[2019] UKUT 0286 (TCC)

Appeal number: UT/2018/0038

VAT – whether construction of cricket pavilion by cricket club zero-rated – whether cricket club a "charity" for VAT purposes – whether pavilion had intended use as a village hall or similarly in providing social or recreational facilities for a local community – whether EU law principles of equal treatment or fiscal neutrality apply

VATA 1994 Sch 8 Group 5 Item 2 and Note 6 – FA 2010 Sch 6

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

EYNSHAM CRICKET CLUB

Appellant

- and -

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

TRIBUNAL: Mr Justice Nugee
Judge Timothy Herrington

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 18, 19 and 20 June 2019

John Brinsmead-Stockham, Counsel, instructed by Hogan Lovells International LLP, Solicitors, for the Appellant

Howard Watkinson, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Eynsham Cricket Club (**"ECC"** or the **"Club"**) appeals against a decision by the First-tier Tribunal (**"FTT"**) (Judge Jonathan Richards and Susan Lousada) released, following revisions on review, on 29 December 2017 (the **"Decision"**). The FTT dismissed ECC's appeal against a decision by the Respondents (**"HMRC"**) dated 21 May 2015 that ECC was not entitled to treat construction services supplied to them for the building of a cricket pavilion as zero-rated under the terms of Value Added Tax Act 1994 (**"VATA 1994"**) Schedule 8 Group 5 Item 2.

2. The provision in VATA mentioned above provides for zero-rating to apply to the supply in the course of the construction of a building intended for use only for a "relevant charitable purpose." In order to obtain the benefit of that provision, the requirements of the definition of "relevant charitable purpose" contained in Note 6 to Group 5 of Schedule 8 VATA had to be met, which meant that it had to be found that the pavilion was intended to be used "by a charity" either "otherwise than in the course or furtherance of a business" or "as a village hall or similarly in providing social or recreational facilities for a local community."

3. ECC was, at all material times, a registered Community Amateur Sports Club (**"CASC"**) within the meaning of the Corporation Tax Act 2010 (**"CTA 2010"**).

4. There were four issues before the FTT as follows:

Issue 1: At the relevant time, was ECC a "charity" for the purposes of VATA Schedule 8, Group 5, Note 6, which applies the definition contained in the Finance Act 2010 (**"FA 2010"**) Schedule 6?

This issue was broken down into the following three sub-issues:

Issue 1(a): was ECC "established for charitable purposes only" within the terms of FA 2010 Schedule 6 paragraph 1(1)(a)?

Issue 1(b): did s 6 of the Charities Act 2011 (**"CA 2011"**), which provides that a CASC established for charitable purposes cannot be a charity under the general law of charities, prevent ECC from being "established for charitable purposes only" under FA 2010 Schedule 6 paragraph 1(1)(a)? and

Issue 1(c): did ECC satisfy the "registration condition" in FA 2010 Schedule 6 paragraph 3, that is did it comply with "any requirement to be registered" under CA 2011?

Issue 2: Was the new pavilion intended for use solely by ECC "otherwise than in the course or furtherance of a business" for the purposes of VATA Schedule 8, Group 5, Note 6(a)?

Issue 3: Was the new pavilion intended for use solely by ECC as "a village hall or similarly in providing social or recreational facilities for a local community" for the purposes of VATA 1994 Schedule 8, Group 5, Note 6(b)?

Issue 4: If ECC was not entitled to treat the services supplied to it in connection with the construction of the new pavilion as zero-rated for UK VAT purposes, then would this constitute a breach of the EU law principles of: (1) equal treatment; and/or (2) fiscal neutrality?

5. The FTT determined Issues 1(b), 1(c) and 3 in favour of ECC. However, HMRC succeeded on Issues 1(a), 2 and 4. The basis of the FTT's finding that ECC was not "established for charitable purposes only" was that although it was established for a charitable purpose, namely "the advancement of amateur sport" within the terms of s 3(1)(g) CA 2011 it was also established for a subsidiary purpose of providing social facilities to the residents of Eynsham. The FTT found that such a subsidiary purpose was not a charitable purpose within s 3 CA 2011 and consequently ECC was not "established for charitable purposes only" for the purposes of Schedule 6 FA 2010.

6. ECC's success before the FTT in respect of Issues 1(b), 1(c), and 3 meant that if ECC had also succeeded in respect of Issue 1(a) then ECC's appeal would have been allowed, in full, on the basis of the VAT analysis as a matter of UK law (i.e. without ECC having to rely on the EU law arguments in Issue 4).

7. On 23 April 2018 Judge Herrington granted ECC permission to appeal on the papers to the Upper Tribunal in respect of Issue 1(a) and Issue 4.

8. In its Response to ECC's application for permission to appeal, dated 19 June 2018, HMRC conceded that the sole basis on which the FTT had dismissed ECC's appeal, that is its decision in respect of Issue 1(a), was wrong in law. Following a case management hearing which was held on 22 January 2019 to consider the effect of HMRC's concession, the Upper Tribunal (Judge Herrington) issued a decision on 18 February 2019 ([2019] UKUT 0047 (TCC)) in which the Upper Tribunal allowed ECC's appeal in respect of Issue 1(a) and determined that issue in ECC's favour as a preliminary issue before the Upper Tribunal.

9. The effect of that decision was that ECC had effectively succeeded in its appeal before the FTT. However, as HMRC in its Response sought to challenge the FTT's findings in respect of Issue 1(b), Issue 1(c) and Issue 3 HMRC proceeded as the appellants. Therefore, although these proceedings are still formally an appeal by ECC against the Decision, ECC is now regarded, in substance, as the respondent.

10. ECC has not appealed against the FTT's findings on Issue 2. ECC maintains its appeal on Issue 4 and that issue will be relevant if HMRC succeed on any of the FTT's findings which they challenge.

The Facts

11. The FTT made detailed findings of fact at [8] to [45], based on both the witness evidence of Mr Ian Miller, the Chairman of ECC, and the documentary materials before it. So far as relevant to this appeal, we summarise those findings as follows.

12. ECC is a local village cricket club in Oxfordshire. ECC has been registered with HMRC as a CASC since 2003. On 20 February 2012, ECC's existing pavilion was destroyed by fire in a suspected arson attack. After an extensive fundraising effort, ECC engaged a contractor to build a new pavilion. After correspondence between HMRC and ECC, HMRC decided in a letter dated 21 May 2015 that ECC was not entitled to benefit from zero-rating of the relevant construction services which were supplied to it for the building of the new pavilion.

13. At all material times, the constitution of the Club has described its objectives as including the promotion of participation within the local community in healthy recreation by the provision of facilities for the playing of cricket and the promotion of the Club within the local community and within Cricket. It has both playing members and non-playing members.

14. The Club is managed by a General Committee consisting of officials who are elected by members of the Club, most of whom are residents of Eynsham. The Club permits non-members to use the Club's facilities and to attend various events and functions which it organises. Playing members are the only people who are allowed to play cricket for the Club; non-playing members generally choose to become members in order to support the Club in a modest financial way.

15. The pavilion is not open continuously and is generally used only when some event organised by the Club is taking place or if a third party has hired it. The local croquet club has a licence to use the cricket ground and the new pavilion. Saturdays in the cricket season are "sacrosanct" in the sense that since the Club needs to use the pavilion for the match to be played on that day, they would not agree to allow anyone else to hire the pavilion for exclusive use, although a request to use the pavilion on a Saturday alongside the Club could be accommodated subject to that use not interfering with the use of the social area of the Club during the tea interval of the cricket match. Anyone who has ever played cricket will be aware of the importance of the tea interval.

16. Under 9 matches are played on a Friday evening during the cricket season which coincides with "open nights" that the Club organises to encourage the youth of the village to turn up and try cricket or another sport. On those evenings, other games are organised such as table tennis, rounders and football for children and their parents and a barbecue takes place thereafter. The bar in the pavilion is open and table tennis and air-hockey tables are set up in the social area of the pavilion. No one is required to be a member of the Club in order to attend the open nights and, according to Mr Miller's evidence, the open nights provide the residents of Eynsham with an easy way to integrate into village life.

17. Under 11 matches are played on a Thursday evening or on Sundays.

18. In past years, the Club has hosted children's sports camps during school holidays during which the pavilion would be in use. There is also a table tennis club that plays on a table in the social area of the pavilion. In the winter the Club organises an occasional film night for local children that takes place in the pavilion, which is open to both members of the Club and non-members and there are also Christmas and Halloween parties for local children which are also open to both members and non-members. A number of special "whole community" events have also taken place at the Club and the pavilion in past years, such as an annual beer festival to celebrate the end of summer.

19. The Club also makes the pavilion available for hire, the cost being higher for a commercial organisation than for a local resident or Club member. The overwhelming majority of bookings involve the pavilion being used for regular scheduled events that the Club was organising or by the croquet club. However, there were a few occasions each year on which the Club allowed a local business, community group or individual to use the pavilion, for example, for birthday parties or by other sporting or games clubs.

20. As far as finances are concerned, in a typical year the Club's income would be more or less equal to its expenditure and its turnover has always been much less than £50,000 a year. Consequently, it has not been liable to be registered for VAT at any relevant time. The principal source of revenue comes from the bar at the pavilion.

Relevant statutory provisions

Zero-rating of supplies in relation to the construction of a building intended for use for charitable purposes

21. By s 30(2) VATA 1994 a supply of goods or services is zero-rated if the supply is of a description specified in Schedule 8 to VATA 1994. Schedule 8 is divided into a number of Groups. Group 5 of Schedule 8 (**"Group 5"**) is concerned with the construction of buildings. Item 2 of Group 5 so far as relevant provides for zero-rating to apply to:

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

22. Where item 2 applies, item 4 provides for the zero-rating of building materials which are incorporated into the building in question. This means that if item 2 applies both the materials and the builder's construction services are zero-rated.

Charitable purposes

23. Note 6 to Group 5 explains what is meant by a "relevant charitable purpose" in the following terms:

> "(6) Use for a relevant charitable purpose means use by a charity in either or both the following ways, namely—
>
> (a) otherwise than in the course or furtherance of a business;
>
> (b) as a village hall or similarly in providing social or recreational facilities for a local community."

24. Therefore, in order for there to be use for a "relevant charitable purpose", there must be use "by a charity". The relevant definition of "charity" for these purposes is contained in paragraph 1 of Schedule 6 FA 2010, as paragraph 7(d) of that Schedule provides for this definition to apply to, among others, enactments relating to value added tax. We set out the provisions of the definition, so far as relevant, as follows:

> "(1) For the purposes of the enactments to which this Part applies "charity" means a body of persons or trust that—
>
> (a) is established for charitable purposes only,
>
> (b) meets the jurisdiction condition (see paragraph 2),
>
> (c) meets the registration condition (see paragraph 3), and
>
> (d) meets the management condition (see paragraph 4).
>
> …
>
> (3) Sub-paragraphs (1) and (2) are subject to any express provision to the contrary.
>
> (4) For the meaning of "charitable purpose", see section 2 of the Charities Act 2011 (which—
>
> > (a) applies regardless of where the body of persons or trust in question is established, and
> >
> > (b) for this purpose forms part of the law of each part of the United Kingdom (see sections 7 and 8 of that Act))."

25. Following the decision of the Upper Tribunal referred to at [8] above, it is accepted that ECC is established for "charitable purposes only" (the requirement of paragraph 1(1)(a) of Schedule 6 of FA 2010), but there continues to be a dispute as to whether the effect of s 6 of the Charities Act 2011 (**"CA 2011"**), as set out below, means that ECC cannot be regarded as being established for charitable purposes. There also continues to be a dispute as to whether ECC met the "registration condition" in paragraph 1(1)(c) of Schedule 6 of FA 2010.

26. Sections 2 to 5 and s11 CA 2011 deal with the concept of "charitable purpose". We set out the relevant provisions as follows:

> "2 (1) For the purposes of the law of England and Wales, a charitable purpose is a purpose which—
>
> (a) falls within section 3(1), and
>
> (b) is for the public benefit (see section 4).
>
> (2) Any reference in any enactment or document (in whatever terms)—
>
> (a) to charitable purposes, or
>
> (b) to institutions having purposes that are charitable under the law relating to charities in England and Wales,
>
> is to be read in accordance with subsection (1).
>
> (3) Subsection (2) does not apply where the context otherwise requires.
>
> (4) This section is subject to section 11 (which makes special provision for Chapter 2 of this Part onwards).
>
> …
>
> 3 (1) A purpose falls within this subsection if it falls within any of the following descriptions of purposes—
>
> …
>
> (g) the advancement of amateur sport…
>
> (m) any other purposes—
>
> (i) that are not within paragraphs (a) to (l) but are recognised as charitable purposes by virtue of section 5 (recreational and similar trusts, etc) or under the old law,
>
> (2) In subsection (1) …
>
> (d) in paragraph (g), "sport" means sports or games which promote health by involving physical or mental skill or exertion…
>
> 4 (1) In this Act "the public benefit requirement" means the requirement in section 2(1)(b) that a purpose falling within section 3(1) must be for the public benefit if it is to be a charitable purpose.
>
> (2) In determining whether the public benefit requirement is satisfied in relation to any purpose falling within section 3(1), it is not to be presumed that a purpose of a particular description is for the public benefit.

(3) In this Chapter any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.

(4) Subsection (3) is subject to subsection (2).

5 (1) It is charitable (and is to be treated as always having been charitable) to provide, or assist in the provision of, facilities for—

(a) recreation, or

(b) other leisure-time occupation,

if the facilities are provided in the interests of social welfare.

(2) The requirement that the facilities are provided in the interests of social welfare cannot be satisfied if the basic conditions are not met.

(3) The basic conditions are—

(a) that the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended, and

(b) that—

(i) those persons have need of the facilities because of their youth, age, infirmity or disability, poverty, or social and economic circumstances, or

(ii) the facilities are to be available to members of the public at large or to male, or to female, members of the public at large.

(4) Subsection (1) applies in particular to—

(a) the provision of facilities at village halls, community centres and women's institutes, and

(b) the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation,

and extends to the provision of facilities for those purposes by the organising of any activity.

But this is subject to the requirement that the facilities are provided in the interests of social welfare.

(5) Nothing in this section is to be treated as derogating from the public benefit requirement."

The "registration condition"

27. The "registration condition" is dealt with in paragraph 3 of Schedule 6 of FA 2010 and in related provisions of CA 2011. Paragraph 3 of Schedule 6 of FA 2010 provides so far as relevant as follows:

> "(1) A body of persons or trust meets the registration condition if—
>
> (a) in the case of a body of persons or trust that is a charity within the meaning of section 10 of the Charities Act 2011, condition A is met, and
>
> (b) in the case of any other body of persons or trust, condition B is met.
>
> (2) Condition A is that the body of persons or trust has complied with any requirement to be registered in the register of charities kept under section 29 of the Charities Act 2011.
>
> (3) Condition B is that the body of persons or trust has complied with any requirement under the law of a territory outside England and Wales to be registered in a register corresponding to that mentioned in sub-paragraph (2)."

28. Where the body or trust concerned is a UK entity, in considering whether it requires to be registered in the register kept under s 29 CA 2011 the starting point is that it must be a "charity" as defined in that Act.

29. Section 1(1) of CA 2011 defines a charity as follows:

> "(1) For the purposes of the law of England and Wales, "charity" means an institution which—
>
> (a) is established for charitable purposes only, and
>
> (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities."

30. Therefore, a central feature of the definition of a charity under CA 2011 (which is not present in the FA 2010 definition) is whether or not the institution is subject to the control of the High Court.

31. As the FTT found at [59] of the Decision, a charity that falls within s 10 CA 2011 is generally required to be registered.

The "jurisdiction condition" and the "management condition"

32. It is common ground that ECC satisfies both the "jurisdiction condition" and the "management condition" referred to above. For that reason the FTT did not set them out. We think it is nevertheless helpful to refer to them for reasons that will become apparent.

33. The "jurisdiction condition" is dealt with in paragraph 2 of Schedule 6 of FA 2010. This provides so far as relevant as follows:

"(1) A body of persons or trust meets the jurisdiction condition if it falls to be subject to the control of—

(a) a relevant UK court in the exercise of its jurisdiction with respect to charities, or

(b) any other court in the exercise of a corresponding jurisdiction under the law of a relevant territory.

(2) In sub-paragraph 1(a) "a relevant UK court" means–

(a) the High Court

(b) the Court of Session, or

(c) the High Court in Northern Ireland.

(3) In sub-paragraph 1(b) a relevant territory means–

(a) a member State other than the United Kingdom, or

(b) a territory specified in regulations made by the Commissioners for Her Majesty's Revenue and Customs."

34. The "management condition" is dealt with in paragraph 4 of Schedule 6 of FA 2010. This provides so far as relevant as follows:

"(1) A body of persons or trust meets the management condition if its managers are fit and proper persons to be managers of the body or trust."

The exclusion in s 6 of CA 2011

35. Section 6 of CA 2011 contains an exclusion for CASCs (such as the Club) registered under the provisions of CTA 2010 as follows:

"(1) A registered sports club established for charitable purposes is to be treated as not being so established, and accordingly cannot be a charity.

(2) In subsection (1), "registered sports club" means a registered club within the meaning of Chapter 9 of Part 13 of the Corporation Tax Act 2010 (community amateur sports clubs)."

36. As will become apparent, the determination of Issue 1(b) depends on whether ECC can still be a charity within the terms of the definition in FA 2010 notwithstanding the fact that s 6 CA 2011 provides that it cannot, as a CASC, be treated as being established for charitable purposes.

The Decision

37. We summarise the reasoning and conclusions of the FTT on the issues that remain live on this appeal as follows.

Issue 1(b)

38. The FTT concluded that it was possible for ECC to be both a CASC and a charity for the purposes of FA 2010. Its core reasoning was set out at [63] to [66] as follows:

> "63. Central to our reasoning is the conclusion that there are two different definitions of "charity" set out in FA 2010 and in CA 2011 (which we have referred to as a "Finance Act charity" and a "Charities Act charity" respectively) and we will start by explaining the significance of this. The relevance of the definition of a Finance Act charity is that it determines whether particular tax benefits are available. Running in parallel with the concept of a Finance Act charity is the concept of a Charities Act charity which is, among other things, relevant to the question of whether a body is subject to regulation under CA 2011. We therefore respectfully disagree with the conclusion of the Tribunal in *Witney Town Bowls Club v HMRC* [2015] UKFTT 421 (TC) to the effect that Parliament intended the concepts of a Charities Act charity and a Finance Act charity to be "aligned". Our impression of the legislation is that Parliament has deliberately enacted two separate definitions which are relevant to completely separate matters (tax benefits on one hand and regulatory requirements on the other). The FA 2010 definitions cross refer to those in CA 2011, but we do not consider they were intended to be "aligned" given the different purposes that they serve.
>
> 64. In order to be a Finance Act charity, the Club must be "established for charitable purposes only" (paragraph 1(a) of Schedule 6). The meaning of "charitable purpose" in this context is that set out in s2 of CA 2011 (paragraph 1(4) of Schedule 6). Therefore, FA 2010 provides that the question of whether a particular purpose is a "charitable purpose" is to be found by applying s2 of CA 2011. Importantly, in our view, paragraph 1(4) of Schedule 6 does not determine that the question of whether a body is "established for charitable purposes" must be determined by applying provisions of CA 2011. Rather, paragraph 1(4) has the more limited effect of treating s2 of CA 2011 like a dictionary in order to provide the meaning of "charitable purposes" for the purposes of the FA 2010 definition.
>
> 65. Meanwhile, in determining whether a particular body is a Charities Act charity, s1(1)(a) of CA 2011 asks whether a body is "established for charitable purposes only". The "charitable purposes" relevant in this context are those set out in s2 of CA 2011, the very same "charitable purposes" that apply in connection with the FA 2010 definition. However, the effect of s6 of CA 2011 is that, if a CASC is established for charitable purposes, it is to be treated as not so established with the result that it cannot be a Charities Act charity.
>
> 66. Section 6 of CA 2011 is not, therefore, explaining the meaning of "charitable purpose" in s2 of CA 2011. The advancement of amateur sport remains a charitable purpose within s2 even if s6 of CA 2011 applies. Rather, s6 of CA 2011 provides that CASCs are treated as not being <u>established</u> for charitable purposes. Moreover, that deeming provision applies only for the purposes of CA 2011. Therefore, s6 of CA 2011 means that a body of persons cannot be both a CASC and a Charities Act charity. However, since s6 of CA 2011 does not prevent the advancement of amateur sport from being a charitable

purpose that falls within s2 of CA 2011, s6 does not prevent a CASC from being a Finance Act charity."

39. At [69] the FTT referred to other indications on the face of the statutory provisions that s 6 CA 2011 was not intended to prevent a CASC from being a charity for the purposes of FA 2010 as follows:

> (1) Paragraph 1 of Schedule 6, which contains the relevant definition of a Finance Act charity, cross-refers to a number of provisions of CA 2011 but does not mention s6 of CA 2011. Rather, it provides that the meaning of "charitable purposes" is to be found in s2 of CA 2011, having regard to s7 and s8 of CA 2011.
>
> (2) Section 2 of CA 2011 (which contains the definition of "charitable purposes") itself cross refers to other provisions of CA 2011 but does not mention s6.

40. In making those observations, the FTT rejected HMRC's submissions that, read in context, ss 2 and 6 of CA 2011 were intended to be read together. At [70] it said that the statutory scheme "seals off" s 6 CA 2011 by providing that the definition of "charitable purposes" is to be found in s 2 of CA 2011 without having regard to s 6. The FTT held that the relevance of s 6 is that it prevents a CASC from being a charity for the purposes of CA 2011 even if the purposes for which it is established amount to charitable purposes that fall within s 2.

41. Finally, it rejected HMRC's submission that the tax law provisions in Schedule 6 FA 2010 were necessarily parasitic on the provisions of CA 2011. It said this at [71]:

> "…in Schedule 6, Parliament has explained precisely which provisions of CA 2011 are relevant to the definition of a Finance Act charity. Section 2 of CA 2011 is relevant (because it contains the definition of "charitable purposes"). However, s6 of CA 2011 is not relevant (because that provision operates only to prevent CASCs from being Charities Act charities)."

Issue 1(c)

42. The FTT set out its understanding of the requirements of CA 2011 as regards the registration of charities at [58] and [59] as follows:

> "58. Therefore, the combined effect of the above rather convoluted provisions is that, if an institution is a Charities Act charity (which can only be the case if the institution is subject to the jurisdiction of the High Court), that institution must comply with any requirement to be registered under CA 2011 in order to be a Finance Act charity. By contrast, if the institution is not a Charities Act charity (for example if it is not subject to the jurisdiction of the High Court), it must satisfy any requirement to be registered on a corresponding register outside England and Wales.

> 59. The relevant registration requirements for the purposes of CA 2011 are contained in s29 and s30 of CA 2011. It is sufficient to note that a Charities Act charity that falls within s10 of CA 2011 is generally required to be registered. There are some exclusions from this requirement in s30 of CA 2011, but none of those exclusions would apply to the Club. In particular, the Club's gross income is in excess of £5,000 per year and therefore, if s10 of CA 2011 applied to it, it could not benefit from the exclusion in s30(2)(d) of CA 2011."

43. At [93] the FTT observed that the registration condition set out in paragraph 3 of Schedule 6 depends on whether ECC was a charity within the meaning of s 10 CA 2011. At [96] it held that all that was necessary was for ECC to demonstrate that it complied with "any" requirement to be registered under s 29 CA 2011. ECC was not liable to be registered under s 29 CA 2011 because s 6 CA 2011 prevented it from being a charity for the purposes of CA 2011. There was no suggestion that ECC was under any obligation to register under the laws of a territory outside the UK. Accordingly, ECC satisfied the registration condition.

Issue 3

44. The FTT dealt with the question of whether the use of the pavilion could be said to provide social or recreational facilities for a local community as required by Note 6 to Group 5 at [110] very briefly as follows:

> "We are quite satisfied that the pavilion was intended for use by the Club solely for the purpose of providing social or recreational facilities for a local community. We consider that conclusion follows quite clearly from the nature of Eynsham (a small village which we are satisfied constitutes a "local community") and the intended use of the pavilion."

45. It is clear that the FTT's conclusion at [110] was influenced by its findings at [86] which it made in the context of its consideration of Issue 1(a).

46. The FTT said at [86]:

> "In our judgement, the Club's recreation facilities are "primarily intended" for its members. The principal recreation facility that the Club offers is the ability to play cricket and that facility is enjoyed primarily, if not exclusively, by the Club's members. The enhanced recreation facilities that the Club was able to offer came about only because it built the new pavilion: as we have noted at [17], the Club's previous pavilion was basic. The new pavilion was built with the Club's cricketing interests uppermost in its mind since, as noted at [18], without an upgraded pavilion the Club would find it difficult to continue to play in the OCA league. The initiative to build the pavilion came from the Club and the Club secured the overwhelming majority of the necessary funding. The Club owns the pavilion and has the right to exclude non-members from it if it chooses to do so and has determined that its use of the pavilion for Saturday senior club matches is "sacrosanct" as noted at [31]. In practice, as we have found, the Club is generous with its recreation facilities but it remains a private members' club and its purpose of providing recreation facilities to non-members is subsidiary to its purpose of providing such facilities to its members. In all of those circumstances, we consider that all of the Club's recreation facilities are

> "primarily intended" for the Club's members and not for residents of Eynsham generally."

47. In Footnote 5 to the Decision, which related to its findings at [110], the FTT said:

> "This is not inconsistent with our finding at [86]. In that paragraph, we conclude that the Club's recreational facilities were "primarily intended" for members of the Club specifically, as distinct from residents of Eynsham generally. By contrast, in paragraph [110], we are concluding that overall the pavilion was to be used in providing recreational facilities to a local community, some of whom would be members of the Club and some of whom would not."

48. At [112] to [116] the FTT reviewed the relevant authorities on the question as to what constitutes use "as a village hall or similarly" for the purpose of providing social recreational facilities for a local community. We review those authorities ourselves later, but note at this stage that the FTT relied in particular on the dicta of Sir John Vinelott in *Jubilee Hall Recreation Centre Limited v HMRC* [1999] STC 381 at 390d to the effect that the overall purpose of Note 6(b) to Group 5 (**"Note 6(b)"**) was to grant relief from VAT where the local community was the user of the services supplied by the construction of the building (through a body of trustees or management committee acting on its behalf) and where the only economic activity is one in which the community participates directly.

49. The FTT rejected HMRC's submissions to the effect that the pavilion was built to satisfy the need of the Club (and not the wider community) which needed a new pavilion if it was to continue to function as a cricket club. It said at [119] to [121]:

> "119.The first point is that, as we have noted, the Club is generous with its facilities and does not exclude non-members from the pavilion. For example, residents of Eynsham who are not members of the Club choose to, and are permitted to, watch games of cricket from the pavilion and use the bar. Vinelott J, in *Jubilee Hall*, mentions the watching of a performance by local players as an "obvious example" of a village hall's use. That is not a statement of law that is binding on us, but we respectfully agree with it. If watching a play involving local actors is a prime example of a village hall's use, we see no reason why the use of the pavilion to watch a game of cricket involving local players is not also use that is at least similar to that of a village hall.
>
> 120.Moreover, the Club makes the pavilion available for use at events aimed at the whole community. The Friday night "open nights", the table tennis club and the children's film nights involve the pavilion being used for purposes that are exactly what one would expect of a village hall. The fact that these are organised by the Club rather than someone else does not detract from that conclusion as ultimately someone has to organise a community event otherwise it simply will not happen. As we have noted, the Club arranges events such as this partly because of its community spirt and partly because of the opportunity to raise revenue and seek new members. However, even to the extent that the Club is motivated by its own interests in arranging these events, the nature of the use of the pavilion remains the same and is similar to that of a village hall.

> 121.The fact that a person wishing to hire the pavilion has to pay a fee is also not inconsistent with the pavilion being used as a village hall or similarly in providing social or recreational facilities for a local community. We were referred to a report prepared in October 2011 by ACRE entitled "The state and management of rural community buildings in England" which suggested that 98% of rural community buildings are available for hire in return for a fee."

50. The FTT held at [123] that the fact that there were limited occasions on which the Club's use of the pavilion means others cannot use it (for example on Saturday afternoons during the cricket season where the Club's use of the pavilion was "sacrosanct") is not inconsistent with the pavilion being used similarly to a village hall, notwithstanding that the test is whether the intended use of the pavilion is solely as a village hall or similarly for the purpose of providing recreational facilities to a local community.

51. The FTT then concluded at [125]:

> "Finally, we have tested our conclusion against Vinelott J's explanation of the purpose behind Note 6(b). Given our conclusions as to the way in which the pavilion was intended to be used from the point at which it was being constructed, we consider that the local community was, in a real sense, the true consumer of the services of its construction. [Counsel for HMRC] drew our attention to the fact that those construction services were not organised by the local community "through a body of trustees or a management committee acting on its behalf" in the words of Vinelott J. However, as we have noted, we do not consider that, by this phrase, Vinelott J was identifying a separate free-standing condition that needs to be satisfied as a matter of law…."

Issue 4

52. At [130] the FTT rejected ECC's argument that the principle of equal treatment required the relevant supplies to be treated as zero-rated. ECC submitted that ECC was, for EU law purposes, no different from another local cricket club, Charlbury Cricket Club, which is registered as a charity but is not a CASC and because the building of a new pavilion for the former qualified for zero-rating, the construction of ECCs pavilion should do so as well. The argument was rejected on the basis that ECC had not demonstrated that it was in an objectively similar position to Charlbury Cricket Club.

53. At [131] the FTT recorded that the principle of fiscal neutrality, which it said was a particular aspect of the principle of equal treatment that applies in the VAT context, precluded treating similar goods and services which are thus in competition with each other differently for VAT purposes. It rejected ECC's argument that the principle applied in this case at [132] as follows:

> "132…. as presently understood, the principle of fiscal neutrality relates to supplies of goods and services and provides, in essence, that supplies of similar goods and services should not be treated differently. [Counsel for ECC] is seeking to extend that principle to the recipients of supplies by arguing that, since the Club and the Charlbury Cricket Club are objectively similar, the

> supplies of construction goods and services that they received should be treated in the same way for VAT purposes. He quite fairly accepted that there was no authority to support the application of the principle in this way. Moreover, as we have said, we are not satisfied that the Club and the Charlbury Cricket Club (or any other charitable sports club) are indeed objectively similar…"

Issues to be determined

Issue 1(b)

54. ECC maintains that there are two separate definitions of "charity" that are relevant to this appeal. Schedule 6 to FA 2010 provides a definition of what constitutes a "charity" for tax law purposes whereas s 1(1) CA 2011 provides a definition of "charity" for charity law purposes. Consequently, although s 6 CA 2011 was relevant to ECC's status for charity law purposes, that provision was not relevant for the purposes of tax law. ECC's case is that the categories of CASC and charity are distinct but overlapping and that s 6 CA 2011 does not operate as an absolute bar to prevent a CASC from being a charity for tax (and specifically VAT) purposes.

55. Conversely, HMRC maintain that even if a CASC (such as ECC) was, in fact, "established for charitable purposes only" under s 2 CA 2011, the effect of s 6 CA 2011 is to deem the CASC not to have been established for "charitable purposes". HMRC maintain that this deeming has effect not only in a charity law context, but also for tax purposes. HMRC, therefore, maintain that s 6 CA 2011 operates as an absolute bar, preventing any CASC from being a "charity" for tax purposes under the definition in Schedule 6 to FA 2010, as a matter of law.

Issue 1(c)

56. ECC's case is that the analysis of the FTT at [58] to [59] and [93] to [96] of the Decision is correct.

57. HMRC maintain that the FTT made an error of law in holding that s 6 CA 2011 was irrelevant in the context of paragraph 1(a) of Schedule 6 to FA 2010 (that is in determining whether ECC was "established for charitable purposes only") but was relevant in determining whether ECC satisfied the registration condition. HMRC maintain that either s 6 CA 2011 applies to Schedule 6 FA 2010 or it does not. If it does not then ECC failed to meet the registration condition.

Issue 3

58. ECC maintains that the FTT applied the correct legal test for this issue and arrived at a factual conclusion that ECC did intend to use the pavilion solely "as a village hall or similarly" that was amply supported by the evidence before it.

59. HMRC contend that the FTT erred in its conclusions on this Issue on the basis of two arguments.

60. First, HMRC challenge the FTT's conclusions at [110] that the pavilion was intended for use by the Club solely for the purpose of providing social or recreational facilities for a local community. HMRC contend that the FTT erred in finding that members of ECC using the pavilion's facilities were using them in their capacity as members of the local community in circumstances where it had found that those members were the primary intended users of the pavilion.

61. Mr Watkinson accepted that this argument did not feature in its Response to ECC's grounds of appeal and therefore it required the permission of this Tribunal to run the argument. Mr Brinsmead-Stockham objected to the argument being run. We agreed that we would hear submissions on the point on a provisional basis. We therefore need to decide, as a preliminary matter, whether to grant permission for the point to be argued and, if so, to determine the point on the basis of the arguments made at the hearing.

62. Secondly, HMRC contend that the FTT erred in its application of the restriction that the pavilion be intended for use solely as a village hall or similarly. HMRC maintain that there were, on the facts found, twin purposes intended for the use. Firstly, the predominant intended use was as a cricket pavilion by ECC. Secondly, the secondary intended use of the pavilion was as a village hall or similarly, firstly by staging community events and secondly by hiring the building to other users. However, having a predominant user of a building, who controls a building, uses it without charge for its own specific purposes and is able to take precedence over any and all other users, means that the building cannot be said to be used solely as a village hall or similar.

63. HMRC therefore contend that the FTT could not have come to the conclusion that the requirements of Note 6(b) were satisfied by reference to the facts as it found on the law properly applied.

Issue 4

64. ECC maintain that if the Upper Tribunal holds that the supply of the relevant construction services to ECC did not qualify for zero-rating, then such an outcome would constitute, prima facie, a breach of both the principle of equal treatment (as it would involve similar situations being treated differently without any objective justification) and the principle of fiscal neutrality (as it would involve treating similar supplies of services differently for VAT purposes). ECC maintain that the classification of an entity for the purposes of UK law as either a charity or a CASC can be of no significance for the purposes of EU VAT law, yet it would result in otherwise identical supplies being subject to different rates of VAT. In those circumstances, the Upper Tribunal would be obliged to construe the relevant UK legislation in a way that conforms to EU VAT law and to hold that ECC was entitled to zero-rating of the relevant construction services.

65. HMRC maintain that there is no authority for ECC's proposition that the principle of fiscal neutrality extended to the recipients of supplies. As to equal treatment, HMRC maintain that a charity and a body that is not a charity are not the

same thing and the FTT did not err in requiring ECC to make good its plea as to lack of equal treatment with some evidence of the same.

Discussion

Issue 1(b): whether ECC is a charity for VAT purposes

66. It is helpful before considering the parties' submissions on this issue to set out by way of background the historical development of the definition of "charity" for VAT purposes.

67. Prior to the enactment of the Charities Act 2006, which came into force on 1 April 2008, the definition of a "charity" in English law for the purposes of both charity law and tax law, was derived from the Charitable Uses Act 1601 and subsequent case law. Thus, prior to 1 April 2008, a tribunal interpreting the meaning of "charity" in relation to the VAT legislation had to engage in an exercise of determining what a charity was as a matter of general law.

68. As recorded by the FTT at [67], in November 2001 the Charity Commission reversed its long-held view that local amateur sports clubs were incapable of being charities and recognised "the promotion of community participation in healthy recreation by the provision of facilities for the playing of particular sports" as a charitable purpose. Therefore, at that stage a cricket club such as ECC may have been capable of recognition for VAT purposes as a charity.

69. The concept of a CASC was introduced by the Finance Act 2002 (s 58 and Schedule 18). This came into force on 6 April 2002 and provided certain tax reliefs for CASCs, none of which concerned VAT. The effect of the CASC legislation, which in essence created a statutory entity that exists only for the purposes of taxation treatment, was to give CASCs some but not all of the tax benefits available to charities.

70. Section 1 of the Charities Act 2006 (**"CA 2006"**) provided a statutory definition of charity which was in force between 1 April 2008 and 13 March 2012. The definition was substantially identical to that subsequently to be found in s 1(1) CA 2011 as set out at [29] above. That definition was expressed to be for the purposes of the law of England and Wales, and was therefore of general application, although s 1(2) CA 2006 provided that the definition did not apply for the purposes of an enactment if a different definition of that term applied for those purposes by virtue of that or any other enactment. As there was no separate definition of "charity" at that time for VAT purposes the definition would have applied for the purposes of VATA.

71. Thus, when s 1 CA 2006 came into force a club such as ECC could continue to be treated as a charity for VAT purposes, even though it might also have registered as a CASC. Consequently, as recognised by the FTT at [68] of the Decision, between 6 April 2002 (when the CASC legislation came into force) until the coming into force of s 5 CA 2006 on 1 April 2009, as referred to below, it was possible for a local sports club to be both a CASC and a charity.

72. Section 5 CA 2006 contained in s 5(4) and (5) substantially identical provisions to that now contained in s 6 CA 2011, as set out at [35] above. Therefore, from 1 April 2009, when those provisions came into force, a club registered as a CASC could no longer be a charity for the purposes of the law of England and Wales and could not therefore obtain any kind of VAT relief. This consequence was expressly recognised by the secondary legislation bringing s 5(4) and (5) CA 2006 into force: see The Charities Act 2006 (Commencement No. 4, Transitional Provisions and Savings) Order 2008 (SI 2008/945), Article 11(2) of which made provision for the position where a CASC "ceases to be a charity" on 1 April 2009 as a result of the coming into force of s 5(4) CA 2006.

73. It was common ground that at least one purpose of the enactment of s 5(4) CA 2006 was to absolve CASCs from being subjected to the additional, potentially burdensome, administrative requirements of registering as a charity for charity law purposes under CA 2006. Thus, at the time that s 5(4) CA 2006 came into force a CASC that was charitable could cease to be registered as a CASC, register as a charity and be subject to the administrative requirements of CA 2006 and get the full tax benefits of being a charity; or it could decide not to do so and remain a CASC and obtain the more limited tax benefits available to a CASC.

74. The position of CASCs remained the same under CA 2011 which came into force on 14 March 2012. CA 2011 was a consolidating Act and made no relevant changes to the law in respect of charities.

75. It was common ground that the purpose of the enactment of Schedule 6 FA 2010 was to enact a separate definition of "charity" specifically for tax law purposes. Article 5 of The Finance Act 2010, Schedule 6, Part 1 (Further Consequential and Incidental Provision etc) Order 2012 (SI 2012/735) (the **"Order"**) provided that in relation to supplies of goods or services made on or after 1 April 2012, the definition of "charity" in s 1(1) CA 2011 ceased to apply "for the purposes of enactments relating to value added tax to which it would otherwise apply" and accordingly the definition of "charity" in Part 1 of Schedule 6 FA 2010 applied for the purposes of those enactments.

76. The parties have different views on Parliament's intentions when enacting the separate definition of "charity" for VAT purposes.

77. HMRC submit that a charity and a CASC are two different types of entity for tax purposes and Parliament had deliberately decided that each should be eligible for different tax reliefs. In particular, Parliament deliberately intended that CASCs, in contrast to charities, should obtain no reliefs in respect of the impact of VAT on their activities. HMRC contend that the status quo before FA 2010 was that a CASC could not be a charity for tax purposes and nothing in FA 2010 was intended to change that. The provisions in FA 2010 were primarily intended to extend the distinct UK charity and CASC tax reliefs to similar bodies in other Member States and other relevant territories.

78. HMRC contend that Parliament did not intend, through Schedule 6 to FA 2010 to take the radical step of putting CASCs and charities on an identical footing for VAT exemption purposes. They rely on the following matters to support that contention:

(1) The Explanatory Notes to FA 2010 clearly set out that Schedule 6 introduced a new definition of charity for tax purposes following the extension of UK charitable tax reliefs to bodies equivalent to charities and CASCs in Europe.

(2) The Explanatory Memorandum to the Order made it clear that the legislative context to the new definition was the European Court of Justice's judgment in Case C-318/07 *Hein Persche v Finanzamt Lüdenscheid* [2009] ECR I-359. In that case, the ECJ decided that where a taxpayer claims in a Member State the deduction for tax purposes of gifts to bodies established and recognised as charitable in another Member State, such gifts come within the compass of the provisions of the EC Treaty relating to the free movement of capital. Consequently, Article 56 of the Treaty precludes legislation of a Member State which restricts the benefit of a deduction for tax purposes only in respect of gifts made to bodies established in that Member State without any possibility of the taxpayer to show that a gift made to a body established in another Member State satisfies the requirements imposed by that legislation for the grant of such a benefit. The Explanatory Memorandum stated that the policy objective behind the introduction of the new definition was to make it clear in legislation that UK charity tax reliefs and exemptions administered by HMRC are available to organisations in EU Member States and their UK taxpayer donors where the organisation would be recognised as a charity according to the law of England and Wales.

(3) There was no legislative context suggestive of an intention by Parliament to take the radical step of putting CASCs and charities on an equal footing for all tax reliefs including VAT. The mischief to which the relevant provisions of FA 2010 were directed is clear, that is to ensure that the UK avoided non-compliance with the ECJ judgment. The Explanatory Memorandum to the Order also made it clear that the new definition was more restrictive, stating that it would help to protect the UK exchequer from non-compliance and fraud by including an additional "fit and proper" test for the management of the charity.

79. ECC contends that HMRC's analysis fails to take account of the fact that throughout the period from 24 July 2002 to 1 April 2009 it was possible for a CASC to also be a charity. It contends that if Parliament intended to exclude CASCs from the definition of charity in Schedule 6 to FA 2010 it could easily have done so. The wording of the provisions is clear and demonstrates that the effect of Schedule 6 is to return to the position that applied between 2002 and 2009, that is that an entity can be both a CASC and a charity for VAT purposes.

80. ECC contends that the fact that the new definition was enacted in order to comply with the terms of the ECJ's judgment referred to above, does not affect ECC's case. In order that there would be a common tax treatment for donations made to

charitable bodies or their equivalent throughout the EU it would have been odd to include a definition that was based on classification under UK domestic law as a CASC. Therefore, in formulating an EU law compliant definition it was not sensible to include a UK domestic classification within that definition; it was correct not to create a distinction between CASCs and charities. Thus, the new definition would permit the Hamburg Cricket Club, for instance, to be treated as equivalent to a UK cricket club which was established for a charitable purpose, whether that UK club had registered as a charity under CA 2011 or as a CASC.

81. In relation to this issue, the task is essentially one of statutory interpretation. In his skeleton argument Mr Watkinson helpfully set out six relevant principles of statutory construction that should be applied in this case. We did not take Mr Brinsmead-Stockham to disagree with the first five of these, which we set out as follows:

(1) The Tribunal should strive to give the relevant statutory provisions a fully informed construction;

(2) That requires the Tribunal to have regard to the "context" of the statutory provision as well as to its terms;

(3) The "context" of a statutory provision includes its legislative history, its statutory purpose and other enactments *in pari materia*;

(4) The Tribunal should also have regard to the consequences of rival constructions; and

(5) The Tribunal should presume that Parliament did not intend a construction which would operate unjustly, anomalously or absurdly and did intend one which promotes consistency in the law.

82. We were referred to two authorities dealing with the requirement to construe the words of a statute in their context. In *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436, Viscount Simonds stated at page 461:-

> "… words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use "context" in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy."

83. That case involved the House of Lords seeking to construe the words of enactment in a statute in the context of its preamble. The purpose of the statute was to naturalise as British subjects the Electress of Hanover, who through the Act of Settlement 1701 would succeed to Queen Anne on her death, and her descendants. The preamble to the statute referred to the purpose of the statute being that "..the said Princess Sophia … and the Issue of Her Body and all Persons lineally descending from Her, may be encouraged to become acquainted with the Laws and Constitutions of this Realm, it is just and highly reasonable, that they, in Your Majesty's Life Time

should be naturalized..” The enacting words provided that “the said Princess Sophia … and the Issue of Her Body, and all Persons lineally descending from Her, born or hereafter to be born, be and shall be, to all Intents and Purposes whatsoever, deemed, taken and esteemed natural-born Subjects of this Kingdom…”

84. The question was whether the reference to lineal descendants “born or hereafter to be born” referred only to persons born during the lifetime of Queen Anne, or included any such persons born at any time thereafter. The Attorney-General sought to argue that the purpose of the statute, as set out in the preamble, with its reference to the object of encouraging lineal descendants to become acquainted with English law and the constitution, could only be construed as referring to people born during Queen Anne’s lifetime.

85. The House of Lords, however, notwithstanding the words in the preamble, placed strong weight on the natural meaning of the enacting words. Lord Morton referred to the fact that the words “in Your Majesty’s lifetime” had already been used in the preamble and it would have been the most natural thing in the world to repeat them in the enacting part, if the legislature had intended so to limit the class: see page 470. He said at page 472 that if the enacting words were to bear the natural meaning the respondent must succeed in his claim that as a living lineal descendant of Princess Sophia he was a British subject. Neither did the House of Lords accept that there was a manifest absurdity in that construction, notwithstanding that it led to most of the members of the Royal families of Europe being British subjects.

86. Therefore, although we accept that the case is authority for construing a statute in its context, we also note that in doing so the House of Lords gave strong weight to the natural meaning of the enacting words.

87. That does not mean that the “natural meaning of the words” should always prevail. In *Bloomsbury International Ltd v Sea Fish Industry Authority and Department for Environment, Food and Rural Affairs* [2011] UKSC 25 Lord Mance said at [10]:

> “In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance. They represent the context in which individual words are to be understood. In this area as in the area of contractual construction, "the notion of words having a natural meaning" is not always very helpful (*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 391C, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme. In the case of a statute which has, like the 1981 Act, been the subject of amendment it is not lightly to be concluded that Parliament, when making the amendment, misunderstood the general scheme of the original legislation, with the effect of creating a palpable anomaly (see eg the principle that provisions in a later Act in pari materia with an earlier may be used to aid the construction of the former, discussed in *Bennion on Statutory Interpretation*, 5th ed (2008), section 234).”

88. The concept of *in pari materia* is explained in *Bennion on Statutory Interpretation*, 7th edition, March 2019, at Section 21.5:

> "Acts that are *in pari materia* are sometimes described as forming a single code on a particular matter in the sense that they deal with the same or a similar subject matter and are to be construed as one. They "are to be taken together as forming one system, and as interpreting and enforcing each other." "

89. Carnwath LJ (as he then was) explained the concept in *Oxfordshire County Council v Oxford City Council & Anor* [2005] EWCA Civ 175, at [86]:

> "… when one is looking at the combined effect of two statutes, concerned with the same general subject-matter, even if separated by a substantial period of time, the intention of Parliament is not necessarily to be derived solely from the most recent. They must be looked at together."

90. That case concerned whether a later definition of "village green" could be read into an earlier statute. Carnwath LJ said it could, in circumstances where the term "village green" had been referred to in 19th century statutes without definition, and there was no settled legal interpretation of that term. As Mr Brinsmead-Stockham observed, the position is different in this case where both the statutes concerned do have a definition of the relevant term.

91. The sixth principle of construction that Mr Watkinson referred to was that the Tribunal may have regard to the views of official bodies charged with functions under the statute. In particular, Mr Watkinson submits that the Tribunal should have regard to HMRC's published guidance, published on 27 March 2015, which states that a CASC cannot be a "charity" within the definition in FA 2010 Schedule 6.

92. However, as stated in Section 24.17 of *Bennion*, guidance is not a source of law and cannot alter the true legal meaning of a statute. As *Bennion* says, in the context of statutory construction guidance has no special legal status, because it is the judiciary, not the executive which determines the meaning of legislation. As *Bennion* also says, "guidance that tries to explain what the legislation means will be given no more weight than the quality of any reasoning contained in it deserves." Thus, if the court or tribunal believes the reasoning in the guidance is wrong, it will not be followed and if it is consistent with the view that the court or tribunal is inclined to adopt, it may be of some reassurance. We have not found HMRC's guidance to be of any material assistance in this case.

93. We shall therefore approach Issue 1(b) by first analysing the wording of the relevant statutory provisions by carrying out a purely textual analysis. We shall then consider the extent to which the purpose of the legislation, in so far as it can be divined, assists in the construction of the relevant provisions, giving strong weight to the actual words used in the relevant provisions.

94. HMRC's arguments in support of its contention that a CASC cannot be a charity for VAT purposes can be summarised as follows:

(1) The relevant provisions of FA 2010 and CA 2011 should, but for the specified disapplication of the definition of charity in s 1 CA 2011, have been interpreted by the FTT using an *in pari materia* approach. The Acts did in fact

deal with the same subject matter, viz. the tax position of a CASC, which could not, under CA 2011, have been a charity for any purposes, not just the purposes of charity regulation. FA 2010 and CA 2011 both form part of one scheme to determine whether an entity qualifies as a charity for the purposes of tax. That much is made plain by the cross-references in FA 2010 to CA 2011. If the FTT had adopted an *in pari materia* approach it would have found that the bar in s 6 CA 2011 applied to prevent a CASC from being a charity for tax purposes. Instead, the FTT found at [70] that s 6 CA 2011 was "sealed off" from the FA 2010 provisions because it was not specifically referred to in those provisions. The draftsman clearly had in mind the two different concepts and had no need to refer explicitly in Schedule 6 FA 2010 to the bar in s 6 CA 2011. The FTT's approach to interpreting the provisions was unduly narrow and failed to take account of the statutory purpose of the provisions in FA 2010 and CA 2011 and the mischief to which they were directed.

(2) ECC itself sought to apply s.6 CA 2011 to the registration requirement under paragraph 3 of Schedule 6 FA 2010 in order to avoid it being subject to the registration requirement, but simultaneously argued that s 6 CA 2011 did not apply to paragraph 1, within the same Part of the Schedule. There is no explicit reference to s 6 CA 2011 in paragraph 3 of Schedule 6 FA 2010, which refers to a charity within the meaning of s 10 CA 2011. Section 10 CA 2011 itself limits the meaning of a charity to that in s 1(1) CA 2011 and sets out that various ecclesiastical corporations are not charities in certain contexts. Accordingly, ECC itself relies on an *in para materia* approach to interpreting FA 2010 and CA 2011.

(3) In the alternative, the FTT's approach renders Paragraph 1(3) of Schedule 6 to FA 2010 obsolete. Paragraph 1(3) provides that sub-paragraphs (1) and (2) that define a charity for the purposes of inter alia VATA "are subject to any express provision to the contrary." That is not an intra-statutory reference since there is no such express provision in FA 2010. That must therefore be an inter-statutory reference. Section 6 CA 2011 is an express provision that a registered sports club established for charitable purposes is to be treated as not being so established, and accordingly cannot be a charity. Section 6 CA 2011 was not disapplied by FA 2010 or the statutory instrument that brought in the new definition of a charity therein. Therefore, the FTT should have found on this basis also that the deeming provision in s.6 CA 2011 operated to prevent a CASC from being a charity for tax purposes. Instead, it found to the contrary at [66].

(4) The correct interpretation is that found by the FTT in *Witney Town Bowls Club v HMRC* [2015] UKFTT 0421 (**"*Witney*"**). In that case, the FTT reached the opposite conclusion to the FTT in this case at [70] – [73], finding at [72]:

> "…it seems to us that the intention was to align the definition of "charity" for most tax purposes with that in the Charities Act. For the purpose of the Charities Act 2011, a CASC is treated, by virtue of section 6(1) of that Act, as not being established for charitable purposes and so cannot be a charity. The position was the same under the Charities Act 2006, which contained (in section 5(4)) a provision equivalent to that in section 6(1) of

> the 2011 Act. We cannot discern any intention in the scheme of the legislation for the position to be any different for tax purposes as a result of the introduction of the definition in paragraph 1 of Schedule 6 to the Finance Act 2010. Indeed, the legislation preserves the distinction between a registered charity and a registered CASC."

(5) The FTT in the instant case failed to recognise that the continuing distinction between a CASC and a charity for tax purposes in the provisions in FA 2010 meant that its interpretation, under which one could be both, produced an absurd result.

95. ECC's submissions on this point can be summarised as follows:

(1) FA 2010 Schedule 6 provided a definition of what constituted a "charity" for tax law purposes whereas s 1(1) CA 2011 provided a definition of "charity" for charity law purposes. Consequently, although s 6 CA 2011 was relevant to ECC's status for charity law purposes, that provision was not relevant for the purposes of tax law.

(2) A CASC may be a charity for tax purposes, but that will be the case if (and only if) the CASC in question satisfies the tax law definition of "charity" in FA 2010 Schedule 6. ECC's case is that the categories of "CASC" and "charity" are distinct but overlapping so that s 6 CA 2011 does not operate as an absolute bar to prevent a CASC from being a charity for tax (and specifically VAT) purposes.

(3) FA 2010 Schedule 6 enacted a new definition of "charity" specifically for tax purposes that cross-refers to, but is distinct from, the definition of that concept (and related concepts) in CA 2006, and subsequently in CA 2011. Therefore, as the FTT correctly identified at [63], following the enactment of FA 2010, there were separate definitions of "charity" for the purposes of charity law (in CA 2006 and CA 2011) and tax law (in FA 2010 Schedule 6).

(4) The definition of "charity" for tax law purposes relies upon the concept of "charitable purposes" as defined in CA 2011 s 2 (see FA 2010 Schedule 6 paragraph 1(4)). The FTT was correct to find at [64] that the question of whether a body is "established for charitable purposes" must be determined by applying the provisions of CA 2011.

(5) The concept of "charitable purpose" in s 2 CA 2011 is defined exclusively by reference to ss 3-5 CA 2011. Section 6 CA 2011 is not relevant to that definition but is instead a deeming provision that operates outside the definition of "charitable purpose" in CA 2011 s 2. The FTT was correct to find at [66] that the advancement of amateur sport remains a charitable purpose within s 2 CA 2011 even if s 6 CA 2011 applies and that s 6 CA 2011 merely provides that CASCs are treated as not being *established* for charitable purposes. The legislation does not say that a CASC is not established for charitable purposes, merely that it is not to be so treated for the purposes of CA 2011.

(6) Schedule 6 to FA 2010 does not cross-refer to s 6 CA 2011, either directly or indirectly. The absence of such a cross-reference is particularly telling, given that paragraph 1(4) of Schedule 6 FA 2010 cross-refers *directly* to ss 2, 7 and 8

CA 2011 and *indirectly* to ss 3, 4 and 5 CA 2011 (through CA 2011 s 2). The Parliamentary draftsman must, therefore, be taken to have made a deliberate choice in opting not to include a reference to CA 2011 s 6 in the definition of "charity" or "charitable purposes" in a tax law context, as it would have been very straightforward to include such a cross-reference (or a provision equivalent to s 6 CA 2011) in Schedule 6 FA 2010.

(7) Consequently, there is simply no basis on which to read a reference to s 6 CA 2011 into the express wording of Schedule 6 FA 2010. The FTT in *Witney* did not identify any textual basis on which to read in such a reference.

(8) In short, "charitable purpose" is a defined term in Schedule 6 FA 2010 that is defined without reference to s 6 CA 2011. Therefore, the FTT was correct to conclude at [67] that on a "natural reading" of the legislation, although s 6 CA 2011 is relevant to determining the status of ECC for charity law purposes (i.e. under CA 2011), it is not relevant to the determination of whether ECC was established for "charitable purposes" or is a "charity" in a tax law context (i.e. under FA 2010 Schedule 6).

(9) The definitions of "charity" and "charitable purpose" in Schedule 6 FA 2010 should be applied on the basis of the ordinary meaning of their express terms (i.e. without reading in a reference to s 6 CA 2011), unless there is a good reason to do otherwise.

(10) Section 6 CA 2011 is a deeming provision and there is clear authority to the effect that deeming provisions "shall be carried as far as necessary to achieve the legislative purpose, but no further" (*Szoma v Secretary of State for Work and Pensions* [2005] UKHL 64 at [25]), and that "the hypothetical must not be allowed to oust the real further than obedience to the statute compels" (*Polydor Ltd v Harlequin Record Shop Ltd* [1980] 1 CMLR 669 at 673). Accordingly, the deeming in s 6 CA 2011 should be applied only for areas of law governed by CA 2011 (e.g. charity law), and that it is unnecessary, and illegitimate, to read that deeming across into other fields of law to which CA 2011 does not apply (e.g. tax law). That is particularly the case where there is a separate definition of the relevant concept (i.e. "charity") in a tax law context that makes no reference to the deeming provision in question.

(11) There is no absurdity on ECC's case. All HMRC are required to do is to ascertain whether a CASC meets the conditions laid down in FA 2010 in order to obtain the relevant reliefs. It is only a CASC that meets those conditions which can obtain the reliefs.

96. First, we start with a purely textual analysis. We consider that such an analysis gives considerable support to ECC's arguments. It is common ground that the purpose of Schedule 6 of FA 2010 was to provide a new definition of "charity" for tax purposes which was distinct from the definition of "charity" for the purposes of charity law generally. Hence Schedule 6 does not simply cross-refer to the definition of charity in s 1 CA 2011. Instead Schedule 6 adopts a definition of charity that is both wider in some respects and narrower in others than the CA 2011 definition of charity.

97. It is wider because it needed to include bodies established and recognised as charitable in other Member States. That means that the definition in s 1 CA 2011, which requires a charity to be subject to the control of the High Court, is too narrow. Instead Schedule 6 requires a charity to meet the jurisdiction condition, namely that it is subject to the control of a relevant UK court (thus including Scottish and Northern Irish charities), or a court exercising a corresponding jurisdiction under the law of a relevant territory (thus including charities established in other Member States and other territories specified in regulations – we were told that these were EEA states). (For the sake of completeness it should be noted that CA 2011 itself contained provisions enabling tax relief to be given to Scottish and Northern Irish charities – see ss 7 and 8 CA 2011).

98. But the Schedule 6 definition of charity is also narrower than the CA 2011 definition because it requires a charity to meet the management condition, namely that its managers are fit and proper persons. This does not find any equivalent in CA 2011. That is understandable. One would expect that a charity that had been duly established would still be a charity for the purposes of CA 2011 (and hence subject to the regulation of the Charity Commission) even if it were being mismanaged, whereas it can be seen that Parliament did not want a charity in the hands of those who were not fit and proper persons to enjoy the benefit of tax relief.

99. It is therefore apparent on the face of Schedule 6 that there are, as the FTT said (Decision at [63] – see [38] above), two different definitions of charity set out in FA 2010 and CA 2011, and that Parliament has deliberately enacted two separate definitions which are relevant to separate matters.

100. In those circumstances one needs to look with care at Schedule 6 to identify which provisions of CA 2011 are relevant to the Schedule 6 definition and which are not. If one does that, it is striking that paragraph 1(4) of Schedule 6 cross-refers to s 2 CA 2011 to identify what counts as a charitable purpose, but contains no express cross-reference to s 6 CA 2011 which contains the provision deeming a CASC not to be established for charitable purposes. As Mr Brinsmead-Stockham submitted, the cross-reference to s 2 CA 2011 acts as an indirect reference to ss 3, 4 and 5 CA 2011 because s 2 CA 2011 itself refers to ss 3 and 4 (see s 2(1)(a) and (b)), and s 3 in turn refers to s 5 CA 2011 (see s 3(1)(m)). But ss 2 to 5 CA 2011 do not contain any cross-reference to s 6 CA 2011.

101. And it is noticeable that the draftsman of Schedule 6 had the definition of a CASC before him. Part 3 of the Schedule (paragraphs 30 to 32) is concerned with the definition of a CASC and made extensive amendments to the relevant provisions of CTA 2010. One might have thought that the draftsman who was thinking about what a club needed to do to qualify as a CASC might also have thought about whether a CASC should continue to be incapable of benefiting from the tax reliefs available to a charity. If that was what he intended, he went about it in a very oblique fashion: it would have been very easy for paragraph 1 to contain an express cross-reference to s 6 CA 2011.

102. For these reasons a purely textual analysis does not suggest that paragraph 1 of Schedule 6 was intended to bring into the definition of a charity for tax purposes the effect of s 6 CA 2011.

103. Second, we are not persuaded by HMRC's argument based on CA 2011 and Schedule 6 of FA 2010 being *in pari materia*. In general terms both statutes are indeed dealing with the same subject-matter, that of charities, but for the reasons we have already explained the two definitions are designed for different purposes, and differ (deliberately and for good reason) in their detail. It could not for example be suggested that the requirement in Schedule 6 of FA 2010 that a charity be managed by fit and proper persons should be read across into the definition of charity for CA 2011 purposes. Where the two definitions deliberately diverge in certain respects we do not see that the question whether a particular aspect of the CA 2011 regime applies to the Schedule 6 definition can be answered by the fact that at a high level of generality the two Acts operate in the same field. So they do, but this does not provide any real assistance in identifying whether in any particular respect the two definitions diverge or are aligned.

104. Third, we were not persuaded by HMRC's arguments based on the registration condition. It is correct that ECC rely on s 6 CA 2011 to establish that they are not required to be registered under CA 2011, and hence that the registration condition is in their case fulfilled. Mr Watkinson said that paragraph 3 of Schedule 6 (which explains what the registration condition is) contains no reference to s 6 CA 2011, and hence that ECC was itself relying on an *in pari materia* approach to take advantage of it. We do not accept this. Paragraph 3(1)(a) itself refers to a charity within the meaning of s 10 CA 2011. But s 10 refers to charity as meaning a charity within the meaning of s 1(1) CA 2011 (subject to some exceptions of no relevance for present purposes); and the effect of that definition, read with s 6 CA 2011, is that a CASC cannot be a charity within the meaning of s 1(1) or s 10 CA 2011. That conclusion does not rest on an *in pari materia* argument: it is simply the result of following through the cross-reference in paragraph 3(1)(a) of Schedule 6. We do not find this point of any assistance in considering whether s 6 CA 2011 applies in general to the definition of charity in Schedule 6.

105. Fourth, we do not find HMRC's argument based on paragraph 1(3) of Schedule 6 convincing. It is true that neither counsel was able to identify any other "express provision to the contrary", but we do not find this a compelling reason to assume that what the draftsman had in mind was s 6 CA 2011. Had the draftsman specifically had that in mind, we think the more natural place to express the reservation was not in paragraph 1(3) (which only in terms qualifies paragraphs 1(1) and 1(2)), but as a qualification to paragraph 1(4) (which contains the cross-reference to the meaning of charitable purpose in s 2 CA 2011). Had it done that, the argument would carry much more weight. As it is, we think paragraph 1(3) is no more than a precautionary provision in case there are other express provisions which the draftsman was unaware of.

106. Fifth, we do not find the reasoning in *Witney* compelling. The FTT there acknowledged that the Schedule 6 definition of charity differs from that in CA 2011

in two important respects, namely the jurisdiction requirement and the management requirement, but said that it seemed to them that subject to those two points, the intention was to align the two definitions. But this reasoning, with respect to them, seems to us to be incomplete. Once it is accepted that the two definitions diverge in certain significant respects, we do not see how it can be properly assumed that in other respects the intention was that the definitions should be aligned. That must depend on what the statutory provisions say, understood in their context.

107. The arguments of HMRC that we have considered so far do not therefore seem to us persuasive. But there is a further argument that seems to us to have much more force, namely that there is not the slightest indication that the mischief at which Schedule 6 was aimed was, or included, a desire to return to the position that a sports club could be both registered as a CASC and benefit from the tax relief available to charities.

108. As set out above, the historical position was as follows:

(1) Before the Finance Act 2002 introduced the concept of a CASC, a community sports club could only have benefited from tax relief if it qualified as a charity.

(2) By the time what became the Finance Act 2002 was being debated, the Charity Commission had announced that certain sports clubs could qualify as charities, but it was recognised that this did not apply to all clubs (for example, it did not apply to angling or snooker clubs); and it was also recognised that some clubs would not want to meet the requirements or responsibilities of becoming a charity. That was demonstrated by an extract from Hansard for 3 July 2002 which we were shown in which an opposition amendment (which would have given CASCs the same tax reliefs as charities) was debated. The then Economic Secretary to the Treasury, John Healey MP, in resisting the amendment, said that sports clubs that were eligible to become charities and wished to do so could register as charities; but that the Government's proposals for CASCs provided alternative support for clubs that could not or did not want to become charities.

(3) It may well have been assumed that a sports club that was eligible to be treated as a charity would register as a charity and not bother registering as a CASC so that clubs would either be one or the other. Nevertheless, there was nothing in the legislation then enacted which precluded a CASC from also being a charity.

(4) But when the CA 2006 was passed, which put the definition of charity on a statutory footing for the first time, the opportunity was taken in s 5(4) and (5) CA 2006 to enact a clear divide between the two. If a club was registered as a CASC, it could not qualify as a charity (even if its purposes met the statutory definition of charitable purposes) because it was to be treated as not established for charitable purposes. It is clear that that was a deliberate

decision to make it impossible for a club to be both a CASC and a charity, and that it was recognised that once s 5(4) and s 5(5) were brought into force in April 2009, a CASC that had been a charity would cease to be a charity (see [72] above).

(5) The practical consequences for tax relief were that a club could either, if eligible, qualify as a charity and enjoy the tax reliefs available to charities, or register as a CASC and enjoy the lesser tax reliefs available to CASCs. It could not be both.

109. The purpose of s 5(4) CA 2006 was said by Mr Brinsmead-Stockham to be to prevent CASCs from being subject to the potentially burdensome administrative requirements of registering as a charity. He referred to the House of Lords debates on the bill on 10 February 2005 where Lord Hodgson of Astley Abbotts said:

> *"In theory, an amateur sports organisation registered with the Inland Revenue as a CASC could also be a charity under the "advancement of amateur sport" heading. As a charity, such a CASC would be obliged to comply with charity law. Probably in most cases it would be obliged to register with and be registered by the Charity Commission.*
> *By saying that CASCs established for charitable purposes are not to be treated as so established, Clause 5(4) seeks to draw a clear dividing line between CASCs and charities and ensure that CASCs do not find themselves subject to charity law and regulation."*

110. Mr Watkinson did not dispute, and we accept, that one of the purposes of what became s 5(4) was to exempt sports clubs that would otherwise qualify as charities from having to register with the Charity Commission and comply with charity law. But we think this is an inadequate account of what the provision did and was designed to do. Lord Hodgson was himself a member of the opposition who was moving an opposition amendment to *"tease out the Government's thinking on this matter"* and went on to ask the Minister a number of questions, the first of which was:

> *"…is the purpose of this clause to force sports clubs down one of the two routes; that is, to become either a CASC or a charity – they cannot be both?"*

111. The Government's response was given by Lord Bassam of Brighton, who said:

> *"The CASC scheme was devised by the Inland Revenue in 2002 and was promoted to small sports clubs as an alternative to charitable status. The scheme was meant to allow a sports club to be a CASC or a charity but not both. We are trying to iron out some of the flaws that have arisen in the construction of CASCs…*
> *Since the introduction of the CASC scheme, a number of sports clubs have also had to be registered with and be regulated by the Charity Commission due to their charitable purposes. Our intention is that CASC status should be a true alternative to charitable status for sports clubs,*

making it clear that a sports club cannot be a charity and a CASC at the same time….[The Bill] enables those sports clubs to choose whether to register with the Inland Revenue under the CASC scheme, or, instead, to register as a charity with, and be regulated by, the Charity Commission, and it allows them to convert from one to the other in either direction…
The effect of the amendment would be to maintain the currently anomalous position. We cannot accept that; it would be inappropriate and wrong, which is why we cannot accept this probing amendment."

112. No objection was made to our looking at this material, rightly in our view as it assists in identifying the mischief at which the legislation was aimed. It seems to us to indicate clearly that the purpose of s 5(4) and (5) CA 2006 was not only to exempt CASCs from the burden of regulation, but to effect a sharp divide between CASCs and charities. A sports club could either be a CASC (and exempt from registration and regulation), or (if eligible) a charity (and access the more generous tax reliefs) but not both. It is clear from what Lord Bassam said that the then Government saw the existing position under which a sports club could both be a CASC and a charity as a flaw that should be ironed out, and an anomalous position that it would be inappropriate and wrong to maintain.

113. This history seems to us to be a very significant part of the context in which the effect of Schedule 6 of FA 2010 falls to be construed. As Mr Watkinson submitted, the status quo at the time of the passing of FA 2010 was that a sports club that chose to register as a CASC could not simultaneously be a charity. That was not an accident of drafting or an unintended consequence but the result of a deliberate decision made by Parliament less than 4 years before (CA 2006 was passed on 8 November 2006 and FA 2010 on 8 April 2010) and which had come into force just over a year before (s 5(4) and (5) CA 2006 came into force on 1 April 2009). The measure moreover had been promulgated by the same Government and had been intended to iron out what was perceived by that Government to be an anomaly that it would be wrong to maintain. In those circumstances it would be surprising, to say the least, if the Government had sought to reinstate the position that they had so recently regarded as anomalous and flawed; and it would be doubly surprising if they had decided to do so without identifying some reason for reversing their decision, or some mischief in the current law.

114. When however one looks at the material that was put before us, there is no hint that this was part of the mischief which Schedule 6 of FA 2010 was intended to address: see [78] above.

115. Mr Brinsmead-Stockham submitted that all that FA 2010 did was to return the position to what it had been between 2002 and 2009, and that there was nothing absurd or anomalous about that. But that overlooks two points. First, as we have already said, it would mean reverting to a position that Parliament had recently deliberately moved away from on the grounds that it was flawed. And second, the position that obtained between 2002 and 2009 would not in fact on his case be restored. It is true that a sports club in that period could have registered as a CASC and still claimed to be a charity, but in order to do so it would have had to take on the

administrative burden that came with the status of being a charity, would have had to submit itself to regulation by the Charity Commission and (in almost all cases) would have had to register with the Commission. That at least involved a degree of *quid pro quo*: if a CASC wished to access the more generous suite of tax reliefs available to a charity, it would have to comply with the obligations applicable to other charities.

116. By contrast, if ECC are right in their submissions, a CASC is now in a uniquely privileged position. By registering as a CASC, it is exempt by s 6 CA 2011 from the administrative and other requirements applicable to charities; but so long as its purposes are charitable purposes (and it meets the other requirements of Schedule 6) it can enjoy the reliefs available to charities. That is not a restoration of the position that obtained between 2002 and 2009 but a significant improvement on it, and would in our view indeed put such a club in an anomalous position.

117. These seem to us to be powerful points which strongly suggest that the aim of the legislation was not to reverse the decision made in CA 2006 and permit a CASC to be a charity for tax purposes (although not for other purposes), but was primarily to enable the tax advantages available in the case of UK charities to be extended to equivalent bodies in other Member States as required by *Persche v Finanzamt Lüdenscheid*, and secondarily to introduce a fit and proper person test for tax relief purposes.

118. That context seems to us to require us to interpret the legislation, if it is reasonably possible to do, in such a way as not to have the unintended and anomalous effect of enabling a CASC to benefit from the tax reliefs available to charities while at the same time not being obliged to submit to the regulatory and other requirements applicable to them.

119. In our judgment this is not difficult to do. Paragraph 1(1)(a) of Schedule 6 of FA 2010 requires that a body qualifying as a charity "is established for charitable purposes only". The effect of s 6 CA 2011 is that a CASC, even if its purposes are charitable purposes, "is to be treated as not being so established". There is nothing in s 6 which confines its effect to the operation of CA 2011. We see no reason why it should not be regarded as a statement of the general law.

120. Thus for example, suppose that a testator by will left money on trust for his trustees to distribute to any body established for charitable purposes that they thought fit. We think it plain that the trustees could not properly distribute the fund to a CASC, because s 6 CA 2011 has the effect that whether or not a CASC has charitable purposes within ss 2 to 5 CA 2011, it is to be treated as not established for such purposes. In other words the deeming provision in s 6 CA 2011 is not simply for the purposes of the regulatory and administrative requirements in CA 2011, but for all purposes.

121. If that is right, we think the same applies to paragraph 1(1)(a) of Schedule 6. Even without an express cross-reference to s 6 CA 2011, the effect of s 6 is that a CASC such as ECC is (for all purposes) to be treated as not established for charitable

purposes. It therefore cannot satisfy the requirement in paragraph 1(1)(a) that it is established for charitable purposes only.

122. We consider that this is the correct way to understand the legislation as a whole. In our view it gives effect to the obligation, referred to by Viscount Simonds in *Attorney-General v Price Ernest Augustus of Hanover*, to "examine every word of a statute in its context", that context including "the existing state of the law … and the mischief which … I can discern the statute was intended to remedy": see [82] above. It is also consistent with the guidance of Lord Mance in *Bloomsbury International Ltd v Sea Fish Industry Authority* that "the statutory purpose and the general scheme by which it is to be put into effect are of central importance": see [87] above. In those circumstances we conclude that ECC, being registered as a CASC, does not qualify as a charity for VAT purposes, and that Issue 1(b) is to be resolved in HMRC's favour.

123. We add a footnote, albeit with some diffidence as it was not argued before us. It will be apparent from the arguments we have set out above that ECC's case is that it is capable of being a charity for VAT purposes even though it is not a charity for CA 2011 purposes. It will be recalled that one of the requirements for being a charity for VAT purposes under Schedule 6 of FA 2010 is that it meets the jurisdiction condition. This requires the relevant entity to be subject to the control of either a relevant UK court or a court in another relevant territory: see [32] above. The latter has no application as ECC is not subject to the jurisdiction of courts in any other territory. But so far as a UK court is concerned, it does not meet the jurisdiction condition unless it "falls to be subject to the control of … a relevant UK court *in the exercise of its jurisdiction with respect to charities*" (emphasis added). It seems to us that ECC, not being a charity within CA 2011, is not subject to the control of the High Court in the exercise of its jurisdiction with respect to charities. That seems to us to have the effect that ECC does not meet the jurisdiction condition and hence cannot be a charity for Schedule 6 purposes. In effect, the jurisdiction condition makes it a requirement for an English entity that it is an English charity (within CA 2011). As we have indicated this point was not argued before us, where it was conceded, for reasons that were not explained, that the jurisdiction condition was met. But it does seem to us to be entirely consistent with, and strongly supportive of, the view that we have come to above.

124. Our determination of Issue 1(b) in HMRC's favour means that it is not strictly necessary for us to determine the other domestic law issues, but since they were argued in full before us we will express our views as follows.

Issue 1(c): whether ECC satisfied the "registration condition" under paragraph 3 to Schedule 6 FA 2010

125. HMRC contend that the FTT's decision that ECC satisfied the registration condition was a consequence of its error in finding that a CASC can simultaneously be a charity for the purposes of Schedule 6 FA 2010. They submit:

(1) The purpose behind paragraph 3 of Schedule 6 to FA 2010 was to ensure that (i) UK charities that pass the threshold requirements for registration comply

with that requirement before they can meet the definition of a charity for tax purposes, and (ii) that similar entities in other Member States or relevant territories comply with the corresponding requirement in their domestic laws.

(2) Once the FTT had concluded that the deeming provision in s 6 CA 2011 did not apply to ECC for the purposes of deciding whether it was initially a charity within Paragraph 1(1)(a) of Schedule 6 to FA 2010 it would be an absurd result for exactly the same provision to apply in relation to Paragraph 1(1)(b) of the same, both of which are part of the scheme in FA 2010 for determining whether an entity is a charity that is entitled to charitable tax reliefs. Either s 6 CA 2011 applies to Schedule 6 FA 2010, or it does not. If it does not, then ECC failed to meet the registration condition.

126. ECC contends that the analysis of the FTT at [54] to [59] and [93] to [96] of the Decision is correct and should be endorsed by the Upper Tribunal. ECC submits:

(1) Once it is accepted that following the enactment of Schedule 6 to FA 2010 there are distinct definitions of "charity" for the purposes of charity law and tax law, the issue is straightforward.

(2) Since the effect of s 6 CA 2011 is that ECC is deemed not to be a "charity" for charity law purposes, Condition A of the registration condition, as set out in paragraph 3(3) of Schedule 6 FA 2010, namely that the body has complied with any requirement to be registered in the register kept under s 29 CA 2011, is not relevant.

(3) ECC is not subject to "any requirement" to register as a charity under the law of a territory outside England and Wales and therefore satisfies Condition B of the registration condition.

(4) It should not be viewed as a surprising result that a body of persons is able to satisfy the registration condition without being on a register of charities. Both elements of the condition are framed in a contingent manner, referring to compliance with "any requirement" to be registered and thus contemplate that an entity may satisfy the condition on the basis that it is not subject to "any requirement to be registered".

127. Although the wording of paragraph 3(1) of Schedule 6 FA 2010 does not make it absolutely clear that Condition A applies to UK bodies that are required to be registered pursuant to s 29 CA 2011 and Condition B applies only to bodies established outside the UK which are required to be registered under corresponding provisions in the jurisdiction of their establishment, we agree with the FTT that that is the effect of the provisions, as it said at [58] of the Decision.

128. It seems to us therefore that the answer to this issue must follow the result of the determination of Issue 1(b). If that issue is determined in favour of ECC, then in our view it is difficult to fault the FTT's reasoning. We agree with ECC that if the correct interpretation of paragraph 1 of Schedule 6 to FA 2010 is that ECC (as a CASC) may be a charity for VAT purposes, then the registration condition is met because it is not a charity that is required to be registered in the register maintained under s 29 CA 2011. As ECC correctly submitted, the condition is framed in a contingent manner.

129. Since we have determined that HMRC are correct in their construction of paragraph 1 to Schedule 6 to FA 2010 the point does not arise. The registration condition is only relevant if the body concerned is established for charitable purposes, and, as we have found, ECC is not such a body because of the application of s 6 CA 2011.

Issue 3: Whether the pavilion was intended for use solely as a village hall or similarly in providing social or recreational facilities for a local community

130. As mentioned above, HMRC contend that the FTT erred in two respects in relation to its findings on this Issue. First, they contend that the FTT erred in finding that members of ECC using the pavilion's facilities were using them in their capacity as members of the local community in circumstances where it had found that those members were the primary intended users of the pavilion ("the community issue"). Secondly, they contend that the FTT erred in its application of the restriction that the pavilion be intended for use solely as a village hall or similarly, having found as a fact that there were twin purposes intended for the use ("the twin purposes issue"). We shall deal with each of these issues in turn.

The community issue

131. As we mentioned above, this argument did not feature in HMRC's Response to ECC's grounds of appeal and Mr Watkinson therefore accepted that it would require our consent before the point could be argued.

132. Mr Brinsmead-Stockham objected to argument on the point being permitted at this late stage. He submitted that the point did not feature in HMRC's Statement of Case before the FTT and at the hearing before the FTT HMRC did not raise the issue. He submits that as a result ECC has been denied the opportunity to lead evidence specifically on that issue and that the FTT might have made further findings on the point before coming to the conclusions it did at [110] on the community issue.

133. The principles to be applied when considering whether a party may be permitted to raise a new point on appeal in the Upper Tribunal were set out in *Astral Construction Limited v HMRC* [2015] UKUT 21 (TCC) at [27] to [33]. In setting out the principles, the Upper Tribunal relied primarily on previous authorities in the courts and it is therefore clear that the approach to be taken by the Upper Tribunal to this issue is the same as that taken by the courts. The relevant principles have recently been restated by the Court of Appeal in *Notting Hill Finance Limited v Sheikh* [2019] EWCA Civ 1337 and we therefore approach this issue by reference to that authority. In that case, Snowden J, who gave the leading judgment, set out at [25] the relevant principles as summarised by Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360 at [15]-[18]:

> "15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.
>
> 16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.

> 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49]).
>
> 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24 at [29])."

134. At [26] Snowden J observed that the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken. He then said at [27] and [28]:

> "27. At one end of the spectrum are cases such as *Jones*[1] in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. As Peter Gibson LJ said in *Jones* (at [38]), it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances; but as May LJ also observed (at [52]), there might nonetheless be exceptional cases in which the appeal court could properly exercise its discretion to do so.
>
> 28. At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court: see e.g. *Preedy v Dunne* [2016] EWCA Civ 805 at [43]-[46]. In such a case, it is far more likely that the appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irremediable prejudice in the meantime."

135. Applying those principles in this case, we are satisfied that the point sought to be taken is a pure point of law which can be run on the basis of the facts as found by the FTT. In our view, the community point and the twin purposes point are closely linked and the findings that the FTT made, as summarised in this decision at [15] to [19] in the further finding it made at [86], as set out at [46] above, and the footnote set out at [47] above are equally relevant to the community point and the twin purposes point. We therefore find it difficult to envisage what further evidence would need to be adduced in order to deal with this issue nor in our view if the point had been run

[1] *Jones v MBNA International Bank* [2000] EWCA Civ 514

below, would it have resulted in the hearing before the FTT being conducted differently with regards to the evidence at the hearing. The FTT relied primarily on Mr Miller's witness statement which set out in considerable detail the use of the new pavilion both by members of ECC and the wider community.

136. We are also satisfied that ECC has had time to meet the new argument and has not suffered any irremediable prejudice by the point being raised. This is demonstrated by the fact that the point was raised fairly and squarely in HMRC's skeleton argument for the hearing before us, and Mr Brinsmead-Stockham replied skilfully in his oral submissions to the arguments raised by Mr Watkinson in support of the point. The authorities relied on by Mr Watkinson to support his argument are the same authorities that are relevant to the twin purposes point.

137. We therefore conclude that this is a case clearly at the end of the spectrum where it is appropriate that permission should be granted to argue the point and we so decide.

138. HMRC contend that the FTT's finding at [110] of the Decision that the pavilion was intended for use by ECC solely for the purpose of providing social or recreational facilities for a local community was not a conclusion that it was entitled to reach on the basis of the primary facts that it found. HMRC therefore contend that the error of law was of the nature identified by Viscount Simonds in the well-known case of *Edwards v Bairstow* [1956] AC 14 at page 29, that is it is a case where the primary facts as found lead irresistibly to the opposite inference or conclusion drawn by the FTT, or, as Lord Radcliffe said at page 36 in the same case, the case is one in which the true and only reasonable conclusion contradicts the determination made by the tribunal.

139. In particular, Mr Watkinson submits that although, as the FTT found, members of the Club could be regarded as members of the local community, and the pavilion was predominantly used by them, it was used not in their capacity as members of the local community but in their capacities as members of ECC. Mr Watkinson relies on two authorities in support of this argument as follows.

140. The first case is *CEE v St Dunstan's Educational Foundation* [1999] STC 381. The relevant facts were that the object of a charitable foundation was the provision and conduct in or near Lewisham of a school, and the land belonging to the foundation and the buildings thereon were to be used for the purposes of the school. The foundation wished to build a sports hall on this land. Funds were made available from the national lottery on condition that there was "community use", that is use by the community based on the recommendation of the local authority. Planning permission for the building of the sports hall was granted subject to an agreement with the local authority by which the school agreed to make the sports hall available for hire by organised groups recommended by the local authority, the hire charges being retained by the school to offset the running expenses of the sports hall. The question was whether the sports centre was intended solely for use as a village hall or similarly in providing social or recreational facilities for a local community. The tribunal decided that issue in favour of the foundation on the basis that the pupils at the school

formed part of the local community. That decision was reversed in the Court of Appeal. The reasoning was set out by Sir John Vinelott at page 394f-g as follows:

> "In my judgment the tribunal erred in treating pupils at the school as part of the local community for the purposes of this sub-paragraph. There was evidence before the tribunal that "pupils came mostly from the borough of Lewisham and surrounding areas"; it seems probable that, as the college is a well-known school, some would have come from a wider catchment area. However, it is, I think, immaterial whether the pupils or most of them were drawn from what can properly be described as "a local community". The sports centre was constructed primarily for use as one of the facilities of a fee paying school; use for community purposes at the direction of the council was secondary. In so far as pupils at the school benefited from that facility, they did so not as members of the local community, but as pupils on whose behalf fees were paid to the school. The sports centre could not therefore be said to have been intended for use solely for the purpose of "providing social or recreational facilities for a local community"."

141. The second case is *HMRC v Greenisland Football Club* [2018] UKUT 440 (TCC). The relevant facts were that a football club (GFC) constructed a multipurpose facility for use by its members and the local community. Members of GFC, who paid a subscription, had access to the new clubhouse and substantial fees were collected from boys who played for GFC's football teams. The facilities of the clubhouse were available for booking on a first-come first-served basis and open to anyone in the local community; GFC did not have any priority over any other body when it came to reserving facilities nor could it block book a particular facility, although Saturdays were reserved for GFC during football season.

142. At [42] Horner J, relying on what Sir John Vinelott said at page 394f in the *St Dunstan's* case said:

> "Modest incidental use of the facility by other than members of the local community may be acceptable. However, it is no answer to say that it was used by members of the local community because the clubhouse was being used by members of GFC who were from that community. This is because the important issue is the capacity in which they were they using the facilities. If they were using the facilities as GFC members, junior members, affiliated members, associate members, playing members, its supporters, its parents etc (hereinafter called "GFC users"), then they were not doing so as members of the local community…"

143. At [45] Horner J said that 20% use of GFC's facilities by GFC itself would not be modest incidental use.

144. Mr Watkinson submits that the FTT fell into error in concluding that overall the pavilion was to be used in providing recreational facilities to a local community, some of whom would be members of the Club and some of whom would not. He submits that members of the Club using the pavilion's facilities could not have been using them as members of the local community, yet the FTT found that those members were the primary intended users of the pavilion. Mr Watkinson submits that where there is

a privately owned facility which is enjoyed primarily by fee paying members with secondary use by the community, those who use it as members of a private club do not use it in their capacity as members of the community even though those members are drawn from the local community and even though the club is a community-based organisation.

145. Mr Brinsmead-Stockham submits that HMRC's reliance on the comments of Horner J are flawed for a number of reasons as follows:

(1) The comments are obiter dicta as the conclusion of the Upper Tribunal in *Greenisland* was simply that the FTT in that appeal had not given adequate reasons to explain its conclusion that the requirements of Note 6(b) were met;

(2) The comments are unsupported by authority and wrong in law. Horner J appeared to derive from the finding of Sir John Vinelott in *St Dunstan's* a principle of law that the capacity in which individuals use community facilities are critical to determining whether the terms of Note 6(b) are satisfied, and to apply that principle in a way that was abstracted entirely from the factual circumstances in the case of St Dunstan's College, that is a sports centre owned by a private, fee paying, school. Such an approach would lead to some very surprising results, for example would members of the Women's Institute or a village chess club meeting at a local church hall not count as "members of the local community" on the basis that they are attending the meetings in their "capacity" as members of their respective organisations? Horner J's approach would also appear, in the case of GFC to exclude from the local community supporters and parents of those playing for the club as well as the club members.

(3) *St Dunstan's* was decided on its facts and it cannot be deduced from that decision that capacity is determinative in every case; it can be relevant but it is fact specific to be determined in all the circumstances.

146. Mr Brinsmead-Stockham submits that in this case there are no grounds to distinguish between members of the Club and the local community. The FTT made clear findings of fact to that effect and rejected HMRC's arguments based on the distinction between the club and the community. The FTT found that the annual cost of becoming a non-playing member of ECC was only £5 and the fact that a resident of Eynsham has paid such a nominal amount cannot be sufficient to mean that for the purposes of applying Note 6(b) in respect of the new pavilion, that the resident has ceased to be a member of the local community.

147. We prefer the submissions of Mr Brinsmead-Stockham on this point. In *St Dunstan's* Sir John Vinelott drew a distinction between use by the school and use by the community. Once that distinction was drawn, it was inevitable that use by the pupils would not be regarded as community use, as their use was use in their capacity as pupils of the (fee-paying) school not as members of the community. But that seems to us to be a decision on the facts of that case.

148. In the present case, the FTT found that ECC's facilities were primarily for use by its members. The relevant question therefore is whether when it was used by the

members of ECC (as a cricket pavilion), ECC was using the pavilion to provide recreational facilities for the local community of Eynsham. We do not see why not. ECC, as its name suggests, is a local club. Its objectives include the promotion of "participation *within the local community* in healthy recreation by the provision of facilities for the playing of cricket": see [13] above. The FTT does not appear to have made a finding as to how many of the members of ECC in fact were residents of Eynsham, but it did find that the people capable of benefiting from ECC's purpose of advancing amateur sport were the residents of Eynsham and surrounding villages (footnote 4 to [86] in the Decision), that 10 of the 12 members of the General Committee that managed ECC were currently residents of Eynsham (at [14]), that there was no sharp division between club and community (at [118]), and that the pavilion was intended for use by ECC solely for the purpose of providing social or recreational facilities for a local community, namely Eynsham (at [110]), by which they meant that the pavilion was to be used in providing recreational facilities to a local community, some of whom would be members of the club and some of whom would not (footnote 5 to [110]).

149. We do not think there is any principle of law that use by a local sports club cannot be regarded as use by the local community. If as here the club is established for the purpose of providing sporting facilities for the members of a local community, then we do not see that use by the members of the club ceases to be community use. If Horner J decided otherwise, then we respectfully disagree with him. We consider therefore that the findings of fact that the FTT made were open to them, and that on those findings they were correct to hold that the pavilion was intended by use by ECC solely for the purpose of providing social or recreational facilities to the local community.

The twin purposes issue

150. This issue relates to the question of whether the new pavilion was "intended for use solely… as a village hall or similarly…". Before considering the submissions of the parties on the issue, it is helpful to review, in chronological order, the relevant authorities on the interpretation of Note 6(b).

151. We start with the Court of Appeal's judgment in *Jubilee Hall Recreation Centre Limited v CEE* [1999] STC 381. The relevant facts were that a charity, Jubilee Hall, ran a sports and fitness centre which comprised a well equipped gymnasium, a main hall, cafeteria, studios, and changing rooms with sauna, showers and sunbeds. Its objects were to promote, provide and maintain facilities for recreation and other leisure time occupation in the interests of social welfare for the benefit of the local community. The centre was run on a commercial basis; there were several categories of membership with discounts for senior citizens, residents, children and the unemployed. Free use of the main hall was provided to a number of other community organisations. The question was whether the construction services supplied for extensive alterations and improvements to the premises qualified for zero-rating for VAT purposes on the basis that the centre was used "as a village hall or similarly in providing social or recreational facilities for a local community."

152. Sir John Vinelott gave the leading judgment. At page 389 he rejected the observation of Lightman J in the High Court proceedings below that what matters was whether or not the members of the community were the final consumers of the supplies in respect of the refurbishment, whether or not the refurbishment services were provided to the members of the community. That observation was made in rejecting a submission that what is now Note 6(b) precluded the provision of any goods or services by intermediaries to the final consumers of supplies. Sir John said that it was necessary that the final consumer either benefits directly from the supply or where it can be said that the supply is "sufficiently close to the consumer to be of advantage to him.". He then went on to say at page 390a-d:

> "In this context the plain purpose of sub-para (b) was in my judgment to extend the relief in sub-para (a) to the case where a local community is the final consumer in respect of the supply of the services, including the reconstruction of a building, in the sense that the local community is the user of the services (through a body of trustees or a management committee acting on its behalf) and in which the only economic activity is one in which they participate directly; the obvious examples are the bring and buy or jumble sale, the performance of a play by local players and the like. On a strict construction, any economic activity carried on by somebody outside the local community even to raise money for the maintenance of a village hall (by, for example, letting the village hall at a commercial rate) would be outside sub-para (b). Similarly a hospital which provides free medical care and which carries on the business of selling flowers and books to visitors is outside sub-para (a). [Counsel for HMRC] explained that the commissioners exercise a reasonable administrative discretion and disregard such incidental use if it is modest in its scope.
>
> Lightman J criticised…the formulation which had been advanced … of "something which is owned, organised and administered by the community." I agree that that formulation adds gloss to the words used which may be too restrictive… Sub--paragraph (b) is intended to cover economic activities which are an ordinary incident of the use of the building by a local community for social, including recreational, purposes. The village hall is the model or paradigm of that case…"

153. At page 396 Beldham LJ referred to the fact that parts of the hall were let out to practitioners for commercial activities. He then said that the scale of Jubilee Hall's commercial activities went beyond the normal activities of a village hall, although from time to time village halls are used to raise money by commercial activities. As Mr Brinsmead-Stockham submitted, that was the ratio of the case; Beldham LJ went on at page 397 to conclude that the tribunal's finding of fact that the use by local people was subsidiary to what was plainly a well-organised commercial operation competing with other sports centres in the neighbourhood was one the tribunal was entitled to make and that such a venture was outside any normal conception of how a village hall it ordinarily used.

154. It is therefore clear from this authority, that the relevant question is whether the activities carried on at the building in question, when considered as a whole, constitute the normal conception of how a village hall is ordinarily used, and that is a factual matter to be established by the FTT in the light of all of the circumstances.

155. In *CEE v Yarburgh Children's Trust* [2002] STC 207 the question was whether a building owned by a charitable trust and used by a playgroup charity under licence was used "as a village hall or similarly…". Patten J, sitting in the High Court, at [38] quoted with approval the passage from Sir John Vinelott's judgment in *Jubilee Hall* referred to above. He then held at [39]:

> "It seems to me to follow from the passages I have quoted that it is not enough to show that the building in question was intended to be used for an activity which could conceivably take place in a village hall and is available to members of the local community. What needs to be shown is that the building is or fulfils the role of a village hall or other building designed for public use in the provision of social or recreational facilities for the local community. If, as in the present case, the use to which the building can be put is severely limited it is no answer to say (as the Tribunal did) that those who benefit from that limited use are members of the local community. The village hall was deliberately chosen as the obvious or paradigm example of a building which exists for the benefit of a local community being able to provide premises for a wide range of social and other activities for their benefit. The words "or similarly" were intended to include other buildings which although not village halls as such provide a centre for community activities. They qualify the words "village hall" and not the words which follow in Note 6(b). The provision of social and recreational facilities to a section of the public does not make the building a village hall or something similar. For Note 6(b) to apply the building must be a village hall or its equivalent and provide social and recreational facilities for the local community at large. The building used by the Playgroup is not generally available and does not do this. On this issue the decision of the Tribunal cannot stand."

156. In that case, the fact that the use of the hall was restricted to the playgroup meant that the class of persons who had use of it was not sufficiently wide to be deemed to be provided for "the local community at large". We accept, as Mr Brinsmead-Stockham submitted, that the case demonstrates that whether the use is as a village hall or similarly is to be decided as a question of fact.

157. That point is apparent from the decision of the Upper Tribunal in *New Deer Community Association v HMRC* [2015] UKUT 604 (TCC). The Association was a charitable community association, whose objects included maintaining and managing the village hall and pleasure park for activities promoted by it and its constituent members. The hall was used for various sporting and other community activities. A new building was constructed as a sporting pavilion, comprising mainly a large entrance area and changing room and a small meeting room and kitchen, as well as in adjacent equipment storage area. HMRC refused to treat the works as zero-rated. The taxpayer contended that the use of the building fell within Note 6(b).

158. At [18] the Upper Tribunal held that attention must focus on the nature of the activities conducted – or intended to be conducted – in the building, and that the question is whether these are similar to the type of social or recreational activities that one would expect to be conducted in a village hall for the benefit of a local community. It went on to say:

> "That will, inevitably, depend upon the facts and circumstances of each case. It does not, however, seem to me to be a necessary requirement that there should be a "mix" of activities such as one might find carried on in a traditional village hall; the sub-paragraph merely requires use "similar to" – not "the same as" – that of a village hall. The carrying on of a mix of activities may be favourable to a finding that the use of a building is similar to that of a village hall, but a single use might, depending upon circumstances, qualify if it consisted of providing social or recreational facilities for the local community."

159. At [19] the Upper Tribunal said that the difficulty for the taxpayer in that case was that the building was not used in providing social or recreational facilities, but rather as an adjunct of the social or recreational facilities provided for the local community by the sports pitch. At [20] it held that the FTT was entitled to find on the evidence before it, that a building used primarily to provide changing room facilities and storage of sporting equipment was not used as a village hall or similarly.

160. In *Caithness Rugby Football Club v HMRC* [2016] UKUT 354 (TCC), a Rugby club, which was a registered charity, built a club house consisting of changing rooms occupying just under half of the building, a main hall, a kitchen and bar area and various ancillary rooms. The main hall, kitchen and toilets constituted about 40% of the building. The FTT found as a fact that the clubhouse was used by a significant number of diverse community groups and was advertised as a "community venture" available for use by any groups or individuals. It was managed by the club, a members' club, on a non-commercial basis and let out to other groups at modest rates. The FTT took into account that the club also used the clubhouse for its own activities, and that its own needs were the motivation for building the clubhouse in the first place. The FTT also found that the club gave priority to its own needs, in that bookings were made for rugby matches as soon as the fixtures for a season were published and others could not book the clubhouse for those times, holding that that was a factor that needed to be weighed together with all other considerations. It found that 90% of the usage of the hall was by clubs or groups other than the Rugby club.

161. Before the Upper Tribunal it was accepted that the FTT had been entitled to find that the building had been intended for use solely by the Rugby club in providing social or recreational facilities for a local community. HMRC however, argued that the FTT had erred in law because a prerequisite of satisfying Note 6(b) was that there be local community direction or control of the use of the building. The Upper Tribunal held at [28] that the judgments in *Jubilee Hall* support the proposition that the existence or non-existence of directional control over the use of a building is a relevant circumstance, but not necessarily a decisive one, being one of several factors which may be pertinent. As is apparent from the earlier cases, the emphasis was on the intended uses of the building at the time goods or services were supplied.

162. At [33], in referring to *New Deer*, the Upper Tribunal said that in many cases the provision of sports pavilion facilities to a local community is likely to be the provision of social or recreational facilities.

163. HMRC contend that the FTT's finding that the intended use of the pavilion is solely as a village hall or similarly, supported by its reasoning at [119] to [125] of the

Decision, was not a conclusion that it was entitled to reach on the basis of the primary facts that it found. HMRC therefore contend that the error of law was of the nature identified in *Edwards v Bairstow* as described at [138] above.

164. Mr Watkinson submits that there were, on the facts found by the FTT, and starkly so, twin intended purposes for the use. Firstly, the predominant intended use was as a cricket pavilion by ECC's members, hence the changing rooms for players and umpires and the sacrosanct use of the pavilion on certain days by ECC, for free. Secondly, the secondary intended use of the pavilion was as a village hall or similarly, firstly by staging community events and secondly by hiring the building to other users. However, having a predominant user of a building, who controls the building, uses it without charge for its own specific purposes and is able to take precedence over any and all other users, who are occasionally indulged by attending community events or otherwise charged to use it, cannot be use solely as a village hall or similar. Mr Watkinson submits that the use of the word "solely" in Note 6(b) indicates that there is a high hurdle to surmount if the provision for zero-rating, which is to be construed strictly, is to be allowed.

165. Mr Brinsmead-Stockham submits that the FTT correctly analysed the legal principles relevant to this issue at [112] to [116] of the Decision. He submits that HMRC's argument, as summarised at [164] above, is flawed for the following reasons:

(1) It mischaracterises the factual position in the appeal. Far from finding that ECC "occasionally indulged" non-members by allowing them to attend community events at the new pavilion, the FTT held at [119] that ECC is generous with its facilities and does not exclude non-members from the pavilion.

(2) It is not supported by any authority and is contrary to the decision of the Upper Tribunal in *Caithness Rugby Club*. The FTT in that case correctly took into account as relevant considerations the facts that the club (1) used the clubhouse building for its own activities; (2) that its own needs were the motivation for building the clubhouse; and (3) that the club gave priority to its own needs. However, the FTT held that those considerations were outweighed by other factors that demonstrated that the clubhouse building was "used as a village hall or similarly".

(3) If the argument purports to identify legal rules such that in any situation where the conditions identified by HMRC apply, the taxpayer will fail to satisfy Note 6(b), this would amount to a very high bar for relief and would deny relief in many circumstances where it is routinely accepted that relief is available, such as in respect of church halls.

166. Mr Brinsmead-Stockham submits that as the authorities demonstrate, the question is primarily a question of fact. The FTT considered all of the factors identified in HMRC's argument in its detailed analysis of the evidence in relation to the issue and there is no tenable basis on which to maintain that the FTT arrived at an irrational factual conclusion on the basis of the evidence before it.

167. Mr Brinsmead-Stockham submits that in contrast to the position in *Jubilee Hall*, where the ratio of the decision was that the exemption was not available because the various commercial uses that the building was put to were predominant, the only economic activity carried on at the pavilion were the activities engaged in by ECC. The intended predominant use of the pavilion for cricket purposes cannot take the supply out of the scope of the relief. This case was, on the facts, similar to *Caithness Rugby Club*; in both situations an independent community club uses the pavilion for its own purposes but allows other community use. HMRC's argument in reality amounts to an attempt to re-run the management and control question which was rejected in *Caithness Rugby Club*. HMRC are in essence saying that this is ECC's own building which it controls and that is a bar to the relief being granted. That control argument was rejected in *Jubilee Hall* as an unnecessary gloss on the wording of Note 6(b).

168. Mr Brinsmead-Stockham also submits that *New Deer* makes it clear that the single use of a building for a single sport can be sufficient: see the last sentence of [18] of that decision quoted at [158] above.

169. In summary, Mr Brinsmead-Stockham submits that the question for the FTT to decide was whether on all the evidence, having taken into account all the circumstances of the case, the intended use of the pavilion was as a village hall or similar. All the factors identified by HMRC in its arguments were properly considered and weighed up and the FTT found that for the purpose of determining the pavilion's intended use, the division between "Club" and "community" was not as sharp as HMRC suggested: see [118] of the Decision. HMRC's arguments therefore amount to an impermissible attack on the FTT's findings of fact.

170. We prefer the submissions of Mr Brinsmead-Stockham on this point. In our view, the FTT correctly identified the relevant principles to be applied, as derived from the authorities, as set out at [112] to [116] of the Decision: see [48] above.

171. The authorities do not demonstrate that there is a stark "twin purpose" test as propounded by HMRC. The authorities emphasise that it is necessary is to look at all of the relevant circumstances. Excessive use for commercial purposes can be a bar (*Jubilee Hall*) as can restriction of use to a limited category of persons (*Yarburgh*). None of those features appear to be present in this case. *Caithness Rugby Club* demonstrates that a facility primarily designed for use by the club's members and owned and controlled by the club is not a bar to the facility being "intended for use solely as a village hall or similarly".

172. The FTT was entitled to come to the conclusion it did at [125] as regards the local community being the true consumer of the construction services, based on its findings of fact. In all other respects, the FTT's evaluation of the facts cannot be impugned. It was a carefully carried out multifactorial assessment taking all relevant factors into account and it was entitled to come to the conclusions that it did on the facts and find that the pavilion was intended for use solely by ECC as a village hall or similarly in providing social or recreational facilities for a local community.

Issue 4: Whether the EU law principles of equal treatment and fiscal neutrality require the UK to treat the relevant construction services as zero-rated

173. Mr Brinsmead-Stockham provided a succinct summary of the principles of equal treatment and fiscal neutrality in his skeleton argument which we gratefully adopt as follows.

174. The principles of equal treatment and fiscal neutrality are related, in that the principle of fiscal neutrality reflects, in matters relating to VAT, the general EU law principle of equal treatment. Nonetheless, the two principles are distinct.[2]

175. The principle of equal treatment requires that similar situations must not be treated differently unless such differentiation is objectively justified.[3] A breach of the principle of equal treatment can be established in matters relating to tax by discrimination which affects traders who are not necessarily in competition with each other but who are nevertheless in a similar situation in other respects.[4]

176. In contrast, the principle of fiscal neutrality "precludes treating similar goods and supplies of services, which are thus in competition with each other differently for VAT purposes". In this context, "the similar nature of the two supplies of services entails the consequence that they are in competition with each other" and accordingly it is not necessary to demonstrate the "actual existence of competition between the two supplies of services" or the "existence of a distortion of competition" to show a breach of the principle of fiscal neutrality.[5] A difference in treatment for the purposes of VAT of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of the principle of fiscal neutrality. In order to determine whether two supplies are similar for the purposes of the principle of fiscal neutrality:

> "account must be taken of the point of view of the typical consumer… two supplies of services are therefore similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other."[6]

177. Although zero-rating of supplies in the UK is provided for in UK law (i.e. s 30 VATA 1994 and Schedule 8) under a permitted derogation from the Principal VAT Directive, the UK is required to apply zero-rating in a manner that is consistent with

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[2] *Commission v Sweden* (Case C-480/10), at [15]-[19].

[3] *Marks and Spencer v HMRC* (Case C-309/06) [2008] STC 1408 ***("M&S")***, at [51].

[4] ibid, at [49].

[5] *Rank Group plc v Revenue and Customs Commissioners* (Case C-259/10) (*"Rank"*) at [32]-[36].

[6] *Rank*, at [43]-[44].

the fundamental principles of EU VAT law, including both the principles of equal treatment and fiscal neutrality.[7]

178. Mr Brinsmead-Stockham submits that if this Tribunal found that the supply of the relevant construction services to ECC did not qualify for zero-rating, then such an outcome would constitute, *prima facie*, a breach of both the principle of equal treatment (as it would involve similar situations being treated differently without any objective justification), and the principle of fiscal neutrality (as it would involve treating similar supplies of services differently for VAT purposes).

179. If, as we have found, the basis of that finding was because ECC was registered as a CASC and that as a result s 6 CA 2011 prevented it from being a *"*charity*"* then, Mr Brinsmead-Stockham submits, this would constitute a clear breach of the principles of equal treatment and fiscal neutrality. This follows from the fact that the classification of an entity for the purposes of UK law as either a "charity" or a CASC can be of no significance for the purposes of EU VAT law, yet it would result in otherwise identical supplies being subject to different rates of VAT. In those circumstances, the Tribunal would be obliged to construe the relevant UK legislation in a way that conformed to EU VAT law, and to hold that ECC was entitled to zero-rating of the relevant construction services. Mr Brinsmead-Stockham relies on the judgment of the ECJ in Case C-498/003 *Kingscrest Associates Ltd v CEE* where the ECJ held that an exemption which under UK domestic law was available to an entity that was a charity within the meaning of UK domestic law but was not available to a profit-making entity that, according to the independent concept of EU law was a charitable organisation, breached the principle of fiscal neutrality: see [42] to [45] of the judgment.

180. Mr Brinsmead-Stockham accepts that his argument is dependent upon the principle of fiscal neutrality applying not only to the suppliers of the services, but also to the recipients of those services. In other words, using the relevant comparisons made in this case, Mr Brinsmead-Stockham contends the principle is engaged because there is different treatment between ECC and Charlbury Cricket Club as the recipient of the relevant construction services. He accepts that there is no ECJ authority on this point. He submits that in this case the principle of fiscal neutrality is engaged because there is a distortion of competition on a basis which is not relevant for EU VAT purposes, namely that ECC, unlike Charlbury, is not registered as a charity. Similarly, the principle of equal treatment is breached because there is unjustified different treatment between the two clubs, the only difference being that one is a CASC and the other is not.

181. We reject Mr Brinsmead-Stockham's submission that the principle of fiscal neutrality can be extended to the recipient of supplies. As the authorities clearly demonstrate, the principle focuses on whether the supplies are objectively similar from the perspective of the typical consumer, so inevitably the focus must be on the position of the traders in question. Clearly, ECC and Charlbury Cricket Club are not traders who are in competition with each other. As HMRC submitted, the principle

[7] *M&S*, at [33].

does not extend to recipients of supplies who, for social policy reasons, are treated differently for the purposes of some VAT reliefs by statute. That conclusion is sufficient to dispose of ECC's arguments on the principle of fiscal neutrality.

182. As far as the principle of equal treatment is concerned, a body that is a charity, that is in the example in this case Charlbury Cricket Club, and a body which is not, ECC in this case on the basis of our earlier findings in this decision, are not objectively the same and we do not consider that *Kingscrest* is authority for the contrary proposition. That case was simply concerned with the question as to whether there was a breach of the principle of fiscal neutrality in circumstances where there was different treatment of bodies which were both, according to an independent concept of EU law, charitable organisations.

183. For these reasons, we determine Issue 4 in favour of HMRC.

Disposition

184. For the reasons given above, we determine this appeal as follows:

(1) We disagree with the FTT on Issue 1(b) and decide it in HMRC's favour. In our judgment, s 6 CA 2011 has the effect that ECC is to be treated as not established for charitable purposes and hence cannot be a charity for the purposes of Schedule 6 of FA 2010. That means that we uphold the conclusion of the FTT on different grounds.

(2) Issues 1(c) and 3 in those circumstances do not arise, but if they had done we would have preferred ECC's arguments.

(3) We agree with the FTT that Issue 4 should be decided in HMRC's favour.

(4) The overall result is that ECC's appeal is dismissed.

MR JUSTICE NUGEE **JUDGE TIMOTHY HERRINGTON**

UPPER TRIBUNAL JUDGES
RELEASE DATE: 1 October 2019