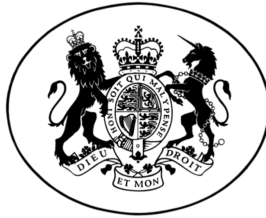
[2015] UKUT 0589 (TCC)



Appeal number: UT/2014/0018
(previously FTC/70/2014)

VAT - Freemasonry - the United Grand Lodge of England – Art 132(1)(l) VAT Directive: aims of a philosophical, philanthropic or civic nature – main aim or aims.

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

Between :

UNITED GRAND LODGE OF ENGLAND	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondent**

- -
- -

TRIBUNAL: THE HON MRS JUSTICE ASPLIN DBE

Sitting in public at London on 13 & 14 October 2015

Miss Nicola Shaw QC (instructed by **KPMG LLP**) for the **Appellant**
Mr Brendon McGurk (instructed by **General Counsel and Solicitors for HM Revenue and Customs**) for the **Respondent**

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Mrs Justice Asplin DBE :

DECISION

1. This is an appeal by the United Grand Lodge of England ("UGLE") from a decision of the First-tier Tribunal (Tax Chamber) (Judge Hellier and Mr Julian Stafford) (the "FTT") released on 3 February 2014 (the "FTT Decision"). The FTT dismissed UGLE's appeal from a decision of the Commissioners for Her Majesty's Revenue and Customs ("HMRC") of 6 April 2010 that its aims were not of a "philosophical, philanthropic or civic nature" for the purposes of VAT exemption. HMRC's decision was in response to a voluntary disclosure reclaiming VAT for the period 1973 to 1996. Permission to appeal the FTT Decision was granted by the FTT on 16 April 2014.

2. UGLE's case before the FTT was that its aims were philosophical, philanthropic or civic in nature and that therefore, the exemption from VAT provided by Article 132 (1)(l) Principal VAT Directive 2006/112, applied. In addition, the FTT itself raised the question of whether UGLE was an organization with aims of a religious nature. It concluded that the aims of UGLE do not include any significant aims of a religious nature. Nothing turns upon that part of the FTT Decision and I make no further mention of it.

Relevant Statutory Framework

3. The relevant exemption from VAT is found in the Principal VAT Directive 2006/112, Article 132 which is entitled "Exemptions of Certain Supplies in the Public Interest" which materially provides as follows:

> "EXTENSIONS FOR CERTAIN ACTIVITIES IN THE PUBLIC INTEREST
>
> Article 132
>
> 1. Member States shall exempt the following transactions:
>
> …
>
> (l) the supply of services, and the supply of goods closely linked thereto, to their members in their common interest in return for a subscription fixed in accordance with their rules by non-profit-making organisations with aims of a political, trade-union, religious, patriotic, philosophical, philanthropic or civic nature provided that this exemption is not likely to cause distortion of competition"

Article 132 replaced Article 13A(l) of the Sixth Directive which was in force from May 1977. There was no equivalent provision before that time. The Principal VAT Directive has direct effect in English law.

4. It is common ground that UGLE is a non-profit making institution whose supplies were in its members' common interest in return for subscriptions fixed in accordance with its

rules and no argument was advanced in relation to the distortion of competition. It is also not disputed that UGLE is an unincorporated association which draws together those practicing Freemasonry in a manner recognized by its rules. However, there are other forms of Freemasonry whose practitioners do not belong to UGLE. In this decision, references to "Freemason" are to a member of a Freemasons' Lodge recognized by UGLE and associated expressions are used similarly.

5. It is also common ground that the exemptions set out in the Principal VAT Directive are to be interpreted strictly and as the FTT pointed out at [9] of the FTT Decision, the "task of the Court is to give the exempting words a meaning which they can fairly and properly bear in the context in which they were used": *Expert Witness Institute v Customs and Excise Commissioners* [2002] STC 42 per Chadwick LJ at [19].

Grounds of Appeal

6. The Grounds of Appeal in its original form was in the following form. Under the heading "Ground A - No change of aims" in summary, UGLE contends that there was no evidence that its aims changed in 2000 and as a result the FTT was wrong in law to have concluded at [57] of the FTT Decision that the practice of Freemasonry had changed since 2000 and had become more involved in charity work for the benefit of non-Freemasons or dependents. In addition, UGLE contends that that conclusion was perverse in the light of the evidence. UGLE also contends that the FTT was wrong to conclude at [113] that the promotion of charity "may" have become more pronounced after 2000 and at [172] to conclude that in the period before 2000 its aims were more concerned with mutual benefit and mutual society.

7. Under the heading "Ground B – The aims of the Appellant are predominantly of a philosophical, philanthropic and civic nature" UGLE contends that the FTT erred in law in concluding at [167], [168] and [173] of the FTT Decision that whilst UGLE had aims which fell within the exemption in Article 132 (1)(l) it also had "other aims" which were not insignificant or ancillary to the qualifying aims. UGLE contends that such a finding was not open to the FTT based on its own factual findings. In relation to those "other aims" identified as social aims, aims of self improvement and to some extent to the performance of ritual, UGLE contends that: they are not aims in themselves but are ancillary to the qualifying aims; and even if they are aims in themselves, they are not the predominant aims of UGLE but are insignificant and do not affect the predominance of the qualifying aims. Further, in relation to the qualifying aims UGLE contends that at [156] and [169] of the FTT Decision, it erroneously concluded that the charitable spending by Masonic charities might to some extent have been analogous to that of a mutual insurance company and was thus not wholly philanthropic, there being no evidential basis for such a conclusion.

8. In summary, therefore, it is contended that the FTT should have been satisfied on the evidence that UGLE's aims were predominantly qualifying aims and that the aims of fraternity, self-improvement and mutual care (if they are aims at all) were merely incidental or ancillary to the philanthropic, philosophical and civic aims of the Appellant and did not affect the predominance of the qualifying aims.

9. Under the same heading, in relation to the qualifying aims themselves, UGLE contends that the FTT erroneously concluded that the charitable spending of the Masonic charities

might to some extent be analogous to that of a mutual insurance company and therefore, was not wholly philanthropic. In relation to its aims of a philosophical nature, it is contended that the FTT should have found this to be UGLE's predominant aim as a result of its findings at [71], [95] and [111]. Lastly, as to its aims of a civic nature, UGLE contends that as a result of its findings at [108(2)] and [111(2)] the FTT was wrong to conclude at [163] of the FTT Decision that only a small part of the Appellant's aims fell within this category. In summary therefore, UGLE contend that there was no basis for the FTT's conclusion at [173] of the FTT Decision and that the FTT should have been satisfied on the evidence that UGLE's aims were predominantly qualifying aims and that the aims of fraternity, self-improvement and mutual care, if they were aims at all, were merely incidental or ancillary to UGLE's philanthropic, philosophical and civic aims.

10. In her skeleton argument for the purposes of the appeal and in oral submissions on behalf of UGLE Miss Shaw sought to widen the grounds upon which she challenges the FTT Decision. She submitted that, in fact, the FTT had erred in law in failing to adopt the correct approach to the statutory question before it. She submitted that the FTT had not first determined what the main aim or aims of UGLE were. She says that "main" means principal, primary or predominant and that it is possible to have more than one main aim. She says that the second step is to assess the nature of the main aim or aims in order to determine whether they are of requisite nature to qualify under the exemption and that had it approached the matter in this way, the FTT would have concluded that UGLE's main aim was to promote the practice of Freemasonry which is philosophical, philanthropic and civic in nature.

11. It was not until the close of the hearing of the appeal before the Upper Tribunal, (the "UT"), that Miss Shaw sought permission to amend the Grounds of Appeal in this respect. In the light of the fact that Mr McGurk on behalf of HMRC had dealt with this line of argument in his oral submissions and having considered rules 2 and 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008 SI 2008/2698 I gave permission for the limited amendment and consequential amendment to the Response to the Notice of Appeal.

The Nature of an appeal from the FTT

12. There is no dispute about the nature of an appeal from the FTT to the UT. Appeals to the UT are on points of law only: section 11 Tribunals, Courts and Enforcement Act 2007 (the "TCEA 2007"). In *HMRC v Pendragon plc* [2015] UKSC 37, a case which was concerned with the concept of "abuse of law" as developed by the European court, in addition to section 11, Lord Carnwath with whom the other Justices of the Supreme Court agreed, referred at [47] – [50] of his judgment, to the extended jurisdiction conferred on the UT as a result of section 12 TCEA 2007. In cases where the UT finds that the FTT made an error of law, that provision enables it either to remit the case to the FTT or to "remake the decision" and in doing so provides that it may make any decision which the FTT could have made if it were remaking the decision and to make such findings of fact it considers appropriate. Lord Carnwath pointed out that that jurisdiction recognizes the UT's function of ensuring that the FTTs adopt a consistent approach to the determination of questions of principle which arise under the particular statutory scheme in question. He went on to state that "law' for this purpose is widely interpreted to include issues of general principle affecting the jurisdiction in question.

13. In this case, it seems to me that the wider interpretation referred to in *Pendragon* is not engaged, at least in relation to the amendment to the Grounds of Appeal upon which Miss Shaw focused her submissions. The issue in that regard is whether the FTT properly applied a well known test. It seems to me that the position is less clear in relation to those Grounds of Appeal which are concerned with whether the aims of UGLE fell predominantly within the categories set out in Article 132 1(l). In circumstances where the FTT finds quite properly that there are numerous aims of equal or near equal importance which may fall within different categories of exemption and each may fall within that category only to some extent, the determination of a question of principle and therefore, the wider interpretation referred to in *Pendragon* may well be engaged.

14. In any event, Lord Carnwath went on to confirm that a challenge to findings of fact can only amount to an error of law in the circumstances described in *Edwards v Bairstow* [1956] AC 14 and in the context of VAT in *Procter & Gamble v HMRC* [2009] EWCA Civ 407; [2009] STC 1990. In *Edwards v Bairstow* at page 29, Viscount Simonds stated that a finding of fact should be set aside if it appeared that it had been made "without any evidence or upon a view of the facts which could not reasonably be entertained". Lord Radcliffe, at page 36, said that a finding of fact would be an error of law where the facts found were "such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal" or, in a formulation which he said he preferred, "the true and only reasonable conclusion contradicts the determination".

15. It seems to me therefore, that in so far as this appeal is concerned with challenges to findings of fact by the FTT, they can only succeed on appeal on the bases set out in *Edwards v Bairstow* to which I have referred and the correct approach to such matters remains as described by Evans LJ who gave the only judgment of the Court of Appeal in *Georgiou and another (trading as Mario's Chippery) v HM Customs and Excise* [1996] STC 463 at 476:

> "…the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision- making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.
>
> It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and, fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a

> roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong."

I also take account of the general approach of an appeal court to findings of fact made by a lower court expressed by Lord Hoffmann in *Biogen Inc v Medeva plc* [1997] RPC 1 as follows:

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

The FTT's Decision in more detail

16. Given the wide ranging nature of the challenges to the FTT Decision and the way in which the Decision itself was structured, it is necessary to set it out in some detail. Having determined that an activity which falls within an exemption must also be in the public interest in order to qualify (a conclusion which is not challenged) the FTT went on to consider the task before it at paragraphs [13] – [17] of the FTT Decision in the following way:

> "*Main or principal aim*
>
> 13. In *BASC* Lewison J reviewed the decision of the Court of Appeal in *Expert Witness Institute v CCE* [2001] STC 42, which concerned whether or not that Institute had aims of a civic nature. He said he drew the following principles from that case:
>
> "i) The aims of an organisation are (at least *prima facie*) to be found in its constitutional documents, tested against the reality of what it does;
>
> "ii) It is permissible to approach the activities of an organisation on the basis that it has a main or primary aim which characterises its fiscal treatment;
>
> "iii) An organisation will not have aims of a civic nature if its objects are solely (or perhaps

mainly) for the purpose of the benefit of its members.";

and at [45] that identifying an organisation's main object is one element in deciding whether it falls within the exemption.

14. In neither *BASC* nor *Expert Witness* did the possibility of aims qualifying under more than one heading of para (1) arise. It seems to us that the Directive does not make it a condition for exemption that the aims of the body must fall exclusively into one of the listed categories. Thus a body whose aims were partly religious and partly patriotic could qualify. That follows from the use of the plural "aims".

15. But it is not enough that some of its aims, or some part of its aims fall within one or more of the listed categories because the requirement is that the nature of the aims falls within those categories. Unless the principal part of those aims falls within one or more listed categories, its aims would not have the requisite nature. That requires in our view that the remainder of those aims are minor, insignificant or incidental, or ancillary to aims of the requisite character.

16. In this context, we note that Article 132(1)(l) relates to services supplied to members "in their common interest" by a body with the requisite aims. It seems to us that these words suggest that the activities of the organisation - including the supplies it makes - need not be limited to those in direct pursuit of its aims. Thus a body brought together to campaign for a political party is not disqualified from being treated as having political aims because it supplies to its members a newsletter, or certificates of membership or even cups of tea during its meetings. On the other hand, if the supplies made for the benefit of the members constitute the majority of its activity and are not directly related to a requisite aim, it may, in our view, be permissible to conclude that the aim of providing them has overtaken any external aim of the body.

17. We do not think that we should strive to find a single phrase describing UGLE's aims and then ask whether that phrase appears in the qualifying words. Instead we should attempt to describe the aims and then ask to what extent the nature of those aims taken together falls within the qualifying concepts."

17. The FTT went on to consider the manner in which the aims of an organisation are to be determined. Its conclusions which are consistent with the authorities, are not challenged in any way. Thereafter, a large part of the FTT Decision was devoted to consideration of the evidence and findings of fact. These were based upon the evidence of Messrs Humblestone and Reed, the Book of Constitutions, which contains amongst other things, the regulations governing UGLE and extracts from lectures and booklets. Having done so, the FTT went on to consider the position of a body such as UGLE which provides the organisational structure for others in the following way:

> "103. Every large body of people needs an organisation. If people are doing things together there will be a need for an administration, whether it is a church, a choir, or a rugby club. It does not seem to us that the activities of administration and organisation define the aims or objects of the body; as the tribunal said in *RIBI* what matters is why such activities are conducted.
>
> 104. We accept that the purposes of the Charities associated with UGLE cannot automatically be taken to be the purposes of UGLE. However, if (as we accept) the reason for the activities which UGLE carries on in relation to its charities is to promote the raising of funds for them or to reduce their costs (so as to increase their charitable spend), then that will be an aim of UGLE. But UGLE's aims must also be assessed by reference to the manner in which control and discretion is exercised by officers of UGLE in their capacity as trustees over the disposition of the charities' funds.
>
> 105. UGLE is in our view properly regarded as comprising all its members; after all it is they who fund the subscriptions. But we accept that, save in exceptional circumstances, its activity is directed by its committees and senior officers, and that the purpose of their activity will affect the determination of its aims.
>
> 106. We therefore accept that the activities of individual Freemasons or Lodges or even Provinces are not the activities which must be examined. When a Lodge runs a charity event it does not do it as part of UGLE, but as a group of people who are members of UGLE but separate from the entirety of its membership: they do not do it as representatives of UGLE.
>
> 107. As Chadwick LJ pointed out at [23] and [31] in *Expert Witness*, the question is whether the aims of the body rather than those of any individual member

> or members are of the requisite nature. But, in our view, if the aims of a body can fairly be described as promoting particular activities of its members, then that body shares the aim of those activities."

Those paragraphs are not the subject of a direct challenge. The FTT then went on to determine UGLE's aims in the following way:

> "108. From the Book of Constitutions we drew little help in finding the aims of UGLE:
>
> (1) Belief in a Supreme Being is a condition of membership, not an object, nor is the veneration of that Being an object.
>
> (2) The inculcation of good citizenship is plainly stated in the Aims as a practice. It is reflected in the charges to be read to a new Master. We accept that it is one of the concerns of Freemasonry. The evidence of UGLE's activities and the description of its Grand Principles did not indicate to the contrary;
>
> (3) But the Aims confess to describing only some of the principles, and appear to us written, not for the purpose of describing the objects but limiting attack and distancing UGLE's form of Freemasonry from that of others.
>
> 109. Aside from the prescription of regalia and hierarchy, the remainder of the Regulations in the Book of Constitutions related to organisation and administration, and raised the question asked by the tribunal in *RIBI*: why organise and administrate?
>
> 110. The evidence of what UGLE did indicated to us that the reason it did what it did was to promote Freemasonry. The evidence showed that it appointed officers, and provided help, assistance, ideas and direction, and the communication and administrative glue to hold all the Lodges together, and that its purpose was to promote and preserve the practice of Freemasonry.
>
> 111. Thus taking what we can find in the constitutional documents and testing it against, and supplementing it by, the evidence of what UGLE actually did, we conclude that the aims of UGLE were the following:

(1) promoting a particular system of morality which:

(a) required belief in a supreme being,

(b) required commitment to the Grand Principles of integrity, brotherly love and charity; and

(c) was taught in allegory as well as directly;

(2) promoting behaviour consistent with that system and which inculcated due obedience to the law;

(3) bringing men together to practice that system:

(4) aiding the cohesion in mutual fellowship and acquaintance of its members through common ceremony and social intercourse; and

(5) administering charitable funds (and their distribution) consistently with these aims.

112. We think it possible that a body could, in theory, exist simply to perform and regulate the performance of ritual. However the evidence of Messrs Reed and Humberstone convinced us that regulation for regulation's sake was not a significant object of UGLE. Both men were part of the governing body of UGLE, and both saw the object of their and UGLE's activities as extending well beyond regulation for regulation's sake. Their evidence on the value of ritual differed - Mr Reed seeing more purpose in the charitable activity and fellowship of masonry, and Mr Humberstone acknowledging the subtle effects of ritual on habit of mind. We concluded that only a small part of Freemasonry, and so of the Grand Lodge's promotion of it, was ritual (including therein ceremony, tradition and hierarchy) for its own sake.

113. There were indications that the relative importance of these aims may have changed over the period from 1977 to the present day. The promotion of charity towards all (rather than mainly those with Masonic connections) may have became more pronounced after 2000 (at least in the sense of greater public "outreach", and the preservation of cohesion and mutual fellowship through ceremony and secrecy less so."

18. The FTT then turned to whether and to what extent the aims it had identified were of the requisite nature to fall within Article 132 (1)(l). Under the heading "Aims of a Philosophical Nature" the FTT concluded at [139] that "a body whose aims are to promote or practice a rule of life is capable of having philosophical aims for the purposes of Article 132 1(l)." It went on to consider the need for some public interest and concluded at [141] - [144]:

> "141. Mr Humberstone's evidence and much of the documentary evidence was that Freemasonry encouraged not only belief in the three Grand Principles but putting them into practice: "a system of belief...which offers a framework for the better regulation of our lives". We accept that the Grand Principles are generally accepted norms of good behaviour, but that does not in our view prevent them from being a philosophy: the means of their expression, and the emphasis on putting them into practice was enough in our view to make them a philosophy. . . . . . Nor was there in the evidence before us anything which suggested that this was in any way an obnoxious system which was against the public interest.
>
> 142. The absorption into a Mason's conduct of the Grand Principles may be called self-improvement. Those two words give the impression of something inward looking and without public benefit. But the internalisation of any moral principles may be so regarded, and we do not consider "philosophical" as requiring proof of the benefits of the acceptance of a particular rule of life. Further the clearly expressed desire to promote Freemasonry and to permit it to survive seen in the speeches of the Grand Master indicates to us a proselytising of the code to others - something which was not wholly inward-looking.
>
> 143. We concluded that the aims of UGLE included aims of a philosophical nature. If we have misinterpreted the meaning of "philosophical" we would have found that "religious" was wide enough to encompass the tenets of Freemasonry.
>
> 144. Whilst greater emphasis may have been placed on the charitable aspect of its philosophy in recent years we detected no change in the relative importance of UGLE's aim of promoting the teachings of Freemasonry over the period since 1977. If anything it had been displaced somewhat by the aim of promoting charitable actions."

19. Next, under the heading “Aims of a Philanthropic Nature” the FTT considered the meaning of “philanthropy” and “philanthropic” by reference to a quotation from *Rotary International v Commissioners of Customs and Excise* [1991] VATTR 177 which itself contained quotations from other cases as to the meaning, all of which included a reference to goodwill towards mankind in general. The FTT went on at [146] – [150]:

> “146. Neither party dissented from these interpretations. It seems to us that, particularly in view of the requirement that the exemption have a public interest, that acts which are intended to benefit only a defined class rather than mankind in general may not be, or be wholly, philanthropic, particularly if that class is small.
>
> 147. But we accept that one of the fundamental responsibilities of Freemasonry is the provision of time and money for relief. The practice of Relief is in our view an aim of Freemasonry. We accept that UGLE's aims therefore included the promotion of this practice.
>
> 148. We also accept that in practice Freemasons devoted substantial amounts of time and money to charitable works and that UGLE assisted, directed and promoted such activity.
>
> 149. Thus we find that Relief was an aim of UGLE. The question is whether or to what extent that aim was philanthropic.
>
> 150. The provision of time to good causes (unrelated to Freemasonry in any way) was in our view a philanthropic activity: it was benevolence towards mankind in general. Its encouragement by UGLE proclaimed a philanthropic aim.”

20. Thereafter, at [151], the FTT expressed the concern that “because of the actual distribution of funds by the charities, the objects of Masonic contribution to the charities, and UGLE’s administration of them, might display – at least to some extent – a principal purpose of benefitting fellow Masons or the dependants of fellow Masons and thus not to that extent indicate goodwill towards mankind in general, but to a particular subset of mankind.” It concluded that:

> “The intimate involvement of UGLE’s officers in the direction of the charities indicated that UGLE’s aim was to encourage charitable donation for the purposes in which the charities’ funds were expended. And if the object of the contributions was not wholly for the general benefit, the object of UGLE in promoting those contributions might not be wholly philanthropic.”

In the following paragraphs the FTT went on to set out that 25-30% of charitable monies was expended on those without any Masonic connection, 50% on the dependants of Masons of whom there are around 1 million and the remaining 25% on Masons themselves. There is no dispute as to the percentages. At [153] in relation to the 50% expended upon dependants of masons, the FTT observed:

> "… It seems to us that such a number of potential beneficiaries permits one to say that there was benefit to mankind. But if the gift was encouraged with some measure of expectation that the charities would provide for the donor's own dependants should the need arise at some time in the future, the object of the gift, and its encouragement, may have a sufficient touch of self interest to prevent it from being philanthropic. If what was promoted was giving which was not philanthropic it seems to us that to that extent UGLE's aims were not philanthropic."

In relation to the 25% spent on Masons, the FTT concluded at [154] that the reasoning applied with greater force and went on:

> "... It is not that benefitting others who happen to be masons does not display goodwill towards mankind in general, but that if that is coupled with a hope or expectation of personal benefit, some of the aim loses that quality of benevolence. To the extent monies were paid with the hope or expectation of self-insurance their payment does not seem to us to be an act of philanthropy, and the aim of encouraging such giving does not appear to be a philanthropic aim."

The FTT concluded:

> "[155] But any expectation of future benefit if there was such, must have been limited. For there could be no certainty of benefit since the availability of funds would depend on the actions of other masons in the future.
>
> [156] Overall we consider that not all of UGLE's promotion of charitable giving can be treated as having a philanthropic aim."

21. In the light of this finding, the FTT also found:

> "[157] It seems to us that this was an area in which the evidence suggested there had been a change since the turn of the century. There was evidence that the Welfare State had to some extent taken the place of Masonic provision; this and the reorganization of the charitable and benevolent funds, and the move towards an outward looking body of persons serving

> their communities suggested to us that the proportion of self interest may have declined since that time."

22. Under the heading "Aims of a Civic Nature" the FTT considered the judgments of Chadwick and Longmore LJJ in the *Expert Witness* case and concluded at [160] that by excluding relationships between citizens from the ambit of civic aims, Longmore LJ was not simply excluding social clubs but bodies whose aims did not relate to the citizen's relationship with the state. It went on at [161] to conclude that neither Freemasonry nor UGLE's activities have a substantial aim which relates to the relationship between the citizen and the state and added:

> "...The charitable activities of Freemasons were largely unrelated to any relationship of citizens with the state, the fellowship and ritual enjoyed by Freemasons had nothing to do with the state, and acceptance of, and living by, the three Grand Principles touched only slightly on a person's relationship with the state. UGLE's coordination, regulation, encouragement and promotion of these activities involved or affected no separate relationship of citizens with the state."

Having considered the effect of the Aims and Relationships enjoining obedience to the law and loyalty and the charge read to new Lodge Masters, the FTT concluded at [163] that "at most only a small part of UGLE's aims were civic in nature."

23. Lastly, under the heading "Other Aims?" at [165] and [166] the FTT also found that UGLE had social aims, aims of self-improvement and fellowship and that "to some extent ceremony and ritual can be an end in itself" and that "some part of UGLE's aim was the promotion of Masonic ritual and ceremony." The FTT concluded as follows:

> "167. We accept that included among UGLE's aims are those of a philosophical, philanthropic and, to some smaller extent, civic nature. But it has other aims as well.
>
> 168. It seemed to us that some of these other aims were aims in themselves and not simply insignificant or ancillary to the qualifying aims. It is true that social intercourse helps people pursue common goals, but common goals also bind people together. Whether one serves the other is a question of degree. Our impression is that the relationship was not simply one of service to the qualifying aims.
>
> 169. To some extent also the pattern of the distribution of the charitable spend by the Masonic charities suggested to us at least the vestiges of mutual insurance – the care for masons and their dependents. Thus there was some element reflecting

> an aim of encouraging mutual benevolence, which we do not regard as wholly philanthropic.
>
> 170. The distinction between UGLE and RIBI is this. RIBI's aim was to promote Rotary, and Rotary's aim was to foster service and acquaintance as an opportunity for service. UGLE's aims by contrast include service to the community but also in our judgment include fostering fellowship for its own sake and care for other masons.
>
> 171. Whether or not UGLE's aims fell within Art 132 (1)(l) therefore depended on whether these other aims were shown to be minor or ancillary to the qualifying aims.
>
> 172. It seems to us that in the period before 2000 they were not. In that period it appeared that Freemasonry had been more inward-looking and more concerned therefore with mutual benefit and mutual society. The evidence was not sufficient to conclude that the pursuit of those concerns was not a minor aim.
>
> 173. In the period after 2000 there was evidence that Freemasonry became more outward looking. We have described the evidence which indicated that Freemasonry was more open and willing to communicate its practices to the world at large and to reach out into the communities in a way it had not done before. But the evidence did not satisfy us that the aims of the encouragement of fraternity, self-improvement and mutual care had become merely incidental or ancillary to the philanthropic, philosophical and civic aims of UGLE.
>
> 174. We therefore conclude that UGLE had a variety of different aims, some of which came within Article 132 and some of which did not. In our opinion, the aims which did not fall within the exemption were not insignificant and were of sufficient magnitude to cause UGLE to fall outside the words of the exemption in Article 132. Accordingly we dismiss the appeal."

Concession made below and additional evidence

24. Before turning to the submissions made, I should mention that at the beginning of his submissions on behalf of HMRC, Mr McGurk explained two things which were not immediately apparent from the FTT Decision or the matters to which I was otherwise referred. He explained that: he had conceded before the FTT that if an organisation were

to have five aims each of equal importance that it would nevertheless fall under Article 132 (1)(l) if three of those aims were within the exemption because those aims could be aggregated and amount to a main aim or aims; and that the evidence in relation to a change in emphasis in relation to charitable giving from the turn of the century had been given by Mr Reed as a result of questioning by the FTT, which took place despite the fact that he had not been called for cross-examination by HMRC. Miss Shaw did not dispute Mr McGurk's explanation both as to the concession, and the way in which Mr Reed's evidence was given to the FTT. It seems to me that the concession to which Mr McGurk refers is consistent with the structure of the FTT Decision and the references to predominance of aims in the Grounds of Appeal both in its original form and as amended.

Submissions

Approach to Statutory question

(a) first stage

25. To turn to the submissions, on behalf of UGLE, Miss Shaw submits that the FTT should first have identified UGLE's main aim or aims. She says that "main" means "principal, primary or predominant" and that it is possible to have more than one main aim. Thereafter, she submits that the second step is to assess the nature of the main aim or aims to determine whether they are of a requisite nature to fall within Article 132 (1)(l). She submits that instead, the FTT asked itself whether UGLE's "other aims" were "minor, insignificant or incidental, or ancillary" to the aims of a qualifying nature. She says that this is revealed in paragraph [15] of the FTT Decision in which the FTT assumed that unless an aim is "minor, insignificant or incidental, or ancillary" it must be a main aim. However, she submits that the terms "minor, insignificant or incidental, or ancillary" and "main" are not antonyms of one another and that it is perfectly possible for an organisation to have an important aim which is neither "minor, insignificant, incidental, or ancillary" but nor is it "main". Miss Shaw submits that had the correct approach been adopted, the FTT would have found that UGLE's main aim was to promote the practice of Freemasonry and that that aim falls within the heads of "philosophical, philanthropic, or of a civic nature". She says that thereafter, all other aims are irrelevant and that therefore, what the FTT termed "other aims" should not have been allowed to affect their conclusion.

26. In support of the approach of first identifying an organisation's "main aim" Miss Shaw relied upon the *Expert Witness* case. That was a case in which the Expert Witness Institute appealed a decision of the Commissioners that it was not entitled to exemption from VAT. The appeal was on the basis of Article 13A (1)(l) of EC Council Directive 77/388 that its aims were of a civic nature. At [7] Chadwick LJ set out the objects of the Institute contained in its memorandum of association. The objective was described in the opening words of the clause as "the support of the proper administration of justice and the early resolution of disputes through fair and unbiased expert evidence" with particular reference to sub-clauses (a) to (g) and subject to a proviso which amongst other things stated that the objects in the sub-clauses should not be treated as subsidiary or auxiliary to the object in the first sub-clause. At [8] Chadwick LJ considered the effect of the proviso and concluded that he was content to treat the sub-clauses as ancillary to the primary object to be found in the opening words of the clause. He stated that they were particular but non-exclusive ways in which the primary object was to be pursued.

27. He went on at [30] to consider whether the primary object was an aim of a civic nature "giving the word "civic" the meanings "of pertaining, or proper to citizens" or "of or pertaining to citizenship" which as it seems to me, it can properly bear." At [31] he considered whether they lost that nature if, in fact, the members of the Institute charged for their services and rejected that conclusion for two reasons:

> "...The relevant question is "what is the nature of the objective" not "why is it being pursued". Secondly, the relevant objective is that of the organisation; not that of any individual member or members. ."

28. In relation to the interpretation of aims of a civic nature, Miss Shaw also referred me to [36] and [37] in the judgment of Longmore LJ which are in the following form:

> "36. Mr Patchett-Joyce submits that such a construction is impossibly wide because any organisation which does not have positively anti-social aims could claim to have objects of a civic nature. I do not consider that that is correct because the requirement that a body has objects which are of a civic nature if it is to be able to claim exemption, means that the body must have objects which promote the relationship of citizens, not among themselves, but with the state of which they are citizens.
>
> 37. There can hardly be a more obvious civic object in peacetime than the support of the proper administration of justice. Of course, the tribunal of fact will wish to be careful that bodies putting themselves forward for exemption under this head of the regulations do, in fact, have the objective which they say they have. But no suggestion is made in this case that the Institute does not. It would be different if the Institute's objectives were solely or even, perhaps, mainly for the benefit of its members. In that case the objects would not be of a civic nature and the body would have to seek exemption, if at all, as a trade union or professional association.
>
> 38. The Tribunal in paragraph 68 of its decision said, merely, that the word "civic" had connotations with a locality or public affairs and then that none of the Institute's aims could be so described. The decision that the proper administration of justice has no "connotations with public affairs" is a surprising one and I can only conclude that the Tribunal gave an incorrect interpretation to the phrase "objects of a civic nature". The Tribunal has thus erred in law and the judge was entitled to substitute his own conclusion based on the findings of fact of the

> Tribunal. That he did and, in agreement with Chadwick LJ, I would dismiss the appeal."

29. In relation both to the approach to be adopted and the interpretation of aims of a civic nature, Miss Shaw also placed reliance upon *British Association for Shooting and Conservation Ltd v Revenue and Customs Commissioners* [2009] STC 1421 which was an appeal from a decision of the tribunal that although conservation and other public-spirited activities represented a substantial part of the association's activities, they did not constitute its primary aim and that the primary aim of representing the interests of its members who were sporting shooters did not fall within the exemption. Lewison J analysed the decision of the European Court of Justice in *Institute of Motor Industry v Customs and Excise Comrs* (Case C-149/97) [1998] STC 1219 and concluded at [41] that the professed aims of an organisation must be tested against what happens in reality and that where an organisation has multiple aims, it is the "main aim" which counts. Having considered the *Expert Witness* case he also concluded at [43] –[45]:

> "43. I derive from this case that:
>
> a) The aims of an organisation are (at least prima facie) to be found in its constitutional documents, tested against the reality of what it does;
>
> b) It is permissible to approach the activities of an organisation on the basis that it has a main or primary aim which characterises its fiscal treatment;
>
> c) An organisation will not have aims of a civic nature if its objectives are solely (or perhaps mainly) for the benefit of its members.
>
> 44. The Tribunal dealt with this as follows. First it considered the legal test. In paragraph 35 the Tribunal said:
>
> > "I accept Mr Barlow's argument that the phrase in paragraph (e) of Item 1 to Group 9, "has objects" is inconsistent with the notion that they must be exclusively of the types listed thereafter. But that is not to say that all one has to do, to secure exemption, is to identify one object, however minor it may be in relation to the organisation's other objects, which falls within one of the listed categories; in that I agree with Mr Chapman. In my judgment it is apparent from reading the whole of the relevant part of the Item as I have set it out above that what is meant is that the primary object or objects of the organisation must fall within one or more of the categories listed. That conclusion seems to me to be what, in essence, the tribunal decided in Game Conservancy Trust. Mr Barlow did not suggest that the decision in that case was

wrong; in my view the tribunal's reasoning was correct."

45. Mr Cordara criticised the Tribunal for approaching the case on the basis of having to identify the primary object or objects of an organisation. I do not agree with this criticism. It is, in my judgment, clear both from the *Motor Institute* case and the *Expert Witness* case that identifying an organisation's main object is one element in deciding whether it falls within the exception. In addition the Tribunal's use of the plural ("object or objects") clearly left room for the possibility that BASC might have multiple objects no single one of which could be said to be predominant."

He went on at [46] – [48]:

"46. On the facts, the Tribunal concluded (§ 36):

> "Here, though I do not doubt that conservation and other public-spirited activities are seriously pursued and represent a substantial part of BASC's activities, the conclusion is inescapable that they do not constitute BASC's primary aim: … Its objects as they are set out in BASC's constitution, its mission statement and the material produced for members all make it clear that BASC is, primarily, a representative body for sporting shooters; its other activities are subordinate to that main aim. It follows that its claim that the residual subscription income is paid for an exempt supply can succeed only if that principal aim, of representing its members' interests, can properly be said to be of a political, philanthropic or civic nature, and in the public interest."

47. I see no legal error in this conclusion. The Tribunal has looked at BASC's constitutional document, supplemented it by reference to other materials from which, objectively, conclusions about its objectives can be drawn, and tested that against the reality of what it does. If it had been argued that the supply should be further dissected so as to separate out the "important" objective of conservation, it may be that the Tribunal would have come to a slightly different conclusion. But it was not. On the case as presented to the Tribunal, the Tribunal's conclusion was one to which it was entitled to come.

48. Finally the Tribunal considered whether BASC's primary objective (as identified) could be considered to be "civic" in nature. It said (§ 37):

> "It does not seem to me possible to argue that the representation of its members' interests can conceivably be regarded as philanthropic or civic, since, whatever may be said of what I have found to be BASC's subordinate activities, representation of its members confers no benefit on the community at large, or in a particular locality (or localities), which I take to be what is connoted by "civic"."

30. Miss Shaw submits that contrary to the proper approach set out in the authorities, the approach set out at [15] of the FTT Decision incorrectly leaves open the issue of what is in fact the main aim of UGLE. Further, by speaking of "sufficient magnitude" of the "other aims" in [174] of the FTT Decision, the FTT failed to address the central question, of what was UGLE's main aim. Furthermore, Ms Shaw says that if the correct enquiry had been undertaken, the FTT would have found that UGLE's main aim was the promotion of Freemasonry. In this regard she referred me to Mr Humberstone's witness statement, paragraph 8, which stated that *"UGLE's aims, in a nutshell, are to practise and promote the practice of Freemasonry..."* and to [97] of the FTT Decision at which the FTT stated that UGLE "held together, or attempted to hold together the 250,000 Freemasons in the UK so that Freemasonry could "survive" be practised and flourish; and its guidance resulted in greater charitable activity that [sic] would otherwise have been the case." She also drew attention to the FTT's conclusion at [110] of its Decision that the evidence indicated that the reason UGLE did what it did was to promote Freemasonry.

31. In relation to the aims of UGLE set out under five sub-headings at [111], Miss Shaw says that (1) and (2) namely in summary the promotion of a particular system of morality and the promotion of behaviour consistent with that system and which inculcates due obedience to the law, encapsulate the main aim of promoting Freemasonry already identified at [110]. She submits that the aims set out at [111] (3) and (4) namely, bringing men together to practice that system and aiding the cohesion in mutual fellowship and acquaintance of its members through common ceremony and social intercourse are ancillary or subordinate to the aim of promoting Freemasonry. The aim set out in sub-paragraph (5) being administering charitable funds consistently with these aims she says is parasitic on the primary aim and it was perverse to suggest that it was otherwise than ancillary to the main aim.

(b) second stage

32. Despite what Miss Shaw characterises as the failure by the FTT at the first stage, she accepted that at [114] of the FTT Decision the FTT went on to address the second stage, which is to determine whether the aims are of a requisite nature to fall within the relevant VAT exemption. However, Miss Shaw says that it did so in a way which was not justified on the evidence or was otherwise perverse. I will take each heading in turn.

"Philosophical"

33. In relation to those aims held to be philosophical, at least, Ms Shaw says that the FTT was correct.

"Philanthropic"

34. In essence, Miss Shaw's complaint in this regard is that despite finding at [147] on the basis of Mr Humberstone's evidence, that the practice of "Relief" or charity is an aim of Freemasonry and that UGLE's aims included the promotion of this practice, it had concluded nevertheless at [87] and without evidential foundation, that some of the charitable contributions resembled a "mutual insurance society" and went on at [169] to decide that there was some element of mutual benevolence which the FTT did not regard as wholly philanthropic. This in turn led to its conclusions at [171] – [174].

35. Miss Shaw submitted that the FTT was incorrect to speculate on the members' motives for charitable donations and thus the FTT erred by focussing on speculative impression rather than reality. In this regard, she referred me to paragraph 18 of Mr Humberstone's witness statement at which he stated that before Masons or their dependants receive any charitable benefits they are means tested and to paragraph 20 at which he states that "it is forbidden to use membership for personal gain". She also drew attention to [29] and [155] of the FTT Decision which she says are inconsistent with the ultimate conclusion reached. At [29] reference is made to an extract from a brochure produced by UGLE which contains the statement: "Masonry offers no monetary advantages" and at [155] the FTT states that there could be no certainty of benefit from charitable giving because the outcome was dependent upon the actions of other Masons in the future.

36. She also submitted that the FTT was incorrect to sub-divide the donations of Freemasons into masonic and non-masonic charities for three reasons: first, there was no expectation of benefit by the donor; secondly, the proper approach is to assess donation in totality rather than the identity of the beneficiary; and thirdly, even if it would be appropriate to consider the destination of the donations, Masons and their dependants number around 1.25 million people and that the charities to which donations are made are considered to be charitable for the purposes of Charities legislation which includes a public benefit requirement. Lastly, she submits that even if a mason expected personal benefit, it would not prevent the donation from having been philanthropic.

37. In addition, Miss Shaw submits that the FTT took into account an unjustified and irrelevant consideration when considering whether UGLE's aims were philanthropic which is reflected in its conclusions at [172] and [173] of the FTT Decision. This was the apparent change in outlook of Freemasonry after the year 2000. She says that those conclusions and those expressed at [157] are inconsistent with the evidence presented to the FTT and the findings which it reached.

38. In summary, she says that the evidence of Mr Reed and Mr Humberstone recorded at [51] to [57] of the FTT Decision revealed that Freemasonry moved from being inward looking around the time of World War II to more outward looking in the 1960s and that from the millennium there had been "a greater emphasis on getting out into, and giving time to, the community." The change following the millennium, Miss Shaw says, was purely a further improvement and mainly due to greater communication with the general public as explained in the Grand Master's speech of 2002 which is referred to at [52] and his 2006 address to which reference is made at [53]. She also places emphasis on [54] at which Mr Humberstone's evidence of a change in need after the advent of the Welfare State and a review of Masonic charities in 1971. She submits that that evidence is inconsistent with the conclusion at [57] that Freemasonry has changed in particular since

2000 and that greater weight should have been given to the evidence in relation to the earlier period. In addition, she notes that Freemasons have been doing good deeds in the community for over 300 years, which is referred to at paragraph [52] of the FTT Decision.

39. Miss Shaw further submits that had a change in 2000 been an issue in the case, it would have been part of HMRC's case and should have been put to the witnesses which it was not. She referred me to the Chairman's note of evidence which makes no direct reference to 2000 (albeit that it records the question "Before 10-15 yrs – How inward looking". Miss Shaw submits therefore, that the evidence supports a finding that the change was long before 2000 and actually in the 1960s, rendering the finding of the FTT at [172] and [173] to be perverse and inconsistent with the evidence.

"Civic"

40. Under this head, Miss Shaw challenges the FTT's findings at [161]-[163] of the FTT Decision, namely that neither Freemasonry nor UGLE's activities have "any substantial aim which relates to the relationship between the citizen and the state" and its conclusion at [163] that "at most only a small part of UGLE's aims [are] civic in nature." Miss Shaw submits that participating in the community to build a better society and being a good citizen is all part of what she describes as the social contract and that at [108(2)] the FTT accepted that the inculcation of good citizenship was one of the concerns of Freemasonry. This was supported for example, by Mr Humberstone's evidence recorded at [70] that the purpose of the three Grand Principles of Freemasonry was to "encourage good deeds." Miss Shaw submits therefore that there is a civic purpose to Freemasonry. She says therefore that the conclusions reached at [161]-[163] are not supported by the evidence and that the FTT applied too narrow a meaning of "civic" which is not required by the dicta in the *British Shooting* and *Expert Witness* cases. She says that UGLE is not like a social club but that the socialising was conducted as part of Freemasonry. She says it was concerned with the promotion of the greater good and promoting good citizenship.

Treatment of the "other aims"

41. In any event, Miss Shaw submits that the aims described by the FTT as "other aims" being social aims, aims of self-improvement, ritual and mutual benevolence are not aims at all, if they are aims, they are not aims of UGLE, and in any event, if they are aims of UGLE, they are not main aims and in fact, they are minor and insignificant. Accordingly, she says that they cannot prevent the main aim of the furtherance of Freemasonry from being the main aim and from being of a requisite nature to fall within Article 132 (1)(l).

(i) not aims at all

42. Miss Shaw submitted that for something to be an aim it must be a goal or objective, distinguished from the way that goal or objective is achieved. In relation to social aims she submits that it is not suggested that UGLE is a social club, repeating that encouragement of socialising is for a greater purpose of furthering the greater good. The goal is to ensure that the practise of Freemasonry flourishes, which requires the aiding of cohesion through fellowship, rather than simply fellowship alone. This she says is made clear and is consistent with the conclusions the FTT arrived at in relation to UGLE's aims which were set out at [111] and in particular at sub-paragraph (4) which refers to aiding cohesion in mutual fellowship. As such she says that it is a means to an end.

43. In relation to self-improvement, Miss Shaw says that this is not a free-standing objective as it is only relevant in the context of encouragement of doing good deeds. She says that this is consistent with the evidence recorded in the FTT Decision itself at [70] at which reference is made to Mr Humberstone's evidence that the practice of the three Grand Principles of Freemasonry being Brotherly Love, Relief and Truth as a way of life and that the purpose of the principles themselves was "to encourage good deeds."

44. In relation to ritual she says that this is insupportable as an aim in itself because it is not an important part of Freemasonry and that this was clear from Mr Reed's evidence referred to at [65] of the FTT Decision at which it is noted that he did not regard ritual as particularly important, the conclusion of the FTT at [66] that its impression of the evidence that a serious interest in ritual was now something for the few and its conclusions at [112] that only a small part of Freemasonry and therefore, of UGLE's promotion of it, was ritual for its own sake and that "regulation for regulation's sake was not a significant object".

45. Lastly in this regard, for the reasons referred to under the "Philanthropic" head under the second stage of the approach to the statutory question, Miss Shaw submits that the findings at [169] of the FTT Decision, that the pattern of charitable spend suggested that there are "at least the vestiges of mutual insurance" and that there was "some element reflecting an aim of encouraging mutual benevolence" which the FTT did not regard as wholly philanthropic are perverse. In this regard, she drew attention to the tentative language used in [151] and [153] as an indicator that the FTT relied on its own speculative assumptions improperly inferred from the percentages of charitable giving rather than upon the evidence as a whole. She says that it is no basis for an inference of an expectation of self-interest and drew particular attention to [155] which she says is inconsistent with such an inference in any event. At paragraph [155] the FTT stated that "any expectation of future benefit, if there was such, must have been limited. For there could be no certainty of benefit since the availability of funds would depend on the acts of other masons in the future."

(ii) Not aims of UGLE

46. Further, in relation to social aims and self improvement, Miss Shaw drew attention to the answers to the question "Why become a Freemason?" set out in a booklet and recorded at [30] of the FTT Decision which includes "making new friends" and the evidence of Mr Reed recorded in the FTT Decision at [33] that 70% of Freemasons had said that they joined because of the fellowship. Miss Shaw points out therefore, that the evidence reveals that fellowship is an aim of the members and not of UGLE itself. In relation to ritual, my attention was drawn to [61] of the FTT Decision at which reference is made to the effect of ritual on the participants' behaviour and the statement that "it is also possible that people indulge in, and become attached to, ritual or ceremonial practice for its own sake." In the same way as with social aims, therefore, Miss Shaw submits that at best, ritual too may be an aim of the individual member but is not an aim of UGLE itself.

(iii) and (iv) Not main – only minor

47. Lastly, if the "other aims" are aims in themselves and are aims of UGLE, Miss Shaw submits first that they are not "main" aims and/or that they are only minor. She says that not even the FTT considered these aims to be main and this is clear from the use of "not

insignificant' in the last sentence of [174]. Having already submitted both that these aims are ancillary and that they are subordinate she went on to submit that in fact, even if they were not subordinate but were not main aims and that that was sufficient.

48. Mr McGurk on behalf of HMRC on the other hand says that the FTT approached the statutory question properly and that there are no errors of law whether in that regard or in an *Edwards v Bairstow* sense.

Approach to statutory question

49. Mr McGurk submits that before the FTT both parties were fully aware that the onus was on the taxpayer to show that there were qualifying aims and that they were UGLE's main aims and that the matter was approached on that basis. In this regard, he referred me to the concession he had made in relation to the aggregation of qualifying aims in order to determine whether aims which were otherwise of equal status could be aggregated in order to constitute a main aim or aims.

50. Further, Mr McGurk submits that the way in which the FTT approached this matter is entirely consistent with the authorities. He says that UGLE's aims were determined by reference to its constitution measured against reality and that the FTT determined that it had a variety of different aims. It determined that only some of its multiple aims (both as to aims and parts of them) fell within the categories of exemption in Article 132 (1)(l) and that those outside the categories of exemption (whether aims or parts thereof) were of sufficient magnitude to render those which were inside the categories other than UGLE's main aim or aims. He says that there is no basis, therefore, to suggest that FTT asked itself the wrong question.

Edwards v Bairstow errors

51. Mr McGurk also reminded me of the high threshold necessary to satisfy the test in *Edwards v Bairstow*. He referred me to the passage in Evans LJ's judgment in the *Georgiou* case and counselled caution. He reminded me that it was for the FTT to determine the relative weight it gave to the evidence which it heard over four days and that Miss Shaw has engaged in a roving selection of evidence which is impermissible. He drew a particular note of caution as a result of: the lengthy period under consideration compared with the bulk of the evidence which related to the period from 2000 onwards; the fact that there is no transcript of the evidence, that the absence of something from the Chairman's note is not decisive and that even the most careful of judges will not record everything; that Freemasonry is by nature, a secretive society and UGLE was able to present the only evidence before the FTT; and lastly, what he described as Miss Shaw's cherry-picking of the evidence which had been before the FTT. He says that the starkest example of this is her approach to whether aims are those of UGLE or its members. In this regard, he referred to [104] – [106] of the FTT Decision which refer to UGLE's governance role in the charitable activities and to [107] at which it is stated that although the aims of the institution and not the aims of the members are the relevant aims, if the aims of the institution can be described as promoting the activities of the members, then the institution shares its aims with its members. He says that Miss Shaw relies heavily on this point in relation to charitable activities when it suits her, but in relation to social aims which the FTT found to be non-qualifying, she takes the opposite stance.

52. Further, Mr McGurk says that in fact, Ground A of the Amended Grounds of Appeal collapses into Ground B. The eight paragraphs under Ground A are concerned with the treatment of the evidence in relation to 2000, given by Mr Reed when questioned by the FTT. Mr McGurk submits that that evidence was helpful to UGLE and had the effect of improving UGLE's position by enabling more of its aims to fall within an exempt category. Further he says that [51] of the FTT Decision is not inconsistent with any other part of the evidence. He points to [173] at which the FTT states that Freemasonry became *"more"* outward looking post-2000 and it records the charitable contribution made over 300 years. In the circumstances, therefore, he says that there can be no question of having taken into account an irrelevant consideration or having come to a conclusion for which there was no basis on the evidence or which was otherwise perverse. He says that regardless of any change post-2000, the same conclusion would have been reached by the FTT. He submits therefore, that this is simply a complaint that weight was given to non-qualifying aims, which impacted on the qualifying aims being found not to be main aims.

"Other aims"

53. In relation to Ground B, Mr McGurk submits that the FTT's findings at [165] and [166] of the FTT Decision need to be read in the context of [92] onwards (what UGLE does). He says that *"other aims"* must be considered alongside the wider governance role of UGLE and the aims of the members being attributable, through committees, to UGLE itself. As I have already mentioned, he says that if member aims are attributable to one Grand Principle, in relation to which Miss Shaw makes no complaint, then it must be attributable to all of them.

54. Mr McGurk also submits that in relation to "other aims" Miss Shaw's first two heads of argument namely (i) "not an aim" and (ii) "not an aim of UGLE" are not in the Grounds of Appeal whether in its original or in its amended form, at all. As to (iii) and (iv) – "not major but minor" he says that her position appears to have changed. Although the Grounds of Appeal refer to the non-qualifying aims as being *ancillary,* in her oral submissions, Miss Shaw referred to them both as ancillary and as subordinate to what she describes as the main aim of UGLE being the promotion of Freemasonry. He also points out that whether the non-qualifying aims were "ancillary" was not argued before the FTT.

55. Further, in relation to social aims, Mr McGurk submits that Miss Shaw's approach is inconsistent. Fellowship is one of the three Grand Principles of Freemasonry as is Relief or charity. On that basis he says that she is happy to accept that Relief is an aim but refuses to do so in relation to social activities. He also says that there is plenty of evidence to support the conclusion that social aims are other than subordinate. Mr McGurk also points out that there is no Ground of Appeal which relates directly to the treatment of self-improvement. He says that in any event, the evidence referred to at [28] onwards of the FTT Decision which relates to reasons for becoming a Freemason is evidence that self-improvement plays a key part and that Mr Humberstone gave impassioned evidence that Freemasonry helped men to improve themselves. In relation to ritual, Mr McGurk submits that the FTT Decision does not record that anything but a small part of Freemasonry was ritual for ritual's sake: see [112]. He says that that conclusion is entirely consistent with its conclusion at [61] – [66] that ritual is part of the function of teaching Freemasonry and is important in binding people together. Accordingly, he says once again that there is no *Edwards v Bairstow* style error here.

Philanthropic

56. Mr McGurk submits that any contentions relating to UGLE's philanthropic nature must be balanced against the fact that it is not itself a charity and that it has committees of members for the purpose of governing and administering any charitable activities. Mr McGurk took me to UGLE's income statements and submitted that they show a top-up approach to charity, in which UGLE has merely an administrative role.

57. He went on to submit that [11] and [12] of the FTT Decision is entirely consistent with [43] of the *British Shooting* case which is quoted at [13] of the FTT Decision and furthermore, is not challenged in the Amended Grounds of Appeal. The paragraphs and the passage in the *British Shooting* case are to the effect that the aim of an organisation must be of the requisite nature and in the public interest and objects which are solely or perhaps mainly for the benefit of its own members will not be of a civic nature. In this regard, Mr McGurk says therefore, that the FTT was perfectly entitled to take account of the fact that 75% of charitable donation by UGLE is to masonic and masonic-dependent causes. Furthermore, he says that the speculative language in [151] – [154] including for example, the passage at [151] that the actual distribution of funds by the charities 'might display at least to some extent a principal of benefitting fellow masons or their dependants" take the matter no further. He says that there was sufficient evidence being the way in which charitable donations are dispersed, from which the FTT was entitled to infer the motives for the benefaction in the first place.

Philosophy

58. With regard to philosophy, Mr McGurk submits that Miss Shaw's bald assertion that the FTT should have decided that these aims were predominant takes her no further forward. She does not say why this should be treated as the main aim. Mr McGurk says therefore, that her complaint is as to the weight given to the evidence.

Civic nature

59. Lastly, Mr McGurk submits that the judgments of both Chadwick LJ and Longmore LJ in the *Expert Witness* case were consistent with the FTT's approach to the category of a civic nature. He says that simply being a good citizen is not sufficient to fall within the civic qualifying category, but that in any event, the FTT still took this element into account at paragraph [111(2)] and to do so further would be double counting.

Conclusions:

Approach to statutory question

60. In my judgment, the FTT did not err in law in the way in which it approached the statutory question in this matter. The FTT summarised the decisions in the *British Shooting* and *Expert Witness* cases accurately and noted that it is permissible to approach the activities of an organisation on the basis that it has a main aim which characterises its fiscal treatment and that identifying the main object of an organisation is one element in deciding whether it falls within an exemption. It seems to me that neither conclusion both of which were derived from the *British*

Shooting case required the FTT as a mandatory first step to identify UGLE's main aim or aims in the way which Miss Shaw suggests. The first conclusion is expressly stated to be a permissible approach to the fiscal characterisation of an organisation's activities rather than a mandatory first step in the process of determining that fiscal characterisation and the second is described as "one" element in deciding whether the organisation's activities fall within the exemption. It seems to me therefore, that Miss Shaw's submissions based upon the premise that it is a mandatory requirement first to determine a main aim or main aims are misplaced.

61. In any event, the circumstances of this case differed from those under consideration in the *British Shooting* case and the *Expert Witness* case. In *Expert Witness* case there was a single purpose or object and the sub-clauses to clause 3 of the memorandum of association contained matters ancillary to that primary object. Chadwick LJ stated at [8] that the sub-clauses set out the particular ways in which the primary object was to be pursued. In the *British Shooting* case, the association's aims included the protection and promotion of shooting and the well being of the countryside. The tribunal concluded that although the conservation activities were substantial they did not constitute the primary aim which was the promotion of shooting but were subordinate to it.

62. In this case, the FTT found at [111] that UGLE had five aims and then went on to decide: whether and to what extent they were of the requisite nature; whether each aim was in the public interest; the relative importance or predominance of each aim over the period since 1977; and thereafter to the extent that they were not qualifying aims whether in whole or in part, whether they could be categorised as merely minor or ancillary to the qualifying aims. As Lewison J pointed out in the *British Shooting* case at [45] it is possible to have multiple objects no single one of which can be said to be predominant. In a case of this kind where there are numerous aims and in which a number of the aims had the potential to qualify under more than one category in Article 132 (1)(l) and in relation to which it was conceded that there could be an aggregation of aims in order to render them the main aim or aims and in which it was necessary to evaluate the nature and relative predominance of those aims over a lengthy period, it seems to me that the FTT was entitled to adopt the approach which it took. That approach is also consistent with the concession to which Mr McGurk referred and from which Miss Shaw did not demur and the fact that it was not argued before the FTT that any one aim was ancillary.

63. If UGLE did not possess qualifying aims which were significant, it would not have been able in any event, to discharge the burden of showing that those aims were its main aims. In the circumstances therefore, it seems to me that the FTT carried out its function in a sensible and practical way. I cannot see that the FTT erred in law in seeking to test UGLE's aims in order to determine the proportion which fell within the categories of exemption and then to decide on the basis of its findings of fact whether those which fell outside the categories were of sufficient magnitude to prevent the qualifying aims from being main aims. It seems to me quite clear from [167] – [174] that that was the exercise undertaken. Furthermore, this is how the exercise is described at [15] and [16] of the FTT Decision. It was seeking to determine the main aims in the circumstances. In this regard, I agree

with Miss Shaw that the terms “minor, insignificant, or incidental or ancillary” referred to at [15] are not antonyms of “main”. However, it seems to me that this does not assist her given the conclusion at [174] that those aims which fell outside the categories of exemption were of “sufficient magnitude” to cause UGLE to fall outside the exemption altogether. That conclusion was reached having determined that the aims which fell outside the categories of exemption were not ancillary or subordinate to the qualifying aims, a conclusion which in my judgment was open to the FTT to make having weighed the evidence.

64. In addition, I did not find Miss Shaw’s submission that had it not misdirected itself, the FTT would and should have found that UGLE’s main aim to be the promotion of Freemasonry of much assistance. In fact, the FTT came to that very conclusion at [110] and quite properly found it necessary to particularise their conclusion at [111] having tested it against what UGLE does and did. Merely to state the aim to be the promotion of Freemasonry begs the question of what, in fact, that means in reality. It seeks merely to use an umbrella term in an attempt to suggest that UGLE in fact, had a single aim. However, as soon as the promotion of Freemasonry is particularised it breaks down into a series of aims or objects. In fact, Miss Shaw does not challenge the content of [111] but went on to rely upon it.

65. In this regard, I also do not consider that it is open to Miss Shaw at this stage, to seek to prefer the aims set out at [111(1)] and [111(2)] over those in sub-paragraphs [111(3) – (5)]. On the case as presented to the FTT, its conclusion was one to which it was entitled to come having weighed the evidence. I consider the FTT’s treatment of bringing men together, mutual fellowship, social intercourse and common ceremony in the sense of ritual, and administering charitable funds further under the heading of *Edwards v Bairstow* challenges below. These are all elements of the aims set out at [111(3)-(5)]. Further I should mention that it was not argued before the FTT that some of the elements of Freemasonry which were distilled into the aims set out at [111(3) – (5)] were ancillary in any way.

***Edwards v Bairstow* challenges**

66. In my judgment, neither did the FTT err in the *Edwards v Bairstow* sense. They came to conclusions upon the evidence before them to which they were fully entitled to come and their conclusions are not perverse.

67. First, in relation to the conclusions reached in respect of a change of emphasis in 2000, which forms the basis of the first eight paragraphs of the Amended Grounds of Appeal, I agree with Mr McGurk. As he points out, the conclusion that after 2000 Freemasonry became more outward looking in the sense of being more willing to communicate its practices to the world at large and to reach out to communities in a way it had not done before, is entirely consistent with the evidence recorded at [51]. It does not seem to me that an absence of a reference to 2000 in the Chairman’s note is indicative of very much given that his note does reveal reference to “before 10-15 yrs” and the hearing took place in 2013. Such a reference is clearly consistent with evidence that there was some form of change in or about 2000 which is also consistent with the speech of the Grand Master in 2002 and his address in 2006 referred to at [52] and [53] of the FTT Decision. It

seems to me that had the evidence post 2000 not been taken into account, the outcome would have been less favourable to UGLE. Furthermore, given Mr Reed's evidence to the FTT, as a result of questions posed by the FTT itself in my judgment, it would have been perverse not to have taken it into consideration. It also seems to me that there can be no complaint on the basis that Mr Reed's evidence given in answer to questions from the FTT itself was not put to the other witness. In any event, given the nature of that evidence as recorded, it does not seem to me that it was inconsistent with that evidence. In effect, the complaint is as to the FTT's view of the evidence as a whole. In my judgment, the FTT was entitled to reach the conclusion it did on the evidence before it and did not err in this respect in an *Edwards v Bairstow* manner.

68. As Mr McGurk pointed out, the challenge in relation to the treatment of the aim of self-improvement is not contained in the Amended Grounds of Appeal and is not before the UT. However, even if it had been I would have decided that whether formulated as an attack upon the element of UGLE's aims which fall under the heading of "philosophical" or as a challenge to the treatment of self-improvement as a separate freestanding aim, the FTT was entitled to come to the conclusion which it did. It seems to me that there was sufficient evidence both in the form of the three Grand Principles themselves and the extract from the booklet referred to at [29] and [30] to enable the FTT to have come to that conclusion. The brochure refers to Masonry consisting of 'a body of men brought together for the sake of mutual intellectual social and moral improvement' and gave 'self-improvement' as a reason for becoming a Mason. It seems to me therefore that it cannot be said that the FTT's conclusions were without foundation on the evidence or were perverse. I also agree with Mr McGurk that it is not open to Miss Shaw to rely upon the FTT's reasoning to attribute the aims of members to those of UGLE under some heads but not others.

69. Further, in relation to charitable giving, I can see no error in the way in which the FTT inferred from the way in which charitable donations were applied that not all of UGLE's promotion of charitable giving has a philanthropic aim. Given that around 75% of charitable spending is directed to Masons or their dependants when taken together with the evidence recorded at [70] that the interests of family are paramount, in my judgment it cannot be said that their decision is perverse or is otherwise subject to challenge on *Edwards v Bairstow* grounds. In this regard, I disagree with Miss Shaw that the conclusion at [87] that "to an extent some of the charitable contributions resembled the activities of a mutual insurance society" is without foundation. In my judgment the evidence in relation to the percentage of charitable giving expended on Masons and their dependants, the detailed evidence as to charitable giving and the organisation of the charities with which UGLE is involved at [72] - [86] and the matters recorded at [87] itself were sufficient for the conclusion reached. I do not consider that either the fact that before Masons or their dependants receive charity they are means tested and that they are forbidden to use membership for personal gain takes the matter further. These matters are not inconsistent with the FTT's conclusion. Further, it seems to me that the use of tentative language is neither here nor there. In particular, I do not consider that the use of 'vestiges' in [169] can form the basis for a successful *Edwards v Bairstow* challenge. It must be read in the light of the fact that the FTT was considering UGLE's activities over a period since 1977. In this regard, it recorded at [157] that

there had been changes over time, not only since 2000 but since the establishment of the Welfare State.

70. It also seems to me that Miss Shaw's complaint that there is no basis for the conclusion at [163] that only a small part of UGLE's aims are of a civic nature is unfounded. The emphasis in the evidence on the encouragement of good deeds and inculcating being a good citizen referred to at [108(2)] to the extent that they fulfil the requirements in the *Expert Witness* case are fully acknowledged by the conclusion at [163] that a small part of UGLE's aims were civic in nature. In the light of the remainder of the evidence in this regard summarised at [162] in my judgment, it cannot be said that the FTT's conclusion in this regard was "*Bairstow* unreasonable". As the FTT pointed out at [161] "charitable activities of Freemasons were largely unrelated to any relationship of citizens with the state, the fellowship and ritual enjoyed by Freemasons had nothing to do with the State, and the acceptance of and living by the three Grand Principles touched only slightly on a person's relationship with the state. UGLE's co-ordination, regulation, encouragement and promotion of these activities involved or affected no separate relationship of citizens with the state." In my judgment the FTT was entitled on the evidence to find as it did. The exhortation to good deeds and to be a good citizen is not enough to colour the entirety of the activities and it was for the FTT to weigh the evidence. Further and to the extent that this in fact, is intended to be a Ground of Appeal based upon an alleged failure to apply the correct legal test in relation to areas of a civil nature, I reject it. It seems to me quite clear from the judgments of Chadwick and Longmore LJJ in the *Expert Witness* case that aims of a civic nature must concern the relationship between the citizen and the State rather than citizens with each other.

71. In relation to the treatment of "other aims' I have already dealt with "self-improvement". As to the "social aims" it seems to me that in the light of Fellowship and Brotherly Love being one of the three Grand Principles, together with the evidence of Mr Reed recorded at [30] that what mainly attracts and retains Masons is the fellowship it offers and that 70% of Masons said that they had joined for fellowship it cannot be said that the FTT's decision at [165], [167], [168] and [170] was perverse or that there was no evidential basis for it. It seems to me that the real complaint is as to the weight given to the evidence and what the FTT describes as the impression gained that the other aims including the social aim did not merely serve the qualifying aims. The same is true under Miss Shaw's head that the social aim is an aim of the individual members and not UGLE. In this regard, I agree with Mr McGurk that Miss Shaw cannot seek to benefit from the approach adopted by the FTT when it favours UGLE but abandon it when it does not.

72. Lastly, what of ritual? Once again I agree with Mr McGurk that although the FTT came to the conclusion that ritual for its own sake is now for the few, it also concluded on the evidence recorded at [60] – [66] that it was an integral part of teaching Freemasonry and binding people together. It seems to me that that is not inconsistent with the conclusion at [166] that some part of UGLE's aim was the promotion of Masonic ritual and ceremony. Further, once again, I do not consider that Miss Shaw is assisted by her argument that if anything the aim is that of the individual. It is the regulation of ritual by UGLE which the FTT considered at

[112] and [166]. In such circumstances, a challenge whether to the conclusion that ritual is an aim of UGLE or that when added with other non-qualifying aims they were not insignificant on the basis of *Edwards v Bairstow* unreasonableness must fail.

73. For all of the reasons already set out I dismiss the appeal.

Mrs Justice Asplin

(Signed on original)

Decision issued: 10 November 2015

Amended under Rule 42: 1 December 2015