TC07911

VAT – Local authority – leisure and recreational facilities – whether economic activity – Art 9 PVD – whether engaging as a public authority - Art 13 PVD

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeals numbers: TC/2011/687 & TC/2012/9253

BETWEEN

MID ULSTER DISTRICT COUNCIL (FORMERLY MAGHERAFELT DISTRICT COUNCIL) **Appellant**

-and-

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

TRIBUNAL: JUDGE PETER KEMPSTER
JUDGE ANNE SCOTT
JUDGE ALASTAIR RANKIN

Sitting in public at the Royal Courts of Justice, Belfast on 12-14 February 2019

Melanie Hall QC and Harry Gillow of counsel (instructed by DLA Piper UK LLP) for the Appellant

Raymond Hill of counsel (instructed by the General Counsel and Solicitor to HM Revenue and Customs) for the Respondents

DECISION

BACKGROUND

1. A dispute has arisen between local council authorities across the UK and the Respondents ("**HMRC**") concerning the VAT liability of charges paid by members of the public for access to sports and leisure facilities provided by those authorities. HMRC contend that the charges should bear VAT at the standard rate; the local authorities disagree.

2. In case management of the appeals (of which there is a large number) it was directed that:

(1) Consideration may need to be given to the statutory provisions relating to local authorities in the constituent parts of the UK, which vary by jurisdiction.

(2) A single lead case (Tribunal Procedure Rule 5(3)(b) refers) should be identified for each of the three territorial jurisdictions: England & Wales, Scotland and Northern Ireland.

(3) The nominated lead cases were Chelmsford City Council (TC/2011/7816) for England & Wales; Midlothian Council (TC/2011/7844) for Scotland; and the Appellant for Northern Ireland.

(4) The Tribunal panel to hear all three lead appeals would consist of three Judges, together qualified in the three jurisdictions. The then Chamber President confirmed the panel as constituted, and nominated Judge Kempster as the presiding member (Senior President's Practice Statement of 10 March 2009, paras 7 & 8, refers).

(5) For administrative reasons, the Appellant's appeal would be heard first, followed by a hearing of the other two lead cases together. The Tribunal's decisions on the three appeals would be released together.

3. The Appellant's appeal was originally listed to be heard in Belfast in December 2016, but was postponed to allow the parties to consider the forthcoming decision of the CJEU in *London Borough of Ealing* (Case C-633/15) [2017] STC 1598 (issued 13 July 2017). Both parties updated their written submissions for the relisted hearing, and a further witness statement was filed with permission.

4. The proceedings were filed and conducted in the name of Magherafelt District Council. The Appellant merged with two other local authorities in 2015 and was renamed Mid Ulster District Council, and this decision is issued in that name – nothing turns on the change of name.

INTRODUCTION

5. By voluntary disclosures submitted in 2010 and 2011 the Appellant ("**the Council**") claimed repayment of VAT allegedly overpaid in the VAT accounting periods 12/06 (£32,336.07), 03/07 (£34,539.03), and 06/07 to 03/11 (£451,816). By a decision made on 7 October 2011 the claims were rejected by HMRC; and that decision was upheld on formal internal review on 28 September 2012. The Council appeals to the Tribunal.

6. In brief summary, the Council contends (and HMRC disputes) that the charges in dispute do not attract VAT on two alternative grounds:

(1) Its supplies of leisure and recreational services to members of the public are not "economic activities", and are therefore outside the scope of VAT; or

(2) Its supplies of leisure and recreational services to members of the public are provided by the Council in its role as a public authority acting under a special legal regime, and therefore it is not a taxable person in respect of those supplies.

LEGISLATIVE PROVISIONS

VAT Legislation

7. Article 2 Principal VAT Directive (2006/112/EC) ("**PVD**"), provides, so far as relevant:

> "1. The following transactions shall be subject to VAT: …
>
> (*c*) the supply of services for consideration within the territory of a Member State by a taxable person acting as such; …"

8. Article 9 PVD provides, so far as relevant:

> "1. 'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.
>
> Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity. …"

9. Article 13 PVD provides, so far as relevant:

> "1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.
>
> However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition. …"

10. The relevant UK VAT legislation, which does not need to be quoted here, is in ss 1, 4, 5(2) and 41A VAT Act 1994 ("**VATA**").

Local Authority Legislation

11. Section 75 Northern Ireland Act 1998 ("**NI Act**") provides, so far as relevant:

> "*Statutory duty on public authorities.*
>
> (1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity—
>
> (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
>
> (b) between men and women generally;
>
> (c) between persons with a disability and persons without;
>
> and

(d) between persons with dependants and persons without.

(2) Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group. …"

12. Article 3 The Recreation and Youth Service (Northern Ireland) Order 1986 (SI 1986/2232 (N.I. 25)) ("**the 1986 Recreation Order**"), provides, so far as relevant:

"3. (1) The council for the furtherance of sport and physical recreation known as the Sports Council for Northern Ireland shall continue in being as such.

(2) The Sports Council shall be constituted in accordance with Part I of Schedule 1 and Part II of that Schedule shall apply to it.

(3) The functions of the Sports Council shall, in accordance with arrangements approved by the Department, be—

(a) on matters relating to sport and physical recreation, to advise the Department and other government departments, education and library boards, district councils and other bodies interested in sport and physical recreation;

(b) to encourage the provision of facilities for, and participation in, sport and physical recreation;

(c) to assist, subject to paragraph (4)—

(i) the provision of administrative services, equipment, coaching and instruction; and

(ii) the organising or supporting of, or participating in, international or other events,

by bodies providing facilities for sport or physical recreation or organising such activities; and

(d) to assist, subject to paragraph (4), bodies providing supportive services in connection with sport and physical recreation.

(4) Except with the consent of the Department, the Sports Council shall not under paragraph (3)(c) or (d) assist by way of financial contributions any body which is not a voluntary organisation.

(5) For the purposes of its functions, the Sports Council, with the approval of the Department, may—

(a) receive donations and make charges for its services;

(b) organise, or assist in the organisation of, conferences, courses of training, sport and physical recreation;

(c) provide and manage, or assist in the provision and management of, centres for sport and physical recreation;

(d) print, publish and disseminate information relating to sport and physical recreation;

(e) visit other parts of the United Kingdom and other countries;

(f) co-operate with other bodies in the exercise or pursuit of any of its functions;

(g) carry out, or assist or co-operate with other persons in carrying out, research into and studies concerning matters relating to sport and physical recreation. …"

13. Article 10 of the 1986 Recreation Order ("**Article 10**") provides:

"*Provision by district councils of facilities for recreational, social, physical and cultural activities*

10 (1) Each district council shall secure the provision for its area of adequate facilities for recreational, social, physical and cultural activities and for that purpose may, either alone or together with another district council or any other person—

(a) establish, maintain and manage any such facilities;

(b) organise any such activities;

(c) assist, by financial contributions or otherwise, any person to establish, maintain and manage any such facilities or to organise any such activities;

(d) provide, or assist by financial contribution or otherwise in the provision of, leaders for such activities; and

(e) defray or contribute towards the expenses of any persons taking part in any such activities.

(2) A district council shall, in carrying out its functions under paragraph (1), have regard to the facilities provided by other district councils or by other persons.

(3) A district council may, with the approval of the Department and the Department of the Environment, provide a facility such as is referred to in paragraph (1) for the whole of Northern Ireland or for an area or areas outside its own area.

(4) A district council may make bye-laws for all or any of the following purposes—

(a) regulating the use and management of any lands or buildings provided by it for any of the purposes mentioned in paragraph (1);

(b) regulating the days and times of, and charges for, admission to such lands and buildings;

(c) the preservation of order and prevention of nuisance in such lands and buildings;

and, without prejudice to section 93 of the Local Government Act (Northern Ireland) 1972, such bye-laws may authorise persons employed by the district council and members of the Royal Ulster Constabulary after due warning to remove or exclude from any place with respect to which any such bye-laws are for the time being in force a person who commits, or who is reasonably suspected of committing, in that place an offence against any such bye-law or against section 4 of the Vagrancy Act 1824.

(5) A district council may acquire land otherwise than by agreement for the purposes of this Article."

CASE LAW AUTHORITIES

14. The following cases were cited, and those referred to in this decision notice use the marked abbreviations:

C-102/86 *Apple and Pear Development Council v Customs and Excise Commissioners* [1988] STC 221

Joined cases C-231/87 and C-129/88 *Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola d'Arda v Comune di Carpaneto Piacentino and Ufficio Provinciale Imposta sul Valore Agtgiunto di Piacenza v Comune di Rivergara and others* [1991] STC 205 ("***Carpaneto No 1***")

C-4/89 *Comune di Carpaneto Piacentino and others v Ufficio provincial imposta sul valore aggiunto di Piacenza* [1990] ECR I-1869 ("***Carpaneto No 2***")

C-155/94 *Wellcome Trust Ltd v Customs and Excise Commissioners* [1996] STC 945 ("***Wellcome Trust***")

C-216/97 *Gregg v Customs and Excise Commissioners* [1999] STC 934

Institute of Chartered Accountants in England and Wales v Customs and Excise Commissioners [1999] STC 398 ("***ICAEW***")

C-446/98 *Fazenda Pública v Câmara Municipal do Porto* [2001] STC 560 ("***Fazenda Pública***").

C-142/99 *Floridienne SA v Belgium* [2000] STC 1044

C-498/99 *Town & County Factors Ltd v Commissioners of Customs and Excise* [2002] STC 1263

C-284/04 *T-Mobile Austria GmbH and Others v Republic of Austria [*2008] STC 184 ("***T-Mobile***")

C-288/07 *Revenue and Customs Commissioners v Isle of Wight Council and others* [2008] STC 2964 ("***Isle of Wight***")

C-554/07 *Commission v Ireland* [2009] ECR I-128 ("***Ireland***")

C-246/08 *Commission v Finland* [2009] ECR I-10605 ("***Finland***")

Longridge on the Thames v HMRC [2013] UKFTT 158 (TC)

C-174/14 *Saudaçor—Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA v Fazenda Pública* [2016] STC 681 ("***Saudaçor***")

C-263/15 *Lajvér Meliorációs Nonprofit Kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Foigazgatósága* ECLI:EU:C:2016:392 ("***Lajvér***")

R. (on the application of Durham Company Limited (trading as Max Recycle)) v Revenue and Customs Commissioners [2017] STC 264 ("***Durham Company***")

HMRC v Longridge on the Thames [2016] STC 2362 ("***Longridge***")

C-520/14 *Gemeente Borsele v Staatssecretaris van Financien* [2016] STC 1570 ("***Gemeente Borsele***")

C-344/15 *National Roads Authority v The Revenue Commissioners* ECLI:EU:C:2017:28 ("***NRA***")

C-633/15 *London Borough of Ealing v Commissioners for Her Majesty's Revenue and Customs* [2017] STC 1598 ("***Ealing***")

R. (on the application of Durham Company Limited (trading as Max Recycle)) v Revenue and Customs Commissioners [2018] UKUT 188 (TCC) ("***Durham PTA***")

Wakefield College v HMRC [2018] STC 1170 ("***Wakefield College***")

Pertemps Limited v HMRC [2018] SFTD 1410 ("***Pertemps***")

EVIDENCE

15. The Tribunal approved the taking of a transcription of the proceedings, with copies thereof made available to both parties and the Tribunal.

16. We had documentary evidence contained in four volumes, and a bundle of authorities.

17. We took oral evidence from the following witnesses for the Council:

(1) Mr Stephen Reid is a local government Chief Executive in Northern Ireland. He adopted and confirmed a formal witness statement dated 24 March 2016.

(2) Mr John Tohill is the Director of Finance of the Council. He adopted and confirmed two formal witness statements dated 6 December 2016 and 30 January 2019.

18. **Mr Reid's evidence** included the following:

(1) He has more than 30 years experience working in local government in Northern Ireland, including five years as Chief Executive of two Borough Councils (not the Council), and sits on the council of local authority chief executives. He has extensive significant professional knowledge of the planning for and management of sports and leisure facilities as provided by local government in Northern Ireland.

(2) The main local authority functions in Northern Ireland are:

(a) Leisure and community services

(b) Waste management and recycling

(c) Building control

(d) Local economic and cultural development

(e) Recreation and parks

(f) Street cleansing

(g) Environmental health

(h) Cemeteries.

(3) Local authorities in Northern Ireland do not have responsibilities for:

(a) Roads

(b) Housing

(c) Education

(d) Health and social services

(e) Planning (although they have been responsible for planning since April 2015)

(f) Libraries

(g) Collection of rates.

(4) Local government in Northern Ireland is funded primarily from rates and grants from the Department of the Environment. Also, specific grants (which can be large) paid by central government help with the financing of certain revenue and capital expenditure. European funding has been available for investment in infrastructure.

(5) In respect of leisure and recreational services, income from fees is insufficient to cover the cost of service delivery. The income is received into a general fund which is not restricted to be used only for leisure and recreational services, and so is effectively a partial contribution towards the deficit arising on the delivery of all local authority functions.

(6) Equality is an extremely important issue in Northern Ireland. There is a legal duty (Fair Employment and Treatment (Northern Ireland) Order 1998) to promote equality and prevent discrimination on grounds of religious belief or political opinion. Local authorities have a duty under s 75 NI Act to have due regard to the need to promote equality of opportunity when carrying out their functions. Local authorities are required to carry out equality impact assessments, and produce equality schemes and associated plans; they must subject their policies, including pricing policies, to an assessment to ensure the policies do not place certain groups or individuals at a disadvantage.

(7) Northern Ireland has experienced political and social unrest for generations and has been deeply affected by "The Troubles", a period of unrest and instability conventionally dated to the period from the late 1960s to 1998. One effect was to split communities resulting in residents being unable and unwilling to venture into the "other side" even to avail of public services. Local authorities have had to deal with segregation, political turmoil, inequalities, deprivation and social exclusion. These problems led to a major reorganisation of local government services in 1973, with a large range of traditional local authority services being removed from local councils. Significantly, the provision of social, physical and cultural activities was retained by local authorities – and the statutory obligation for the provision of these services was made specific in the Recreation and Youth Services (Northern Ireland) Order 1973 – emphasising the importance placed on the role of local authorities in delivering the objective to use leisure and cultural services to enhance integration and attack all forms of social deprivation.

(8) The Northern Ireland Assembly's programme for government states its aims as:

(a) To reduce sectarianism, racism and hate crime

(b) To improve access for disabled persons

(c) To reduce deprivation of people living in certain areas

(d) To improve health and well-being

(e) To reduce levels of obesity

(f) To improve mental health.

(9) Local authorities lead, in particular, in these areas:

(a) Access to sports and physical recreation to residents (community cohesion programmes, affordable access, older people, etc)

(b) Reduction of the incidence of obesity and the prevention of major health risks such as coronary heart disease

(c) Provision of play and social opportunities for children and young people.

(10) In support of those areas local authorities deliver intervention schemes such as "active living" – a GP referral scheme for those with serious medical conditions – and "midnight soccer league" – for young people aged 14 to 17 aimed at reducing drinks/drug culture and anti-social behaviour.

(11) Pricing policies are subject to an equality impact assessment, to determine whether there are any adverse or differential impacts on specified groups. Policies must take into account the affordability of leisure and recreational facilities for residents. Local authorities are fundamentally concerned to maximise accessibility and levels of participation; consequently, their pricing policies are focussed not on income generation (even to cover costs) but instead on assessment of need and increasing accessibility and participation. Many leisure and recreational facilities are provided free of charge to users, and others are subsidised partly by the local authority. From a spreadsheet prepared by the witness and evidenced to the Tribunal, in the period relevant to the appeal across all 26 Northern Ireland local authorities the level of subsidy was 76%. Taking capital expenditure into account, the level of subsidy would be even higher. A Sport Northern Ireland report estimated the overall subsidy in 2004 at 84%. Another Sport Northern Ireland report stated that in 2009-19 local authorities (independent of central government funding) spent £135 million annually on sports and physical recreation, of which £120 million was on baseline provision at leisure centres, water sports centres etc.

(12) In 1992 compulsory competitive tendering was introduced in Northern Ireland, requiring local authorities to evaluate their provision of defined services and to subject them to competition. In 1998 the Council placed the management of its leisure facilities out to tender; no bids were received from private sector operators, and the contract was retained in-house.

(13) In the period relevant to the appeal the Council provided facilities including two leisure centres, a golf course, and a sports facility (providing pitches for soccer, Gaelic football, rugby and hockey, an athletics track and tennis courts). The median gross weekly earnings of residents in the Council's district were lower than the Northern Ireland average; almost one in four households in the district was in relative poverty. Residents qualifying for concessions (mainly disabled people and those over 60) received a 75% discount on charges; the Council was reluctant to extend the categories of persons who could avail of concessionary rates because of its duty to promote equality. A wide range of recreational facilities was provided free of charge – such as children's play parks, cycleways, summer festivals, and fireworks displays. There was no increase in prices between 2009-10 and 2011-12 - even VAT rate changes had been absorbed into prices – and the single membership tariff had actually decreased. From 2000 to 2009 any price increases were either inflation-linked (typically 2.5-3%) or a flat 5p or 10p.

19. **Mr Tohill's evidence** included the following:

(1) He is a Chartered Accountant and has been with the Council as Director of Finance for 17 years.

(2) He supported the evidence of Mr Reid concerning the functions and responsibilities of local authorities in Northern Ireland ([18(1-3)] above). Leisure and recreational service provision was one of the Council's most significant areas of responsibility.

(3) The Council was required to strike its rate (both domestic and non-domestic) by 15 February prior to the start of the financial year in which it was to be collected. Rates were collected by a body independent of the Council, and accounted to the Council. In preparing to strike its rate, the Council would collate information to prepare financial budgets for both income and expenditure associated with each of its services and functions; the result would be an estimated net cost of services for the coming year.

(4) The Council's rate estimation process in relation to the leisure and recreational service facilities' deficits did not seek to consider the impact on future facility income levels of current or potential future charges for leisure and recreational activities. Nor did the Council seek to establish any formal process for deriving charges for leisure and recreational activities which could, subject to assumptions regarding levels of usage, produce reasonable, if not fully accurate, estimates of income for budgetary or other purposes. Service costs were estimated as accurately as possible given the time involved and the various uncertainties that were inherent to budgeting; however, levels of charges received (ie income in the budgetary context) were simply left "as is" or possibly uplifted or decreased by a round sum amount by leisure and recreational facility in order to derive a politically acceptable "net cost of leisure by facility". The estimation process never identified a leisure service or activity which did not produce a deficit when the projected amounts received from users were compared to the total cost of service or activity provision. The setting of the charges to be levied for leisure and recreational activities had little or no regard to the factors that had influenced the setting of the overall budget deficits by leisure and recreational facility.

(5) Before April 2015 the Council did not have any legal power to trade; consequently all amounts received from levies on users of leisure and recreational services were "charges" as opposed to "trading income".

(6) The setting of charges by the Council was based on two fundamental principles:

(a) Taking one year with another, the charges should do no more than cover the costs of service provision.

(b) The charges should be affordable to the service user.

(7) All local authorities in Northern Ireland operate on a deficit funding model with the deficit being borne by the ratepayers. Leisure and recreational services, in particular, are very heavily subsidised by the ratepayers; the only other service which is subsidised to a broadly equivalent level is waste management (which includes waste collection and disposal).

(8) The Council perceived costs to be relevant to the initial setting of charges but it was affordability and not costs of service provision which was the most significant factor when the Council had to establish a new charge. For example, when the Council

set the initial charges for hire of its new 3G pitch facility at Meadowbank Sports Arena in 2013, they were based on (in fact, slightly below) existing charges for grass pitches. The significantly higher cost of installing the 3G pitches was subordinate to the issue of affordability. Similarly, when setting initial charges for courts at the new Meadowbank Sports Arena, these were based on (in fact, slightly above) what was already being charged at the existing Greenvale Leisure Centre

(9) When reviewing charges in later years, due to the Council's perception of users' ability to pay, the charges were rarely increased. Several years there were no increases. Any increases were generally inflationary, rounded to 5p to facilitate coin-handling. When the VAT rate changed (up or down) it was absorbed in the charges made to users, rather than adjusting the charge to users.

(10) The Council's decision whether or not to proceed with any major leisure and recreational capital project was mainly influenced by non-monetary costs and benefits, such as the expected health, wellbeing and safety benefits for users and ratepayers. While the Council always pursued "best value" (in terms of efficiency, effectiveness and economy) for a project, the business case for a project was not determined by the income generation potential of the project, and the business case clearly identified that the charges levied would be immaterial compared to the cost of providing and operating the facility.

(11) The setting of charges was not a scientific exercise but the Council reflected on the ability of ratepayers to pay those charges. The Council's area included some of the most deprived areas in Northern Ireland, with low levels of household income; the majority of residents lived in rural areas; there was an abnormally high level of mental health issues in the Council's area. The Council saw footfall or attendance at leisure facilities as the key performance indicator in relation to leisure and recreational facilities, and it was important to set charges that would maintain or increase footfall rather than the monetary level of income for each activity.

(12) Having set a basic (adult) price for each activity, the Council also set a range of concessionary prices; these included junior, senior citizen, disabled, club, school etc. There were memberships as well as pay-as-you-go charges.

(13) In the Council's financial statements the revenue expenditure attributed to leisure and recreational services includes depreciation of fixed assets associated with the delivery of those services, but does not include direct revenue funding of capital expenditure. This presented difficulties in attempting to calculate the extent to which leisure and recreational facilities costs were subsidised by ratepayers in any particular period. Detailed schedules were presented in evidence which showed that the level of subsidy was at least 65% and sometimes exceeded 80% of costs. The Council did not break even (or yield a surplus) on its leisure provision in any year.

(14) Northern Ireland, and particularly its rural areas, consists of diverse and often conflicting groups of communities. The Council's population was culturally diverse (64% Catholic, 35% Protestant, 1% other) with an equally diverse interest in leisure and recreational activities. Those interests tend to be heavily influenced by the residents' community background so that the main sporting interests were Gaelic football, soccer and rugby. The Council found itself providing a wide range of leisure and recreational facilities catering for the interests of its population – both mainstream and minority. The Council was broadly successful in presenting all its facilities as neutral spaces that

could be used by everyone; however, it operated in the real world which dictated that (aside from the major facilities) most of its investment in playing pitches in particular tended to have cognisance of the cultural preferences of the local area in which the pitches were located. Consequently, the Council operated a longstanding policy of facility duplication, particularly in the provision of playing pitches, which in a more normal environment might have been capable of being shared by greater proportions of the resident population. Many of the pitches were perceived by the communities in which they were located as being exclusive to them or at least to the sporting code in which they participated. Many individuals associated with certain activities had deliberately cultivated a negative attitude towards activities the other community was perceived to participate in. Historically, public sector sports and leisure provision throughout Northern Ireland was perceived to have favoured activities rooted in a "Protestant/Unionist" culture - consequently, through the formation of the Gaelic Athletic Association ("**GAA**"), many "Catholic/Nationalist" communities became relatively self-sufficient in facilities and activities by forming local clubs on a parish basis which over time secured land and provided their own playing fields. The GAA constitution prevents its facilities being used for activities other than GAA activities – and Unionists would not use such facilities on ideological grounds. The Council had a heavy investment in soccer pitches but low (although heavily used) provision of Gaelic football pitches; there was a constant demand for equality of provision of the latter relative to the investment in the former. At the same time, there was increasing usage by organised clubs (for both training and matches), increased expectations for the provision of toilet and changing facilities, increased expectations for the quality of playing surfaces, and a growing propensity for injuries to result in public liability claims against the Council. Further, it was recognised that provision of accessible, quality leisure and recreational facilities which were attractive to local communities would assist in diverting disaffected (mainly) young people away from less socially desirable activities, and contribute to improvement of health. It was part of contributing to the development of a shared society. The Meadowbank Sports Arena included an outdoor 3G pitch facility which would accommodate the three major participant sports on a shared playing surface, potentially with two codes being played at once; this was a prime example of the Council delivering community relations outcomes through its leisure and recreational service provision.

(15) In 2015 Mr Tohill had an informal telephone conversation about potential leisure and recreational service delivery models with the director of operations at a private provider. The view expressed was that as a commercial operator the company would close all the existing facilities and build a single new leisure centre close to the maximum centre of population (ie Cookstown or Dungannon); that might increase throughput and might become profitable, even to the point of recovering capital costs of construction; there was no discussion of what level of charges would be required to make this possible. The model proposed would not satisfy the Council's requirement to provide adequate facilities; as a rural area the public transport infrastructure could not offer anything approximating a reasonable means of enabling residents accessing a single facility, and one centre would not provide adequate facilities for the area.

(16) The Council was committed to discharging its Article 10 obligations by providing adequate facilities, being functionally appropriate, safe, accessible, affordable, clean and available, taking into account the need to ensure equality of provision. Decisions were never motivated purely by the desire to generate income. Since 2015 the Council

also had a statutory duty to initiate, maintain, facilitate and participate in community planning for its district; in compiling its ten year plan the Council consulted community groups and other public bodies such as health trusts.

(17) Private sector provision of leisure and recreation facilities in the Council's district was limited to a very small number of individuals – typically personal trainers with access to limited basic equipment, operating part-time from domestic premises or small units on short term leases. There was no private sector provision of swimming, racket sports, or pitches (grass or AstroTurf). Providers tended to "come and go" in the marketplace, and there was uncertainty whether adequate insurance was maintained. The Council was actively involved in drawing down grant funding from UK and EU sources totalling several million pounds towards developing leisure and recreational services; that was not available to private operators and, without it, the private providers did not have the necessary resources. Religious, cultural and political differences between the two main communities would make it very difficult or impossible to provide shared facilities throughout the rural area of the district. Consequently, an alternative provider would be likely to find itself having to duplicate provision of facilities - for example, provision of pitches. Private providers would be likely to have a very different view from the Council on concessionary charges, given their financial objectives.

(18) Between September 2011 and September 2016 the Council engaged a private contractor to operate the Greenvale Leisure Centre. Mr Tohill formed the view that the contractor had a completely different ethos from the Council, and was not interested in objectives that were not income and profit oriented; for example, the provider was geared towards annual memberships rather than pay-as-you-go charges.

(19) Provision of leisure and recreational facilities was a significant core activity of the Council. The most expensive Council activity was waste management and street cleaning – accounting for £17-18 million out of a total budget of £40 million. Building control activities generated approximately £600,000 in fees, which about broke even. Local economic and cultural development activities were broadly matched by peace funding (around £6-7 million) from the EU and UK central government. Environmental Health activities carried a net cost of around £400,000.

(20) In reply to questions in cross-examination:

(a) All leisure and recreational services provided by the Council were pursuant to its Article 10 obligation. Similarly, the decision whether to charge for certain services and (if so) at what level and with what concessions; pricing was a significant barrier to participation.

(b) Stated income from Council leisure facilities included specific grants as well as customer charges.

(c) There were around 400,000 visits/admissions annually, with a district population of around 40,000. He felt the facilities were underused, and the Council encouraged greater use by residents.

(d) Article 10 did not require the Council to manage the facilities provided. In fact, the Council managed all those facilities where charges were levied.

(e) Memberships and combination tickets were available; these were better value than pay-as-you-go charges, and reflected lower administrative costs, but

people might not have the lump sum available up-front. Joining fees often included induction sessions (eg for bowling) and lessons included admission charges (eg a swimming lesson charge included pool entry). Corporate memberships were available to small local companies.

(f) Concessions covered various criteria – eg age (under 18 or over 60), disability, GP referrals, or off-peak use. Concessions were not means-tested – they were analogous to child and OAP fares on public transport. He agreed that private facility providers might also apply differential pricing.

(g) The figures for estimated concessionary use were very approximate because of the difficulties in extracting the relevant information from the records held by the Council.

(h) Facilities might be hired to groups including commercial organisations – these tended to be non-sports events.

(i) There was no legal requirement to charge for leisure access, but the reason why the Council did not allow totally free entry or levy only a token price (eg 20p per swim) was that it was felt this would not be appropriate, as a perception of getting something for nothing would not increase participation (users did not value free facilities), and was contrary to the Council's fiduciary duty to ratepayers. There was a continual deficit on leisure activities (even without capital costs) and the ratepayers effectively picked up that bill. The new 3G pitch had higher building costs but lower maintenance costs.

(j) The format of accounts used by the Council was a standard form prescribed by the Department for Communities, which referred to "leisure and recreational services". Although the Council now used some accrual accounting, the format was not the same as is expected of commercial organisations; capital costs were looked at in terms of cash commitments incurred to be met by the ratepayers.

(k) Making comparison between Council facilities and those of local private providers: The HD Fitness Studio membership was not comparable, as a Council leisure centre membership gave access to all facilities including a pool. The Bush Hotel in Coleraine had one small pool whereas the leisure centre had a 50m pool and a children's pool. The Council was aware of what was adequately available locally and sought not to duplicate but instead offer services not available (eg gymnastics) – so for Gaelic sports these were provided by GAA clubs to their members for a single membership fee; however, these were not marketed to people outside that community as that would be prohibited by the GAA Constitution as "foreign sports", and there had been disputes (some high profile). The rugby club charged an annual membership. There was a local tennis club but the Council facilities had outdoor and indoor courts. The Draperstown recreation centre was located in what was perceived to be a Nationalist community; the Council had made a contribution to its costs in the past. There were other golf facilities within reasonable travelling distance; the Council operated a driving range that had low demand and made significant losses.

(l) Section 75 NI Act required that any Council policy on its functions (including leisure) must be seen to be non-discriminatory. Positive mitigations were permitted if proportionate. Later legislation required the Council to have regard to value for money and continuous improvement, generally and

specifically; a private provider would not have these constraints. Since 2011 the ability to obtain cheap finance from central government had been replaced by the prudential code which allowed the Council to borrow externally, tied to the rates stream. The Council had power to vest land (a form of compulsory purchase of land); this required Ministry approval and was not limited to leisure functions; he had never seen it done by the Council. The Council had power to make byelaws (eg for cemeteries, tattooists etc) but there were none governing the indoor leisure facilities.

APPELLANT'S CASE

20. For the Council, Ms Hall and Mr Gillow submitted as follows.

21. The charges in dispute do not attract VAT on two alternative grounds:

(1) The Council's supplies of leisure and recreational services to members of the public are not "economic activities"; there was an insufficiently direct link between the value of the services provided and the charges; and the supplies are therefore outside the scope of VAT.

(2) The Council's supplies of leisure and recreational services to members of the public are provided by the Council in its role as a public authority acting under a special legal regime, and therefore it is not a taxable person in respect of those supplies.

No economic activity

22. Article 2 PVD subjects to VAT "the supply of services for consideration within the territory of a Member State by a taxable person acting as such". Article 9 PVD defines "taxable person" as "any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity"; and elaborated that "Any activity of … traders or persons supplying services, …shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."

23. In *ICAEW* the House of Lords held that ICAEW did not carry out an economic activity when it made charges to support its statutory regulatory function because it was essentially carrying out a function on behalf of the state. That was similar to the position of the Council in carrying out its Article 10 obligations.

24. In *Wellcome Trust* the CJEU concluded the trust was not carrying out an economic activity because it was required to "make all reasonable efforts to avoid engaging in trade when exercising its powers". Thus the trust was in a different position from companies who engaged in commercial share dealing activities. Similarly, the Council in carrying out its Article 10 obligations is in a different position from private providers of leisure services.

25. In *Finland* there was some link in terms of reciprocity between the payments made for legal services provided by the state and those services; however, the payment made by an individual represented a portion of the legal fees incurred but also depended on the individual's income and assets. Per Arden LJ at [74] of *Longridge*: "the charge bore little relation to the actual cost, so the link was not sufficiently direct for there to be an economic activity for VAT purposes."

26. In *Longridge* Arden LJ (at [24]) reviewed the CJEU authorities and identified what she termed "the General Rule" that an activity will be an economic activity where it is permanent

and carried out for remuneration. She continued (at [91]): "The General Rule can be displaced by evidence that there was no direct link between the service and the payment or by other evidence which shows that there was no economic activity. … [That] evidence can be of varying kinds and involves the FTT when making its factual findings looking widely at the circumstances of the case."

27. In *Gemeente Borsele* the CJEU held that the considerable difference between the operating costs of school transport provided by a public body and the sums received for the services was such that the link was not sufficiently direct, and the service was not an economic activity. Although there was some link between the payments and the value of the services (eg length of journey), the determining factor was what the passenger's parents could afford to pay.

28. All of *Finland, Gemeente Borsele* and *Longridge* had been considered by the Court of Appeal in the recent case of *Wakefield College*. The Court adopted a two-stage approach: (a) Is there art 2 consideration for the relevant supplies? (b) If so, are the supplies part of an economic activity? There should be a wide ranging enquiry into the objective circumstances in which the relevant services are supplied.

29. *Pertemps* was an example of a First-tier Tribunal case applying the principles in *Wakefield College*.

30. In the current appeal the evidence demonstrates that the Council does not provide the leisure and recreational facilities for the purposes of obtaining income on a continuing basis. The Council accepts that the charges it receives constitute consideration under art 2; however, the Council is not engaged in an economic activity under art 9; its position was analogous to that of *Wellcome Trust* and *ICAEW*; it was obliged by Article 10 to provide adequate social, physical and cultural activities to residents; its case can be distinguished from *Wakefield College* on the facts. In particular:

(1) Discharging the Council's duty under the 1986 Order is not its sole activity.

(2) The charges paid to the Council cannot reasonably be described as significant.

(3) The level of charges made by the Council was not fixed by reference to the cost of providing the facilities.

(4) The overall means of those who have access to the facilities was a significant factor in setting the level of the Council's charges.

(5) There is not a market in the Council's area in which there is an obligation to provide facilities which are adequate. Even if the relevant market is taken to be that of providing facilities for recreational, social, physical and cultural activities (such as those provided by private clubs, gyms and hotels), the Council could not be regarded as a typical participant in such a market. Its provision of the facilities is made pursuant to a statutory obligation to make those facilities available in its area and to ensure that those facilities are adequate. Further, the wider legislative, procedural and socio-political context in which those facilities are provided has a profound effect on their scope and nature, their mode of delivery and on the payment model.

31. It is not the Council's case that its supply of recreational and leisure services is not an economic activity simply on the basis that the Council does not make a profit and was not trading, or because the supplies are made below cost. These are relevant factors which should be taken into account by the Tribunal as part of its consideration of all of the circumstances

of the case; the Council accepts, however, that it is possible to have an economic activity when supplies are made at a loss.

32. The determinative factor in setting the charges levied for access to the Council's recreational and leisure facilities was whether those charges would be affordable to users. There was, of course, some reciprocity between the charges and the nature of the different recreational and leisure services: unsurprisingly, a golf lesson costs more than entry to the swimming pool. However, the figures demonstrate a significant gulf between the costs of provision to the Council and the charges which are paid by users. In at least one year during the relevant period cost recovery was as low as 11%: the Council's position is, therefore, closely analogous to the cases of *Finland* and *Gemeente Borsele*.

33. Moreover (and also like *Finland* and *Gemeente Borsele*), this approach to setting charges is consistent with the fact that the Council provides leisure and recreational facilities in order to discharge a statutory obligation under Article 10. Facilities are not adequate if they are not accessible; accessibility in this context refers, amongst other things, to whether facilities are affordable; the Council's district is one of the most economically deprived in Northern Ireland; the charge that is affordable bears no obvious relationship to the value of the service that is provided; the Council does not charge more for new, high quality facilities because users cannot afford to pay more. Rather, taking into account the circumstances in which the supplies are made and charges are levied, the link between the value of recreational and leisure services that the Council provides and the charges which are paid by users is insufficiently direct.

34. The Council's supply of leisure and recreational services was not an economic activity; there was an insufficiently direct link between the value of the services provided by the Council and the charges made by the Council for those services.

Public authority acting under a special legal regime

35. Article 13 PVD states "… local government authorities … shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions. However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition."

36. The Council supplied the leisure and recreational services under a special legal regime; it was bound by law to provide adequate leisure and recreational services for individuals throughout its area; it was prohibited from imposing charges exceeding its costs and, in any event, had to ensure the charges were affordable to residents. This placed the Council in a demonstrably different position from private providers of leisure and recreational services.

37. The case-law on art 13(1) was summarised recently by Warren J in *Durham Company*; the comparison between the local authority and private economic operators is of critical importance; the decisive issue is whether the activity must be regarded as "constituting the exercise of public administrative law or as private law which applies equally to all economic operators". Warren J accepted that commercial waste collection was subject to a special legal regime because local authorities were bound by requirements in relation to the collection and disposal of commercial waste that did not apply to commercial operators. This was also accepted by Nugee J in refusing HMRC permission to appeal (*Durham PTA*).

38. In the recent *NRA* case, the National Roads Authority for Ireland was empowered to make a toll scheme on selected roads, and to make bye-laws relating to such a scheme; the NRA could collect the tolls itself or it could entrust the collection of tolls (together with maintenance of the toll road) to a third party private operator. The CJEU stated:

> (1) The primary function of the NRA is to ensure the availability of a safe and efficient network of national roads.
>
> (2) Private operators can enter the market of making roads available on payment of a toll only if the NRA authorises them.
>
> (3) There was no real possibility of a private operator entering the market by constructing a road that could compete with already existing national roads.
>
> (4) Consequently, that activity was not being carried out in competition with that of private operators; and there was no potential competition either.
>
> (5) Accordingly, disagreeing with the Opinion of the Advocate General ("**AG**"), the NRA was not competing with private operators who collect tolls on other toll roads pursuant to an agreement with the NRA under national statutory provisions.

39. The Council's Article 10 obligation to provide adequate facilities is analogous to the NRA's obligation to secure the provision of a safe and efficient network of national roads (rather than just providing access to roads). Private providers of leisure facilities are not burdened with the obligation and overall responsibility for securing the provision of adequate facilities for the entire area. The Council cannot delegate its statutory duties. There is no realistic possibility of private operators entering the market under economic and legal conditions which ensure that, in all the circumstances, they provide adequate facilities of the relevant kind, throughout the area of the Council; private providers would face insuperable difficulties.

40. The legislative framework imposes requirements on the Council in relation the supply of recreational and leisure services which are different from the situation of private companies who provide similar services:

> (1) Article 10 requires the Council to provide adequate facilities for its area. This means that the Council must provide facilities which allow participation throughout its area in a range of leisure and recreational activities, even when it is not economic to do so. This obligation is integral to the Council's activities: it relates not only to decisions about what facilities should be provided, and where they should be provided, but also how they should be operated on a day-to-day basis. This is in obvious contrast to a private provider who is free to choose the nature and location of the services it provides. The Council simply cannot run its recreational and leisure facilities in the way that a private operator can.
>
> (2) During the claim period, the statutory framework in which the Council operated did not confer on it the power to levy charges which exceeded its costs recovery. In other words, the Council was constrained by a requirement to impose charges which resulted in, at most, cost recovery and no surplus. In fact, in order to discharge its obligation under Article 10, the Council had to subsidise access to the facilities which it provided in order to ensure that individuals had a meaningful opportunity to participate. Once again, this is in clear contrast to the position of a private provider who can charge for services in a manner which creates a surplus or profit.

41. As in *Durham Company*, the effect of the legal regime is to require the local authority to bear the burden of uneconomic facilities and customers. The provision of recreational and leisure services by the Council is governed not only by Article 10 but also by the broader political and policy framework. This included the need to make provision for diverse communities, and in a manner which supported their cohesion; the need for provision to reflect and contribute to the broader aims of the Northern Ireland Assembly, including in particular in relation to health and well-being; and the need to comply with constraints on its financial position, including its inability to trade or to access commercial lending. These factors offer clear support for the proposition that the Council did not supply recreational and leisure services under conditions which apply equally to all economic operators.

42. The Council's position does not lead to the conclusion that any activities carried out by local authorities will be subject to a special legal regime. The Council draws a distinction between cases in which a public authority is simply empowered to provide leisure and recreational services, which a private provider also has the power to do, and cases where (as for the Council) a public authority is obliged to provide those services in such a way as to put them in a completely different position than the private provider.

RESPONDENTS' CASE

43. For HMRC, Mr Hill submitted as follows.

44. Following the CJEU decision in *Ealing* HMRC accepted that the sporting services exemption (art 132(1)(m) PVD) applied to sports centre entrance fees charged by local authorities. Therefore, the Council could reclaim overpaid output VAT wrongly charged on those fees. The Council had decided to pursue its appeal before the Tribunal on the basis that output tax was not due on its supplies solely because they were either outside the scope of the tax or because they fell within the scope of art 13(1) – presumably because it considered that more advantageous than an *Ealing* reclaim (with attendant impact on input tax and de minimis aspects).

The economic activity argument

45. The Council was now putting its case forward on the basis that the activities to be examined are all those purportedly undertaken pursuant to Article 10. HMRC contend that the relevant activities are confined to those where the participants pay a fee; if there was no fee then there was no art 2 consideration (and thus no reciprocal performance); in looking at "that activity" in art 9 the focus should be on each activity of the Council, not a consideration of activities in the round or even all sporting activities – see the AG's opinion in *Wellcome Trust* (at [35 & 39]) – and thus the Council could be a taxable person for some activities (those provided for a payment) but not others.

46. From the caselaw it was established that in determining whether there was an economic activity the following matters were *not* relevant:

(1) Whether the activities were carried out with a business or commercial motive, or intention of profit – see *Finland, Gemeente Borsele,* and *Longridge*.

(2) Whether the activities were carried out in the public interest – see *Finland*.

(3) Whether the activities are duties conferred by law – see *Finland* and *Saudaçor*.

(4) How the activities are financed – see *Lajvér*.

47. In *Wakefield College* the Court of Appeal (at [52]) drew a distinction between consideration for the purposes of art 2 and remuneration for the purposes of art 9. The Council has conceded that it receives art 2 consideration. The Court stated, "A supply for consideration is a necessary but not sufficient condition for an economic activity."

48. The Tribunal was required to look widely at the circumstances of the case (per Arden LJ in *Longridge*) and conduct a wide-ranging, fact-sensitive, entirely objective enquiry (per David Richards LJ in *Wakefield College*). Factors may assume different relative importance in different cases (*Wakefield College* at [58]).

49. In *Finland* the Court of Justice noted that only about a third of the users of the Finnish legal aid offices paid even the basic contribution – and the contributions covered less than 8% of the operating costs of the legal aid offices – and held that, in those circumstances, there was no economic activity. The link between the services and the payment was not sufficiently direct for the services to be regarded as economic activities, since the link between the part payment made by recipients and the actual value of the services provided varied in strength according to the recipient's circumstances. This suggested that the part payment borne by recipients should be "regarded more as a fee". Importantly though, the Court indicated that an economic activity for the purposes of VAT "does not necessarily have to be a business activity designed to make a profit" and could be an activity carried out "without any business or commercial objective".

50. This was supported by Arden LJ in *Longridge* where she stated (at [94]) that the fact that Longridge's predominant concern in carrying out its activities and setting prices for them was to further its charitable objectives and "its considerable use of volunteers" which allowed it to reduce costs were irrelevant to whether its activities were economic. This was because "economic activity is assessed objectively and so the concern of Longridge, which is its reason for providing the services which it does provide, is not enough to convert what would otherwise be economic activity into an activity of a different kind for VAT purposes". The calculation of the charges supported the existence of an economic activity, since "the amount of the charge was more than nominal in amount and was directly related to the cost of the activity. … The concessionary charges were also not an indicator against the existence of an economic activity because the economic activity springs from the receipt of income, not profit." Arden LJ took into account, in deciding that Longridge's activities were economic, not just "the fact that it operated in a market where similar services were supplied on a commercial basis", but also the fact that Longridge conducted its activities on a "substantial" scale, applying "prudent financial management".

51. The Court of Justice in *Gemeente Borsele* said (at [31]) it was relevant to look at "the number of customers and the amount of earnings." The Court noted that "the municipality of Borsele recovers, through the contributions that it receives, only a small part of the costs incurred. The contributions at issue in the main proceedings are not payable by each user and were paid by only a third of the users, with the result that they account for only 3% of the overall transport costs, the balance being financed by public funds. Such a difference between the operating costs and the sums received in return for the services offered suggests that the parental contribution must be regarded more as a fee than as consideration".

52. In *Wakefield College,* David Richards LJ noted (at [75]) "in *Finland* and, to an extent, in *Borsele,* the charges paid were fixed by reference to the means of the recipients. Second, and as a necessary corollary, the charges were only partly fixed by reference to the cost of the service. Third, the total amount raised by charges was insubstantial, both in absolute terms

and relative to the cost of the service". The college charged fixed fees which were significantly less than the cost to the college of providing the courses; the Court of Appeal (at [81-84]) took into account that the fees "made a significant contribution to the cost of providing courses to the students paying those fees, to the extent of some 25-30%". The fees paid by the group of students paying subsidised fees were "significant in amount", their level was fixed by reference to the cost of the courses and was "not fixed by reference to the means of the students or employers or others paying the fees". Although the college might have "charged less than it was entitled to, as a response to prevailing economic circumstances in its local catchment area, … that is a factor that any economic activity must take into account and is not comparable to an individual means-tested basis for fixing fees". There was a market in the provision of further and higher education and there was "no reason to suppose that the College [was] other than a typical participant in that market or that it provides courses to students paying subsidised fees on anything other than a typical basis". That was so, even though the College was itself a charity and its viability was underpinned by a combination of grant aid and fees.

53. The position of the Council can be distinguished from that of the municipality in *Gemeente Borsele* on four grounds:

(1) *Most of the users of the Council's leisure and recreational services pay something.* In both *Gemeente Borsele* and *Finland* only a third of users were required to make <u>any</u> contribution; the present case is more similar to *Longridge,* where Longridge charged for the majority of its courses, but offered discounts or waived charges where it considered it justified.

(2) *The relevant charges are based on the leisure and recreational services chosen by the participant and the number of times that they wish to undertake that activity.* In *Gemeente Borsele* the parental contribution to the transport costs was not linked to either the number of kilometres travelled per day, the cost price per journey for each pupil transported, or the frequency of the journeys. In *Finland*, the Court commented (at [48]) that the charges for legal representation depended not on the complexity of the case concerned or the number of hours worked by the legal advisor in question, but on the recipient's income and assets. In contrast, the charging structure adopted by the Council is similar to that adopted by Longridge, which depended on the activity chosen by the participants and whether it was a single activity or course that was chosen. It is true that the Council has various concessionary rates for activities carried out by individuals and groups, but that was also the case in *Longridge*.

(3) *It is relevant (though not conclusive) to look at the percentage contribution of users of the service towards the cost of providing the service* – see *Gemeente Borsele* (at [33]). The Council has calculated that the percentage subsidy between 2002/03 and 2009/10 for admissions to its total leisure and recreational activities varied between 70% and 77%. The 2006/2007 Notes to the District Fund for the Council appear to show that it recovered about 35.9% of its leisure and recreational expenditure through user charges. This is far above the 3% contributions received by the municipality in the *Gemeente Borsele* case. Even if it is right also to include annual capital costs, the percentage recovery for indoor and outdoor leisure and recreational services appears still to be about 22%. In taking into account the percentage contribution by users of the relevant services, the relevant question is whether the Council was exploiting its facilities in order to obtain income therefrom. As the Court of Justice stated in *Lajvér* (at [35]), "it is irrelevant whether the exploitation is intended to make a profit". The

Council obtained very substantial income (around £1 million per annum) from providing leisure and recreational services. It is irrelevant that the Council was subsidised through Northern Ireland Assembly grants and European grants – see the Court of Justice in *Lajvér* (at [38]).

(4) *The Council offers its leisure and recreational services on the general market* – see *Gemeente Borsele* (at [35]). Anyone who wants to take part in leisure and recreational activities can choose to use the facilities offered by the Council – eg the gyms at Dungannon and Magherafelt Leisure Centres – or can choose to use the gym facilities offered by commercial entities in the Council's area, or look to clubs such as the GAA or the local rugby club. The fact that the Council offers leisure and recreational services on the general market in fulfilment of its statutory duties under Article 10 is not relevant – see *Finland* at [40].

54. Accordingly, the present case is not in the exceptional category of cases, such as *Finland* and *Gemeente Borsele*, where the amounts paid by users of the relevant services were to be regarded as symbolic amounts which had an insufficient link with the services provided. Rather, as in *Wakefield College* and *Longridge,* the financial contribution made by users of the services in the Council's case is consideration for the services in question – and those services are an economic activity.

Public authority acting under a special legal regime

55. From the caselaw on art 13 the following principles could be drawn:

(1) Any economic activity is normally taxable and thus the PVD has a wide scope – see *Ireland* at [39], *Isle of Wight* at [28] and *Saudaçor* at [48].

(2) A public law body is normally taxable – see *Ireland* at [39].

(3) Article 13 is a derogation from that general rule and so must be interpreted strictly – see *Ireland* at [40-41] and *Saudaçor* at [38-39].

(4) It is not an objection to the existence of a special legal regime that private bodies can carry out similar activities – see *Isle of Wight* at [33].

(5) A special legal regime is not created simply by operating within a statutory framework – see *Ireland* at [49].

(6) The activity in question must be carried out in exercise of rights and powers of the public authority – *Fazenda Pública* (at [22]).

56. The Council relies particularly on the CJEU judgment in *NRA*. That case does not provide the Tribunal with any assistance on the special legal regime issue. In that case, it was common ground, not just that the NRA was a body governed by public law (at [9]), but also that the NRA was such a body "acting as a public authority as regards the activity of making road infrastructure available on payment of a toll" – and was thus prima facie not to be regarded as a taxable person (at [22]). Indeed, the Court rejected an attempt by the European Commission to reopen that issue (at [30-34]). Thus, there was no issue in that case whether the NRA operated under a special legal regime. The only issue (as set out in the questions referred by the national court (at [29 & 35]) was whether treating the NRA as non-taxable would lead to significant distortions of competition, applying the second sub-paragraph of art 13(1) - and not whether the NRA should prima facie be regarded as a taxable person,

applying the first sub-paragraph of art 13(1). That is confirmed by the Court's answer to the questions referred (at [52]).

57. The Court's discussion of distortion of competition in *NRA* cannot be used to establish that the Council would inevitably be regarded as operating under a special legal regime. The Council seeks to argue (by a process of reverse engineering) that, because the NRA had a statutory function of ensuring the availability of a safe and efficient network of national roads (at [45]) and because it was agreed that the NRA did operate under a special legal regime, the Council must be taken as operating under a special legal regime insofar as it was under a statutory obligation to provide adequate recreational facilities in its area. However, because it was common ground before the CJEU that the NRA operated under a special legal regime, it is not possible to know what factors the parties and/or the referring Tribunal in Ireland took into account in reaching that conclusion – and whether that was solely because of the obligation on the NRA to make a national road network available. In particular, it is noteworthy that the NRA had more extensive powers as a public authority than the Council, such as a direct power of compulsory purchase to force landowners to sell private land to construct roads (at [26]). By contrast, the Council has no direct power of compulsory purchase; it has to apply to the relevant Ministry for a vesting order under s 97 Local Government (Northern Ireland) Act 1972.

58. The Council also relies heavily on the judgment of Warren J in the Upper Tribunal in *Durham Company*; a judicial review concerning the lawfulness of treating local authorities which collected and disposed of trade waste as being non-taxable persons under art 13(1). Warren J applied *Fazenda Pública, Isle of Wight* and *Saudaçor* (at [12-21]). Therefore, *Durham Company* does not purport to establish any new legal test of the existence of a special legal regime, but simply to apply the test laid down by the CJEU in those previous authorities to the particular facts of the case. Furthermore, Warren J's decision was that the relevant statutory provision – section 45(1)(b) EPA 1990 (which required a local authority to arrange for the collection of any commercial waste which the occupier of premises in its area requested it to collect) was "at least … capable of being … a "special legal regime"" (at [103]). Warren J expressly stated that "whether any particular LA is acting as a public authority" will depend on the facts relevant to that local authority (at [104]).

59. Although the Council seeks to rely on the fact that in both *Durham Company* and its own case the local authority was under a statutory obligation, the nature of the obligation is entirely different. In *Durham Company,* the local authority had to arrange for collection of *any* trade waste which an occupier of *any* premises in its area asked it to collect (at [11 & 85]); the only discretion left to the local authority was whether to collect the waste in-house or by arranging for a private sector operator to do so – "It does not have a choice not to provide the service at all" (at [91(a)]). Furthermore, the judge recorded the Local Government Association as submitting that "An LA's collection of commercial waste sits within a wider range of rights, powers and duties of public authorities in relation to environmental law which does not apply to private operators" (at [96]). In the present case, the obligation on the Council is weaker than that involved in *Durham Company*. If there are already adequate facilities for particular recreational activities in its area, the Council is not obliged to secure the provision of any further facilities – and it is not clear that the Council exercises any rights or powers, which are exclusive to a Northern Ireland District Council as opposed to a commercial operator, in securing the provision of any activities it does decide to make available.

60. The Council initially relied solely on Article 10 as constituting a special legal regime. This is exactly the sort of case which the Court was referring to in *Ireland*: under Article 10 the Council is required to secure the provision of adequate recreational activities, but when providing or securing the provision of those facilities it is not exercising any "rights and powers of the public authority" exclusively afforded to it. The wording does not require the Council itself to provide the relevant facilities, thereby implying that the Council could choose to fulfil the obligation either by providing the facilities itself or by ensuring that there was sufficient private and voluntary sector provision. Or to use the language of *Saudaçor* (at [72]), it is not using Article 10 as an "instrument … in order to carry out the activities" in question.

61. This is not a case like *T-Mobile* where only the public authorities could carry out the activities in question (auctioning mobile phone spectrum) and nor is it a case like *Fazenda Pública*, in which the public authorities exercised public powers in order to carry out activities where comparable activities were also provided by private operators (car parking) but in which the specific activity in question was both authorised by and delimited by the use of public powers (onstreet car parking). So this is not a case in which the exercise of public powers was necessary to *create* or *carry out* the specific activity in question; any organisation in Northern Ireland could provide leisure and recreational facilities similar to those provided by the Council, without recourse to public powers.

62. The Council has also relied additionally on a series of further legislative provisions in order to establish a special legal regime. These were all generic provisions which did not relate specifically to the operation of leisure and recreational facilities and thus were merely part of the framework; the duty of equality applies to every act of a Northern Ireland local authority and the Council was not using this to provide the leisure and recreational facilities. In particular, they were not provisions, as in *Fazenda Pública,* which were necessary to create or carry out the activity of operating leisure and recreational facilities by authorising and delimiting those activities. In *Saudaçor* the taxpayer had a duty to provide facilities but that was not sufficient.

CONSIDERATION AND CONCLUSIONS

63. We find as fact the witness evidence of Mr Reid and Mr Tohill set out above.

64. The Council advances two alternative arguments as to why its supplies of leisure and recreational services to members of the public do not attract VAT.

65. First, the supplies do not constitute an economic activity within art 9 PVD; therefore the Council is not a taxable person within the meaning of art 9; therefore there is no VATable supply under art 2 PVD. We shall call this "**the Article 2 Argument**".

66. Secondly, the supplies are made by the Council in its role as a public authority for the purposes of art 13 PVD; it operates as such under a special legal regime; and its consequent treatment as a non-taxable person does not lead to significant distortions of competition. We shall call this "**the Article 13 Argument**".

The Article 2 Argument

67. Article 2 PVD subjects to VAT "the supply of services for consideration within the territory of a Member State by a taxable person acting as such". Article 9 PVD defines

"taxable person" as "any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity … Any activity of … persons supplying services … shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."

68. These provisions were considered by the Court of Appeal in *Wakefield College* where David Richards LJ reviewed the relevant caselaw (which we cover in more detail below) and analysed the current legal position as posing two separate questions:

> **"[52]** Whether there is a supply of goods or services for consideration for the purposes of art 2 and whether that supply constitutes economic activity within art 9 are separate questions. A supply for consideration is a necessary but not sufficient condition for an economic activity. It is therefore logically the first question to address. It requires a legal relationship between the supplier and the recipient, pursuant to which there is reciprocal performance whereby the goods or services are supplied in return for the consideration provided by the recipient: see, for example, the judgment in *Borsele* at para 24. That is what is meant by 'a direct link' between the supply of the goods or services and the consideration provided by the recipient: see *Borsele* at para 26 and contrast *Apple and Pear Development Council v Customs and Excise Comrs*. There is no need for the consideration to be equal in value to the goods or services. It is simply the price at which the goods or services are supplied. This requirement was satisfied in both *Finland* and *Borsele*.
>
> **[53]** Satisfaction of the test for a supply for consideration under art 2 does not give rise to a presumption or general rule that the supply constitutes an economic activity. However, as Mr Puzey for HMRC pointed out, the Advocate General remarked in her opinion in *Borsele* at para 49, 'the same outcomes may often be expected'."

69. On the Court of Appeal's first question, Ms Hall for the Council accepts (and we agree) that the fees the Council receives do constitute consideration for the purposes of art 2. Moving to the Court of Appeal's second question:

> **"[54]** Having concluded that the supply is made for consideration within the meaning of art 2, the court must address whether the supply constitutes an economic activity for the purposes of the definition of 'taxable person' in art 9. The issue is whether the supply is made for the purposes of obtaining income therefrom on a continuing basis. For convenience, the CJEU has used the shorthand of asking whether the supply is made 'for remuneration'. The important point is that 'remuneration' here is not the same as 'consideration' in the art 2 sense, and in my view it is helpful to keep the two terms separate, using 'consideration' in the context of art 2 and 'remuneration' in the context of art 9.
>
> **[55]** Whether art 9 is satisfied requires a wide-ranging, not a narrow, enquiry. All the objective circumstances in which the goods or services are supplied must be examined: see the judgment in *Borsele* at para 29. Nonetheless, it is clear from the CJEU authorities that this does not include subjective factors such as whether the supplier is aiming to make a profit. Although a supply 'for the purpose of obtaining income' might in other contexts, by the use of the word 'purpose', suggest a subjective test, that is clearly not the case in the context of art 9. It is an entirely objective enquiry.

> **[56]** In describing the relationship between the supply and the charges made to the recipients in the context of art 9, the CJEU has used the word 'link'. In *Finland* at para 51, the court concluded that 'it does not appear that the link between the legal aid services provided by public offices and the payment to be made by the recipients is sufficiently direct … for those services to be regarded as economic activities'. Likewise, in *Borsele* at para 34, the court adopted precisely those words in concluding that the provision of the school transport was not an economic activity.
>
> **[57]** Mr Prosser QC for the College submitted that whether there was 'a sufficiently direct link' between the services and the charge made was an important circumstance, while Mr Puzey submitted that 'direct link' does not feature in the analysis.
>
> **[58]** I regard this as a largely semantic point. The word 'link', whether 'sufficient' or 'direct', is used as no more than shorthand to encompass the broad enquiry as to whether the supply is made for the purpose of obtaining income. It is not a separate test, or one of the factors to be considered when addressing the central question. For my part, I think it is apt to cause some confusion to use the same word for both art 2 and art 9 and I have not myself found it particularly helpful or illuminating in considering whether there exists an economic activity.
>
> **[59]** Each case requires a fact-sensitive enquiry. While cases concerning the supply of legal aid services or school transport will provide helpful pointers to at least some of the factors relevant to the supply of subsidised educational courses, there is not a checklist of factors to work through. Even where the same factors are present, they may assume different relative importance in different cases. The CJEU made clear in *Borsele* at para 32 that it was for the national court to assess all the facts of a case."

70. We look first at the CJEU cases referred to by the Court of Appeal in the passages quoted above. In *Finland* the CJEU summarised the position of the caselaw of the Court (at [37]):

> "… the scope of the term economic activities is very wide and … the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results … An activity is thus, as a general rule, categorised as economic where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity …"

71. Finnish law provided for provision of legal aid financed out of public funds, and for charging a contribution to the recipient of the legal services. The payment made to the public office by the recipient of the services was a contribution limited to 20%-75% of the amount of fees on the case (there was provision for additional contributions but these were unlikely to be levied) and was further means tested by reference to the income and assets of the recipient.

> "48 … Thus, it is the level of the [recipient's income and assets] – and not, for example, the number of hours worked by the public offices or the complexity of the case concerned – which determines the portion of the fees for which the recipient remains responsible.
>
> 49 It follows that the part payment made to the public offices by recipients of legal aid services depends only in part on the actual value of the services provided – the more modest the recipient's income and assets, the less strong the link with that value will be.

> 50 … that finding is borne out by the fact that … the part payments made in 2007 by recipients of legal aid services provided by the public offices (which relate to only one third of all the services provided by public offices) amounted to EUR 1.9 million, whilst the gross operating costs of those offices were EUR 24.5 million. Even if those data also include legal aid services provided other than in court proceedings, such a difference suggests that the part payment borne by recipients must be regarded more as a fee, receipt of which does not, per se, mean that a given activity is economic in nature, than as consideration in the strict sense.
>
> 51 Therefore, in light of the foregoing, it does not appear that the link between the legal aid services provided by public offices and the payment to be made by the recipients is sufficiently direct for that payment to be regarded as consideration for those services and, accordingly, for those services to be regarded as economic activities …"

72. In *Geemente Borsele* a Dutch municipality was required to meet stated transport costs of school pupils. For shorter journeys parents paid a price equal to the cost of public transport, and for longer journeys the charge was means tested (at [10]). The Court emphasised (at [29]) that all circumstances must be considered, and stated:

> "30. Comparing the circumstances in which the person concerned supplies the services in question with the circumstances in which that type of service is usually provided may therefore be one way of ascertaining whether the activity concerned is an economic activity …
>
> 31. Other factors, such as, inter alia, the number of customers and the amount of earnings, may be taken into account along with others when that question is under consideration …
>
> 33. …first, … the municipality of Borsele recovers, through the contributions that it receives, only a small part of the costs incurred. The contributions at issue in the main proceedings are not payable by each user and were paid by only a third of the users, with the result that they account for only 3% of the overall transport costs, the balance being financed by public funds. Such a difference between the operating costs and the sums received in return for the services offered suggests that the parental contribution must be regarded more as a fee than as consideration …
>
> 34. It therefore follows from that lack of symmetry that there is no genuine link between the amount paid and the services supplied. Hence, it does not appear that the link between the transport service provided by the municipality in question and the payment to be made by parents is sufficiently direct for that payment to be regarded as consideration for that service and, accordingly, for that service to be regarded as an economic activity …
>
> 35. … second, that the conditions under which the services at issue in the main proceedings are supplied are different from those under which passenger transport services are usually provided, since the municipality of Borsele … does not offer services on the general passenger transport market, but rather appears to be a beneficiary and final consumer of transport services which it acquires from transport undertakings with which it deals and which it makes available to parents of pupils as part of its public service activities."

73. In *Wakefield College* the Court of Appeal provided a helpful summary of the factors taken into account in those two CJEU cases:

> "[75] Turning to the contentious issue of economic activity, both parties drew attention to factors taken into account in *Finland* and *Borsele*, while accepting that ultimately each case depends on its own facts. Those factors were, first, that in *Finland* and, to an extent, in *Borsele*, the charges paid were fixed by reference to the means of the recipients. Second, and as a necessary corollary, the charges were only partly fixed by reference to the cost of the service. Third, the total amount raised by charges was insubstantial, both in absolute terms and relative to the cost of the service. Fourth, in *Borsele*, the municipality did not offer services on the general passenger transport market and appeared more to be the final consumer of the transport services provided by the transport undertakings engaged by it. Fifth, other factors mentioned in those cases were a comparison of the supply in question with the circumstances in which the relevant type of service is usually provided, and the number of customers."

74. From the passages quoted above from *Wakefield College* we understand that the approach we are to adopt to the question whether the Council makes the supplies for remuneration, is to make a wide-ranging (not a narrow) fact-sensitive enquiry, examining all the objective circumstances in which the services are supplied; it is an entirely objective enquiry, and does not include subjective factors; there is not a checklist of factors to work through, and even where the same factors are present, they may assume different relative importance in different cases.

75. We consider that the relevant factors in the current appeal for the purposes of arts 2 and 9 are as follows, and we give our findings on each:

(1) *The supply to local residents of leisure and recreational services is a core activity of the Council.* See the evidence of Mr Reid ([18(2), (7) & (9)] above) and Mr Tohill ([19(2) & (19)] above). That is in contrast to the provision of school transport by the municipality in *Geemente Borsele*, and the provision of legal aid by the public office in *Finland*, which in each case was very much ancillary to the respective body's principal activities.

(2) *The number of customers and the total revenue raised by the Council for the supply of leisure and recreational services are both significant.* See the evidence of Mr Reid ([18(11)] above) and Mr Tohill ([19(19) & (20c)] above). The CJEU in *Geemente Borsele* said (at [31]) it was relevant to look at "the number of customers and the amount of earnings."

(3) *Although concessionary fees are available to qualifying users, (almost) all users pay something for use of the facilities.* In contrast, in *Geemente Borsele* (at [33]) only one-third of transport users paid contributions, and in *Finland* (AG Opinion para [50]) only 34% of users paid any contributions.

(4) *Although the cost of providing the facilities exceeds the fees received from users, the fees do make a significant contribution to the costs of provision.* It is difficult to give precise figures here because as Mr Tohill explained in his evidence ([19(20j)] above), the accounting policies and practices used by local authorities in Northern Ireland differed from those employed by commercial entities, especially in relation to accounting for capital expenditure. Mr Gillow helpfully provided a paper analysing costs both with and without capital expenditure, and also for all activities or only paid-

for activities; however, given Mr Tohill's explanation, we think the best estimate available to us is Mr Tohill's approximation that fees collected accounted for around 20% to 35% of costs ([19(13)] above). That is in contrast to the position in *Geemente Borsele* (at [33]) where the charges covered only 3% of costs, and in *Finland* (at [50]) where the charges covered only around 8% of costs. It is more in line with the situation in *Wakefield College* where, after noting (at [75]) that in both *Geemente Borsele* and *Finland* "the total amount raised by charges was insubstantial, both in absolute terms and relative to the cost of the service", the Court of Appeal (at [82]) stated: "the subsidised fees made a significant contribution to the cost of providing courses to the students paying those fees, to the extent of some 25–30%."

(5) *The fact that the Council does not aim (and has never aimed) to break even (let alone make a profit) on the provision of the facilities does not matter.* That is a subjective factor only and must be ignored – see, for example, *Wakefield College* at [55], *Longridge* at [84], and *Lajvér* at [35].

(6) *The fact that many or most users pay concessionary rates (Mr Tohill's evidence ([19(12)] above) does not matter.* Per Arden LJ in *Longridge* (at [93]): "The concessionary charges were also not an indicator against the existence of an economic activity because the economic activity springs from the receipt of income, not profit."

(7) *The fact that the costs of providing the leisure and recreational services are subsidised in large measure by grants from the EU and UK central government (Mr Tohill's evidence ([19(19)] above) does not matter.* Per the CJEU in *Lajvér* (at [38]):

> "… the fact that the investments were largely financed by aids granted by the Member State and the European Union cannot have a bearing on whether or not the activity pursued or planned by the applicants in the main proceedings is to be regarded as an economic activity, since the concept of "economic activity" is objective in nature and applies not only without regard to the purpose or results of the transactions concerned but also without regard to the method of financing chosen by the operator concerned, which also holds true in relation to public subsidies."

(8) *The fact that the leisure and recreational facilities are provided in fulfilment of statutory duties (under Article 10) does not matter.* Per the CJEU in *Finland* (at [40]):

> "It must first of all be stated that, in view of the objective character of the term 'economic activities', the fact that the activity of the public offices consists in the performance of duties which are conferred and regulated by law, in the public interest and without any business or commercial objective, is in that regard irrelevant."

76. Taking together all those factors and our findings, we conclude that the provision of the leisure and recreational services by the Council constitutes the supply of services for remuneration, and thus that supply constitutes economic activity within art 9 PVD.

77. Accordingly, we do not accept the Article 2 Argument advanced by the Council.

The Article 13 Argument

78. Article 13 PVD provides, so far as relevant:

> "1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even

> where they collect dues, fees, contributions or payments in connection with those activities or transactions.
>
> However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition. …"

79. The Council submits that its supply of leisure and recreational services constitutes activities in which the Council engages as a public authority. Further, that its consequent treatment as a non-taxable person would not lead to significant distortions of competition in respect of those activities.

80. In *Carpaneto No 2* at [10] the CJEU emphasised that art 13 did not apply to activities engaged in by the body as a body governed by private law rather than by public law; thus it is essential to identify the legal regime applicable under national law in relation to the activities:

> "According to [*Carpaneto No 1* at [15]], it is the manner in which the activities are carried out that determines the scope of the treatment of public bodies as non-taxable persons. In so far as that provision makes such treatment of bodies governed by public law conditional upon their acting 'as public authorities', it excludes therefrom activities engaged in by them as bodies governed not by public law but by private law. Consequently, the only criterion making it possible to distinguish with certainty between those two categories of activity is the legal regime applicable under national law."

81. The Courts have since expressed this as requiring a "special legal regime". Per *Fazenda Pública*:

> "21. The national court must, in accordance with the case law …, analyse all the conditions laid down by national law for the pursuit of the activity at issue in the main proceedings, to determine whether that activity is being engaged in under a special legal regime applicable to bodies governed by public law or under the same legal conditions as those that apply to private economic operators."

82. In *Ireland* the CJEU stated (at [49]):

> "… bodies governed by public law act as public authorities when they engage in activities which, while fully economic in nature, are closely linked to the exercise of rights and powers of public authority (*Isle of Wight Council and Others*, paragraph 31). …"

83. In *Saudaçor* the CJEU stated:

> "69. … only activities carried out by a body governed by public law acting as a public authority are to be exempted from VAT.
>
> 70. The court has consistently held that such activities are activities carried out by those bodies under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private economic operators. The court has also made it clear that the subject matter or purpose of the activity is in that regard irrelevant and that the fact that the pursuit of the activity at issue in the main proceedings involves the use of powers conferred by public law shows that that activity is subject to a public law regime (see to that effect, inter alia, judgment in *Fazenda Pública v Câmara Municipal do Porto* (Case C-446/98) [2001] STC 560, [2000] ECR I-11435, paras 17, 19 and 22).

> 71. In that context, the court has stated that the exemption provided for in the first subparagraph of art 13(1) of Directive 2006/112 covers principally activities engaged in by bodies governed by public law acting as public authorities, which, while fully economic in nature, are closely linked to the exercise of powers conferred by public law (judgment in *Revenue and Customs Comrs v Isle of Wight Council* (Case C-288/07) [2008] STC 2964, [2008] ECR I-7203, para 31)."

84. It is clear from those cases, and the other authorities cited to us, that the decision whether art 13 applies in particular circumstances is highly fact-specific. The Council referred us to two cases where it was held that a public body *was* engaging in activities under a special legal regime. The first is the CJEU case of *NRA*; we do not find this case of assistance as the parties there had agreed as common ground that the special legal regime test was met: at [22]. Any comments by the Court (eg at [50]) concerning the test were made against the backdrop of the test already being accepted as satisfied; the meat of the case concerns the second paragraph of art 13 – whether treatment as a non-taxable person would lead to significant distortions of competition in respect of those activities.

85. The second case is *Durham Company* which was an application for judicial review before Warren J sitting in the Tax & Chancery Chamber of the Upper Tribunal. The applicant, TDC, was a commercial company which carried on business as a provider of commercial waste services, including "trade waste collection" services, consisting of emptying wheelie bins used by occupiers of non-residential premises. TDC charged VAT to its trade waste collection customers. Local authorities did not charge VAT on similar services and TDC applied for judicial review against HMRC (and HM Treasury) concerning the lawfulness of the VAT treatment afforded to local authorities carrying out certain trade waste services. The preliminary issue to be determined was, where a local authority that was a waste collection authority (for the purposes of the Environmental Protection Act 1990 ("**EPA**")) was making supplies of trade waste collection services to entities occupying non-residential property in its area, whether those supplies by the local authority were activities in which it was engaged as a public authority, within the meaning of art 13 (and/or the domestic legislation in s 41A VAT Act 1994). HMRC, opposing the application, contended (at [77]) that the legal basis on which local authorities provide commercial waste collection services is contained in s 45 EPA 1990, and that is not only the legal basis on which the services are provided but is also a special legal regime.

86. The Upper Tribunal determined the preliminary issue:

> **"[109]** The preliminary issue is to be answered in the sense that, where an LA [local authority] is making supplies of trade waste collection services to business customers in its area and does so in the performance of its duties under s 45(1)(b) EPA 1990, the supplies are 'activities in which it is engaged as a public authority' within the meaning of s 41A(a) VATA 1994 and art 13(1). Whether an LA is in fact providing its commercial waste collection services under s 45(1)(b) is a matter to be determined on the facts of each case."

87. Warren J explained:

> **"[103]** I have no doubt that s 45(1)(b) EPA 1990 is, or at least is capable of being, a 'special legal regime'. This is demonstrated by consideration of an LA which provides a commercial waste collection service only if requested to arrange for such collection by an occupier of premises and does so for a reasonable charge which, taking the provision of the service to occupiers

generally, results only in cost recovery and no surplus. It would appear that this is the position with North Lincolnshire Council. Indeed, TDC itself does not deny that an LA that is actually arranging a collection in response to a request under s 45(1)(b), and then levying a charge under s 45(4) for the reasonable costs of that collection, may be 'acting as a public authority'.

[104] Since it cannot be said that s 45(1)(b) is not ever capable of constituting a special legal regime, it must follow, even on TDC's case, that whether any particular LA is acting as a public authority will depend on the facts relevant to that LA. As I have already observed, I do not know the detailed facts in relation to any particular LA to say which of the factors relied on by [TDC's counsel] … might even arguably apply quite apart from the responses to those factors …. I do not even have the relevant details in relation to the activities of the LAs in whose areas TDC operates. Although this is not a matter relevant to the preliminary issue, I would have thought that, if TDC is to succeed in an application for judicial review of HMRC and HMT, it is essential for it to show that it is affected by the activities of those LAs. For all I know, each of those LAs is one where commercial waste collections are carried out only following a request and for a reasonable cost reflecting cost recovery and no surplus.

[105] It is therefore impossible, even on TDC's case, to answer the preliminary issue with the answer 'No' (so that the VAT derogation does not apply) since there are at least some, and may be many, LAs who are not to be regarded as taxable persons in relation to supplies of commercial waste collection services. The answer, on TDC's case, would have to be 'it all depends'.

[106] However, once it is accepted, as it must be, that s 45(1)(b) EPA 1990 is capable of constituting a special legal regime in some cases, then in my view any activities carried out by an LA pursuant to that special legal regime fall within the VAT derogation, subject always to the competition proviso. As the cases show, the only criterion making it possible to distinguish with certainty between activities as a public body and activities subject to private law is 'the legal regime applicable under national law'. I accept, of course, that not every activity carried on by an LA is subject to a special legal regime simply because some statutory basis has to be found for that activity. But once a legal regime has been identified as a special legal regime in accordance with the case law, it would defeat the purpose of that clear criterion—namely to provide a clearly and readily applicable test—to require national courts to enter into a further inquiry as to whether particular activities within that legal regime are entitled to the benefit of the VAT derogation. In the present case, the difficulty in drawing lines between what would, and would not, qualify for exemption is, I suggest, obvious. It is no answer for TDC to say (without any, or any adequate, evidence I add) that, wherever lines are to be drawn, there are many cases which exhibit all of the factors identified by [TDC's counsel] … and which should not, on his approach, attract the exemption. …"

88. We also have the benefit of the decision of Nugee J refusing TDC permission to appeal to the Court of Appeal against Warren J's decision (*Durham PTA*):

> "6 … The first, Ground 1, is that the Upper Tribunal erred in law in concluding that Waste Collection Authorities that chose to engage in providing trade waste collection services in competition with private sector

providers are (or at least may be) performing their duty under section 45(1)(b) of the EPA 1990.

7 It is pointed out in support of this ground that section 45, as I will refer to it, does not require local authorities to collect waste themselves. All that it requires of them is, on request, to arrange for the collection of commercial waste and it is then under a statutory duty to levy a reasonable charge for doing so. Mr Bates [for TDC] says that what local authorities are doing when they are going into competition with private sector providers is something quite different from that statutory regime.

8 I have had great difficulty in understanding this point. It does seem to me, and I think Mr Bates accepted this, that it is a possible response to the section 45 duty for a Waste Collection Authority not only to wait until it is requested on each occasion to arrange for the collection of waste, but to arrange in advance with a business that wants its commercial waste collected to do so under a contract for, say, the next 12 months and that there is nothing incompatible with section 45 for the local authority to specify in the contract the reasonable charge that it proposed to charge under that contract. That seems to me to be an example of premises within the local authority area requesting the local authority to collect its waste for the next 12 months and the local authority making a charge for doing so. The fact that it chooses to do that through the means of a contract does not, I think, and I did not understand Mr Bates to suggest it necessarily would, take the matter outside section 45. Once that is accepted, it is difficult to see why the sort of arrangements which are referred to in the decision could not be arrangements by which the local authority was discharging its statutory duty under section 45.

…

11 … I see no error in Warren J's conclusion that local authorities who provide collection services in their area may, depending on the facts, be operating under section 45 and since that is what he decided, I do not myself see that there is a reasonable prospect of success in challenging that in the way that Ground 1 seeks to do.

12 Ground 2 is as follows: Even if and insofar as the Upper Tribunal was correct that local authorities' supplies of waste collection services constitute a discharge of the duty imposed by section 45, the Upper Tribunal erred in law in deciding that authorities providing such supplies were doing so under a "special legal regime". In relation to this ground, Mr Bates's argument was that what the European jurisprudence requires is an analysis of the way in which the activities are carried out.

13 I do however, for my part, think that Warren J was entirely right and that there is no real prospect of challenging the analysis he adopted which is that if local authorities are operating under section 45, then that is a special legal regime which is applicable to them in their capacity as public authorities exercising public duties and which is different from the legal regime which applies to private sector businesses such as the claimant even though, from the point of view of the consumer, the services provided may be indistinguishable. That is because, as Warren J sets out, the section 45 power is hedged around by a number of constraints.

14 The ones he identified were that, firstly, a local authority is obliged to make an arrangement in relation to any commercial waste from any premises

> within its area, an obligation which does not apply to those who are operating in the private sector; secondly, that there are constraints in the charges that can be made because section 45(4) imposes the limitation that the charge must be reasonable, which does not apply to private sector operators; and thirdly, that there are obligations in relation to disposal under section 48; see what he says as to the flexibility available to a private operator in this regard at [41], which refers to some evidence which he had which I have not seen and which is not set out in his decision. Mr Peretz [for HMRC] also relied on one other matter, the environmental obligations, which Warren J deals with at [39] of his decision.
>
> 15 Mr Bates says that none of these things necessarily has any practical impact on the way in which local authorities are able to compete with his client and other operators and therefore they do not amount to a special legal regime, but they do seem to me to be exactly what the European jurisprudence is referring to, namely, that the legal conditions under which the local authorities are providing services are different, because of their function as public authorities, from the legal conditions under which their private sector counterparts are providing what may, as I say, from the point of view of the consumer, be indistinguishable services. In those circumstances, I do not regard Ground 2 as having a reasonable prospect of success either."

89. Turning to the current appeal, the approach we adopt is that stated by the CJEU in *Fazenda Pública* (summarising the Court's own caselaw):

> "16. … it is the way in which the activities are carried out that determines the scope of the treatment of public bodies as non-taxable persons (see *Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola d'Arda v Comune di Carpaneto Piacentino* (Joined cases 231/87 and 129/88) [1991] STC 205 at 235, [1989] ECR 3233 at 3275, para 15, and *Comune di Carpaneto Piacentino v Ufficio Provinciale Imposta sul Valore Aggiunto di Piacenza* (Case C-4/89) [1990] ECR I-1869 at 1886, para 10).
>
> 17. It is thus clear from the settled case law of the court that activities pursued as public authorities within the meaning of [art 13] are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private economic operators (see in particular *EC Commission v France* (Case C-276/97) (2000) Transcript (Judgment) (Eng), 12 September, para 40, *EC Commission v Ireland* (Case C-358/97) (2000) Transcript (Judgment) (Eng), 12 September, para 38, *EC Commission v United Kingdom* (Case C-359/97) [2000] STC 777 at 787–788, para 50, *EC Commission v Netherlands* (Case C-408/97) (2000) Transcript (Judgment) (Eng), 12 September, para 35, and *EC Commission v Greece* (Case C-260/98) (2000) Transcript (Judgment) (Eng), 12 September).
>
> …
>
> 19. In determining whether such an activity is engaged in by [the taxpayer] as a public authority, it must be noted, first, that this cannot depend on the subject matter or purpose of the activity (see *Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola d'Arda v Comune di Carpaneto Piacentino* [1991] STC 205 at 235, [1989] ECR 3233 at 3275, para 13).
>
> …

> 21. The national court must, in accordance with the case law referred to in paras 16 and 17 above, analyse all the conditions laid down by national law for the pursuit of the activity at issue in the main proceedings, to determine whether that activity is being engaged in under a special legal regime applicable to bodies governed by public law or under the same legal conditions as those that apply to private economic operators."

90. In determining whether an activity is being engaged in under a special legal regime, the following factors are irrelevant:

(1) the subject matter of the activity (*Fazenda Pública* at [19]);

(2) the purpose of the activity (*ibid*); and

(3) the fact that private providers carry out similar activities (*Isle of Wight* at [33]).

91. The first step is to identify the applicable legal regime under which the Council engages in the activities. In *Durham Company* HMRC maintained that the local authorities provided commercial waste collection services pursuant to the legislation in s 45 EPA. Warren J (at [97-99]) agreed with that analysis, holding that "the only available power is to be found in s 45(1)(b) EPA 1990."

92. In the current appeal, the Council maintains that it provides the leisure and recreational services pursuant to Article 10. The witness statements of both Mr Reid and Mr Tohill give a detailed history (which we do not need to reproduce here) of the relevant legislation governing local government in Northern Ireland, and the main local authority functions in Northern Ireland (see [18(2)] above). Article 10(1) imposes a duty on local authorities to provide the facilities: "Each district council shall secure the provision for its area of adequate facilities for recreational, social, physical and cultural activities …". It was never put to the witnesses that there were alternative legislative powers for Northern Ireland local authorities to provide such facilities, and we understand that is not part of HMRC's case. Both witnesses were unequivocal (indeed, one might say, took it as obvious) that Article 10 not only permitted but required the Council to provide the facilities, and that was how and why the Council did so - see Mr Tohill's evidence at [19(20a)] above. Our view is that, if we may put it this way, if a disgruntled ratepayer were to challenge the Council's Director of Finance asking, "What is your legal authority for spending all that money on a new 3G soccer pitch?", then Mr Tohill's automatic and correct response would be, "Article 10".

93. We understand what had irked the applicant in *Durham Company* was that a local authority could charge a fee without VAT, thereby apparently under-cutting TDC for the business, but then subcontract the job and so not do the work itself. That, said TDC, was really just the local authority "going into business as a matter of choice" rather than complying with its duties under EPA (see [91a]). As already stated at [91] above, Warren J rejected that argument and concluded that "the only available power is to be found in s 45(1)(b) EPA 1990." Nugee J then determined that there was no reasonable prospect of challenging that conclusion (*Durham PTA* at [11]).

94. We reach a similar conclusion in the current appeal. The Council's provision of the facilities is not done because it is "going into business as a matter of choice". On the contrary, given the statutory equality duties (s 75 NI Act – see [11] above) and the onerous consequences for provision of facilities (see Mr Tohill's evidence at [19(14)] above) it is clear to us that the facilities would not be provided absent the power/duty in Article 10. Thus, the applicable legal regime under which the Council engages in the activities is Article 10.

95. The second step is to determine whether Article 10 constitutes a special legal regime. Warren J in *Durham Company* dealt with this briefly; his view (at [103]) was that as the activities were engaged in under s 45 EPA then that was a special legal regime and the local authorities were acting as public authorities for the purposes of art 13. Nugee J went into more detail when considering the permission to appeal application (*Durham PTA* at [13-15]):

> "13 I do however, for my part, think that Warren J was entirely right and that there is no real prospect of challenging the analysis he adopted which is that if local authorities are operating under section 45, then that is a special legal regime which is applicable to them in their capacity as public authorities exercising public duties and which is different from the legal regime which applies to private sector businesses such as the claimant even though, from the point of view of the consumer, the services provided may be indistinguishable. That is because, as Warren J sets out, the section 45 power is hedged around by a number of constraints.
>
> 14 [Nugee J sets out those constraints]
>
> 15 Mr Bates [for TDC] says that none of these things necessarily has any practical impact on the way in which local authorities are able to compete with his client and other operators and therefore they do not amount to a special legal regime, but they do seem to me to be exactly what the European jurisprudence is referring to, namely, that the legal conditions under which the local authorities are providing services are different, because of their function as public authorities, from the legal conditions under which their private sector counterparts are providing what may, as I say, from the point of view of the consumer, be indistinguishable services. In those circumstances, I do not regard Ground 2 as having a reasonable prospect of success either."

96. We reach a similar conclusion in the current appeal. The Article 10 regime is hedged around by a number of constraints: the statutory equality duties (s 75 NI Act) and the onerous consequences for provision of facilities, including the need for cohesion of diverse communities; the need to set charges by reference to affordability and accessibility, and the consequent deficit against costs of provision; and the inability (prior to April 2015) for the Council to conduct activities by way of a trade. Any private sector business providing leisure and recreational services in the Council's area – even ones indistinguishable to the consumer from the Council's facilities – would be doing so not under the Article 10 regime but instead under the general legal regime applicable to all facilities operators. Accordingly, the legal conditions under which the Council is providing services are different, because of its function as a public authority, from the legal conditions under which its private sector counterparts are providing perhaps indistinguishable services. Thus the Council's provision of the facilities is being engaged in under a special legal regime applicable to a body governed by public law.

97. For completeness, we note that the CJEU in *Ireland* (at [49]) and *Saudaçor* (at [71]) stipulated that the activities should be "closely linked to the exercise of rights and powers of [the] public authority". We consider that is self-evident here; it is the subject matter of Article 10 itself.

98. For those reasons we determine that the first paragraph of art 13 is satisfied in relation to the Council's provision of the leisure and recreational services.

Significant distortions of competition

99. Moving to the second paragraph of art 13, this provides an exclusion from the non-taxability of public authorities:

> "However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition. …"

100. Both parties acknowledged that if consideration of this point arose then it may be necessary for the Tribunal to hear further evidence and submissions thereon. However, we have concluded that from counsel's respective explanations to us of the relevant caselaw and from the evidence adduced during the hearing, we are able to determine this point without any supplementary hearing being necessary.

101. The CJEU summarised its own caselaw on this provision in *NRA*:

> "36 It should be recalled that the second subparagraph of Article 13(1) of the VAT Directive provides for a limitation of the rule stated in the first subparagraph of that provision that bodies governed by public law are to be treated as non-taxable persons for VAT purposes in respect of the activities or transactions in which they engage as public authorities. That second subparagraph thus aims to restore the general rule set out in Article 2(1) and Article 9 of the VAT Directive, according to which any activity of an economic nature is in principle to be subject to VAT, and cannot therefore be construed narrowly (see, by analogy, judgment of 4 June 2009, *SALIX Grundstücks-Vermietungsgesellschaft*, C-102/08, EU:C:2009:345, paragraphs 67 and 68).
>
> 37 However, that cannot mean that the second subparagraph of Article 13(1) of the VAT Directive should be interpreted in such a way that the derogation from treatment as a taxable person for VAT laid down in the first subparagraph of Article 13(1) of the directive for bodies governed by public law acting as public authorities is deprived of effectiveness (see, to that effect, judgment of 20 November 2003, *Taksatorringen*, C-8/01, EU:C:2003:621, paragraphs 61 and 62, and of 25 March 2010, *Commission* v *Netherlands*, C-79/09, not published, EU:C:2010:171, paragraph 49).
>
> 38 Under the second subparagraph of Article 13(1) of the VAT Directive, those bodies are to be regarded as taxable persons in respect of the activities or operations in which they engage as public authorities, where their treatment as non-taxable persons would lead to significant distortions of competition.
>
> 39 According to the Court's case-law on that provision, first, what is envisaged here is the situation in which bodies governed by public law engage in activities which may also be engaged in, in competition with them, by private economic operators. The aim is to ensure that those private operators are not placed at a disadvantage because they are taxed while those bodies are not (see, to that effect, judgment of 25 March 2010, *Commission* v *Netherlands*, C-79/09, not published, EU:C:2010:171, paragraph 90 and the case-law cited).
>
> 40 Secondly, that limitation of the rule that bodies governed by public law acting as public authorities are treated as non-taxable persons for VAT purposes is only a conditional limitation. Its application involves an

assessment of economic circumstances (see, to that effect, judgment of 17 October 1989, *Comune di Carpaneto Piacentino and Others*, 231/87 and 129/88, EU:C:1989:381, paragraph 32).

41 Thirdly, the significant distortions of competition which treatment as non-taxable persons of bodies governed by public law acting as public authorities would lead to must be evaluated by reference to the activity in question, as such, without that evaluation relating to any particular market, and by reference not only to actual competition, but also to potential competition, provided that the possibility of a private operator entering the relevant market is real and not purely hypothetical (judgments of 25 March 2010, *Commission* v *Netherlands*, C-79/09, not published, EU:C:2010:171, paragraph 91 and the case-law cited, and of 29 October 2015, *Saudaçor*, C-174/14, EU:C:2015:733, paragraph 74).

42 The purely theoretical possibility of a private operator entering the relevant market, which is not borne out by any matter of fact, any objective evidence or any analysis of the market, cannot be assimilated to the existence of potential competition (judgment of 16 September 2008, *Isle of Wight Council and Others*, C-288/07, EU:C:2008:505, paragraph 64).

43 As follows from the wording of the second subparagraph of Article 13(1) of the VAT Directive and from the case-law on that provision, its application presupposes, first, that the activity in question is carried on in competition, actual or potential, with that carried on by private operators and, secondly, that the different treatment of those activities for VAT purposes leads to significant distortions of competition, which must be assessed having regard to economic circumstances.

44 It follows that the mere presence of private operators on a market, without account being taken of matters of fact, objective evidence or an analysis of the market, cannot demonstrate the existence either of actual or potential competition or of a significant distortion of competition."

102. In *Isle of Wight* the High Court made a referral to the CJEU of three points for preliminary ruling (at [12]):

> "1. Is the expression "distortions of competition" to be ascertained on a public body by public body basis such that, in the context of the present case, it should be determined by reference to the area or areas where the particular body in question provides off-street parking or by reference to the totality of the national territory of the Member State?
>
> 2. What is meant by the expression "would lead to"? In particular, what degree of probability or level of certainty is required for that condition to be satisfied?
>
> 3. What is meant by the word "significant"? In particular, does "significant" mean an effect on competition that is more than trivial or *de minimis*, a "material" effect or an "exceptional" effect?"'

103. The Court's answer to the first question was (at [53]):

> "… the significant distortions of competition, to which the treatment as non-taxable persons of bodies governed by public law acting as public authorities would lead, must be evaluated by reference to the activity in

> question, as such, without such evaluation relating to any local market in particular."[1]

104. In the current appeal we take that as meaning:

(1) Our evaluation must be by reference to the whole territory of Northern Ireland (being the territory covered by the relevant public law provisions – ie Article 10 and s 75 NI Act), not just to the area of Mid Ulster governed by the Council.

(2) Our evaluation must be by reference to "the activity in question, as such". That means the activity which, absent the second paragraph of art 13, would result in the Council being a non-taxable person – ie the provision of leisure and recreational services pursuant to the special legal regime in Article 10. Of course, that is a *regime* which applies only to the Council and not to private operators, but the *activity* being scrutinised must be concordant with the special legal regime, otherwise the evaluation would be comparing different activities. That is clear from art 13 itself which stipulates "*such* activities or transactions" and "*those* activities or transactions", and was stated by the Court (at [33]) (emphasis added):

> "A body governed by public law may, thus, be responsible, under national law, for carrying on certain activities of an essentially economic nature under the special legal regime applicable to them where *those same activities* can also be carried on in parallel by private operators, with the result that the treatment of that body as a non-taxable person may give rise to certain distortions of competition."

105. The Court's answer to the second question was (at [65]):

> "… the expression 'would lead to' is … to be interpreted as encompassing not only actual competition, but also potential competition, provided that the possibility of a private operator entering the relevant market is real, and not purely hypothetical."

106. The Court's answer to the third question was (at [79]):

> "… the word 'significant' is … to be understood as meaning that the actual or potential distortions of competition must be more than negligible."

107. Here the activities in question are the facilities provided by the Council within the constraints which hedge around (as Nugee J put it in *Durham PTA*) its obligations under Article 10; those constraints include the equality duties under s 75 NI Act. We must evaluate whether the treatment of the Council as a non-taxable person when providing the activities in question would lead to more than negligible actual or potential distortion of competition in the market for such activities in Northern Ireland. We conclude from the evidence before us that there is no non-negligible alternative provision of the activities in question; only local authorities are in a position to provide facilities that meet the demanding requirements for community equality. Those requirements go far beyond a general need for fairness and non-discrimination between the two communities, and extend to enhancing integration and attacking all forms of social deprivation (Mr Reid's evidence at [18(6-7)] above). Mr Tohill (see [19(14-17)] above) explained convincingly the challenges facing the Council and the lengths to which it goes to deliver what he termed community relations outcomes; also, how any private operator would be likely to find itself having to duplicate provision of facilities;

[1] In the Simon's Tax Cases report of the decision ([2008] STC 2964) this passage is misquoted as saying "… bodies governed by *private* law acting as public authorities …".

further, how his informal discussion with a private provider demonstrated that a private operator would never be able to deliver facilities that went anyway close to being comparable to (let alone in competition with) the community-driven facilities demanded from the Council.

108. For those reasons we conclude that the treatment of the Council as a non-taxable person by virtue of art 13 would not lead to significant distortions of competition, within the meaning of art 13. Accordingly, we accept the Article 13 Argument advanced by the Council.

Conclusion

109. As stated at [76-77] above, we do not accept the Article 2 Argument advanced by the Council; we conclude that the provision of the leisure and recreational services by the Council constitutes the supply of services for remuneration, and thus that supply constitutes economic activity within art 9 PVD.

110. As stated at [98 & 108] above, we accept the Article 13 Argument advanced by the Council; the supplies are made by the Council in its role as a public authority for the purposes of art 13 PVD; it operates as such under a special legal regime; and its consequent treatment as a non-taxable person does not lead to significant distortions of competition.

111. Accordingly, we allow the Council's appeal.

Quantum

112. We understand that both parties have further work to perform and discussions to continue in relation to the figures contained in the voluntary disclosures. Therefore they wish this decision to be one in principle. We agree, and we GRANT leave to the parties to return to the Tribunal for adjudication of quantum if they are unable to reach agreement thereon.

DECISION

113. The appeal is ALLOWED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

114. 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

Release date: 17 October 2020