[2018] UKFTT 0357 (TC)

TC06571

Appeals numbers: TC/2012/4557, TC/2012/4761, TC/2012/4769 & TC/2013/6418

VAT *– Exemption – Fund-raising events – art 132 PVD 2006/112/EC – Group 12 sch 9 VATA – social events organised by Students Unions*

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) LOUGHBOROUGH STUDENTS UNION
(2) KEELE UNIVERSITY STUDENTS UNION
(3) NOTTINGHAM TRENT STUDENTS UNION
(4) THE STUDENTS UNION AT BOURNEMOUTH UNIVERSITY **Appellants**

-and-

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

TRIBUNAL: **Judge Peter Kempster**

Sitting in public at Centre City Tower, Birmingham on 15-19 January 2018

Mr Peter Mantle of counsel, instructed by VATangles Consultancy Ltd, for the First, Second and Fourth Appellants
Mr Noel Tyler (VATangles Consultancy Ltd) for the Third Appellant

Mr Joseph Millington of counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

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DECISION

1. The Appellants appeal against various decisions of HMRC rejecting claims for repayment of output VAT and making adjustments to VAT returns. The parties request a decision in principle to determine the correct VAT treatment of certain social events organised by the Appellants. The Appellants contend (and HMRC refute) that the events are exempt activities by virtue of being "fund-raising events", and thus receipts from the events (including ticket sales and bar sales) are exempt supplies for VAT purposes.

2. The following abbreviations for the parties are used in this decision notice:

"**Loughborough**" – Loughborough Students Union

"**Keele**" – Keele University Students Union

"**NTU**" – Nottingham Trent Students Union

"**Bournemouth**" – Students Union at Bournemouth University

"**HMRC**" – the Respondents

3. The events identified by the Appellants as eligible for exemption are as follows (descriptions are given in the witness evidence).

(1) Loughborough:

(a) Year ended 31 July 2007 – Rag Ball.

(b) Year ended 31 July 2008 – Rag Ball.

(c) Year ended 31 July 2009 – Fresher's Ball, Graduation Ball, eight FND events, and a Hey Ewe event.

(d) Year ended 31 July 2010 - Fresher's Ball, Graduation Ball, ten (corrected from eleven at the hearing) FND events, and two (corrected from one at the hearing) Hey Ewe events.

(e) Year ended 31 July 2011 - Fresher's Ball, Graduation Ball, six quizzes, two comedy evenings, three live music events, and two events with DJs who mix.

(f) Year ended 31 July 2012 - Fresher's Ball, and Graduation Ball.

(2) Keele:

(a) In 2006-07 – Graduation Ball, Summer Party, End of Exams Party, Finalists Party, Election Night Party, and three Flirt events.

(b) In 2007-08 – Graduation Ball, Summer Party, Varsity Party, Finalists Party, Freshers Party, a Reloaded Freshers DJ event, and five Flirt events.

(c) In 2008-09 – Graduation Ball, Monsters Ball, Summer Party, Christmas Party, Wicked Roller Disco, four Get Funked events, and two Flirt events.

(d) In 2009-10 – Graduation Ball, Woodstoke Ball, Halloween Ball, Finalists Party, Freshers Party, End of Exams Party, Christmas Party, Wicked Roller Disco, Headphone Disco, a Mega Monday event, a Rock-a-Oke event, a Get Funked event, and a Flirt event.

(3) NTU:

(a) These events in the period September to December 2010 – Kickstart, Baywatch Beach, Game On, You V Rave, Climax, Freshers Ball, two Trent Army events, and two Last Day of Term events.

(4) Bournemouth:

(a) The Freshers Balls, Graduation Balls and Summer Balls held between 1 February 2007 and 30 April 2012.

Law

4. Article 132 VAT Directive 2006 (Dir 2006/112/EC) provides, so far as relevant:

> "*Exemptions for certain activities in the public interest*
>
> 1. Member States shall exempt the following transactions:
>
> …
>
> (o) the supply of services and goods, by organisations whose activities are exempt pursuant to points (b), (g), (h), (i), (l), (m) and (n), in connection with fund-raising events organised exclusively for their own benefit, provided that exemption is not likely to cause distortion of competition;
>
> …
>
> 2. For the purposes of point (o) of paragraph 1, Member States may introduce any restrictions necessary, in particular as regards the number of events or the amount of receipts which give entitlement to exemption."

5. Section 31 VAT Act 1994 provides, "A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 …". Group 12 of sch 9 VATA provides, so far as relevant:

"*Group 12—Fund-raising events by charities and other qualifying bodies*

Item No.

5 **1** The supply of goods and services by a charity in connection with an event—

(*a*) that is organised for charitable purposes by a charity or jointly by more than one charity,

(*b*) whose primary purpose is the raising of money, and

10 (*c*) that is promoted as being primarily for the raising of money.

…

NOTES

…

15 (4) Where in a financial year of a charity or qualifying body there are held at the same location more than 15 events involving the charity or body that are of the same kind, items 1 to 3 do not apply (or shall be treated as having not applied) to a supply in connection with any event involving the charity or body that is of that kind and is held in that financial year at that location.

20 (5) In determining whether the limit of 15 events mentioned in Note (4) has been exceeded in the case of events of any one kind held at the same location, disregard any event of that kind held at that location in a week during which the aggregate gross takings from events involving the charity or body that are of that kind and are held in that location do 25 not exceed £1,000.

(6) In the case of a financial year that is longer or shorter than a year, Notes (4) and (5) have effect as if for "15" there were substituted the whole number nearest to the number obtained by—

30 (*a*) first multiplying the number of days in the financial year by 15, and

(*b*) then dividing the result by 365.

(7) For the purposes of Notes (4) and (5)—

(*a*) an event involves a charity if the event is organised by the charity or a connected charity;

35 …

> In this Note "organised" means organised alone or jointly in any combination, …
>
> (11) Items 1 to 3 do not include any supply the exemption of which would be likely to create distortions of competition such as to place a commercial enterprise carried on by a taxable person at a disadvantage."

Authorities

6. The following caselaw was cited to the Tribunal, and the abbreviations below are used in this decision notice.

Case	***Court***	***Citation***	***Abbreviation***
Marleasing SA v La Comercial Internacional de Alimentacion SA	CJEU	[1992] 1 CMLR 305	*Marleasing*
BLP Group PLC v HMRC	CJEU	[1995] STC 424	*BLP*
EC Commission v Spain	CJEU	[1998] STC 1237	*Spain*
Marks and Spencer v CEC	CJEU	[2002] STC 1036	*M&S*
Haderer v Finanzamt Wilmersdorf	CJEU	[2008] STC 2171	*Haderer*
HMRC v Isle of Wight Council & others	CJEU	[2009] STC 1096	*Isle of Wight*
R (TNT Post) v HMRC	CJEU	[2009] STC 1438	*TNT*
Stichting Centraal Begeleidingsotgaan Voor de Intercoggiale Toesting v Staatssecetaris Financien	CJEU	[2009] STC 869	*Stichting Centraal*
HMRC v Rank Group plc	CJEU	[2012] STC 23	*Rank*

RCC v Bridport and West Dorset Golf Club Ltd	CJEU	[2014] STC 663	*Bridport*
Ordre des Barreaux Francophones et Germanophone & others v Conseil des Ministries	CJEU	[2016] All ER (D) 84 (Aug)	*Ordre des Barreaux*
RCC v British Film Institute	CJEU	[2017] STC 681	*BFI*
Fleming (*t/a Bodycraft*) *v Revenue and Customs Comrs; Condé Nast Publications Ltd v Revenue and Customs Comrs*	House of Lords	[2008] STC 324	*Fleming*
Century Life plc v HMRC	Court of Appeal	[2001] STC 38	*Century Life*
Revenue and Customs Comrs v EB Central Services Ltd	Court of Appeal	[2008] STC 2209	*EB Central Services*
HMRC v European Tour Operators' Association v HMRC	Upper Tribunal	[2013] STC 1060	*ETOA*
Loughborough Students Union v HMRC	Upper Tribunal	[2014] STC 357	*Loughborough 2013 UT*
Loughborough Students Union v HMRC	First-tier Tribunal	[2012] UKFTT 331 (TC)	*Loughborough 2012 FTT*
Loughborough Students Union v HMRC	First-tier Tribunal	[2017] UKFTT 0518 (TC)	*Loughborough 2017*
Northern Ireland Council for Voluntary	VAT Tribunal	[1991] VATTR 32	*NICVA*

Action v HMRC			
Blaydon Rugby Football Club v HMRC	VAT Tribunal	[1995] VTD 13901	*Blaydon RFC*
Newsvendors Benevolent Institution v HMRC	VAT Tribunal	(1996) VAT Decision 14343	*Newsvendors Benevolent*
Cheltenham & Gloucester College Students Union	VAT Tribunal	(1998) VAT Decision 15727	*Cheltenham & Gloucester*

Witness evidence

7. At the start of day one of the hearing the Appellants applied to withdraw four witness statements previously served, and substitute three new witness statements. The explanation was that personnel and officers of the various Unions had changed, and the original witnesses were no longer available to attend. Mr Millington for HMRC objected to the late substitution and highlighted that: no advance notice of the proposed substitution had been given to either the Tribunal or HMRC; an earlier application to substitute witnesses had already been granted by the Tribunal, and now some of those witnesses were themselves being replaced; there were earlier breaches of deadlines by the Appellants, for example the skeleton arguments had been months late; the new witness statements were not simple like-for-like replacements; substantial time had been wasted preparing cross-examinations of persons who now were not to be presented for questions, and extra time would be spent preparing for the proposed new witnesses; however, HMRC were prepared to proceed if the new witnesses were admitted. I am grateful to Mr Millington and those instructing him for their co-operation in this matter. I am satisfied that the Appellants were not attempting to ambush their opponents by presenting three new witnesses on the morning of the first trial day, but it is clearly unsatisfactory and discourteous for that to be done without any prior notice to the other side, let alone informing the Tribunal of the intention. I determined that the substitution would be permitted. Mr Millington reserved his clients' position as to any costs application in relation to the extra work necessitated, and I stated that any costs application must conform with Rule 10 of the Tribunal Procedure Rules.

8. For Loughborough:

(1) Mr Andrew Parsons (union director) confirmed and adopted a witness statement dated 7 January 2015, and gave oral evidence.

(2) Mr Andrew Meakin (venue services director) confirmed and adopted a witness statement dated 7 January 2015, and gave oral evidence.

(3) Mr Steven Black (head of venue operations) confirmed and adopted a witness statement dated 17 December 2017, and gave oral evidence.

(4) Mr Robert Clack (assistant venue manager) confirmed and adopted a witness statement dated 10 January 2018, and gave oral evidence.

5 9. For Keele:

(1) Ms Ceri Smith (services director) confirmed and adopted two witness statements dated 28 January and 8 October 2015, and gave oral evidence

(2) Mr Mark Askew (venue manager) confirmed and adopted a witness statement dated 8 January 2018, and gave oral evidence.

10 10. For NTU:

(1) Mr Ceri Davis (chief executive) confirmed and adopted a witness statement dated 20 May 2016, and gave oral evidence.

11. For Bournemouth:

(1) Mr Alan James (general manager) confirmed and adopted two witness
15 statements dated 29 January and (with a minor amendment) 19 May 2015, and gave oral evidence.

(2) Mr Alan Dove (commercial manager) confirmed and adopted a witness statement dated 29 January 2015, and gave oral evidence.

(3) Ms Sarah Newland (accounts manager) confirmed and adopted a
20 witness statement dated 29 January 2015, and gave oral evidence.

12. For HMRC:

(1) The following witnesses attended and were available for questioning but the Appellants did not wish to ask any questions of the witnesses:

(a) Mr David Fowler (case officer for Loughborough)
25 confirmed and adopted a witness statement dated 28 January 2015.

(b) Mr David Powell (case officer for Keele) confirmed and adopted two witness statements dated 27 January and 20 September 2015.

30 (c) Ms Janine Warner (case officer for Bournemouth) confirmed and adopted a witness statement dated 29 January 2015.

(2) The following witness statements were accepted by the Appellants and the witnesses did not attend - Mr Bede Murray (case officer for NTU)

dated 27 January and 21 September 2015; and Mr Graham Speight (case officer for Loughborough) dated 26 January 2015.

Loughborough witnesses

13. Mr Parsons's evidence included the following.

(1) He has been employed by the Union since 1988 as Union Director. He is responsible to the Union's trustees and elected officers for the financial performance of the Union.

(2) He had been professionally advised that up to 15 events each year of a type and in a location could be exempt from VAT if they were fundraising activities. HMRC's guidance suggested that publicity materials, tickets etc should clearly refer to fundraising.

(3) Entertainments and bars are key profit centres of the Union and the surpluses from these form a major part of the funding of the charitable activities for students that the Union puts on, and without this income these activities simply could not take place.

(4) He had responsibility for determining which events would be relied on as fulfilling the requirements for exemption as fundraising events, and he made this decision in conjunction with Mr Meakin and the Union's vice president. The list would then be signed-off by the executive committee and board. He picked the events that looked most promising and most successful.

(5) The primary purpose of each of the disputed events was to raise money; if they were expected to be loss-making then they would not have been held.

(6) Having determined the events qualified as fundraisers, he issued instructions to ensure that any ticketing, flyers and posters included a red "£" motif and the strapline "Held to fund the charitable objectives of LSU". The Union also produced a termly wallplanner with all events held out as fundraisers are also clearly marked with the red "£" motif. Online marketing used the phrase, "This event is an event held to fund the charitable activities of LSU. Money raised by this night goes back into our work shaping your Loughborough Student Experience." A large pop-up stand bearing the "£" motif and the "Held to fund the charitable objectives of LSU" strapline is put out at all qualifying events.

(7) It was not the case that the primary purpose of any of the disputed events was to fulfil the objective in the Union's constitution of "To develop the student community through the provision of entertainment, media, social or other services, and support for a wide range of student led cultural, recreational and sporting groups."

(8) An increasing number of other student unions had no trading activities but still provided social opportunities to students by way of get-togethers, outings etc.

(9) In reply to cross-examination:

5 (a) Social enjoyment was one aspect of student life but students may define that by a number of factors such as sport, religious life, community participation, and social interaction.

(b) Some events might be operated at a loss where there were particular reasons – eg Monday night Give it a Go sessions which engaged students who might not otherwise participate, similarly international student events and post-graduate nights. Those were very different from FND events. There were also events that raised money but did not have that as their primary purpose.

(c) Some events were run by outside organisations with whom the Union had an affiliation.

(d) In relation to drinks promotions at Stupid Tuesday events, the purpose was to encourage students to come out for the evening rather than stay in and watch Netflix. The Union was like an extension of home. Drinks promotions were run for the same reasons supermarkets run special offers.

(e) Hey Ewe events had a different character depending on the night. Wednesdays concentrated on sports (which was a very important part of the Loughborough experience) and people would attend in sports gear.

(f) FND events were dress to impress events for those looking for romance. This was the closest to a club night, but was different from a town nightclub – students congregated with their friends and their own people, often from their hall of residence; it was not just about drinking and dancing.

(g) Not every FND and Hey Ewe had been claimed as a fundraising event. There would be aspects of the ones claimed that distinguished them – typically special appearances or extra features.

(h) HMRC guidance said what to do for fundraising events, and the professional representatives consulted with HMRC. His understanding was that as long as the primary purpose was to raise money then there were conditions about publicity for exemption.

(i) There were events that raised money but did not have that as their primary purpose.

(j) In relation to the quizzes in 2011 – these were run most weeks at various venues, often targeted at particular academic departments. He was not sure if students from outside the department could attend.

(k) RockSoc was held fortnightly. They were open to persons over 16 because the Union also served Loughborough College and the events attracted rock music lovers, and included moshing. The events identified as fundraisers would have had something special about them – either the event or the date.

(l) All events have a social purpose and a fundraising purpose; however the primary purpose might vary. Not every Hey Ewe event had been claimed as an exempt event because HMRC limited the eligible number to 15; the ones claimed were selected as being strong fundraisers and which had special elements. Those events were designated and highlighted as fundraisers. It was not accepted that the only difference for all of them was the inclusion of a generic strapline on the publicity material for those events.

(m) Nightclubs in Loughborough included Echos, Scream and Mansion. It was correct that Echos ran a Freshers event, and that Mansion held regular student nights.

14. Mr Meakin's evidence included the following.

(1) He has been employed by the Union since 2007 as Venue Services Director. He reported to Mr Parsons and has now taken over from him on an interim basis.

(2) Entertainments and bars are key profit centres of the Union and the surpluses from these form a major part of the funding of the charitable activities for students that the Union puts on, and without this income these activities simply could not take place.

(3) He had been professionally advised that up to 15 events each year of a type and in a location could be exempt from VAT if they were fundraising activities. HMRC's guidance suggested that publicity materials, tickets etc should clearly refer to fundraising.

(4) On a regular basis he met with Mr Parsons and the Union's vice president to discuss planned activities and determine those that would fulfil the requirements of fundraising events for VAT.

(5) Having determined the events qualified as fundraisers, he issued instructions to ensure that any ticketing, flyers and posters included a red "£" motif and the strapline "Held to fund the charitable objectives of LSU". The Union also produced a termly wallplanner with all events held out as fundraisers are also clearly marked with the red "£" motif. Online

marketing used the phrase, “This event is an event held to fund the charitable activities of LSU. Money raised by this night goes back into our work shaping your Loughborough Student Experience.” A large pop-up stand bearing the “£” motif and the “Held to fund the charitable objectives of LSU” strapline is put out at all qualifying events.

(6) In reply to cross-examination:

(a) Drinks promotions depended on a number of factors such as shortdated stock, seasonal demands, and other normal bartending issues.

(b) Union events provided a safe secure environment amongst like-minded people. There was a varied programme of events to ensure a wide appeal.

(c) He did not have a role in deciding which events were designated as fundraisers.

15. Mr Black’s evidence included the following.

(1) He was a student at Loughborough University between 2002 and 2006, and then a Union sabbatical officer between 2006 and 2008, as vice president, finance and commercial services with responsibility for overseeing all commercial activities and budgeting. From 2005 he had been an assistant venue manger in the Union; since 2009 he was involved in the delivery of student entertainment at the Union; and was now head of venue operations.

(2) The Union puts on a wide range of distinct entertainment activities. The bars are open for most but not for all of these. There are four distinct entertainment venues within the Union. It is one of the largest venues in the Midlands.

(3) The category of ‘DJs who mix' involve DJs creating totally unique and individual sounds in response to the crowd; this is done through IT programmes on laptop computers and previously created material on USB memory sticks; this would also include the mixing of sounds using vinyl records on turntables; there are now DJs who, as well as mixing sounds also add video material; this adds in effect a third dimension to the entertainment. There are also on occasions more traditional DJs who do not mix but who purely play records and/or CDs, and anecdotally speak in between tracks much like a radio show.

(4) There will be a number of 'personal appearances' at certain activities. These usually involve persons who have been on TV soaps that are popular with students such as Hollyoaks, or reality television programmes such as Britain's Got Talent, the X Factor or The Only Way is Essex. At 'personal appearances' the celebrity would usually meet and greet the audience but, ordinarily, would not be required to perform in any way.

(5) The Union puts on a number of 'parties'. These are events where the whole of the entertainment area, or at least the relevant entertainment area, of the Union is themed, with appropriate music being played. Students generally attend these activities in themed clothing.

(6) Ordinarily the Union will operate a Freshers Ball and a Graduation Ball annually. These are not balls in the traditionally understood meaning of the word but involve high profile DJs, well known live bands and possibly comedians or compares; there may be other activities such as firework displays, fairground rides or walk-around entertainers; there is little or no actual dancing; it is more of a visual spectacle. Most of the balls, for the period in question, took place in marquees on the grounds outside as well as within the main building.

(7) In a typical week in term time throughout the period in question:

(a) On the Monday there was the Universal Quiz; this was aimed at International and Post Graduate students.

(b) Stupid Tuesday is a party night; there could be drinks offers and cheesy music.

(c) Hey Ewe takes place on a Wednesday and is primarily a social activity for the sports teams; the theme is generally 'cheesy', and the activities may involve DJs some mixing, some not, or parties, or maybe live bands from the 1990s such as S Club etc; this is the evening where the sports clubs and the hall residencies come together; the dress code is casual.

(d) Universal Thursday may involve, in different rooms, food, karaoke, quizzes and world music; these did not make money for the Union, but were part of the commitment to optimise the experience of all students.

(e) FND has derived from its original title 'Friday Night Disco'; attendees 'dress to impress', and the musical theme is club music; there may well be a drinks promotion as well; this is the night where on occasions high profile DJs perform.

(f) Saturday is shown as Subversion Night; this is the rock music night - more likely DJs playing music or the occasional live band; it is run and promoted by the students of the Rock society and is of minority interest only to members.

(g) Sunday night is shown as Comedy.

(8) The two weekly events that gross the most money, and are most likely to make surpluses, are Hey Ewe and the FND.

(9) Activities at the Union provide the students with entirely different experiences from local nightclubs. Loughborough town centre is about

three miles from the University campus. Loughborough is a campus university and the majority of students live within its perimeter.

(10) Most students will be aware that the fundraising events exist to raise much needed funds for the Union, and that they are the largest and most high profile of the entertainments activities. This is itself would be more likely to entice students to attend. Students are all made fully aware of the importance of raising money for the Union, so that this can be spent on student activities. For example, the funds raised from the fundraising Hey Ewes went to fund the athletics union and the sports clubs and teams; students with a sporting interest were well aware of this and make every effort to attend.

(11) The safety of the students at events is paramount. Every event is subject to a rigorous risk assessment process with information about the expected attendance, demographics of the customers, likelihood of drug use, overcrowding, violence and disorder inside or outside the venue distributed to the Police and University ahead of any event. The Union operates a zero tolerance to drug use, this unlike other venues extends to "legal highs".

(12) There are dedicated teams of student volunteers operating within the venue in a similar fashion to how Street Pastors operate in town centres - looking after people that look vulnerable, checking people who are on their own are OK, giving out tea, coffee and biscuits. The Union has a dedicated first aid team who are on rota to assist with welfare issues as they occur, staying with people who are too inebriated to get themselves home and working with campus welfare teams to ensure their safety back into their residency. The Union operates a nightbus to ensure that students can return home safely; this operates not only within the campus, but also to other locations within Loughborough; it only runs when the Union is putting on an entertainment activity, and then only for students attending the Union.

(13) Nightclubs and bars in the Loughborough area do hold events designed to attract students, but they are not in competition with the Union. During freshers week the Union and the University provide a bus service from the Union shuttling thousands of students into town centre venues.

(14) He had worked at some of the town centre venues as door supervisor, whilst as a student and subsequently whilst working at the Union, and there is no comparison between any of the venues. In town centre venues if someone is found drunk they are removed from the premises and this is where the interaction with the venue stops. In the Union, people who are found drunk, would be removed from the venue, looked after by either a first aider or a welfare volunteer, maybe given a glass of water, if they are so inebriated that they are unable to make their

way home on their own way home, staff at the Union would either try and contact a friend for them or would work with the University Security Team to take them home safely.

(15) Fundraising events are promoted in a variety of different manners, all artwork for the events would be discussed in advance of the term and specific dates would be selected for the events to take place on. Events would then make sure that they have suitable provision to ensure they meet the criteria for the event so a DJ, band or party theme would be selected for the date. The marketing material would then be produced and the artwork would include the strapline to signify the charitable nature of the event. This would go on all printed and online material for the event including posters, social media posts, term planners, the Union website and advertising screen system. The materials used on each night can vary but include the strapline on tickets, wristbands and programmes for the events to avoid any confusion about the charitable nature of the activity. On the night of the event a pop-up banner would be placed at the main entrance and there are placed additional posters highlighting the charitable nature of the event.

(16) In reply to cross-examination:

(a) For some students Union events were an important part of their student experience – but not all, around one in four students self-identify as teetotal. Different people would identify with different events – for example, Hey Ewe was sports oriented, which was a big community at Loughborough. Some would be aimed at particular sports societies.

(b) The FND events identified as fundraisers were those hoped to be busier and more profitable. Takings would be likely to be greatest if there was a major act booked to appear. That would also apply to, for example, comedy nights. He did not make the decision as to which events were designated as fundraisers.

(c) It was correct that several nightclubs in Loughborough ran student nights, with entry discounts and drinks promotions. These were very different from the Union and were townie venues that may be hostile to students. There were some other nicer clubs. Many Union events were simply not replicated by nightclubs – eg popcorn parties and beach parties.

16. Mr Clack's evidence included the following.

(1) He is a mature student at Loughborough University, has been a member of student staff at the Union for two years, and is now assistant venue manager.

(2) He supported Mr Black's evidence and added the following.

(3) The Union offers a Night Bus service, available to all students during event nights. The bus will transport students from the venue to their halls, or houses if they live in town. The service operates free of charge, with the ability to pay an optional small fee of £1, most students doing so as a token of their gratitude.

(4) On Friday nights the Christian Union, a Christian society run by students, volunteer their time to open Club Mission, a service that delivers a sober environment for those that don't wish to drink, a quiet and safe place for those that need time to calm down and sober up, or a place to get a biscuit and some company. Club Mission is well received by students and is not a service that exists in local venues.

(5) In reply to cross-examination:

(a) As a campus university many facilities were self-contained and many students existed within what was called the Loughborough bubble.

(b) There were non-drink events organised for students, and the measure of a good event was not just the quantity of alcohol sold.

(c) Students knew that money spent at Union events went to fund Union services for students, not into the pockets of pub managers or nightclub owners.

Keele witnesses

17. Ms Smith's evidence included the following.

(1) She has been employed by the Union since 1993 and is now Services Director, responsible for all non-commercial aspects of the Union.

(2) The commercial activities of the Union are vital and form a major part of the funding of the charitable activities for students that the Union puts on, and without this income these activities simply could not take place.

(3) She and her colleagues had been professionally advised that up to 15 events each year of a type and in a location could be exempt from VAT if they were fundraising activities. HMRC's guidance suggested that publicity materials, tickets etc should clearly refer to fundraising. There were several meetings with HMRC and the professional advisers.

(4) The main responsibility for determining which events that the Union would rely on as fulfilling the requirements for exemption as fundraising events lay with colleagues – the commercial director and the bars and entertainments manager. The primary purpose of each of the disputed events was to raise money; if they were expected to be loss-making then they would not have been held. If she had felt that an event was unlikely

to produce the desired money then it would not have been authorised to qualify for exemption. A monthly calendar poster listing fundraising events is distributed and displayed throughout the University; any ticketing, flyers, online marketing and posters for the event include the strapline "This is a Keele SU Fundraising Event"; the same message is printed on a pop-up stand displayed prominently at each event; all these are done to fulfil the requirements that the fundraising events are held out as such.

(5) The Union's accounting could identify the income (ticket and bar) attributable to the fundraising events.

(6) It was not the case that the primary purpose of any of the disputed events was to fulfil the purely social objective in the Union's constitution of "Providing social, cultural, sporting and recreational activities … for the personal development of its students."

(7) In reply to cross-examination:

(a) The list of fundraising events was signed-off by the trustees of the Union. She was not aware how her colleagues identified the 15 events on the list.

(b) It was important for a University to have a vibrant atmosphere, but that was not confined to bars and nightlife. The Union was more than just its social activities; there were many aspects to enhancing the student experience.

(c) There were many other activities on campus; there were four hall of residence bars; student societies ran events.

(d) The Union would avoid running loss-making events – for example, it no longer held Graduation Balls.

(e) It was correct that the event planner posters advertised (alcoholic) drinks promotions, but that was not the largest part of the poster. It was correct that the calendars stated all events were possible Union fundraising events.

(f) The planners showed regular nights for dancing and drinking. The events identified as fundraisers were different – Flirt was a fancy-dress event, and some were specialised for example for Valentines Day.

(g) There were nightlife venues in Newcastle under Lyme, Stoke and Hanley that students could go to, instead of the Union.

18. Mr Askew's evidence included the following.

(1) He has been employed by the Union since February 2016 and is now Venue Manager. He has been involved in student entertainments for ten

years. He had managed a large nightclub in Stoke. He had not been a student at Keele University.

(2) The biggest of the entertainment activities put on by the Union take place in the 'freshers week', where new students are introduced to the various activities of the Union. Outside of 'freshers week', the Union's largest events are Woodstoke and Winterfest. These events are effectively festivals, involving nationally known bands and DJs, fairground rides (weather permitting) and has entertainment and attractions both inside and outside the Union building. The Easter Ball and Halloween are large themed events that take place within the Union. There is also a 'refreshers week' which is a set of events designed to celebrate the end of exams and the beginning of the second semester. These events tend to be act based, whether live band or DJ, and are very well attended.

(3) The most regular activities take place on Wednesday and Friday evenings. Bar takings are highest on Fridays.

> (a) The Friday evening activity has had a number of titles. For a time, it was called 'Get Funked'. This was a title used by a number of Students' Unions around the country for similar activities. The Friday activity now switches between two events. 'Fresh Friday' and 'SnapShot'. Fresh Friday focuses more on hip-hop and RnB music genres and SnapShot focuses more on the current chart, both involve personal appearances, DJs - whether mixing or not - live music or other entertainment, depending on the genre of music.
>
> (b) The Wednesday activity is generally a social activity for the sports clubs and student societies; the theme is generally 'cheesy', and the activities may involve DJs some mixing, some not, or parties, or maybe live bands and the dress code is casual. The Wednesday night activities are changed to an event titled 'Milkshake' roughly once a month; these are typically themed, fancy dress evenings, and students will often compete for the best costumes. The evening may involve personal appearances, DJs - whether mixing or not - live music or other entertainment, depending on the theme. There is an encouragement of student participation within such activities.

(4) Also the Union has regular quizzes and karaoke activities. Comedy activities used to also be common, although over recent years have not been as regular. However, the income generated from these is generally extremely small.

(5) Activities at the Union provide the students with entirely different experiences from local nightclubs - this is a factor that the Union aims to optimise. Newcastle-under-Lyme town centre is about three miles from the University campus. Keele is a campus university and a considerable

number of students live within its perimeter. There are very few nightclubs within Newcastle-upon-Lyme, however, there are some nightclubs in Hanley - which is approximately five or six miles from the Union's campus.

5 (6) The Union is a friendly environment where everyone will at least know somebody else. The Union strives to optimise safety of members attending activities, and is a gold award winner in the National Best Bar None awards. Union activities are restricted to students plus two guests, and this is strictly enforced - so there is little chance of outsiders coming to the 10 Union and causing trouble. SIA licensed security personnel patrol the campus and operate within the Union building. There are also student stewards who patrol each open room to keep an eye on student welfare. The Union operates, free-of-charge, a safety bus which ensures that all attendees get home safely - this applies whether they live on or off 15 campus. The Union promotes safe drinking, but, in the event that anybody needed to go to A & E they would be taken there by the safety bus, accompanied if appropriate by the dedicated student first aid team who are present at every regular event. There is also a student volunteer led 'street team' who will walk students back home if they live close to the students' 20 union on campus to ensure their safety. They also provide items such as flip flops and bottles of water to students who need them. There is a dedicated team of trained student first aiders present at every regular event. The Union operates a series of campaigns to prevent the sexual exploitation of female students. It has an absolutely zero tolerance to the 25 use of unlawful drugs.

(7) His experience of the nightclubs in the Potteries is entirely different. There is no safety net for a customer if they do consume too much alcohol, they are told to leave the club and given no help to get home. Clubs have no dedicated first aiders, so if a customer has any issues they have to wait 30 for an ambulance before they can be given any medical attention. Due to the open door policy the environment can feel unsafe and a lot less friendly than that of the students' union. Also, if someone were to run out of money or lose their bank card there is no way of getting home, potentially getting into a taxi with strangers or facing a long. dark walk 35 home.

(8) In reply to cross-examination:

> (a) The Union was an important part of University life, but only one aspect. The Union used focus groups to identify trends and wants. Social events changed over time. Now some 40 non-alcoholic events were organised.
>
> (b) The annual Woodstoke Ball was the biggest event outside Fresher's Week. K2 Lockdown was a club night with a DJ. Pool nights ran pool competitions with prizes but did not charge entrance fees. Flirt was a club night with a national

NUS branding, no longer held. Get Funked was held every Friday, again no longer held. Milkshake was fancy-dress. Live Sport was with the TV on in the bar, no admittance fee was charged. Karaoke was held every week, with no admittance fee.

(c) Drinks promotions were run – usually all evening on Mondays, Wednesdays and Fridays.

NTU witness

19. Mr Davies's evidence included the following.

(1) He has been the Union's Chief Executive since 2010, having previously worked at De Montfort University and the YMCA.

(2) The income generated by fundraising events, when added to the surpluses from other commercial activities and the grant income for the University, enable the Union to undertake its activities for students.

(3) He had been professionally advised that up to 15 events each year of a type and in a location could be exempt from VAT if they were fundraising activities. HMRC's guidance suggested that publicity materials, tickets etc should clearly refer to fundraising.

(4) It was not the case that the primary purpose of any of the disputed events was to fulfil the purely social objective in the Union's constitution of "Providing social, cultural, sporting and recreational activities … for the personal development of its students."

(5) In reply to cross-examination:

(a) He was not responsible for the decision to exempt certain events. That was taken by the management team and the board of trustees.

(b) The University was split over three sites; socialising played a large role in developing a student community.

(c) Baywatch Beach was a fancy-dress event. Game On was an ordinary dress event. Buses were laid on for transport. Trent Army was an occasional event with a military theme. Climax was a regular event restricted to first year students. UV Rave was held during Freshers Week. Fluid was a regular Friday event with a small bar; the atmosphere was like a rowdy village pub.

(d) Union events provided a safer environment than Nottingham city centre. Firstaiders were present, staffed by students themselves.

(e) The Union's city centre venue was a new one; it was used as a refectory and sports hall also, and was not comparable to a nightclub. During redevelopment there had been a temporary affiliation with other nearby venues; some events had had to be dropped because outside venues did not want to run them.

(f) The Trent Army title was trademarked because other venues were copying the format and passing-off as counterfeit Trent Army events, with lower standards.

(g) The events selected as fundraisers were those that had maximum revenue. Not every event could be included because HMRC rules limited these to 15 each year. The Union sought professional advice and applied in it good faith.

Bournemouth witnesses

20. Mr James's evidence included the following.

(1) He has been the General Manager of the Union since 1994.

(2) The Summer Ball is held each year as a 12-16 hour festival event on a site around ten miles from the University campus. The monies raised are a significant proportion of the net income of the Union.

(3) The Graduation Ball and Freshers Ball are held in some years; they are not held if it is not anticipated that they will be sufficiently profitable.

(4) He oversees the marketing of the events and was aware of the legal requirements that they should be held out as fundraising events. Since he was advised that it would be best practice, the appropriate strapline has been attached to all tickets, flyers, posters, and online materials.

(5) It was not the case that the primary purpose of any of the disputed events was to fulfil the social objective in the Union's constitution of "Providing social, cultural, sporting and recreational activities … for the personal development of the students."

(6) The income generated from fundraising events, when added to the surpluses from other commercial activities and the grant income for the University, enable the Union to undertake its activities and fulfil its charitable objects.

(7) In reply to cross-examination:

(a) The Union had a student centre on a subsidiary campus in town called Feelprime, in a building owned by the University; it contained a nightclub called The Old Fire Station. Most students lived in town, not on campus. Much British socialising revolves around drinking – for example village pubs

– but there were many social occasions with no alcohol involved.

(b) Union events allowed students to meet and socially reinforce with their peer group, which may not be possible at commercial nightclubs.

(c) The Balls were targeted at students although some outside guests were allowed.

(d) The Summer Ball raised more in one night than The Old Fire Station did in a year.

(e) The Balls had been held since 1994. Marketing of the events had been done in the same way since 2000 when Mr Dove became aware of the VAT opportunity from attending a conference. The Balls were identified as special events; the Union felt uncomfortable at including other events, which were seen as business-as-usual type events, in the permitted 15 as fundraisers.

21. Mr Dove's evidence included the following.

(1) He has worked for the Union since 1993 and is now the Commercial Director. He reports to Mr James. His role involves optimising the income stream of the Union in order that it can operate and provide the desired services to its members.

(2) Each year the Union holds its Summer Ball. This is a one day music event on a site several miles from the University campus. Although most attendees are students, many others attend. The Ball is advertised as a fundraising event even to non-students. The Ball is constructed with the aim of maximising the financial surplus which can be used by the Union for its other activities; every year such income has been significant; this is the sole purpose of the Ball and without the revenue produced the Union would be unable to offer the full range of services to students. The pricing of tickets and drinks cannot be too high or he would be accused of extorting the students.

(3) In some years the Union has also put on a Graduation Ball and/or a Freshers Ball. The primary purpose of these events is to raise money, and if sufficient profit is not anticipated then the events are not held. For that reason the Freshers Ball was dropped several years ago.

(4) In early 1999 he attended a seminar for student union representatives where a presentation was made by Cheltenham & Gloucester College Students Union concerning its recent VAT Tribunal success in respect of that Union's Balls. This suggested to him that Bournemouth had wrongly declared VAT on its own Balls; he discussed the matter with Ms Newland.

(5) He arranges the marketing of the events and ensures the appropriate strapline is attached to all tickets, flyers, posters, and online material.

(6) In reply to cross-examination:

(a) The Union was losing money before he arrived and the Summer Ball was one he introduced, which he had seen other universities organise successfully. He saw his role as to raise money, not to entertain students.

(b) The Summer Ball was identifiably different from other Union events. Its success meant that competitors tried to capitalise on it – for example, in 2016 both a rugby festival (with bands and DJs) and a music festival had been held on the same field, one on the same day as the Summer Ball; that was pretty much a direct competitor and the Ball made only £20,000 that year, compared to £110,000 this year. He did not know if the other festivals correctly accounted for VAT. The "student pound" was worth chasing, and many venues had gone bust during the recession.

(c) Part of the success of the Summer Ball was that students wanted to be with other students, rather than locals.

(d) From the documents available he could not be sure that the publicity for the Graduation Balls had contained the strapline, but he assumed it would have been there.

22. Ms Newland's evidence included the following.

(1) She has been the Accounts Manager of the Union since 1998, and is ACCA qualified.

(2) Each year the Union holds its Summer Ball. This is a one day music event on a site several miles from the University campus. The sole purpose of the Ball is to raise money to allow the Union to continue to function, and without the revenue produced the Union would be unable to offer the full range of services to students.

(3) In some years the Union has also put on a Graduation Ball and/or a Freshers Ball. The primary purpose of these events is to raise money, and if sufficient profit is not anticipated then the events are not held.

(4) In 1999 she spoke with Mr Dove who had attended a seminar with other student union entertainment officers, and he reported that following a VAT Tribunal decision the Union should not have been accounting for VAT on its Balls, as they were fundraising events. She spoke with HMRC, who confirmed that was correct. She therefore instructed Hays Allen to make a claim by the Union for a retrospective refund of VAT overdeclared. At a control visit HMRC (Mrs Symons) stated that the Union's input tax would need to be adjusted for the reclaim to be

processed. That was done and the claim was paid by HMRC to the Union. Between 1999 and 2012 the Union received a number of control visits from HMRC, at all of which she had been present; the treatment of the fundraising events had been examined each time, without any issue as to their qualification as exempt supplies.

(5) In 2010 another reclaim was applied for (by VATangles); the main matter was unrelated to fundraising events, but those events were involved indirectly. As a result of this HMRC (Mrs Warner) conducted visits in 2011 and 2012, and initially had no issue about the fundraising events. However, in 2012 HMRC concluded that no activities of students unions could qualify as fundraising activities as they were "social".

(6) The Union has always treated the Balls as fundraising events, as reflected in the Union's audited accounts where the net income from these events is shown separately from the Union's commercial income.

(7) In reply to cross-examination:

(a) All commercial activities of the Union were to generate funds – shops, coffee bars, bars etc.

(b) She was not aware that the VAT rules for fundraising events changed in 2000.

HMRC witnesses

23. The evidence of the HMRC witnesses was mainly confined to descriptions of their respective enquiries and conclusions. Nether the Appellants' advocates nor the Tribunal had any substantive questions for these witnesses.

Documentary evidence

24. There were five binders of agreed documents. On day four of the hearing Bournemouth applied to admit further documents, being advertising posters relating to some of the events in dispute. The explanation was that these had been discovered the previous evening by Mr Dove in an IT archive. Mr Millington for HMRC objected to the late submission and highlighted that: the deadline for disclosure of documents had long passed; one submission of HMRC was to be the lack of evidence put forward by Bournemouth as to the marketing documents, despite the burden of proof lying with it; however, if the documents were admitted then HMRC were ready to proceed. Although it is obviously unsatisfactory that evidence should be adduced so late in the proceedings, I determined that the posters should be admitted to the documents bundles.

Appellants' case

25. Mr Tyler was advocate for NTU and Mr Mantle for the other three Appellants. Mr Tyler adopted the same legal arguments as put forward by Mr Mantle and I am grateful to both advocates for avoiding duplication. In this section where there are

references to submissions on behalf of particular Appellants, it should be read that submissions on behalf of NTU were by Mr Tyler, and submissions on behalf of the other three Appellants were by Mr Mantle.

26. The Appellants advance their appeals on two alternative bases.

5 (1) That Group 12 sch 9 does not correctly implement art 132(1)(o); that the deficiency cannot be cured under the *Marleasing* principle; that art 132 is unconditional and sufficiently precise as to have direct effect; that the Appellants can therefore rely on art 132; and that the disputed events qualify for exemption under art 132.

10 (2) That the disputed events qualify for exemption under Group 12 sch 9; and that Note 4 (the 15 events restriction) is ineffective as not being a necessary restriction.

First basis

27. Item 1(b) Group 12 required *the primary purpose* of the event to be the raising of
15 money. That was a misstatement of art 132 (1)(o) – there was no such requirement in the Directive; there was no reference to "purpose" (let alone "primary purpose") in any of the exempt items listed in art 132(1). The point had been considered in the VAT Tribunal cases of *Blaydon RFC, Newsvendors Benevolent,* and *Cheltenham & Gloucester*. Those considered the statutory provisions pre-2000. The latter two cases
20 were to be preferred, and confirmed the Appellants' position.

28. Article 132 should be interpreted so as to follow its intended effect and avoid divergences between member states: *Haderer* and *Ordre des Barreaux*. The exemptions in art 132 concerned services intended to be provided to the general public at a reasonable price and without the addition of VAT: *TNT*. Fundraising was
25 in the public interest provided it did not distort competition. That was met if the fundraising aim was one of the purposes, not necessarily the primary purpose, provided such purpose was not merely incidental. If a summer ball had joint purposes of providing a social function to students and also fundraising, then that was sufficient for art 132 (1)(o). Therefore HMRC's emphasis on the social function of the events
30 was irrelevant; there was no contradiction in an event being part of the social calendar and it being a fundraising event. Similarly, the frequency and/or regularity of fundraising events did not (in itself) prevent those events from qualifying under art 132(1)(o); there was separate provision in art 132(2) for (discretionary) limits on the number of events, if necessary to prevent distortion of competition.

35 29. The same objection applied to Item 1(c) Group 12; there was nothing in art 132 that required the event to be promoted as being primarily for the raising of money. Both Item 1(b) & (c) were unjustifiable and impermissible restrictions on and barriers to the exemption provided by art 132 (1)(o). The UK cannot use conditions to narrow the subject manner of the exemption, so as to exclude from benefit persons who
40 should be entilted: *Spain*.

30. Article 132(2) permitted *necessary restrictions*. That must mean restrictions necessary to avoid distortion of competition: *NICVA*. Notes 4, 5 and 11 to Group 12 related to distortion of competition; Items 1(b) & (c) cannot be *necessary*, given those Notes.

31. Group 12 could not be rescued/salvaged under the *Marleasing* principle. By Item 1(b) & (c) Parliament had clearly but incorrectly treated those requirements as fundamental to the exemption afforded by the domestic legislation; the requirement of "primary purpose" could not merely be deleted without effectively re-legislating the point. If Item 1 went because it was non-compliant then so did the Notes, entirely.

32. Article 132(1)(o) was directly effective because it was sufficiently precise and unconditional: *BFI*. Thus the Appellants could rely on it: *M&S*.

33. The requirements of art 132(1)(o) were met entirely, including the non-competition proviso. All four Appellants are organisations whose activities are exempt pursuant to point (g) of art 132(1), being bodies recognised by the UK as being devoted to social wellbeing; further, for Loughborough and Keele only, they are organisations whose activities are exempt pursuant to point (m) of art 132(1), being non-profit making organisations supplying certain services closely linked to sport or physical education. For the reasons set out at [40] below, the exemption was not likely to cause distortion of competition.

Second basis

34. The UK legislation in Group 12 could be relied on by the Appellants even if Group 12 was an infraction of art 132(1)(o): *Century Life*.

35. On Item 1(b) - The primary purpose of all the disputed events was the raising of money, and they were promoted as such. Again, HMRC's emphasis on the social function of the events was irrelevant; there was no contradiction in an event being part of the social calendar and it being a fundraising event. The constitution of each Appellant empowered it to engage in commercial activities to raise funds to further its charitable objective of student welfare; the witness evidence was clear that the events were held as fundraisers; a specific example at Loughborough was that students attending Hey Ewe events were aware that funds raised would go to the sports clubs; at Bournemouth the witnesses said that the *sole* reason for the Summer Ball was to raise funds, which it did very effectively; at Loughborough and NTU the evidence was that events that did not anticipate a profit were dropped, unless there was some separate reason for them to be continued.

36. On Item 1(c) – The witness evidence was clear that tickets, posters, flyers, online marketing, and pop-up stands all promoted the events as being primarily for the raising of money.

37. Article 132(2) specifically permitted limits on number of events or amount of receipts, but those were only examples. Notes 4, 5 and 11 to Group 12 related to distortion of competition and were only permitted by art 132(2) – thus they must be necessary for prevention of distortion of competition. Given that the UK had enacted

Note 11, that was all that was necessary; Notes 4 & 5 went further and so were not permitted. The point had been considered by the Upper Tribunal in *Loughborough 2013 UT* and remitted back to the FTT for further findings of fact, but the appeal had been withdrawn before that was performed.

5 38. If Notes 4 and 5 did serve a legitimate purpose, then any charity that satisfied them must thereby satisfy the non-competition proviso; Note 11 should not be read as an independent alternative test.

39. HMRC's interpretation of Note 4 was that a 16th event in a period denied exemption to all 16 events; the Appellants said only the 16th event was denied (and 10 the first 15 remained exempt). HMRC's view meant that a charity would not know when holding an event whether it qualified for exemption, because it might eventually fall to be one of at least 16 such events, and that confusion would deny legal certainty to the charity. The only "events" that were relevant to Note 4 were those that satisfied the requirements of Item 1 – otherwise events that did not raise any money would still 15 be counted in the 15; therefore, events that were not promoted as fundraisers were not counted. HMRC's focus on a series of events was steered by the pre-2000 legislation and was not appropriate to the current Group 12. If HMRC's view was correct then Note 4 was not a reasonable and necessary measure to prevent distortion of competition.

20 40. The test for distortion of competition was that set down in *Rank* (per the Upper Tribunal in *Loughborough 2013 UT*) and *Bridport*; that required evaluation from the point of view of the consumer. The witness evidence was clear that the events provided by the Appellants met different needs of the student consumers than were met by commercial entertainment venues; several witnesses emphasised that there 25 was no real comparison between Union events where student safety and security was paramount, and local nightclub events where such factors were subsidiary or ignored; the Union events were not merely better, they were genuinely different. There was evidence that the Bournemouth Summer Balls did have competition from similar events at the same location, but as Note 4 had been satisfied one did not need to 30 consider Note 11.

Respondents' case

41. Mr Millington submitted as follows for the Respondents.

42. The burden of proof lay on the Appellants in relation to the cases pleaded by each of them.

35 43. The Appellants were eligible under the domestic legislation by virtue of being charities: Item 1(a). If instead they wished to rely directly on the Directive then they would need to establish that they were one of the bodies listed in art 132(1)(o) as being eligible thereunder; that issue had not been adequately addressed by the Appellants. Further, the argument that art 132(1)(o) was directly effective had also 40 not been adequately addressed by the Appellants.

44. The exemptions conferred by art 132 "for certain activities in the public good" must be interpreted strictly, as being exceptions from the general principles of taxability: *Stichting Centraal.* Article 132(1)(o) conferred exemption only on fund-raising events organised by eligible bodies; there was no extension to other activities of such bodies; the exempt events must be distinguishable from any normal trading activities carried out by the body; the terminology "event" indicated that the exemption is intended to apply to activities that are distinct, and organised separately, from typical trading activities.

45. The governing constitutions of the Appellants were similar in stating the object of the provision of social and recreational activities for their respective student populations. That was important not only for the satisfaction of its current student population but also to encourage future student applications. In furtherance of that object the Appellants had chosen to engage in running commercial venues used by the students; each Appellant organised a schedule of regular social events throughout the academic year for the benefit and entertainment of the students; the venues included bars and dancing areas; the events involve selected music styles, themed dress codes, and promoted drinks offers. The events were successful, popular, and profitable; the primary purpose of the events was to provide recreational activities for the students. It is not disputed by the Appellants that generally these events were VATable business supplies; however, the Appellants had sought to identify a handful of the events and badge them as "fund-raising events"; that had been done on professional advice but was misconceived; there was nothing materially different about the selected events compared to all the others that were admittedly VATable; the primary purpose of the selected events was not fund-raising but instead exactly the same as all the other VATable events, namely the provision of recreational activities for the students.

46. The Appellants had argued that any event that ran at a surplus must be a "fund-raiser" because the surplus went into the Union's coffers for application to its charitable purposes. That was clearly incorrect and had been dismissed by the VAT Tribunal in *NICVA*. There must be something distinguishable about an event to move it from being a normal VATable social entertainment into an exempt fund-raising event; the professional advice given seems to have been just to choose the most profitable events (maximum 15 pa) and badge them as fund-raisers in the relevant promotional literature; that was incorrect and unsupportable. The regular club nights (such as Loughborough's FND and Hey Ewe events, Keele's Flirt and Get Funked nights, and NTU's Climax nights) fell immediately – they were run weekly during term time and witness evidence had failed to establish why the selected events were distinguishable from the others not selected. Some selected events were larger annual events described as "student balls"; but on scrutiny these events were really a continuation of the social calendar of VATable business activities - they might be less frequent and on a larger scale, but they were primarily social and recreational activities consisting of social gatherings with music, dancing and drinking. No evidence had been submitted (for example, minutes of meetings or other documents) demonstrating that an event was organised primarily to raise funds; a similar absence of evidence had been noted by the First-tier Tribunal in *Loughborough 2012 FTT*.

47. On the promotional requirement in Item 1(c), the evidence adduced related almost solely to generic straplines added to various materials; it was piecemeal and some of it was produced only during the course of the hearing; HMRC did not accept that the addition of a generic strapline to the foot of promotional materials was sufficient to satisfy the legislative requirements. Indeed, the materials that were in evidence in fact emphasised the social and recreational aspects of the events rather than their "fund-raising" purpose.

48. The Appellants' contention that Items 1(b) & (c) should be ignored left them in a quandary. Absent those provisions there was *nothing* to distinguish any event from another; it was not claimed that all the Appellants' social events were exempt; as exemption must be the exception rather than the norm, all events should be VATable.

49. On the conditions in Notes 4 & 5, art 132(2) permits member states to introduce "any restrictions necessary, in particular as regards the number of events or the amount of receipts"; that explicitly envisages the type of restriction contained in Notes 4 & 5. The Appellants had not explained how Notes 4 & 5 offend the principle of fiscal neutrality; similarly, the Appellants had not explained how Notes 4 & 5 offend the principle of fiscal certainty. The Notes precisely delimit the circumstances in which exemption can be claimed – a fixed number of events of the same kind in the same year. It was clear from the wording of the legislation that where there are held at the same location more than 15 events of the same kind (excluding any events held in a week where the aggregate takings did not exceed £1,000) *none* of those events may qualify under Group 12. Events "of the same kind" was to be determined objectively – certainly events do not cease to be of the same kind merely because the organiser brands them differently where otherwise their fundamental characteristics are so similar that no real distinction can be drawn between them. Notes 4 & 5 restore the general rule that activity of an economic nature be subjected to VAT; whilst an exemption is to be interpreted strictly, a restriction restoring the general rule is not to be construed narrowly: *Isle of Wight*.

50. On distortion of competition, this should be evaluated by reference to the tests in *Isle of Wight* and *Rank* – per *Loughborough 2013 UT*. The venues for the student events were generally bars and club venues within the premises of the respective Unions; these were in direct competition with bars and nightclubs located nearby, who were vying for the custom of a finite number of students and provided similar facilities for students to meet, socialise, drink, dance, and listen to music; the student pound was a competitive and potentially lucrative market; the allegedly exempt events did not meet different needs of the student consumers than were met by commercial entertainment venues; while students may have had a preference to attend Union premises, that did not show the Unions were not in competition with other venues, rather it demonstrates they had the resources to win that competition despite the identical activities. Further, the competition was actual not hypothetical; student nights were advertised by local nightclubs, with discounted admission for NUS cardholders. Affording different VAT treatment to events organised by the Appellants would distort competition in this market.

51. The domestic legislation is entirely consistent with the Directive. It was straightforward that the essential characteristic of a fundraising event must be that it is organised to raise funds. The VAT Tribunal in *Blaydon RFC* held that fund-raising must be the primary purpose of an event – although that was later doubted in *Newsvendors Benevolent* and *Cheltenham & Gloucester*. Items 1(b) & (c) were permissible restrictions; this was not a case similar to *Spain*, where domestic legislation imposed conditions that excluded certain persons from the benefit of the exemption – here the same rules about fund-raising events applied to all bodies who organised them. Even if (which was disputed) Item 1 is non-compliant, that does not destroy the Notes – those can still be read as effective and operative.

52. Notes 4 & 5 were permissible restrictions. Fifteen events per year was generous – any more was indicative of normal trading. The UK could legislate a general non-competition provision (in Note 11) and also make specific provision in Notes 4 & 5 – the Directive said "in particular"; Notes 4 & 5 do not exhaust the non-competition restriction.

53. The Appellants claim Group 12 is incompatible with the Directive, and is so broken that it cannot be fixed under the *Marleasing* principle. No cogent reasoning had been advanced for that contention. The test to be applied was set out by the Court of Appeal in *EB Central Services.* Items 1(b) & (c) are not fundamental departures from the Directive; they attempt to state what is a fundraising event; there is no clear intention that Parliament did not intend conformity. Accordingly, there was no case for ignoring the provisions in Group 12 which happened to be inconvenient for the Appellants.

Consideration and Conclusions

54. The basis of the Appellants' conduct of their appeals has changed over the course of the proceedings, and in accordance with permissions granted by the Tribunal (Judge Poole) to amend their grounds of appeal. I think it is clearest if I deal sequentially with the two main themes. First (which I shall call the **Domestic Argument**): that the requirements of Group 12 are satisfied by each Appellant in respect of each disputed event. Secondly (which I shall call the **EU Argument**): that Group 12 does not correctly implement art 132(1)(o); that such incompatibility cannot be repaired under the *Marleasing* principle; that art 132(1)(o) is unconditional and sufficiently precise to be directly effective; and the requirements of art 132(1)(o) are satisfied by each Appellant in respect of each disputed event. For completeness, it is common ground that the Domestic Argument is available to the Appellants even if (as they alternatively contend in the EU Argument) Group 12 incorrectly implements art 132(1)(o).

55. Before I address the details of those two arguments, I consider the point common to both and fundamental: did the Unions *organise fundraising events*, within the meaning of the relevant legislation?

Did the Unions organise fundraising events?

56. I was invited to consider several relevant VAT Tribunal decisions (none of which are strictly binding on this Tribunal). As those all pre-date the change in domestic legislation in 2000, I give here the pre-2000 version of Group 12 (so far as relevant):

> "GROUP 12 — FUND-RAISING EVENTS BY CHARITIES AND OTHER QUALIFYING BODIES
>
> Item No
>
> 1 The supply of goods and services by a charity in connection with a fund-raising event organised for charitable purposes by a charity or jointly by more than one charity. …
>
> Notes
>
> (1) For the purposes of items 1 and 2 "fund-raising event" means a fete, ball, bazaar, gala show, performance or similar event, which is separate from and not forming any part of a series or regular run of like or similar events. …"

57. I do not accept the contention by the Appellants that anything a Union does which turns a surplus must be an organised fundraising event. That does not to me seem a fair interpretation of the legislative words, especially in the context of legislation setting out a specific exception to the general rule of VATablility of supplies. As Lewison J stated in *British Association for Shooting and Conservation Ltd v RCC* [2009] STC 1421:

> **"[12]** The general principle is that VAT is payable on all goods or services supplied for consideration by a taxable person within the relevant territory. [The relevant points in art 132(1)] are exceptions to this general principle. In considering the scope of an exception to a general principle of Community law, the court should adopt a strict, but not strained, construction. A 'strict' construction is not to be equated, in this context, with a restricted construction. The court must recognise that it is for a supplier, whose supplies would otherwise be taxable, to establish that it comes within the exemption, so that if the court is left in doubt whether a fair interpretation of the words of the exemption covers the supplies in question, the claim to the exemption must be rejected. But the court is not required to reject a claim which does come within a fair interpretation of the words of the exemption because there is another, more restricted, meaning of the words which would exclude the supplies in question: *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën* (Case 348/87) [1989] ECR 1737; *Expert Witness Institute v Customs and Excise Comrs* [2001] EWCA Civ 1882, [2002] STC 42, [2002] 1 WLR 1674."

58. Having carefully considered the variety of views expressed by the VAT Tribunals, I agree with that stated in *Blaydon Rugby*:

> "As I see it, a "fundraising event" is an event the main purpose of which is to raise funds. If a merely incidental purpose to raise funds were to qualify, then every pint that was pulled with a marginal profit resulting could constitute a "fundraising event". …
>
> Further I agree with [HMRC] that Note (1) must be construed against the background of the requirement that an exemption should not create a distortion of competition: see EC Sixth Directive art 13A(1)(m). This means that "fundraising" events are likely to be exceptional rather than routine in the life of the club."

59. Mr Mantle was dismissive of the VAT Tribunal's comment about "every pint that was pulled" but I consider there is an important point being made by the VAT Tribunal. It cannot be the case that whenever the Union bar staff raise the shutters and turn on the sound system, they are "organising an event" as envisaged by the Directives or Group 12; that is just business as normal for a student union bar every evening during term time. The bar manager expects (or at least hopes) to have made a surplus by closing time, but that is not "fundraising" as envisaged by the Directives or Group 12. On a fair interpretation of the legislative words, that does not constitute the organisation of fundraising events.

60. Some of the disputed events were run only occasionally – for example the Summer Balls and Graduation Balls – and I shall return to those, but most were self-identified instances of regular weekly events (for example, at Loughborough some FND and Hey Ewe events, at Keele some Get Funked and Flirt events, and at NTU some of various weekly events). What distinguishes those instances as being organised fundraising events, rather than business as normal? With one exception, all the witnesses emphasised that they were not personally responsible for the selection of the identified events, although they might contribute information if requested. The exception was Mr Parsons (giving evidence for Loughborough) who confirmed that the events chosen were those expected to be most promising and successful, usually because of special appearances or extra features. However, Mr Meakin (also giving evidence for Loughborough) confirmed that even for big events such as an appearance by star DJ Calvin Harris, the ticket prices and drinks prices were the same as usual. I am satisfied that all the witnesses had a fair opportunity to explain exactly why the identified events were in any way different from the remainder of the termtime schedule. The matter was put concisely by HMRC in a letter to Loughborough during the investigation of its claim: "in effect the Union is treating one event as exempt and exactly the same event the following week as taxable". I have the impression (the point was not put directly to the witnesses) that if Note 4 to Group 12 had placed a limit of, say, 24 rather than 15 events then 24 regular events would have been identified and claimed. I conclude (and so find) that the identified regular events were simply those expected to show the largest surpluses; while that was pragmatic in terms of the desired VAT result, it does not suffice to move them from business-as-normal to being organised fundraising events.

61. Returning to what I have termed the occasional events: Summer Balls, Graduation Balls, and similar descriptions. With the exception of Bournemouth's Summer Balls, there was not much evidence before me. Mr Black explained that Loughborough's

Freshers Balls and Graduation Balls were not balls in the traditionally understood meaning of the word but involved high profile DJs, well known live bands and possibly comedians or compares; possibly firework displays, fairground rides or entertainers. I have seen no internal documentation (eg trustee minutes, financial forecasts etc) to support the assertion that the balls were organised with the main purpose of raising funds. Having carefully considered the evidence that was available, I consider (and so find) that (with the exception of Bournemouth's Summer Balls) these occasional events were larger versions of the normal social activities organised by the Unions and - while doubtless well-organised, popular with the students who attended, and usually showing a surplus – were not organised with the main purpose of raising funds.

62. I am aware that the VAT Tribunal in *Cheltenham & Gloucester* (Dr Brice) came to a different conclusion; there it was found (at [19]) that fundraising was not the primary purpose of any of the five student balls in dispute but nevertheless all the balls were fundraising events within Group 12 (to reiterate, this was on the pre-2000 statutory wording). I have read carefully but respectfully disagree with the VAT Tribunal's reasoning and conclusion on that point. I agree that fundraising need not be the *sole* purpose of an organised event but if fundraising is not the main purpose of the event then I consider it is not a *fundraising event*, it is instead merely an event which has the incidental purpose of being expected to yield a surplus.

63. Bournemouth's Summer Balls are different in that I had some fairly focussed evidence (albeit some of it provided at a late stage) from Mr James, Mr Dove and Ms Newland. This included, that the Summer Ball had been introduced by Mr Dove specifically to turn around the poor finances of the Union; that the Ball raised more in one night than the main Union bar did in the whole year; and that the revenue was treated in the Union's accounts as fundraising rather than commercial income. Taking that evidence together, on balance I am satisfied that Bournemouth's Summer Balls do constitute organised fundraising events within the meaning of art 132(1)(o) and Group 12.

64. To summarise, I find that the only disputed events which, on a fair interpretation of the legislative words, constitute organised fundraising events are the Summer Balls organised by Bournemouth.

The Domestic Argument

65. From my conclusions in [64] above, I need determine this argument only in relation to Bournemouth's Summer Balls. However, as I heard considerable argument on three particular points, I should (in case this dispute goes further) address those generally, rather than just in relation to Bournemouth.

The 15 event limit in Note 4

66. The first point concerned the interpretation of Note 4 to Group 12 – the 15 event limit. HMRC's interpretation of Note 4 is that a 16th event in a period denies exemption to all 16 events; the Appellants contend that only the 16th event is denied

(and the first 15 remain exempt). I look to the purpose of Note 4; it derives from the permission given by art 132(2) that, "Member States may introduce any restrictions necessary, in particular as regards the number of events … which give entitlement to exemption." I agree with the VAT Tribunal in *NICVA* that the restrictions are permitted if they are necessary to ensure the exemption does not cause distortion of competition. One permitted way of trying to avoid that distortion is to disqualify events that are run so frequently as to suggest that they are normal business transactions running in competition with those run by VATable traders. The Appellants' interpretation of Note 4 would mean that even where such frequent events are run, and so risk distortion of competition, the first 15 are forgiven or overlooked and still granted exemption. I prefer HMRC's interpretation; running up to 15 events is not in itself likely to cause distortion of competition but a greater number indicates a course of normal trading which may be distortive; therefore running a large number of events disqualifies them all from exemption.

The promotional requirement in Item 1(c)

67. The second point concerned the requirement in Item 1(c) for the event to be promoted as being primarily for the raising of money. In seeking to satisfy this requirement the Unions included in their marketing materials what was described as a "strapline".

(1) For Loughborough this was stated to be a red "£" motif and the strapline "Held to fund the charitable objectives of LSU" or for online marketing "This event is an event held to fund the charitable activities of LSU. Money raised by this night goes back into our work shaping your Loughborough Student Experience." On the limited documents submitted in evidence, the material relating to the Fresher's Ball 2008 contains no wording; nor does that for the Graduation Ball 2009; for a small sample of Hey Ewe and FND events in October 2009, the wording is "In aid of LSU's activities". It may be that the more detailed wording was included on material for later events but I saw no documentary evidence supporting that.

(2) For Keele the strapline was "This is a Keele SU Fundraising event", and that is evidenced by, for example, the posters for Woodstoke 3 and the 2010 Graduation Ball. Keele's events calendar wall planners (listing all the events for a whole term) were endorsed with the words "All events are possible KUSU fundraising events"; that suggests any event could be treated as either VATable or exempt, but it had not been determined whether the events were fundraisers when the calendars were printed, and so it appears that the events were not *organised* as fundraisers (rather they were selectively so dubbed later).

(3) For NTU both witnesses referred to a strapline being included, but I can see no straplines on the limited documents put in evidence.

(4) For Bournemouth the strapline was "BU Summer Ball is a fundraising event for the Students' Union at Bournemouth University", and that is evidenced by the posters for several Summer Balls.

68. On Bournemouth, I am satisfied that the promotional requirement was satisfied, albeit the descriptive wording on the Summer Ball marketing materials was brief. If I was required to decide the point for the other three Appellants, I have to conclude that the evidence presented on the specific events that are in dispute does not satisfy me that they were promoted as being primarily for the raising of money.

The distortion of competition restriction in Note 11

69. The third point concerned the restriction in Note 11 – denying exemption to any supply "which would be likely to create distortions of competition such as to place a commercial enterprise carried on by a taxable person at a disadvantage." The approach to be adopted here was stated by the Upper Tribunal in *Loughborough 2013 UT*:

> **"[64]** We consider that *Isle of Wight* [ie the CJEU decision in *HMRC v Isle of Wight Council & others* [2008] STC 2964] and *Rank* [ie the CJEU decision in *HMRC v Rank Group plc* [2012] STC 23] show that whether there is distortion of competition must be determined by reference to the nature of the activity and without regard to the particular market in which it is supplied. It is not necessary to show that there is actual competition between the two activities provided that the potential competition is a real and not purely hypothetical possibility. If the two activities are identical or similar from the point of view of the consumer and meet the same needs of the consumer then they are in competition with each other. If, further, the two activities are treated differently for the purposes of VAT then, as a general rule, that will be regarded as giving rise to a distortion of competition."

70. On Bournemouth I am satisfied that for their Summer Balls there was not just a hypothetical possibility of competition but actual competition. Mr Dove's evidence was that the success of the Summer Ball resulted in competitors trying to capitalise on it – for example, in 2016 both a rugby festival (with bands and DJs) and a music festival had been held on the same field as used for the Summer Ball, one on the same day as the Summer Ball; he considered that was a direct competitor and the Ball made only £20,000 that year, compared to £110,000 this year. Thus the Bournemouth Summer Balls do not qualify for exemption, because of Note 11.

71. If I were required to decide the point on the other three Appellants then my conclusions would be as follows.

(1) For all three, there was evidence that nightclubs and other venues in the locality of the relevant University were keen to attract student customers by running Freshers events (eg Echos in Loughborough town) and regular student nights (eg Mansion in Loughborough town), with discounts on entry fees and drinks offered on production of an NUS card.

(2) Several witnesses emphasised that Union events had a particular focus on the safety of the young people attending (eg volunteer welfare stewards – similar to street pastors; stricter no-drugs policies; nightbus; first-aiders) while such precautions and services were not provided by commercial nightclubs. Mr Black stated that attending an event off-campus (three miles distant in Loughborough town) was very different to a Union event on-campus. Mr Askew (who has run a commercial nightclub in Stoke) made the same point in relation to Keele (Hanley approximately five miles from the Keele campus).

(3) While NTU's premises were being redeveloped it had a temporary affiliation with town venues to host Union events. NTU had trademarked the "Trent Army" title because other venues were copying the format and passing-off counterfeit Trent Army events, with lower standards.

72. Taking all the above together I consider that although many students may have preferred Union events for the reasons given by the witnesses, Union events and commercial nightclub events were similar from the point of view of students and meet the same needs of the students (being a good night's entertainment). Accordingly, they are in competition with each other.

Conclusion on the UK Argument

73. The only disputed events which, on a fair interpretation of the legislative words, constitute organised fundraising events are the Summer Balls organised by Bournemouth (see [64] above). Further, Bournemouth's Summer Balls are disqualified from exemption by virtue of Note 11 to Group 12 (see [70] above). Accordingly, under the UK Argument, none of the disputed events qualify for exemption.

The EU Argument

74. This argument contains a number of challenges to the effectiveness of Group 12, viewed against the Directive from which it derives, and invites the Tribunal to adjudicate the appeals by reference to art 132, rather than Group 12. Before taking those challenges in turn it is necessary to establish that the Appellants would be eligible under art 132(1)(o) if that is indeed the legislation to be applied.

Are the Appellants eligible under art 132(1)(o)?

75. The exemption afforded by art 132(1)(o) is restricted to "organisations whose activities are exempt pursuant to points (b), (g), (h), (i), (l), (m) and (n)". So the Appellants must fall within one or more of those points. (For clarity, there is no doubt over eligibility under the UK domestic legislation, because all the Appellants are charities – as required by Item 1 Group 12.) Taking the points out of order:

(1) Point (b) is hospital and medical care; (h) is child protection; (n) is cultural services – none of the Appellants contended that any of these were applicable. I note that in *Loughborough 2013 UT* (at [48]) the Upper

Tribunal held that the cultural services exemption did not apply to entertainment events held by Loughborough.

(2) In *Loughborough 2017* I determined (at [75]) that Loughborough did not satisfy the requirements of art 132(1)(i) (the education exemption) for the reasons set out in detail in that decision. That case is currently under onward appeal to the Upper Tribunal, but in the current appeal it was not advanced that any of the Appellants fell within point (i).

(3) The submission put forward originally was that the Appellants are organisations whose activities are exempt pursuant to point (l) of art 132(1), being non-profit making organisations with aims of a philanthropic or civic nature. That was later withdrawn and substituted by the following.

(4) It was submitted that:

> (a) All four Appellants are organisations whose activities are exempt pursuant to point (g) of art 132(1), being bodies recognised by the UK as being devoted to social wellbeing; and
>
> (b) For Loughborough and Keele only, they are organisations whose activities are exempt pursuant to point (m) of art 132(1), being non-profit making organisations supplying certain services closely linked to sport or physical education.

76. That submission ([75(4)] above) was not made in the skeleton arguments, and was advanced only on the final day of the hearing. There was no argument put forward on the point, and no specific evidence advanced, by the Appellants. Mr Millington submitted that HMRC reserved their position on this aspect, and he suggested it may be that further representations may be required for the Tribunal to be in a position to resolve the matter. While I am grateful for Mr Millington's accommodation on this issue, I do not think it is appropriate to sideline the issue. If the Appellants claim to be eligible under art 132(1)(o) then the burden of proof is on them to establish how they so qualify, and the opportunity to do so was at the hearing of their appeals.

77. I have analysed the caselaw cited to me to see what approach was taken there on this particular matter – it is only the VAT Tribunal and Tax Tribunal cases that tackle the issue.

(1) Point (g) was cited as relevant in *Cheltenham & Gloucester* (at [14]). The wording then in force in the Sixth VAT Directive was slightly different, in particular it specifically referred to charities:

> "(g) the supply of services and goods closely linked to welfare and social security work, including those provided by old people's homes, by bodies governed by public law or by other organisations recognised as charitable by the Member State concerned;"

(2) In *Loughborough 2013 UT* (at [49]) it is recorded that the parties agreed that the appellant was within art 13A(1)(o) of the Sixth Directive but without stipulating which point in art 13A(1) was relevant.

(3) In *Newsvendors Benevolent* the VAT Tribunal apparently considered that point (g) (again on the Sixth Directive and the pre-2000 wording) was applicable, but without analysing the issue – see [16-17] thereof.

(4) In *NICVA* the VAT Tribunal seems to have accepted that the appellant was eligible under art 13A(1)(o) of the Sixth Directive but without stipulating which point in art 13A(1) was relevant.

(5) *Blaydon RFC* considered only the domestic legislation.

(6) None of the cases refer to point (m) (sporting services).

78. The wording in the 2006 Directive (ie the legislation relevant to the current appeals) on points (g) and (m) is:

> "(g) the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing; …
>
> (m) the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education;"

79. Taking first point (m) (sporting services), as already stated I did not receive any analysis of how Loughborough and Keele satisfied this point, nor why NTU and Bournemouth were distinguished from the other two Unions in not satisfying (or at least, not seeking to rely on) point (m). I note the evidence led for Loughborough that the Hey Ewe events had a particular affinity with the various sports clubs, and that sport was of particular importance for students at Loughborough University. There is the complication – explored in depth by the CJEU in *Spain* – that point (m) only applies to "certain services" – ie not everything of a sporting nature. On the basis of the evidence and argument put before me, I am not satisfied that Loughborough and Keele have discharged the burden of establishing that they are "organisations whose activities are exempt pursuant to point … (m) …" as required by art 132(1)(o).

80. Turning to point (g) (social wellbeing), the definition considered in *Cheltenham & Gloucester* and *Newsvendors Benevolent* was the Sixth Directive wording (quoted at [78] above) making explicit reference to charities. The 2006 Directive instead refers to "bodies governed by public law or … other bodies recognised by the Member State concerned as being devoted to social wellbeing". In *Loughborough 2017* I held (at [54]) that (for the reasons set out in that decision) Loughborough was not "a body governed by public law" in the context of point (i) (the education exemption), and I consider that same conclusion (for the same reasons) is applicable to all the Appellants here in relation to point (g). I did not receive any analysis of how the

Appellants constituted "bodies recognised by the [UK] as being devoted to social wellbeing". It may be that the Appellants anticipated that, as in *Loughborough 2013 UT,* HMRC were content that the Appellants were within art 132(1)(o); however, that is not a concession Mr Millington makes in the current appeals. I think it is fair to look at the conclusions I reached in *Loughborough 2017* (at [75]) concerning the correct analysis of the objects and activities of Loughborough:

> "From the evidence available to me I find that LSU's objects and activities are those of a student representative body promoting and supporting the general interests of its members; creating and promoting a good social, cultural and sporting life; and providing appropriate pastoral support for its members. I note that conclusion is consistent with what one would generally expect a good student union to be engaged in."

81. The evidence in the current appeals supports that earlier conclusion and I consider the same conclusion applies also to the objects and activities of the other three Appellants. For those reasons I am satisfied that the Appellants are "bodies devoted to social wellbeing", as I understand the term. That leaves the words "recognised by the [UK]"; again, I do not have the benefit of any submissions on the meaning of those words. I look first to Group 7 sch 9 at the domestic implementation of the point (g) exemption to see if that assists but it does not; the only head possibly applicable to student unions is Item 9 "The supply by a charity ... of welfare services …" but the (exhaustive) definition of welfare services in Note 6 does not cover the services provided by student unions (I take the reference therein to "young people" to refer to persons under the age of 18 – pursuant to s 107 Children & Young Persons Act 1933 (as amended) – and that does not cover most university students). I next look wider, at the fact that student unions (or at least, the Appellants) are registered charities and that does, I consider, assist the Appellants. One manner in which bodies devoted to social wellbeing could be recognised by the UK is by official acceptance of their charitable status by way of registration under the Charities Acts.

82. Accordingly (by a necessarily self-directed route) I conclude that all four Appellants are eligible under art 132(1)(o) by virtue of being "bodies recognised by the [UK] as being devoted to social welfare" and thus within art 123 (1)(g).

Is Item 1 (and applicable Notes) compliant with art 132?

83. This matter has been raised in separate litigation by Loughborough and the Upper Tribunal in *Loughborough 2013 UT* stated:

> "[65] Since the FTT dealt with the issue of the fund-raising exemption solely by reference to the UK legislation, it seems to us that it implicitly decided that the restrictions in Item 1 of Group 12 of Sch 9 to the VAT Act 1994 were intra vires the provisions of the VAT Directives. Unfortunately, the matter was not discussed in the decision and no reasons were given for the implicit answer to the ultra vires issue so that we cannot be confident that the FTT properly considered the issue. If this were simply a matter of analysis of the EU and UK legislative

provisions then we could decide the point but we consider that the issue also raises questions of fact.

[66] Our view is that, in order to decide whether the conditions in Item 1 of Group 12 of Sch 9 are ultra vires the provisions of the VAT Directives, it is necessary to determine:

> (1) applying the *Isle of Wight* and *Rank* cases, whether the exemption of the balls organised by the LSU gives rise to distortion of competition; and, if so,
>
> (2) do the conditions make the exemption of such events unlikely to cause distortion of competition?

We consider that the first question cannot be answered without determining whether the LSU balls and commercial events were sufficiently similar that they must be regarded as in competition with each other. That is a question of fact. The effect of the conditions on removing or reducing competition between fund-raising events and comparable commercial events is also a question of fact.

Decision on fund-raising exemption

[67] The FTT's decision proceeded on the basis that the restrictions in Item 1 of Group 12 of Sch 9 were not ultra vires the provisions in the Directives. In some circumstances, an implicit decision on such a point might be enough but, in this case, we consider that the absence of any discussion of the point in the decision means that there is real doubt that the issue was given proper consideration by the FTT. The only course open to us in the circumstances is to remit the appeal for a further hearing at which the parties may adduce further evidence and make submissions on the issue.

[68] We have attempted to indicate the approach which the FTT might adopt in considering this issue, but we would not wish to be too prescriptive: the matter was not argued in depth before us, and further, and detailed, argument by the parties before the FTT may indicate that the issue should be approached with reference to different, or additional, factors.

[69] There are some advantages to a further hearing before the same judge, and some to a fresh hearing before a differently constituted tribunal. In its application to the FTT for permission to appeal, the LSU asked the judge to review the decision on the fund-raising exemption but he decided not to do so. In the circumstances, we consider that it would be more appropriate to remit the matter to a differently constituted tribunal.

[70] For the reasons given above, we remit the matter to the FTT to determine whether the conditions in Item 1 of Group 12 of Sch 9 to the VAT Act 1994, that the raising of money must be the primary purpose of the event and that the event must be promoted as being primarily for

> the raising of money, are ultra vires the provisions in art 13A(1)(o) of the Sixth VAT Directive and, later, art 132(1)(o) and (2) of the Principal VAT Directive."

84. Loughborough did not pursue that earlier appeal back to the First-tier Tribunal, as remitted by the Upper Tribunal. The point now comes before me.

85. First, the condition in Item 1(b) that the raising of money must be the primary purpose of the event. While this condition is not explicitly provided in art 132(1)(o), it follows from my conclusions on the meaning of an organised fundraising event (see [56-64] above, which I shall not repeat here) that a primary purpose of fundraising is a fair interpretation of the legislative wording in art 132(1)(o). Accordingly, I conclude that Item 1(b) is not ultra vires art 132(1)(o).

86. Secondly, the condition in Item 1(c) that the event must be promoted as being primarily for the raising of money. Again, this is not explicitly provided in art 132(1)(o). I assume (I heard no submissions on this specific point) the purpose of this condition is to ensure that persons attending (or planning to attend) a fundraising event are aware that it is such an event, and so they regard themselves as benefactors of the organisation rather than mere customers of the goods and services provided at the event. If that is the purpose behind the condition then I consider the restriction is unwarranted. If a charity organises a fundraising event (say, a jumble or nearly-new sale of donated items) then the motivation of customers (benefactors or bargain hunters) does not, I consider, affect the character of the event as a fundraiser. Accordingly, I conclude that Item 1(c) is an unwarranted restriction on the availability of the exemption, and thus is ultra vires art 132(1)(o).

87. In the current appeals the Appellants raise a further ultra vires challenge to Item 1 – they assert that the restrictions in Notes 4 (the 15 event limit) and 11 (no distortion of competition) are ultra vires art 132(1)(o). Their first submission on this point is that Note 11 is exhaustive of distortion of competition matters, and so Note 4 cannot co-exist with Note 11. I do not agree; art 132(2) (emphasis added) specifically permits member states to "introduce any restrictions necessary, *in particular as regards* the number of events… which give entitlement to exemption". I conclude the purpose of that provision is to allow member states to particularise *permitted* restrictions in addition to the *mandatory* restriction in art 132(1)(o), "provided that exemption is not likely to cause distortion of competition". That is exactly what the UK has done in Notes 4 & 11. The Appellants' second submission on this point is that the 15 event restriction is unnecessary. As already stated, art 132(2) specifically permits a restriction on the number of events and so I take the argument to be that the UK has imposed an unnecessary restriction on the exemption by stipulating the limit to be 15 events. I heard no argument as to why a limit of 15 events (as opposed to some other number) was unnecessary; I agree with HMRC that that figure may be generous, in terms of the number of events that could be held during a year without distorting competition with VATable traders. For those reasons I conclude that Notes 4 & 11 are not ultra vires art 132(1)(o).

Is Item 1(c) "curable" under the <u>*Marleasing*</u> *principle?*

88. I have determined (at [86] above) that Item 1(c) - the requirement for the event to be promoted as being primarily for the raising of money – is ultra vires art 132(1)(o). That nonconformity requires consideration of the *Marleasing* principle, which requires a national court of a Member State to interpret the national law in the light and wording of the directive. The principle was examined by Arden LJ in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2010] STC 1251:

> **"[258] …** [In *Marleasing* the] ECJ held that the national court was required so far as possible under national law to interpret its national law so as to preclude a declaration of nullity in cases other than those prescribed in the directive. In other words, the national court was required to disapply provisions of its national law.
>
> **[259]** The ECJ helpfully commented on the *Marleasing* principle in *Miret v Fondo de Garantía Salarial* (Case C-334/92) [1993] ECR I-6911, para 20 of the judgment:
>
> > '20. Thirdly, it should be borne in mind that when it interprets and applies national law, every national court must presume that the State had the intention of fulfilling entirely the obligations arising from the directive concerned. As the Court held in its judgment in *Case 106/89 Marleasing v La Comercial Internacional de Alimentación* [1990] ECR I-4135, paragraph 8, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.'
>
> **[260]** The obligation of our courts to interpret domestic legislation in conformity with Community law if it is possible to do so is a powerful one, requiring the court to go beyond what could be done by way of statutory interpretation where no question of Community law or human rights is involved: see *R (IDT Card Services Ireland Ltd) v Customs and Excise* [2006] EWCA Civ 29, [2006] STC 1252; *Litster v Forth Dry Dock and Engineering Co Ltd* [1989] [All ER 1134, [1990] 1 AC 546. …"

89. It is straightforward for me to read Item 1 so as to be compliant and conforming with art 132(1)(o); the only offending provision is Item 1(c) and Item 1 is coherent with the simple omission of Item 1(c). So, for completeness, I would read Item 1 after such adjustment as being:

> "The supply of goods and services by a charity in connection with an event—

(*a*) that is organised for charitable purposes by a charity or jointly by more than one charity, and

(*b*) whose primary purpose is the raising of money."

90. That reading "cures" Item 1 so that it is fully compliant with art 132(1)(o). Therefore, I do not accept the Appellants' contention that Item 1 cannot be cured under the *Marleasing* principle.

Is art 132(1)(o) directly applicable?

91. The Appellants contend that if Item 1 cannot be read as compliant with art 132(1)(o) then they are entitled to rely on art 132(1)(o) as being directly applicable. Because of my conclusions on the above points it is not necessary to determine this question. I heard no particular argument from the Appellants as to why they say art 132(1)(o) meets the test for direct applicability – ie that it is unconditional and sufficiently precise (*Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62 [1963] ECR 1; [1970] CMLR 1).

Other points

92. The following point was mentioned by the Appellants but without any particular argument: that Item 1 somehow breaches the principle of equal treatment. In the absence of detailed argument I cannot decide that matter in favour of the Appellants, and I mention it only for completeness.

Conclusion on the EU Argument

93. To summarise:

(1) The Appellants are eligible under art 132(1)(o) by virtue of being "bodies recognised by the [UK] as being devoted to social welfare" and thus within art 123 (1)(g).

(2) The only respect in which Item 1 is not compliant with art 132 (1)(o) is Item 1(c) (the publicity requirement).

(3) Item 1 can be read as conforming with art 132(1)(o) by disapplying (only) art 1(c).

(4) I am not persuaded that art 132(1)(o) is directly effective.

94. I conclude that there is no reason to put aside Item1; instead it can be applied by being given the conforming reading stated at [89] above. I have already determined (at [64] above) that the only disputed events which, on a fair interpretation of the legislative words, constitute organised fundraising events are the Summer Balls organised by Bournemouth. Further, (at [70] above) that Bournemouth's Summer Balls are disqualified from exemption by virtue of Note 11 to Group 12. Accordingly,

even with a conforming interpretation of Item 1, none of the disputed events qualify for exemption.

Outcome

95. None of the disputed events qualify for exemption under Item 1 Group 12 (see [73] above). Further, even with a conforming interpretation of Item 1, none of the disputed events qualify for exemption (see [94] above).

Decision

96. The appeals of all four Appellants are DISMISSED.

97. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Peter Kempster
TRIBUNAL JUDGE

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