosen to attach to it.

87. HMRC had attempted, in their skeleton argument and orally, to advance the proposition that the fact that MU's agreements were concluded with SAE's global body and included provisions relating to the delivery of courses worldwide was in some way incompatible with the status of SEL as a college of MU. That argument could not be reconciled with the analysis which the F-tT conducted and whose result was recorded by them as follows:

> "[173] … our interpretation of the results of the negotiations is that they were intended to result in legal obligations being undertaken by whichever was the SAE entity operating in the jurisdiction concerned, despite the direct commitment being between the 'umbrella organisation' and MU. As a result, we find that the result of the negotiations between SAE Institute and MU was that first SETL, and subsequently SEL, became bound by the terms of the various agreements between SAE and MU so far as operations within the UK were concerned. We also find that the negotiations between SAE and MU were intended to have general international effect, with the arrangements for any particular jurisdiction binding the particular operating subsidiary in that country or area …
>
> [174] In *HIBT* at [15] and the relevant footnote, the VAT and Duties Tribunal did not attach any significance to the fact that the college (HIBT) was described as having been founded in 2000, even though this statement appeared to apply to a previous legal entity rather than HIBT. We interpret the Tribunal's view as being that the change in legal entity was not significant and that continuity was assumed as between predecessor and successor companies. In the same way, we accept that SEL is now covered by the negotiations generally made in the name of 'SAE Institute', and that previously the UK entity covered by the SAE Institute's negotiations was SETL."

88. The reference to *HIBT* is to *HIBT Ltd v HMRC* (2006, VAT Decision 19978).

89. Mr Singh's argument that the question whether there is any element of shared governance is crucial is simply wrong. Although it was a factor identified by Judge Bishopp in *LCC*, he did not describe it as crucial and Judge Hellier did not refer to it at all. It was not a factor considered in *SFM* or in *HIBT*, the facts of which were similar to those of this case. Perhaps for that reason, HMRC did not argue before the F-tT that it was a material consideration. On the contrary, they argued that the appeal should be decided on the basis of the *SFM* factors, in which shared governance does not feature.

90. Moreover, even though HMRC did not advance the argument before them, the F-tT did address the point. At [156] they said that they had "been provided with a very substantial amount of information" on the topic and between [157] and [162] they set out details of an extensive body of evidence of meetings of various joint working groups, at a senior, governance, level. The various agreements into which the parties entered provided for the establishment of a Joint Liaison Group, meeting at least twice a year, a Steering Group also meeting twice yearly, and for the routine exchange of information. That, said Mrs Hall, was ample evidence of shared governance, and it could not simply be put to one side or treated as no more than the necessary consequence of a commercial relationship, as HMRC had argued.

91. There was a great deal of evidence before the F-tT relating to the provision by SEL of tuition which led to an award by MU. It was that evidence which was a clear indication that the circumstances of this case were much closer to those of *SFM* than to those of *LCC*. From August 2011, the only courses offered by SEL which did not lead to an MU award were the "taster" courses; over 90% of its courses carried MU credits which did or could lead to the award of the degree. Unlike LCC, SEL was itself authorised by MU to validate certain courses. SEL's successful students, like those of SFM, attended graduation ceremonies of the university; by contrast, LCC's students did not unless they had first transferred to, and become students of, MU, whereupon they ceased to be LCC's students.

92. HMRC's submissions about financial dependence, or interdependence, seek to advance an argument which was not pursued before the F-tT and which, in the light of *MDDP*, is unsustainable. In that case the Court made it clear, in para 1 of the *dispositif*, that it was not permissible to discriminate against commercial bodies which have financial independence. Thus the point is not critical, but even though it was not advanced before them the F-tT dealt with it. Their conclusion, at [203] (see para 68 above) was one they were entitled to reach and it was a factor they could properly take into account in reaching their overall conclusion that SEL was a college of MU.

93. Similarly, the F-tT were entitled to find at [207] that SEL did receive some public funding. There was no basis for HMRC's argument that the funding in question had to be direct, rather than by way of support to SEL's students in the form of loans. Moreover, the F-tT did not misunderstand the extent and manner in which SEL received government funding. The finding was one which it was open to the F-tT to make, though again it was not critical to their overall conclusion.

94. HMRC's arguments about the admission of SEL's students to MU are also misconceived. The F-tT considered the point in considerable detail between [234] and [257] and came to conclusions which HMRC now seek to challenge on no stronger ground than that the F-tT ought to have attached more weight to the position of non-degree students. The question is not, however, whether the F-tT could have come to a different conclusion, but whether the conclusion to which they actually came was justified by the evidence. Even HMRC do not, because they cannot, argue that it was not. In any event, this factor too was not critical to the F-tT's conclusions.

95. It was important, Mrs Hall added, to bear in mind what is the objective of the PVD and the UK's implementation of the educational exemption. The aim is to relieve those receiving university education of the burden of paying VAT. It is apparent from art 132.1(i) that the Directive's aim is to include within the scope of the exemption not only bodies governed by public law which provide university education, but also other organisations with similar objects. UK universities, although not bodies governed by public law, are (as was common ground) to be treated in an equivalent manner. The UK's implementation of the Directive should be construed in a conforming manner: here, as HMRC accept, SEL did provide university standard education in collaboration with MU. The two organisations had similar objects and it was clear that the objective of the

Directive was to ensure that organisations such as SEL came within the scope of the exemption.

96. The manner in which university education is delivered has changed significantly over recent years, and the tribunal should take that fact into account when construing already imprecise legislation. The legislation does not, for example, define a "university" yet it is well known that universities within the UK differ in their structure and constitution. It is also apparent from perusal of the relevant authorities that the relationships between universities and their constituent colleges, or colleges in a position similar to SEL, differ in many respects. If, however, the legislation is interpreted purposively it is apparent that the Directive's aim is to include within the exemption university education, properly so-called, delivered by organisations such as SEL. We should approach the interpretation and application of the UK's domestic legislation with that aim in mind.

Discussion

97. We begin with Mrs Hall's argument that a conforming interpretation of the legislation is required. A similar argument was touched upon by Burton J in *SDM* at [12] and, although he did not expressly say so, he must have conducted his examination of the *SFM* factors with the provisions of the Directive in mind. However, his analysis of the European law impact, which was in any event somewhat inconclusive, has since been overtaken by the judgment of the CJEU in *MDDP* and by what was said by the Court of Appeal in *FBT*.

98. We do not need to examine *MDDP* in this decision because in *FBT* Arden LJ, after setting out the European and domestic legislation, helpfully provided a succinct summary of the principles to be derived from the judgment, a summary which we gratefully adopt:

> "[4] The relevant decision of the CJEU is … *MDDP* …. Polish law gave a general exemption from all supplies of education. This case concerned a reference from the Supreme Administrative Court of Poland for a preliminary ruling on the questions (1) whether a commercial body (which did not wish to benefit from the education exemption) was required to be excluded from the education exemption if it was profit-making and (2) whether it could still deduct input tax if the exemption was non-EU law compliant. Question (2) is not relevant to this appeal. Question (1) is, however, relevant because FBT is a profit-making enterprise.
>
> [5] Any exemption had to be construed strictly. It had also to comply with the doctrine of neutrality: [25].
>
> [6] The purpose of the exemption was to facilitate access to educational services: [26].
>
> [7] A profit-making enterprise could still meet the conditions for the exemption, unless the member state had chosen to use the option in Article 133 to exclude profit-making entities: [27]- [29].
>
> [8] The PVD did not permit member states to give a general exemption for all supplies of educational services without regard to the objects pursued by the non-public organisation providing the service: [35], [39]. To qualify for the exemption, the body in question needed to be recognised by the

> member state as a body having objects which were similar to those of a body governed by public law having such as their aim (see Article 132.1(i)): [35]. (The word 'such' refers back to 'the provision of children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto'). I will call this 'the PVD supplier condition'.
>
> [9] Each member state had to lay down conditions for this purpose, to the extent that the conditions were not specified in Article 133.1(i) . However, member states had a discretion as to what those conditions were (citing C-498/03 *Kingscrest Associates Ltd v Customs and Excise Commissioners* [2005] STC 1547 at [49] and [51], and C-174/11 *Steglitz v Zimmerman* at [26]): [37].
>
> [10] National courts had to determine whether national law imposed EU law-compliant conditions (*Kingscrest* at [52]). The conditions had to comply with EU law principles, including the principle of fiscal neutrality: [38]. The national courts have to compare the activities of the person whose entitlement to the exemption is in issue with those of bodies who (1) are of the member state, (2) are governed by its public law and (3) provide educational services (see [54])."

99. The first question in *FBT* was whether a provider of university courses is entitled to the education exemption in the same way as a university even if it does not come within the domestic exempting provision. In essence, the question was whether art 132 has direct effect even though, as Arden LJ recorded, it had not been argued in the F-tT or in this tribunal that there was any incompatibility between Note (1)(b) and arts 131 and 132 of the PVD. That is also not the way in which SEL put its case before us, although there is some parallel.

100. FBT had been accredited by the University of Wales, and its accreditation entitled it to prepare and examine candidates for the university's degrees. The F-tT in that case found that FBT provided a university education, and that finding was not challenged. What was challenged was the F-tT's further finding that FBT was not a college of the university since it was insufficiently integrated with it. The F-tT and, on appeal, this tribunal had determined that issue by reference to the *SFM* factors. The most important findings of fact were that the provision of university education represented only a minor part of FBT's activities—Morgan J thought that an important factor since, in his view, an organisation such as FBT could not be a partially eligible body—that it had only a short-term commercial relationship with the university, and that the link between the college and the university was held out to students as being no more than one of partnership.

101. Arden LJ summarised the arguments and her conclusions on this point as follows:

> "[18] In a nutshell FBT … contends that, to the extent that it supplied the same service as a university, it should be treated for the purposes of VAT in the same way (relying on the EU principle of fiscal neutrality). Furthermore, contends FBT, Note (1)(b) in Group 6 of Schedule 9 does not comply with the EU principle of legal certainty because it does not lay down the conditions which an institution has to satisfy to be treated in the same way as a university.

> [19] FBT contends that the domestic legislation is inconsistent with the exemption as interpreted by the CJEU in *MDDP*. The exemption had to comply with the principle of fiscal neutrality. Conditions for exemption had also to be laid down by the member state. The question whether a person is entitled to the education exemption is an objective one, to be determined if necessary by the court. Here the UK VAT law failed to meet these principles and so FBT is entitled to the education exemption.
>
> [20] The respondent, … ("HMRC") … does not dispute the application of the EU law principles that FBT relies on but contends that in this context they lead to a different result. Fiscal neutrality means not just that the service provided (university education) is the same but also that the suppliers have similar objects for the purposes of Article 132.1(i). As to that, the PVD gives member states power to determine whether a body is similar to a body governed by public law having the objects required by Article 132.1(i). The UK has exercised that power in an EU law-compliant manner.
>
> [21] In my judgment, for the detailed reasons given below, the jurisprudence of the CJEU supports HMRC's argument. Even though it is supplying educational services, FBT fails to meet the EU law-compliant supplier condition for the education exemption. FBT has fundamentally misunderstood the statutory scheme which in brief is that, in the case of university education, the UK has exercised a member state option to recognise non-public law bodies carrying on qualifying educational activities to a small group consisting of college and halls of universities which are integrated into the university's activities. This appeal must therefore be dismissed."

102. We think the phrase "the UK has exercised a member state option to recognise non-public law bodies …" was intended to be "the UK has exercised a member state option to limit the recognition of non-public law bodies …". In other words, the UK's restriction of the educational exemption to those organisations identified in Note (1) as eligible bodies does not offend the aims of the PVD, and it is necessary for the terms of Note (1)(b) to be interpreted as they stand, and without any gloss supposedly derived from the Directive.

103. Before leaving *FBT* we should add that at [33] Arden LJ rejected Morgan J's view that an organisation such as FBT or, in this case, SEL could not be exempt in respect of only some of its activities. In so far as SEL's (or SAE Institute's) other activities might have been a factor, we accordingly leave them to one side.

104. As we have said, Mr Singh acknowledged that much of HMRC's challenge to the F-tT's decision is, in substance, an attack on their findings of fact. The recognised restriction on such attacks was, as Mrs Hall said, dealt with by this tribunal in *Arkeley* and was also succinctly and forcefully restated by Lewison LJ in *Fage UK Limited and another v Chobani UK Limited* [2014] EWCA Civ 5 at [114]:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them."

105. In a case such as this, in which it has rightly been said that the outcome depends upon the evaluation of evidence by reference to an imprecise legal test, that warning is of particular importance. In *Pendragon*, between [47] and [50], Lord Carnwath examined the circumstances in which, exceptionally rather than routinely, this tribunal might legitimately interfere with findings of fact by the F-tT. He made it clear at [50] that its power to do so was dependent upon its finding what he described as "errors of approach" in the F-tT's decision; but once such errors were found "it was appropriate for [the Upper Tribunal] to exercise their power to remake the decision, making such factual and legal judgments as were necessary for the purpose." That was because, as he said at [48] "the Upper Tribunal is itself a specialist tribunal, with the function of ensuring that First-tier Tribunals adopt a consistent approach in the determination of questions of principle which arise under the particular statutory scheme in question." He also made it clear, at [50], that an "error of approach" might not amount to an error of law in the strictest sense of the term.

106. It follows therefore that if we are to allow this appeal we must first find an error of approach by the F-tT. For the reasons which follow we are satisfied that there was such an error and that it is appropriate for us to intervene.

107. It is necessary to start with an understanding of what is meant by the expression "college of a university". Peter Gibson LJ made some observations on the matter at [36] in his judgment in *University of Leicester*:

> "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."

108. The examples which followed related to universities of a traditional collegiate structure, but we think they were merely examples and not intended to be exhaustive of the possible relationships between university and a putative college. We agree with Mrs Hall that more comprehensive guidance can be derived from what was said by Arden LJ at [55] (see para 82 above); as she said, at [56], there are "many variations in the organisation of universities in the United Kingdom". Moreover, had the draftsman intended to restrict the scope of the exemption to institutions of a traditional collegiate university he could easily have said so. Therefore, although the statutory wording is easier to apply to the institutions of a university of that kind than to others, it cannot be a requirement that the putative college is merely one of several making up the university; a greater flexibility of approach is required.

109. In our view it is necessary to adopt a multi-step evaluation of the relationship between the two bodies. The first step is to ascertain whether the university and the college had a common understanding of it. If they did not, the enquiry is likely to end there. Second, the common understanding must be that they are in a relationship of university and college, and not some different relationship, such as partnership. As Judge Bishopp said in *LCC*, it is difficult if not impossible to see how an institution could properly be considered a college of a university which does not recognise it as such. The same would, of course, be true of a college which does not consider itself to be part of a university. The third

step is that one must examine whether the relationship is sufficiently close that the college is a college "of" the university – this was the question in *SFM* and it is only at this point that most, though not all, of the *SFM* factors become relevant: the evidence in that case showed that the university and the college had a common understanding, but that understanding alone did not answer the question whether the statutory test was satisfied.

110. The last step is to consider whether the college satisfies the requirement that it supplies education; this step is reflected in the ninth of the *SFM* factors, which is derived from the art 132.1(i) requirement that the college must have "similar objects" to those of the university; absent similar objects it would not satisfy the supply test (which is why the union failed in *University of Leicester*). Whether, as has been said in other cases, the "similar objects" requirement is met only if the "fundamental purpose" of the college is to supply university-level education is not an issue we need to decide in this case since it is accepted that SEL does satisfy this part of the test, however it is articulated. We merely add that if it is right, as Arden LJ said in *FBT* at [33], that an institution may be a college of a university without making exclusively exempt supplies "fundamental purpose" may overstate what must be shown.

111. The error into which the F-tT fell, in our judgment, is that they did not undertake the first and second of the steps we have identified correctly.

112. It is clear that the F-tT attempted, from rather sparse evidence, to determine whether MU's perception of the relationship between it and SEL coincided with SEL's perception, even though they did not put the exercise they were undertaking in quite that way. It is true that the FtT's task was made more difficult because no representative of MU gave evidence. This can be contrasted with the position in *SFM* where a representative of the university gave evidence from which it was clear that SFM and the University had a common understanding of their relationship. In this case, the F-tT were confined to limited documentary evidence in seeking to ascertain MU's understanding of its relationship with SEL.

113. We agree with Mr Singh that the F-tT's conclusion, that there was a common understanding that SEL became a college of MU from the moment it took over SAE's UK business in May 2009, is difficult to sustain in the light of the documentary evidence and indeed the F-tT's own analysis of it at [165] and [167], in which they discussed SAE Institute's status and concluded by observing that "there is no specific evidence to show an effective date for SAE's attainment of Associated College status, despite the recommendation which had been made at the Sydney conference in February 2002." It is plain from its context that the reference to SAE in that observation was to the worldwide organisation. We also agree with Mr Singh that it was not appropriate for the F-tT to treat the minutes of the meeting on 26 November 2009 (see para 55 above) with caution; they were the best available evidence of MU's perception at the time.

114. Against that background we have encountered some difficulties with para [190] of the F-tT's decision which, for convenience, we repeat:

> "We find that there is some acknowledgment by MU of the status of SAE Institute, and that the entity in the UK which carries that status is SEL. The extent of that acknowledgment is limited, in that SAE has been designated

> since 2010 (or possibly earlier) as an Associate College, and since September 2010 as an accredited institution. On the basis of the evidence, we find on the balance of probabilities that SAE Institute was regarded informally by MU as an associated college as early as 1 May 2009, the date on which SEL acquired the business of SETL."

115. The first of the difficulties is that the F-tT do not seem to have distinguished between MU's relationship with SAE Institute and its relationship with SEL. As we have indicated, Mr Singh made a good deal of the fact that, before the SACA, all of MU's relevant agreements were with SAE Institute rather than with SETL or SEL. Even the SACA, albeit it referred specifically to SEL, was nevertheless an agreement to which SAE Institute was a party. We agree with him that this is an important point. There is no doubt, and Mr Singh did not argue otherwise, that MU and SAE Institute have, and for many years have had, a close working relationship and that MU regards SAE Institute as a body which is capable of providing university level education to the extent that MU considers it competent not only to provide but also to validate courses which lead to MU awards: these were features of the case which the F-tT found to be of great importance. It is, however, perfectly clear that MU did not regard SAE Institute as a college of itself, and the nature of their relationship was such that it could not realistically have done so. All the evidence showed that SAE Institute had a wholly independent existence, and that it had entered into agreements similar to those it had with MU with other universities throughout the world. It plainly did so on its own behalf, and regardless of its relationship with MU, since there was no evidence to suggest that MU was affected by or in a position to influence SAE Institute's relationships with other educational establishments. Whether one calls the relationship between MU and SAE Institute partnership or association, it is clear that there was no element of integration between them: they were wholly separate bodies. Thus if "Associate College" is an apt description, it must mean a college with an association with the university but without any element of integration with it.

116. The second difficulty follows from the first: if, as we have said, SAE Institute cannot have been a college of MU, and SEL carried the same status within the UK, it too cannot have been a college of MU. In other words if, as the F-tT said in the concluding sentence of [190], SAE Institute was regarded as an associated college, the association can have been no closer than that of collaboration or partnership. It is, in our view, a considerable leap from such an association to the conclusion that SAE Institute's UK arm was a college of MU in the statutory sense.

117. The third difficulty also lies in the concluding sentence of the paragraph, which contains a proposition for which there was no evidence, and which is in any event inconsistent with what precedes it. The question which has to be answered is whether SEL, the body whose liability to account for VAT on its supplies is in issue, was recognised by MU as a college of itself from 1 May 2009, and not whether SAE Institute's UK trading arm, whatever form it might take at any given time, was a college from that date. The F-tT seem to have overlooked the fact that SEL is a corporate body of whose existence MU was unaware until some time after 1 May 2009; it is in our judgment impossible to say, in those circumstances,

that there was a common understanding that SEL became a college of MU immediately it took over SETL's business.

118. It might be said – indeed Mrs Hall does say – that the F-tT's finding at [190] is a finding of fact ordinarily immune from challenge on appeal. In our view, however, it must be regarded as perverse because it is contrary to the available evidence that in November 2009 MU did not perceive of SEL as a college of itself and, for the reasons we have given, its logic is flawed. Nevertheless, we do not need to dispose of the appeal on this basis because of what follows about the second of the steps we have identified. But before coming to a discussion of that step we need to consider the relevance of the SACA in August 2011.

119. We begin by observing that the first of the *SFM* factors is whether or not there is a foundation document establishing the college as part of the university, and it is the only one of the factors relevant to the first and second steps in the enquiry as we have identified them. It is likely that a foundation document would put the status of the putative college beyond doubt, but it is common ground that there was none in this case, and that the closest one comes to such a document is the SACA. We have already made the point that it was not professionally drafted, and we do not read too much into infelicities and omissions. It recited that it "builds upon the existing status of SAE-UK as a Middlesex University Associate College", and at clause 4 it indicated that its purpose was to promote "a higher level of integration of SAE-UK operations with those of Middlesex University". Although those provisions, and use of the phrase "the new status of the MU-SAE relationship" in clause 12, suggest that the SACA was intended to change SEL's status the oral and some other evidence, as the F-tT recorded, were to the effect that the SACA did not effect any change of the relationship but merely reflected what was the existing position.

120. We do not, we think, need to resolve for ourselves that conflict in the evidence because of the F-tT's failure, as we perceive it, to undertake the second of the steps we have identified. What they omitted to do was to undertake an analysis of what was meant by the use of the term "associate college". We emphasise, in deference to Mrs Hall's argument, that the label is unimportant in itself; the object of the enquiry must be the character of the relationship, albeit the label the parties choose to apply to it may represent some evidence of their own perception. It is, for example, of some though not decisive significance that SAE Institute was referred to as an associate college yet, for the reasons we have given, could not be regarded as a college of MU in the statutory sense.

121. Clause 4 of the SACA referred to a greater integration of SEL's operations with those of MU; it did not refer to a higher level, or indeed any level, of integration of SEL as an institution with MU. At clause 5 it required SEL "to collaborate only with Middlesex University to the exclusion of other possible partners in higher education in the United Kingdom", suggesting that MU considered that its relationship with SEL was one of collaboration too. We cannot read those words in a manner which implies that MU regarded SEL as a college of itself; the word "collaborate" is indicative of a relationship similar to partnership between two independent organisations. As we have said, we accept that the words used in the SACA may not have the precise meanings which might be

adopted by a legal draftsman, but in our judgment, even with that caveat, they do not support the proposition that the document was intended to constitute SEL as a college of the university, or to reflect its existing status as such a college.

122. In several of the minutes and notes to which we have referred it was said that MU looked upon SAE informally as an associated college. Even if one were to treat references to SAE as references to SEL, we have considerable doubt whether an informal regard by a university of another institution as an associated college could ever satisfy the statutory test. It is true, as we already said, that the test is imprecise and that it must take account of constitutional structures which differ from one university to another. But one cannot lose sight of the fact that the expression used is "college of a university"; it is in our view plain that something more than an informally recognised association is required.

123. At [189] the F-tT referred to a newspaper article describing a visit by the Duke of York to Oxford to open SAE Institute's world headquarters. It recorded that MU's Vice Chancellor had said that "SAE Institute in the UK is a valued Associate College awarding Middlesex University degrees, and we take pride in the achievements of this long-term partnership". The F-tT evidently took the reference to "associate college" as one supporting the proposition that SEL was a college of MU. However, in our view, if the newspaper report is to be treated as reliable evidence it is the reference to "this long-term partnership" which is of greater importance. In *FBT*, at [15], Arden LJ referred to a finding of the F-tT that the link between FBT and the university was held out as one of partnership, and recorded that the F-tT had "concluded that it was not consistent with being a college or hall of a university that the parties were working in partnership". She did not, because it was unnecessary for the decision in that case to do so, go on to indicate whether she agreed with the F-tT on that point, but we nevertheless read that paragraph of her judgment as an indication that she did so agree. We certainly do so ourselves. The relationship between a university and a constituent college is not, as we perceive it, one of partnership. Rather, as Arden LJ herself said in *University of Leicester* at [56], the university is a kind of umbrella organisation, implying that it and the college have rather different statuses.

124. Some evidence of MU's perception of the meaning of "associate college" can however be gleaned from a handbook published by it in 2007-08, of which a copy was produced to us and was, we understand, before the F-tT. It deals, among other things, with the "Principles and Criteria for Assessing Associate College proposals" and it includes the following passage:

> "The University and Associate College shall remain independent, each with its own Governing Body and Academic Board and separate, but compatible, missions and values; staff of the Associate College shall be employed by the College under the College's conditions of employment."

125. Similar provisions appear in a revised version of the handbook published in 2012. Both versions refer to "collaboration" between MU and a "partner institution", and we do not find in them, or in any of the other material produced to us, any evidence that MU regarded SEL or, before it, SETL, as a college of itself, rather than as an independent institution with which MU had collaborative arrangements. We accept that, as Burton J said in *SFM* at [21], an associated or

affiliated college is not ruled out, but in our judgment the kind of independence to which MU's Handbook refers, and the relationship of partnership between MU and SAE Institute and, within the UK, SEL, which is all the evidence supports, are inconsistent with the proposition that MU considered SEL to be a college of itself.

126. It follows that the F-tT did not address the statutory test and that in consequence they misdirected themselves about the proper analysis of the facts. In our judgment the only realistic conclusion from the evidence is that MU and SEL had a relationship which fell short of constituting the latter a college of the former.

127. For those reasons HMRC's appeal is allowed and the F-tT's decision is set aside.

128. We were not addressed on the consequences of our so concluding, and in particular on the action, if any, we should take in relation to the penalties. We invite further submissions, in writing, within 14 days after the release of this decision.

Judge Colin Bishopp
Judge Guy Brannan

Upper Tribunal Judges

Release date: 25 April 2016