[2014] UKUT 00452 (TCC)
Appeal number: FTC/96/2013

VAT – exemption for provision of services of an insurance broker or agent – whether exemption applies to services provided to facilitate insurance brokers obtaining better terms and related benefits from insurance companies and other insurance related services – Article 135.1(a) Directive 2006/112 EC – Schedule 9 Group 2 Value Added Tax Act 1994

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

WESTINSURE GROUP LIMITED **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE NUGEE

Sitting in public at the Rolls Building, London EC4A 1NL on 4-5 June 2014

David Southern QC (instructed by Dickson Minto W.S.) for the Appellant

Eleni Mitrophanous (instructed by the General Counsel and Solicitor for HM Revenue and Customs) for the Respondents

DECISION

Mr Justice Nugee:

Introduction

1. This is an appeal against a decision (**"the Decision"**) of the First-tier Tribunal (**"the FTT"**) (Judge Herrington and Mr Michael Bell) given on 14 February 2013 (reported as *Westinsure Group Ltd v R & C Commissioners* [2013] SFTD 873) in which the FTT dismissed appeals by the Appellant, Westinsure Group Ltd (**"Westinsure"**) against two decisions of the Respondents, the Commissioners for Her Majesty's Customs and Revenue (**"HMRC"**), namely (i) that the supply of services by Westinsure to its insurance broker subscribers was standard-rated and not exempt; and (ii) that consequently Westinsure should be compulsorily registered for VAT with effect from 1 September 2005.

2. The second decision followed from the first and the substantive question is whether the relevant supplies were exempt under art 135.1(a) of the Principal VAT Directive, Council Directive 2006/112/EC (**"the VAT Directive**"), which provides exemption for insurance transactions and certain insurance-related services in the following terms:

> "1. Member States shall exempt the following:
>
> (a) insurance and reinsurance transactions including related services performed by insurance brokers and insurance agents."

This replaced art 13B(a) of the EC Council Directive 77/388 (**"the Sixth Directive"**) which was in the same terms. It can be seen that the exemption has two limbs: (i) 'insurance and reinsurance transactions' and (ii) 'related services performed by insurance brokers and insurance agents'. It is not suggested that the services supplied by Westinsure were insurance or reinsurance transactions but Westinsure contends that they are exempt under the second limb. The FTT held that they were not so exempt, and Westinsure appeals that decision. Permission to appeal was refused by the FTT but given by the Upper Tribunal (Judge Sinfield) on 29 August 2013.

The facts

3. As the FTT noted, the facts were largely undisputed. They are fully and carefully set out in the Decision, and Mr Southern QC, who appears for Westinsure, does not criticise the FTT's findings. The salient features are as follows (references are to paragraphs of the Decision):

(1) Westinsure was formed on 8 February 2000 to provide introductions and improve terms to member insurance brokers. It operates in the field of general insurance (rather than life insurance): [7].

(2) The role of brokers in the general insurance market is to work on behalf of individuals and businesses requiring insurance in assessing their needs and identifying an appropriate insurer (an insurance company or Lloyd's syndicate). Often a broker will access the insurer through one or more intermediate brokers, leading to a chain of brokers between the insurer and insured, each typically bring remunerated by a share of the commission paid by the insurer: [8].

(3) Smaller regionally based brokers will typically join an alliance or network of brokers to gain commercial buying power, regulatory compliance assistance and other business support. Westinsure is an example of such an alliance: [9].

(4) Westinsure's business model is that it interfaces with both insurance brokers and insurers. Westinsure markets its services to smaller brokers and, if suitable, invites them to join. Brokers who join Westinsure (known as "Westinsure Brokers") pay a membership fee and are referred to as members or subscribers. There are currently some 180 Westinsure Brokers. They pay a joining fee of £250 and an annual fee based on actual gross premium income, the vast majority paying between £1500 and £3500 per annum: [10], [12], [13].

(5) Westinsure also identifies suitable insurers to offer products to its brokers. They are known as "Partner Insurers" and an insurer becomes a Partner Insurer by agreeing to provide exclusive products and beneficial commissions to Westinsure Brokers. In return Westinsure agrees to use its best endeavours to promote and market the Partner Insurers' products to its Brokers. Westinsure receives an annual commission from Partner Insurers based on a percentage of the premiums of each policy taken out by a client of a Westinsure Broker with the Partner Insurer concerned. The level of payment Westinsure receives from Partner Insurers is thus entirely dependent on the amount of business placed by Westinsure Brokers with the Partner Insurer concerned: [17]-[18]. (No question arises in the present appeal as to the commission payments from Partner Insurers as the appeal is concerned solely with the membership fees paid to Westinsure by Westinsure Brokers.)

(6) There are a number of advantages for a broker in joining Westinsure. Westinsure is able to harness the buying power of its brokers to persuade the Partner Insurers to pass on better commissions and better insurance terms than would be the case if a broker was dealing individually with the Partner Insurers. Another advantage is that insurers often impose a minimum business requirement on brokers

before they will deal with them, and this is waived for Westinsure Brokers: [10].

(7) Mr Addis, a director of Westinsure, gave a description of the actual services provided by Westinsure to its brokers. It included: negotiating with Partner Insurers for beneficial rates of commission, superior products and service standards and lower premiums for brokers' clients; negotiating better rates for premium instalment finance for brokers' clients; business support in the form of visits and communications to provide brokers with updates, information on products and ideas for business development; a free annual insurance exhibition at which brokers can meet Partner Insurers; regional meetings for brokers to meet and network, and online forums for discussion purposes; negotiating discounts with the Chartered Insurance Institute; and assistance with brokers' FSA compliance obligations: [15] .

(8) Mr Brown, the Managing Director of one of the Westinsure Brokers, confirmed that there was a significant advantage for his business in dealing with Partner Insurers as part of the Westinsure alliance as the minimum business requirements imposed by insurers were applied to the Westinsure relationship as a whole; and that there was a clear benefit in enhanced commission rates. He noted a number of other key benefits in being a Westinsure Broker, including: the ability to market niche schemes to other Westinsure brokers, and access products promoted by them; access to dedicated teams within insurers; access to the Lloyd's market at discounted commission rates; discounted rates off professional services for compliance; access to training provided by insurers on various products; and access to broker forums: [23].

(9) On the other hand, Mr Brown said that he would jealously guard his client relationship and only seek general guidance on his business from Westinsure rather than assistance in relation to a particular client transaction. Mr Addis confirmed that the focus of Westinsure's efforts was to promote particular products of the Partner Insurers to the Westinsure Brokers rather than focusing on the brokers' underlying client base: [21], [22].

(10) So, as the FTT found at [20]:

> "In substantially all cases Westinsure did not get involved in the negotiation or arrangement of any particular insurance contract, which would be entered into by a client of the Westinsure Broker and the Partner Insurer concerned, pursuant to terms of business entered into separately between the Partner Insurer concerned and the Westinsure Broker. Thus if there was a chain of brokers involved in a transaction, Westinsure would not be part of that chain and it received no

part of the commission paid by the Partner Insurer to the Westinsure Broker which passed directly down the chain of brokers from the Westinsure Broker … Mr Addis described the essence of Westinsure's business as standing between the Westinsure Brokers and the Partner Insurers and having no interest in any particular insurance transaction …"

(11) Mr Addis agreed with the description of the essence of the business as being (at [20]):

"to provide two different services, that is marketing or promotional services to the Partner Insurer and aggregation services to the Westinsure Brokers."

(12) Mr Southern is recorded as summarising Westinsure's business as follows (at [26]):

"the organisation of co-operation between insurance providers and insurance brokers to facilitate the insurance business of both and enhance the effective working of the insurance market by enabling buyers of insurance to obtain good value."

The FTT described this as wholly consistent with the findings of fact they had made.

4. At [82] the FTT set out Mr Southern's summary of the key elements of Westinsure's business which he relied on to show that Westinsure was providing the services of an insurance intermediary, as follows:

"(1) Establishing structures so that insurers and brokers can do business with each other;

(2) Providing access to Lloyd's brokers either via Partner Insurers or though Westinsure itself;

(3) Assisting in the administration of the insurance business carried on by Westinsure Brokers, for example through visits by Westinsure business development managers;

(4) Bringing together Partner Insurers and Westinsure Brokers;

(5) Preselecting brokers for eligibility to participate in the arrangements made with Partner Insurers;

(6) Maintaining a continuing dialogue between Partner Insurers and Westinsure Brokers at events such as roadshows and the annual exhibition organised for both sides to participate in;

(7) Allowing Westinsure Brokers to provide wholesale brokering services to other Westinsure Brokers;

(8) Facilitating access to and acceptance by a wider range of insurers, which would not otherwise be possible for a Westinsure Broker to achieve on its own; and

(9) Creating synergies by putting insurer contacts in touch with broker contacts."

The FTT accepted that all these features were borne out by the findings of fact that they had made.

The legislation

5. I have already set out art 135.1(a) of the VAT Directive which requires Member States to exempt certain insurance-related transactions, and the second limb of which refers to 'related services provided by insurance brokers and insurance agents.'

6. The VAT Directive contains no definition of 'insurance broker' or 'insurance agent', but it is an established principle that in construing a directive one may look for assistance to a directive dealing with a related subject matter, and Council Directive 77/92/EEC (**"the Insurance Directive"**) is of some assistance: *Century Life plc v Customs and Excise Commissioners* [2001] STC 38 (***"Century Life"***) at [12] per Jacob J. The Insurance Directive was not concerned with VAT, but was a transitional directive relating to the freedom of establishment and freedom to provide services in relation to insurance brokers and insurance agents. Art 2.1 provided that it applied to the following activities:

"(a) professional activities of persons who, acting with complete freedom as to their choice of undertaking, bring together, with a view to the insurance or reinsurance of risks, persons seeking insurance or reinsurance and insurance or reinsurance undertakings, carry out work preparatory to the conclusion of contracts of insurance or reinsurance and, where appropriate, assist in the administration and performance of such contracts, in particular in the event of a claim;

(b) professional activities of persons instructed under one or more contracts or empowered to act in the name and on behalf of, or solely on behalf of, one or more insurance undertakings in introducing, proposing and carrying out work preparatory to the conclusion of, or in concluding, contracts of insurance, or in assisting in the administration and performance of such contracts, in particular in the event of a claim;

(c) activities of persons other than those referred to in (a) and (b)

> who, acting on behalf of such persons, among other things carry out introductory work, introduce insurance contracts or collect premiums, provided that no insurance commitments towards or on the part of the public are given as part of these operations."

Art 2.2 of the Insurance Directive then provided that it applied in particular to activities customarily described in the Member States as there listed, and the descriptions for the UK of the activities referred to in paragraphs (a), (b) and (c) were given as 'insurance broker', 'agent' and 'sub-agent'. It is not therefore surprising that in *Century Life* Jacob J said (at [12]) that the Insurance Directive:

> "can and does help in providing some idea of how to identify an 'insurance broker' or 'insurance agent'."

7. However even in the absence of authority (which I come to below) one can see that one should be cautious about treating the activities listed in art 2.1(a) and (b) of the Insurance Directive as if they were definitions of 'broker' and 'agent' for the purposes of the exemption in art 135 of the VAT Directive. Although the words used in the English text of art 135 of the VAT Directive correspond with the descriptions in the Insurance Directive, Mr Southern showed me various other language versions of the VAT Directive which demonstrate that this is not always the case. In some cases it is: thus the German language version of the VAT Directive has 'von Versicherungsmaklern und –vertretern' which corresponds with the descriptions in art 2.2 of the Insurance Directive for Germany ('Versicherungsmakler' and 'Versicherungsvertreter'). But in other cases it is not: the French and Italian versions of the VAT Directive have 'par les courtiers et les intermédiaires d'assurance' and 'dai mediatori e dagli intermediari di assicurazione' respectively, whereas the descriptions in the art 2.2 of the Insurance Directive under paragraphs (a) and (b) are, for France, 'courtier d'assurance' and 'agent général d'assurance', and for Italy 'mediatore di assicurazioni' and 'agente di assicurazioni'. It is clear therefore that the coincidence of terms in the English texts between the two directives is not matched by a similar coincidence in all versions. It is well established that in principle each version is equally authoritative: see eg *R v Commissioners of Customs and Excise ex parte EMU Tabac SARL* (Case C-296-95) [1998] ECR 1-1605 at [36].

8. The Insurance Directive was replaced by Council Directive 2002/92/EC on insurance mediation (**"the Insurance Mediation Directive"**), which takes a different form. Instead of describing activities and referring to the customary description of them in the different Member States, it uses the generic term 'insurance intermediaries', a term that is defined in art 2.5 as meaning:

> "any natural person who, for remuneration, takes up or pursues insurance mediation."

Insurance mediation itself is defined in art 2.3 as follows:

> "the activities of introducing, proposing, or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim.
>
> These activities when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking shall not be considered as insurance mediation.
>
> The provision of information on an incidental basis in the context of another professional activity provided that the purpose of that activity is not to assist the customer in concluding or performing an insurance contract, the management of claims of an insurance undertaking on a professional basis, and loss adjusting and expert appraisal of claims shall also not be considered as insurance mediation."

9. Thus although it is clear that the directive is intended to cover brokers and agents (Recital (9) says that various types of persons or institutions "such as agents, brokers and 'bancassurance' operators" can distribute insurance products and should all be covered by the directive), it is by no means obvious that the persons covered by the directive are precisely the same as those entitled to the insurance exemption in art 135.1(a) of the VAT Directive, and it cannot be safely assumed that the definition of 'insurance mediation' found in art 2.1 of the Insurance Mediation Directive can be used as if it were synonymous with the services of an 'insurance broker or insurance agent' in the VAT Directive.

10. The relevant UK legislation is the Value Added Tax Act 1994 (**"VATA"**). By s. 30(1) VATA a supply of goods or services is an exempt supply if it is of a description specified in sch 9. Sch 9, Part II, Group 2 (Insurance) specifies:

> "Item No.
>
> 1. Insurance transactions and reinsurance transactions.
>
> 4. The provision by an insurance broker or insurance agent of any of the services of an insurance intermediary in a case in which those services—
>
> (a) are related (whether or not a contract of insurance or reinsurance is finally concluded) to an insurance transaction or a reinsurance transaction; and

(b) are provided by that broker or agent in the course of his acting in an intermediary capacity."

Item No. 4 has to be read with the Notes, of which Notes 1 and 2 are as follows:

"*Notes:*

(1) For the purposes of item 4 services are services of an insurance intermediary if they fall within any of the following paragraphs—

(a) the bringing together, with a view to the insurance or reinsurance of risks, of—

(i) persons who are or may be seeking insurance or reinsurance, and

(ii) persons who provide insurance or reinsurance;

(b) the carrying out of work preparatory to the conclusion of contracts of insurance or reinsurance;

(c) the provision of assistance in the administration and performance of such contracts, including the handling of claims;

(d) the collection of premiums.

(2) For the purposes of item 4 an insurance broker or insurance agent is acting 'in an intermediary capacity' wherever he is acting as an intermediary, or one of the intermediaries, between—

(a) a person who provides insurance or reinsurance, and

(b) a person who is or may be seeking insurance or reinsurance or is an insured person."

11. But although I was referred to the text of VATA, it was not suggested, either by Mr Southern or by Miss Mitrophanous, who appeared for HMRC, that it is anything other than in conformity with the VAT Directive. The ultimate question therefore is whether Westinsure's supply of services to its broker members is exempt under art 135.1(a) of the VAT Directive and it is sufficient for the most part to concentrate on the text of the VAT Directive.

Authorities

12. I was helpfully referred to a number of authorities, both European and domestic. I propose to deal with these under the following heads: (a) general principles; (b) cases in the European Court of Justice (**"ECJ"**) directly concerning the insurance exemption; and (c) certain of the domestic cases concerning the insurance exemption. I was also referred to a number of cases concerning exemptions from VAT for certain financial transactions, by way of analogy: I will deal with those separately as appropriate.

General principles

13. *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën* Case C-348/87 [1989] ECR 1737 concerned another exemption from VAT then contained in art 13 of the Sixth Directive. I was referred to it for two principles which are settled law and reiterated in most if not all of the ECJ cases referred to below. The first (at [13]) is that the exemptions laid down in the VAT Directive:

> "are to be interpreted strictly since they constitute exceptions to the general principle that turnover tax is levied on all services supplied for consideration by a taxable person."

(See also *Stichting 'Goed Wonen' v Staatssecretaris van Financiën* (Case C-326/99) [2003] STC 1137 at [46] which is to the same effect.) The second principle (at [11]) is that:

> "the exemptions constitute independent concepts of Community law"

or, as it often put, that they are to be given an autonomous meaning, the purpose being to avoid divergences in the application of the VAT system from one Member State to another (see *Card Protection Plan Ltd v Customs & Excise Commissioners* (Case C-349/96) [1999] STC 270 (***"CPP"***) at [15]).

14. Mr Southern also referred me to *Expert Witness Institute v Customs & Excise Commissioners* [2001] EWCA Civ 1882, [2002] STC 42 which concerned an exemption for organisations with 'aims of a … civic nature', and in particular to the judgment of Chadwick LJ at [16]-[18] where he explains that the requirement to construe phrases conferring exemption from VAT strictly does not mean that the Court has to give them the most restricted or narrow construction possible. A 'strict' construction is not to be equated with a restricted construction; and if a claim comes within a fair interpretation of the words, it is not to be rejected simply because a narrower construction is possible. 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 are used. 'Aims of a civic nature' therefore included aims pertaining to citizenship and was not to be confined to aims of a municipal nature.

The insurance exemption – ECJ cases.

15. I was referred to a number of decisions of the ECJ specifically on the insurance exemption. In date order they are: *CPP*; *Re Försäkringsaktiebolaget Skandia (publ)* (Case C-240/99) [2001] STC 754 (***"Skandia"***); *Assurandør-Societetet obo Taksatorringen v Skatteministeriet* (Case C-8/01) [2006] STC 1842 (***"Taksatorringen"***); *Staatssecretaris van Financiën v Arthur Andersen & Co Accountants c s* (Case C-472/03) [2005] STC 508 (***"Arthur Andersen"***); and *JCM Beheer BV v Staatssecretaris van Financiën* (Case C-124/07) [2008] STC 3360 (***"Beheer"***).

16. *CPP* was the first case in which the ECJ was asked to interpret the insurance exemption, then contained in art 13B(a) of the Sixth Directive. CPP offered credit card holders a card protection plan which included protection against financial loss arising from the loss or theft of their cards. CPP procured insurance against such loss from an insurer under a block policy which named the cardholders as insureds. The ECJ held that the services supplied by CPP to the cardholders were exempt under the first limb as 'insurance transactions', this expression being broad enough to include the provision of insurance cover by a person who is not himself an insurer but who procures such cover for his customers: [22]. The ECJ did not therefore consider the second limb of the insurance exemption ('related services performed by insurance brokers and insurance agents') and the judgment is not directly in point.

17. However the Advocate General (Fennelly), who had in his opinion rejected the view that the supplies by CPP were insurance transactions, did consider the second limb. He said that the expression 'related services' was broad enough to include any services that might be related to insurance and that the crucial issue was whether CPP might be regarded as having acted as an insurance agent or broker: [31]. He said that the authors of the Sixth Directive had chosen to refer separately to 'insurance agents' and 'insurance brokers' rather than using a more general term such as 'insurance intermediaries' and that in his view they thereby described persons:

> "whose named professional activity comprises the bringing together of insurance undertakings and persons seeking insurance."

He added (at [32]) that:

> "The limitation of the exemption of 'related services' to 'insurance brokers' and 'insurance agents' would be deprived of any meaning if any intermediary whatever which is incidentally involved in arranging insurance ipso facto came within the definition."

Thus although he accepted (at [31]) that CPP would appear to have played an intermediary role, related to the provision of insurance, between the insurer and CPP's customers, his view was that CPP could not be regarded as an agent or broker since:

> "its usual business does not seem to be that of an insurance broker or agent in the strict sense."

18. *Skandia* concerned a Swedish insurance company, Skandia. It had a wholly-owned subsidiary, Livbolaget, which, as its name suggests, was engaged in life assurance. Under a planned merger of their operations, it was intended that Livbolaget's staff would transfer to Skandia and Skandia would then conduct all of Livbolaget's business operations (selling insurance, settling claims, calculating actuarial forecasts and capital management) in return for a fee. But Skandia would not take on any liability under the policies which would remain with Livbolaget. In other words it would be providing administrative and management services to Livbolaget to enable Livbolaget to run its business; it would not be running the business as insurer itself. Skandia argued that this supply of services was exempt as an insurance transaction. The ECJ disagreed: an insurance transaction necessarily implies the existence of a contractual relationship between the provider of the insurance services and the insured, but Skandia would have no contractual relationship with the persons insured with Livbolaget: [40]-[41]. The ECJ did not consider the second limb of art 13B(a), Skandia having accepted in the Swedish proceedings that the service which it planned to provide to Livbolaget did not constitute related services which would be performed by an insurance agent or broker: [20].

19. Again however the Advocate General (Saggio) did say something about the second limb. He said ([19]) that:

> "Skandia cannot be regarded as a broker or as an agent, since it had no legal relationship with the insured, that is to say – to all intents and purposes – with Livbolaget's clients."

In a footnote to this passage he referred to the Insurance Directive and a Commission recommendation dating from 1991 and said:

> "From these texts it can be seen that, as a general rule, the business engaged in by brokers and agents entails putting insurance companies in touch with potential clients for the purpose of concluding insurance contracts, or bringing insurance products to the attention of the general public or even the collection of premiums. In all cases, however, it is clear that such business is characterised by a direct relationship with the insured."

At [27] he said that the services that Skandia planned to provide to Livbolaget could at most be regarded as a supply of services related to insurance transactions but that such activities were only exempt if provided by insurance brokers or agents and reiterated that Skandia did not fall into either category.

20. *Taksatorringen* concerned a Danish association, Taksatorringen, established by small and medium-sized insurance companies to assess damage caused to

motor vehicles insured under their policies. Taksatorringen claimed exemption from the provision of these services to its members under both limbs of the insurance exemption. The ECJ rejected both claims. So far as the first limb was concerned, the supply of services was not an insurance transaction as Taksatorringen did not have any contractual relationship with the insured parties: [42]. So far as the second limb was concerned, the ECJ said ([44]):

> "As to whether such services are 'related services performed by insurance brokers and insurance agents', it must be stated, as the Advocate General has set out in para 86 of his opinion, that this expression refers only to services provided by professionals who have a relationship with both the insurer and the insured party, it being stressed that the broker is no more than an intermediary."

21. This refers back to the view of the Advocate General (J Mishco) who had accepted the arguments put forward against Taksatorringen's submissions. These arguments were found in the submission of the Danish Government to the effect that the services must be provided by a party "who is an intermediary between the insurance company and the insured", and that the nature of a broker is that "its activities comprise the bringing together of insurance companies and persons seeking insurance" ([79]-[80]); and the similar submission of the UK Government that the activities which distinguish the undertaking of an insurance agent or broker are "the bringing together of insurance companies and persons seeking insurance," and having "a direct relationship with the insured" ([84]). The Advocate General said (at [86]):

> "I am of the opinion that the weight of these arguments against Taksatorringen's submissions is sufficient to dispose of the matter. Even if art 13B(a) of the Sixth Directive is not particularly well drafted, in that it distinguishes between insurance brokers and insurance agents, whereas a broker is truly an insurance agent in that his task is to act on behalf of a person seeking insurance in finding an insurance company that will offer cover exactly suited to his needs, it remains clear that this provision applies only to services provided by those professionals who had a relationship with both the insurance company and the person seeking insurance"

and (at [87]) that Taksatorringen itself did not contend that it had any kind of relationship with insured persons:

> "in other words it does not claim to act as an intermediary."

22. At [88]-[91] he dealt with an argument by Taksatorringen based on the wording of the Insurance Directive. Although expressing some reservation as to whether a directive concerning VAT should necessarily be interpreted in the light of a directive relating to the free movement of persons, he considered the text of art 2.1(a) and (b) but said they did not support Taksatorringen's

submissions. Although both art 2.1(a) and (b) referred to 'assist[ing] in the administration and performance of such contracts, in particular in the event of a claim', para (a) only applied where this was in conjunction with the activities distinctive of the carrying on of the business of an insurance broker, namely:

> "the bringing together of insurers and persons seeking insurance and the preparation of contracts"

and para (b) only applied where the agent was acting in the context of a contract or authority to act on behalf of insurance undertakings. The ECJ accepted this view in its entirety: see judgment at [45].

23. *Arthur Andersen* concerned an arrangement under which an Arthur Andersen entity, ACMC, contracted with a Dutch life assurance company, UL, to perform various 'back office' activities for UL. These included the acceptance of applications for insurance, the issue and administration of, and amendments to, policies, the management of claims, the fixing and payment of commission to insurance agents, and the provision of information and reports to UL, insurance agents, insured parties and others. Save where a medical examination was necessary (in which case UL itself decided whether to accept the risk), ACMC could take the decision to accept an application and thereby bind UL; and it was responsible for almost all of the daily contacts with intermediaries: see ECJ judgment at [10]. The reference concerned ACMC's claim to exemption under the second limb of the insurance exemption on the ground that it was acting as insurance agent (the Dutch court having correctly considered, in the light of *Skandia*, that ACMC's activities did not constitute insurance transactions: see ECJ judgment at [22]).

24. The ECJ rejected the claim. Although ACMC's staff were skilled in life assurance and its activities were related to insurance transactions, these two factors were, as ACMC accepted, insufficient by themselves to make ACMC an insurance agent. It was necessary to assess whether the activities in question corresponded with those of such an agent: [26]-[27]. The existence of a power to render the insurer liable was not the determining criterion for recognition as an insurance agent: that presupposed an examination of what the activities in question comprise: [32]. Having examined those activities, the ECJ concluded that they did not constitute services that typify an insurance agent: [34]. Specific aspects of the services, such as the setting and payment of commission for insurance agents, and the supply of information to them, clearly were not part of the activities of an insurance agent: [35]. And at [36] the ECJ said:

> "Furthermore as the Commission of the European Communities stated in its written observations and as the Advocate General pointed out in para 32 of his opinion, essential aspects of the work of an insurance agent, such as the finding of prospects and their introduction to the insurer, are clearly lacking in the present case. It is apparent from the order for reference – and the defendant has not disputed – that the

> activity of ACMC starts only when it handles the applications for insurance sent to it by the insurance agents through whom UL seeks prospects in the Netherlands life assurance market."

The services which ACMC carried out for UL were "to assist it in the tasks inherent in its insurance activities" or "a form of co-operation in assisting UL, for payment, in the performance of activities which would normally be carried out by it." Such activities constituted "a division of UL's activities and not the performance of services carried out by an insurance agent (see, by analogy, *CSC Financial Services Ltd v Customs and Excise Comrs* (Case C-235/00) [2002] STC 57, para 40)." [37]-[38].

25. The Advocate General (M Poiares Maduro), following the ECJ in *Takstorringen* at [45], said that the concepts of insurance broker and agent should not automatically be interpreted in the same way in the VAT context and the Insurance Directive, and that one should not conclude that a person who carried out one of the activities in art 2.1(b) of the Insurance Directive was automatically an insurance agent. It was more worthwhile to turn to the definition given by the ECJ in *Taksatorringen*: [22]-[23]. This required a relationship with both the policyholder and the insurance company [24]. He examined the relationship that ACMC had with the policyholders saying (at [28]) that:

> "the decisive aspect, in my view, lies in the fact that a relationship between an insurance agent and a policyholder necessarily implies the existence of an agent's *own* declarations, adopted *as such* and addressed to the policyholder before whom he presents himself as an insurance agent acting on behalf of and possibly in the name of the insurer."

In a footnote, he points out that an agent may communicate with policyholders through third parties who pass on his declarations to the policyholders; this indirect relationship should not mean he ceases to be an insurance agent for the purposes of the VAT Directive.

26. The reference in the ECJ's judgment to para 32 of his opinion was to a passage where he referred to the business of distribution of insurance products "which necessarily presupposes that the intermediary engages actively in finding and introducing customers and insurers" and concluded:

> "Without prejudice to a finding by the referring court, it seems that ACMC is not engaged in such an activity, even when it accepts in the name of UL the applications for life assurance contracts addressed to the latter company by potential policy holders."

27. The reference in the ECJ's judgment to para 40 of *CSC Financial Services Ltd v Customs and Excise Comrs* (Case C-235/00) (***"CSC"***) is to a case concerning another VAT exemption, in this case art 13B(d)(5) of the Sixth

Directive, under which Member States were obliged to exempt "transactions, including negotiation, excluding management and safe-keeping, in shares, interests in companies or associations, debentures and other securities …". CSC operated a call centre on behalf of Sun Alliance and handled all communications with the public in relation to one of Sun Alliance's investment products, the Daisy PEP. It gave members of the public information about the PEP, supplied them with application forms, and processed applications and cancellation requests. The ECJ held that the services which CSC provided to Sun Alliance were neither 'transactions in securities' (which referred to transactions liable to create, alter or extinguish parties rights or obligations in relation to securities [33]) nor 'negotiation in securities'.

28. In relation to negotiation the ECJ said at [39]-40]:

> "39. It is not necessary to consider the precise meaning of the word 'negotiation', which also appears in other provisions of the Sixth Directive … in order to hold that in the context of art 13B(d)(5), it refers to the activity of an intermediary who does not occupy the position of any party to a contract relating to a financial product, and whose activity amounts to something other than the provision of contractual services typically undertaken by the parties to such contracts. Negotiation is a service rendered to, and remunerated by a contractual party as a distinct act of mediation. It may consist, among other things, in pointing out suitable opportunities for the conclusion of such a contract, making contact with another party or negotiating, in the name of and on behalf of a client, the detail of the payments to be made by either side. The purpose of negotiation is therefore to do all that is necessary in order for two parties to enter into a contract, without the negotiator having any interest of his own in the terms of the contract.
>
> 40. On the other hand, it is not negotiation where one of the parties entrusts to a sub-contractor some of the clerical formalities related to the contract, such as providing information to the other party and receiving and processing applications for subscription to the securities which form the subject-matter of the contract. In such a case, the sub-contractor occupies the same position as the party selling the financial product and is not therefore an intermediary who does not occupy the position of one of the parties to the contract, within the meaning of the provision in question."

29. *Beheer* concerned a Dutch company, Beheer, which acted as a sub-agent for another company, VDL. VDL itself acted as insurance agent, concluding insurance contracts in the name of insurance companies. Beheer acted on VDL's behalf in concluding such contracts, processing transfers of policies,

issuing policies, paying commissions and providing information to the insurance companies and policyholders. VDL remunerated it by paying it a commission equivalent to 80% of the commission it itself received from insurance companies. Beheer claimed exemption under the second limb of art 13B(a) of the Sixth Directive. The ECJ held that it was entitled to the exemption. It did so without requiring an opinion from the Advocate General, which indicates that it considered that the case raised no new point of law: art 20 of the Protocol on the Statute of the Court of Justice.

30. The ECJ said that recognition of a person as an insurance broker or agent presupposed an examination of its activities: [17]. The activities carried out by Beheer were unquestionably the characteristic activities of an insurance broker or agent: [18]. The Netherlands Government argued, on the basis of *Taksatorringen*, that it was necessary for a broker or agent to have a relationship with both insurer and insured and that Beheer did not have any relationship with the insurers, its relationship being with VDL: [20]-[21]. The ECJ however rejected this: *Taksatorringen* said nothing about the nature of the relationship with the parties and Beheer's indirect relationship with the insurers was sufficient [24]-[26]. Its answer to the question referred was ([29]):

> "art 13B(a) of the Sixth Directive must be interpreted as meaning that the fact that an insurance broker or agent does not have a direct relationship with the parties to the insurance or reinsurance contract in the conclusion of which he has been instrumental but merely an indirect relationship with them through the intermediary of another taxable person who is, himself, in a direct relationship with one of those parties, and to whom the insurance broker or agent is contractually bound does not prevent the service provided by the latter from being exempt from VAT under that provision."

31. Before coming to the domestic cases, I will try and summarise what seem to me the principles to be derived from these decisions:

(1) In order to come within the second limb of the insurance exemption the services have to be provided by an insurance agent or insurance broker.

(2) To determine whether the taxpayer is an insurance agent or insurance broker, it is necessary to examine its activities: *Arthur Andersen* at [32], *Beheer* at [17] (pargraphs 24, 30 above). Such examination may show that the services provided by the taxpayer do not constitute 'services that typify an insurance agent' (as in *Arthur Andersen*); or conversely may show that the services are 'the characteristic activities of an insurance broker or agent' (as in *Beheer*). In other words if you want to know whether a person providing services is an insurance agent or broker, you have to look and see whether what they are doing is what an insurance broker or agent typically or characteristically does.

(3) The ECJ has given various guidance as to what an insurance broker or agent does. The description of the activities in the Insurance Directive is of some assistance but should not be automatically assumed to be directly applicable to the VAT Directive. An insurance broker or agent is a professional who has 'a relationship with both the insurer and the insured, the broker [being] no more than an intermediary' (*Taksatorringen* at [44] – paragraph 20 above); essential aspects of the work of an insurance agent include 'the finding of prospects and their introduction to the insurer' (*Arthur Andersen* at [36] – paragraph 24 above); an intermediary 'engages actively in finding and introducing customers and insurers' (Advocate General M Poiares Maduro in *Arthur Andersen* at [32], endorsed by the ECJ at [36] – paragraph 26 above).

(4) More guidance is given by the Advocates General even if not expressly endorsed by the ECJ. Thus Advocate General Fenelly in *CPP* said that insurance brokers and agents describe persons whose professional activity 'comprised the bringing together of insurance undertakings and persons seeking insurance' (at [31]), a phrase picked up in the submissions of the Danish and UK Governments and accepted by Advocate General J Mischco in *Taksatorringen* at [79]-[86] (paragraphs 17, 21 above). Advocate General Saggio in *Skandia* said that the business engaged in by brokers and agents 'entails putting insurance companies in touch with potential clients for the purpose of concluding insurance contracts, or bringing insurance products to the attention of the general public or even the collection of premiums' (paragraph 19 above). Advocate General M Poiares Maduro in *Arthur Andersen* referred to the relationship between an insurance agent and a policyholder necessarily implying 'the existence of an agent's own declarations, adopted as such and addressed to the policyholder before whom he presents himself as an insurance agent acting on behalf of and possibly in the name of the insurer' (paragraph 25 above).

(5) The role is further elucidated by the analogy of 'negotiation'. Negotiation is a 'distinct act of mediation' by an intermediary 'who does not occupy the position of any party to a contract'; it may consist in 'pointing out suitable opportunities for the conclusion of such a contract, making contact with another party or negotiating, in the name of and on behalf of a client, the detail of payments to be made', the purpose being to 'do all that is necessary in order for two parties to enter into a contract without the negotiator having any interest of his own in the terms of the contract' (*CSC* at [39] – paragraph 28 above).

(6) It is not however negotiation where a contracting party subcontracts part of its business to a sub-contractor who thus 'occupies the same position as the party … and is not therefore an intermediary who does not occupy the position of one of the parties to the contract' (*CSC at* [40] – paragraph 28 above).

(7) This explains why it was rightly accepted that Skandia was not an insurance broker or agent, and why it was held that Arthur Andersen was not an agent. In each case Skandia and Arthur Andersen were effectively occupying the position of the insurer (Livbolaget and UL respectively), and carrying out the insurer's activities for it, not performing distinct acts of mediation between the insurer and insured. It also explains why Taksatorringen was not an insurance agent: it too was acting solely for the insurer and had no kind of relationship with the insured persons.

(8) On the other hand Beheer, who was also a sub-contractor, did qualify as an insurance agent. It was not occupying the position of one of the parties to the contract but was a sub-contractor for VDL which was itself an agent. And although in *Skandia* Advocate General Saggio had referred to the need for a 'direct relationship' with the insured, *Beheer* establishes that an indirect relationship with one of the parties is sufficient.

The insurance exemption – domestic cases

32. I was also referred to a number of domestic authorities on the insurance exemption. There are two decisions of the Court of Appeal, of which I have already referred briefly to *Century Life*. In that case an insurance company, Lincoln, outsourced its pensions mis-selling review to Century Life, and the issue was whether the services supplied by Century Life to Lincoln were exempt as being services provided by an insurance agent. The Court of Appeal held that they were: it was not disputed that Century Life's own business was properly characterised as that of 'insurance agent' ([4]), and hence the services were provided by an insurance agent. This decision pre-dates all the ECJ decisions except *CPP* and there may be some doubt whether its reasoning, or the result, is consistent with the later decisions. In particular it may be that the activities Century Life was carrying out were not activities characteristic of an insurance agent, but were rather more like the back office activities carried out by ACMC in *Arthur Andersen*. But it is not necessary for me to consider this as it is not directly in point.

33. I was however specifically referred to what Jacob J (who gave the only reasoned judgment) said about 'related services'. Jacob J at [15] referred to the principle that exemptions are construed strictly or narrowly, and said:

> "Applying that, one can say that if a service is only remotely or incidentally connected with an insurance transaction it is not 'related to' it; there must also be a close nexus between the service and the insurance transaction concerned. So, for example, if an insurance agent supplies secretarial or general computer services to an insurance company, the exemption would not apply. Those services would only be incidental to insurance transactions."

This may be contrasted with what Advocate General Fennelly said in *CPP* (the ECJ itself does not appear to have expressed any views on the phrase 'related services') at [31]:

> "the expression 'related services' is broad enough to include any services that may be regarded as related to the provision of insurance."

34. The other decision of the Court of Appeal is *InsuranceWide.com Services Ltd v Revenue and Customs Commissioners* [2010] EWCA Civ 422 (***"InsuranceWide"***). This concerned claims by two taxpayers to exemption under the second limb of the insurance exemption. In each case the taxpayer's website had a facility where customers seeking insurance could be directed to quotes for insurance. Etherton LJ, who gave the leading judgment, considered the ECJ cases that I have already referred to. At [80] he said this of *Beheer*:

> "I agree with Ms Sloane [counsel for the taxpayer] that *Beheer* marks an important shift in the jurisprudence of the ECJ. The earlier cases indicate that a vital characteristic of an insurance broker or an insurance agent within art 13B(a) is a direct relationship with both the insurer and the insured or at any rate with the insured. I agree with Ms Sloane that *Beheer* shows that, while there is a need to exercise the characteristic functions of an agent or broker, what is not required is a direct legal relationship with both or either of the ultimate parties, namely the insurers and those seeking insurance. It is sufficient that the insurance agent or insurance broker is carrying out a vital intermediary role in a chain of intermediaries."

35. At [85] Etherton LJ set out the principles applicable to the interpretation of the second limb of the insurance exemption, referred to by him as 'the Insurance Intermediary Exemption', as follows:

> "(1) The Insurance Intermediary Exemption should be interpreted so far as possible, consistently with its terms, in a way that reflects the jurisprudence of the ECJ and the United Kingdom's obligations under the Sixth Directive and the 2006 VAT Directive. To do otherwise would, as Ms Foster pointed out, risk infraction of EU legislation by the United Kingdom.
>
> (2) The exemption in art 13B(a) must be interpreted strictly since it constitutes an exception to the general principle that VAT is to be levied on all services supplied by a taxable person. This does not mean, however, that the words and expression in art 13B(a) and the Insurance Intermediary Exemption are to be given a particularly narrow or restricted interpretation. It is for the supplier to establish that it and its activities come within a fair interpretation of the words of the exemption.

(3) The exemption for "related services" under art 13B(a) only applies to services performed by persons acting as an insurance broker or an insurance agent. Although those expressions are not defined by EU legislation, they are independent concepts of Community law which have to be placed in the general context of the common system of VAT.

(4) Whether or not a person is an insurance broker or an insurance agent, within art 13B depends on what they do. How they choose to describe themselves or their activities is not determinative.

(5) The definitions of "insurance broker" and "insurance agent" in the Insurance Directive are relevant to the meaning of the same expressions in art 13B(a) to the extent, but only to the extent, that they should be taken into consideration as reflecting legal reality and practice in the area of insurance law. It is not necessary, in order to invoke the exemption in art 13B(a), for the taxpayer to perform precisely the description of activities in art 2(1)(a) or (b) of the Insurance Directive.

(6) On the other hand, the mere fact that a person is performing one of the activities described in art 2(1)(a) or (b) of the Insurance Directive or the definition of "insurance mediation" in the Insurance Mediation Directive does not automatically characterise that person as an insurance agent or an insurance broker for the purposes of art 13B(a).

(7) It is an essential characteristic of an insurance broker or an insurance agent, within art 13B(a), that they are engaged in the business of putting insurance companies in touch with potential clients or, more generally, acting as intermediaries between insurance companies and clients or potential clients.

(8) It is not necessary, in order to claim the benefit of the exemption in art 13B(a), for a person to be carrying out all the functions of a insurance agent or broker. It is sufficient if a person is one of a chain of persons bringing together an insurance company and a potential insured and carrying out intermediary functions, provided that the services which that person is rendering are in themselves characteristic of the services of an insurance agent or broker.

(9) All the above principles are capable of being applied, and must be applied, to the Insurance Intermediary Exemption in Schedule 9 to VATA 1994."

36. On the facts of the appeals before the court, Etherton LJ concluded that the taxpayers were entitled to the exemption. HMRC's case was that they merely

provided a 'click-through' service but Etherton LJ held that it was plain that they were doing much more than that [86]:

> "They identified, and provided those looking for insurance with access to, insurers who provided a range of competitive insurance products. In both cases the evidence indicated that the insurers were appraised and selected bearing in mind the competitiveness of their pricing and products and their level of consumer service. In the post-Wizard phases, InsuranceWide provided those seeking insurance with a means of directing them most effectively and efficiently to the most appropriate insurers, whether directly or through another intermediary, to match their requirements. In the case of Trader Media the evidence was that it not only had an input into the questions to be answered by those seeking insurance, but, importantly, it made suggestions for the composition of the insurance panel based on its understanding of the experience and demographics of the consumers and with a view to providing customers with insurers who would quote competitive prices. Neither of them were, as Ms Sloane emphasised, a mere "conduit". Their relevant activities can fairly be described as the business of bringing together insurers and those seeking insurance, by contrast with the taxpayers in *Skandia*, *Taksatorringen* and *Arthur Andersen*, who were sub-contractors."

37. Longmore LJ gave a short concurring judgment in which he said (at [99]):

> "In these circumstances it is necessary to ascertain an autonomous European law meaning for the terms insurance broker and insurance agent. I agree with my Lord's analysis of the authorities and his conclusion (at [86]) that the activities of an insurance broker or agent can fairly be described as the business of bringing together insurers and those seeking insurance…"

And at [100] he referred to the fact that the taxpayers had disclaimed any responsibility and in InsuranceWide's case asserted that it was not a broker, agent or intermediary and said:

> "But once one accepts, (as one must) the shift in the ECJ jurisprudence marked by [*Beheer*] to the effect that, provided the relevant company carries out an intermediary role of broker or insurance agent in a chain of intermediaries, then the broker or insurance agent may have no legal relationship with an end-user at all, it must follow that the mere disclaimer of a relationship cannot be legally significant in considering the claim for exemption."

38. The result in that case can be contrasted with the more recent decision in *Royal Bank of Scotland v Revenue and Customs Commissioners* [2012] EWHC 9 (Ch) (***"RBS"***). There an insurance company, Prudential, transferred

its general business to another company, Winterthur, who in turn transferred it to a company in the RBS group, UKI. Winterthur, and later UKI, paid Prudential commissions on renewals of policies, and other policies resulting from leads generated by the use of the Prudential name. Prudential claimed exemption from VAT on the ground, among other things, that it was providing related services as a broker or agent. Mann J dismissed its appeal from the VAT Tribunal refusing the exemption.

39. Having said that there was no real suggestion that Prudential acted as an insurance agent, so the concept of broker was the important one, Mann J set out certain important features emerging from the authorities as follows (at [45]):

> "(i) For a person to qualify as a broker there must be more than some mechanical or quasi-mechanical act of reference as between the would-be insured and the insurer. In paragraph 86 of his judgment Etherton LJ contrasted the situation in his case with that of a "mere conduit". The latter would not be broker – not enough is done. The reference to a "click through" facility is to the same effect – if all that happened was that the website owner provided a button to click, as a result of which the viewer was transferred to the insurer, and there was no greater input than that, then the owner would not (it seems) have done enough to be a broker.
>
> (ii) So something else is required. One of those things is that it is the business, or part of the business, of the person in question to provide services of an intermediary – in the words of Etherton LJ, they are "engaged in the business of putting insurance companies in touch with potential clients"; and "providing services … vital to the process of introducing those seeking insurance with insurers …". Thus the mechanical routing of inquiries does not count; and there has to be an element of conducting business about the services or facilities provided. To the same effect is the judgment of Longmore LJ – "the activities of an insurance broker or agent can fairly be described as the business of bringing together insurers and those seeking insurance" (para. 99).
>
> (iii) Those services have to have the quality of being those of an intermediary. Again, this is why mechanical conduit-like behaviour does not count. A mere conduit is not an intermediary. He does not do enough to qualify. It is not possible to identify a universal test for being an intermediary, but it is at least possible to identify what is not sufficient.
>
> (iv) Although it is probably only putting the same point in a different way, a person claiming the exemption must perform services

which are characteristic of the services of a broker. Those acts include "work preparatory to the conclusion of contracts of insurance" and assisting in the administration and performance of such contracts (see the legislation identified above).

(v) In making referrals, the broker should have freedom of choice as to the insurer to whom referrals are made."

40. In the light of those matters, Mann J held that the VAT Tribunal had been entitled, and probably obliged, to reject Prudential's claim. At [48] he said this:

> "When seeing if Prudential was doing the same sort of thing that a broker does one starts with a key distinction. A customer engaging with, or dealing through, a broker (or other intermediary) is likely to know that that person is an intermediary, or at least likely to know that that person is not the end insurer. Even the customers in InsuranceWide will have known that somehow they moved on from the website providers and had gone on to deal with someone else. Contrast the apparent position in this case. So far as the original renewals of Prudential general insurance policies were concerned, there is no relevant dealing at all between customer and Prudential. Prudential merely passes on the renewal information to UKI, who take it from there. There is nothing at all akin to the sort of approach that a customer makes to a broker. So far as Lead A customers are concerned, Prudential does nothing in relation to the individual customers in question except to provide a click-through facility on its website so that the customer is in fact looking at pages maintained on the Prudential website by UKI, until he clicks the "Buy" button when he enters UKI's own website. The parties did not fall over themselves to make sure that it was suddenly made apparent that the customer was not dealing with Prudential as soon as he clicked on to the first general insurance page. Nor is it apparent that he would suddenly have the realisation when he "Buys". That would have gone completely against the whole purpose of using the Prudential branding. So far as Leads B to D are concerned, there is no suggestion that Prudential made it clear to the customer that it was no more than an intermediary, and again it would seem to go against the purpose of the exploitation of the brand that it should do so. The customer has not approached Prudential as an intermediary. All this does not, in my view, amount to bringing the parties together, or amount to introducing them, as a broker does."

At [49] he said that the customer doubtless thinks it is approaching the insurance company for insurance, not a broker for broking purposes; and that in truth the customer is not receiving broking services:

"His/her inquiry is being passed on to another company which provides insurance that Prudential no longer provides. That is all, there is only the business of an insurer; there is no business of broking."

And at [50] he said:

"The other positive activities of Prudential, described above, do not stand in the way of that conclusion. Most of those activities have nothing to do with the introductions or the individual policies. An analysis of them reveals that they help to refine policy terms, to refine the marketing necessary to sell policies and to maintain the Prudential brand when it is applied to non-Prudential policies. If anything, they fall on the same side of the line as the activities in Arthur Andersen – they are the sort of activities that insurance companies do, not insurance brokers."

Submissions of Mr Southern

41. The conclusions of the FTT can be seen from the Decision at [89]-[90] and [94] as follows:

"89. Our characterisation of the services provided by Westinsure is that they prepare the ground in order to enable other market participants to intermediate and are too remote from the effecting of particular transactions to amount to the services of an insurance broker or insurance agent. The services provided by Westinsure undoubtedly assist both the Partner Insurers and the Westinsure brokers to develop their respective businesses and add clear value to those businesses. In respect of the Partner Insurers the essence of the services, as expressed in the specimen agreement we referred to in paragraph 18 above is marketing the Partner Insurers' services to the Westinsure Brokers. In respect of the Westinsure Brokers, the core obligation under the specimen we were provided with as referred to in paragraph 14 above was to grant access to the Partner Insurers and the specialist products that had been negotiated for the benefit of their clients on favourable terms.

90. We are therefore of the view that Mr Southern's analogy of Westinsure being a gatekeeper is apt. Westinsure is the gatekeeper of a facility that it has built and to which it controls access. Where we part company with Mr Southern is that in our view for the services that Westinsure provides to constitute the services of an insurance broker or insurance agent they would need to go further and actually enter the facility themselves, participating in the intermediary services that are conducted through the facility. In our view the services that Westinsure

> provides are more akin to the support services provided in *Arthur Andersen* or the services of the lawyer who assists an intermediary or insurer to carry out its business by drafting the policy terms that the insurer will use, or the terms of business which the broker will provide to his client than being acts of intermediation in themselves. While it is true that the insurer or broker could not effect transactions without policy wordings or terms of business, so in that sense transactions would not take place without them, there is not a sufficiently close connection to the transactions themselves that result.
>
> …
>
> 94. In the current case Westinsure undoubtedly does provide the services referred to in paragraph 93 above, namely the appraisal of insurers, which are characteristic of the services provided by an insurance broker or insurance agent but it does not do so as part of the transaction chain. It is this difference that distinguishes its services from that of an insurance broker or insurance agent and means that its services must be regarded as too remote from particular insurance transactions to enable it to benefit from the exemption."

42. Mr Southern advanced his criticisms of these conclusions under 5 heads, as follows:

    (1) The FTT should have classified Westinsure as an insurance intermediary.

    (2) The only true and reasonable conclusion from the facts is that the services Westinsure provides are insurance-related services.

    (3) For the FTT to classify Westinsure's services as 'administrative and support services' was irrational.

    (4) There is no judicial authority for the restriction on the type of related services which qualify for the exemption which the FTT relied on.

    (5) The result reached by the FTT does not accord with commercial realities.

    These submissions did not really match the four grounds of appeal set out in Westinsure's original application for permission to appeal but they form a useful framework in which to consider Westinsure's appeal, and I will deal with them in turn.

Submission (1) – was Westinsure an insurance intermediary ?

43. Mr Southern submitted that the primary question was whether Westinsure was

an 'insurance broker or agent' as that concept is understood as a matter of European law. I agree that this is the primary question.

44. Mr Southern said that the FTT had in fact at one point in the Decision found that Westinsure was an intermediary, but that overall the Decision was confused. This submission was based on the fact that at [84] the FTT had set out what he himself had said were four conditions which needed to be satisfied in order for Westinsure to qualify for the exemption, and at [88] the FTT said that in their view while the third condition was clearly satisfied the others were not. The third condition was as follows:

> "The intermediary must not himself be an insurer or purchaser of insurance. His business must have a distinct independent substance and he must be paid for his intermediary services: see *CSC,* paragraphs 39 to 39 [sic] and *Arthur Andersen*, paragraphs 33 of the Advocate General's opinion. Mr Southern submits that on the facts these conditions are clearly satisfied in the case of Westinsure."

45. I agree with Miss Mitrophanous that to regard the FTT's acceptance that this condition was fulfilled as a finding that Westinsure was an intermediary is a misreading of the Decision. It is tolerably clear from the Decision as a whole that the FTT was doing no more than saying that Westinsure was not itself an insurer or purchaser of services, that its business had a distinct independent substance, and that it was paid for its services. As I read the Decision, the FTT was not at this stage considering or deciding whether Westinsure was in fact an intermediary and it later said that its services were not 'acts of intermediation in themselves' [90].

46. In any event the question arising on the wording of the Directive is whether the services provided by Westinsure were provided by an 'insurance broker' or 'insurance agent', and the FTT clearly found that the services provided by Westinsure were too remote from the effecting of particular transactions to amount to the services of an insurance broker or insurance agent [89]; and that its services were to be distinguished from that of a insurance broker or agent [94].

47. Mr Southern's submissions ran together the concepts of insurance broker, insurance agent and insurance intermediary, suggesting that the ECJ had 'deformalised' the concepts in the legislation. He suggested that Westinsure came within the general phrase 'insurance brokers and insurance agents' and did not specify whether he was contending that Westinsure was a broker or an agent: rather he suggested that they were a sort of 'broker-agent' and an intermediary. He pointed to the fact that the French and Italian versions of the VAT Directive used words such as 'intermédiaires' and 'intermediari'; and that VATA referred in Item 4 to the services of an intermediary.

48. I think one should be careful about treating the phrase 'insurance brokers and insurance agents' in art 135.1(a) as if it were a composite expression

equivalent to 'insurance intermediaries.' Insurance brokers and agents clearly are intermediaries and engaged in acts of mediation, but this does not mean that one can simply equate 'insurance brokers and insurance agents' with 'insurance intermediaries.' I do not read any of the ECJ cases as supporting such an approach. I fully accept that the ECJ has said that what is important is whether the activities that a person carries out are typical or characteristic of a broker or agent (or, as it is put by Etherton LJ at [85(4)] of *InsuranceWide*, whether a person is a broker or agent depends on what they do, not on how they describe themselves), and to this extent the ECJ has 'deformalised' the concepts. But I do not read the cases as treating brokers and agents as a single class, or as treating this class as interchangeable with insurance intermediaries. On the contrary it seems to me the European jurisprudence proceeds on the basis that the roles of insurance agent and insurance broker are conceptually distinct.

49. Thus for example in *Arthur Andersen*, the ECJ considered whether ACMC was an insurance *agent*, by reference to the characteristic activities of an agent, such as the finding of prospects and their introduction to the insurer ([36] – paragraph 24 above), as did Advocate General M Poiares Maduro who referred to an insurance agent presenting himself to a policyholder as an agent acting on behalf of and possibly in the name of the insurer ([28] – paragraph 25 above); one can contrast this with the description of an insurance *broker* by Advocate General J Mischco in *Taksatorringen* that his task is to act on behalf of a person seeking insurance in finding an insurance company that will offer cover exactly suited to his needs ([86] – paragraph 21 above).

50. This division between the activities of agents acting for insurance companies in finding prospects ('instructed … or empowered to act in the name and on behalf of, or solely on behalf of, one or more insurance undertakings'), and brokers acting for persons seeking insurance in finding insurance companies ('acting with complete freedom as to their choice of undertaking'), is reflected in the activities separately described in art 2.1(a) and (b) of the Insurance Directive. These descriptions are not to be treated as definitions of broker and agent for the purposes of the VAT Directive, but they should be 'taken into consideration as reflecting legal reality and practice in the area of insurance law' (per Etherton LJ in *InsuranceWide* at [85(5)]). The Insurance Directive was replaced by the Insurance Intermediation Directive in 2002 with its broader definition of 'insurance intermediaries' (paragraph 8 above), but when the Sixth Directive was replaced by the VAT Directive in 2006, the reference to 'insurance brokers and insurance agents' was left unchanged.

51. As to the other points relied on by Mr Southern:

    (1) I accept that the ECJ has made it clear that in order to be a broker or agent the person concerned must be acting as an intermediary: see *Taksatorringen* at [44] and the Advocate General at [87]. But it does not follow that every intermediary is a broker or agent, and Advocate General Fennelly in *CPP* was clearly of the view that the fact that

exemption was limited to brokers and agents meant that not all intermediaries came within the exemption. I cannot see any subsequent decision which takes a different view.

(2) I do not think the wording of the exemption in VATA takes the matter any further. Item 4 refers to the 'provision by an insurance broker or insurance agent of any of the services of an insurance intermediary.' On a natural reading of these words they require both that the person concerned is an insurance broker or agent and that the services they provide are those of an intermediary, the latter concept being expanded by Notes 1 and 2. No doubt the reference here to broker and agent are to be understood as referring to the European law concepts of broker and agent; but this does not provide any textual support for regarding anyone providing the services of an insurance intermediary as thereby qualifying as a broker or agent.

(3) So far as the other language texts of the VAT Directive are concerned, the French and Italian texts undoubtedly refer to 'intermédiaires' and 'intermediari' where the English text (and some other language versions) have 'agents'. However I think an English court or tribunal should be wary of relying on an untutored view of the meaning and scope of a foreign language text, especially where it involves what may be a more or less technical term, without any evidence or explanation as to how such terms would be understood by a native speaker. Despite the obvious linguistic similarity, I have no information as to what a French or Italian speaker would understand by these words.

52. I conclude therefore that the criticism that the FTT should have decided whether Westinsure was an 'intermediary' is not made out. What the FTT should have decided was whether Westinsure was a broker or agent within the meaning of art 135.1(a). (It is to be noted that this is in line with the approach of Mann J in *RBS* who considered whether Prudential was an agent or broker, not whether it was an intermediary). As I have already said, the FTT did do this – in fact twice, once at [89] and again at [94].

53. Mr Southern referred me, as he had referred the FTT, to the description by the ECJ of 'negotiation' in *CSC* at [39], and submitted that what Westinsure did fell directly within those words. *CSC* was not concerned with the insurance exemption (then in art 13B(a) of the Sixth Directive) but with the financial services exemption then in art 13B(d)(5) which referred to 'transactions, including negotiation … in shares [etc]': see paragraph 27 above. There is clearly an analogy between this and the exemption of insurance transactions and related services provided by brokers and agents: in each case the exemption extends not only to the underlying substantive transaction but to certain acts of those who are not parties to the contract but negotiate them. And as we have seen the ECJ in *Arthur Andersen* cross-referred to what was said in *CSC* by way of analogy.

54. But I accept Miss Mitrophanous' submission that this does not mean that one can simply transpose what the ECJ said about 'negotiation' in *CSC* and apply it to the insurance exemption. The two exemptions are distinct and differently worded and the word 'negotiation' does not appear in art 135.1(a) at all. No doubt what brokers and agents do can be described as negotiation, but that does not mean that all one has to do is point to something that is negotiation and conclude that the person concerned is therefore an agent or broker. Nor did the ECJ in *Arthur Andersen* say that the concept of being a broker or agent was to be equated with being a negotiator; it referred to *CSC* by way of analogy. In the context in which this reference appears, the analogy is a useful one as it illustrates the point that a broker or agent, like a person engaged in the negotiation of financial transactions, 'does not occupy the position of any party to a contract', as opposed to a sub-contractor who 'occupies the same position as the party selling the financial product', with the result that ACMC, which merely assisted UL in the performance of activities 'which would normally be carried out by it' was not performing the services of an insurance agent. But none of this means that one can simply use what the ECJ said about negotiation in *CSC* as delimiting what it is to be a broker or agent for the purposes of art 135.1(a).

55. As I understand the ECJ cases, the question whether a party is an insurance agent or broker for the purposes of the insurance exemption is not therefore to be answered by asking whether the services provided are those of an 'intermediary' or are 'negotiation' but to be answered by asking whether those services are the services of an agent or broker. This was the approach taken, correctly in my view, by the FTT which decided that Westinsure's services were too remote from the effecting of particular transactions to amount to the services of a broker or agent: see [89]. Mr Southern challenges this conclusion in his 4th submission, but the approach of asking whether Westinsure's services were the services of an agent or broker appears to me to be correct.

Submission (4) – restriction on the type of services

56. It is convenient to take Mr Southern's 4th submission next. This is that there is no judicial authority for the restriction on the type of services which qualify for the exemption which the FTT relied on.

57. The starting point in the analysis is to identify whether the services Westinsure provides are said to be those of an agent or of a broker. As already indicated, Mr Southern did not really address this point, preferring to regard the category of broker and agent as a single category and saying that Westinsure was a sort of broker-agent. He also made the point that Westinsure was operating a single business and its relations with the Partner Insurers and the Westinsure Brokers were two complementary aspects of the same business. I accept this, but the question at issue is the correct classification of the services provided to the Westinsure Brokers in return for their membership fees, and the nature of the services provided to the Partner Insurers in return for their commissions is

not in issue and not directly relevant.

58. Miss Mitrophanous however did address the point: she submitted that in relation to the services provided to the brokers, Westinsure could not be acting as insurance agent as it was not acting on behalf of insurance companies, so it could only qualify for exemption as a broker. I accept this submission. Westinsure provides its broker members with a number of services, some of which (assistance with regulatory compliance, negotiating better rates for premium finance or with the Chartered Insurance Institute) have nothing to do with individual insurance companies, while others do (negotiating better commissions for the brokers or better terms for their clients); but in these latter respects Westinsure is acting for the brokers not for the insurance companies. If the characteristic activities of an insurance agent are to act in the name of or on behalf of an insurance company (art 2.1(b) of the Insurance Directive), or finding prospects and their introduction to an insurer (*Arthur Andersen*), the services Westinsure provides to its brokers are nothing like these.

59. The next question therefore is whether Westinsure is acting as a broker. This requires identifying what services are characteristic or typical of a broker. Mr Southern relies on the general description of brokers as "bringing together … insurance undertakings and persons seeking insurance" (eg Advocate General Fennelly in *CPP*) and said that Westinsure did bring together the Partner Insurers and the Westinsure Brokers with a view to their doing business together and so fell squarely within these words. However as with all such statements there is a danger in taking them out of context. I accept that Westinsure brings insurers and brokers together, but this by itself cannot be determinative as, if it were, the organisation of a conference or exhibition where brokers could meet insurers (in fact one of the services provided by Westinsure) would be sufficient, but it seems plain (and Mr Southern did not dispute) that the organisation of conferences would not by itself be within the insurance exemption. Miss Mitrophanous submitted that what is required is that a person should introduce people *as a broker does*: cf *RBS* at [48] where Mann J refers to "bringing the parties together, or … introducing them as a broker does." I accept this submission.

60. The FTT gave its own description of what a broker does, based on Mr Addis's evidence, as follows [8]:

> "the role of an insurance broker in the general insurance market is to intermediate on behalf of personal and commercial customers, through the assessment of their circumstances and to assist them in purchasing the cover they need."

Mr Southern did not quarrel with this description. It is of course a description of what an insurance broker in the UK market does and not necessarily to be taken as a description of the autonomous European concept of a broker, but it is entirely consistent with the description of a broker's task given by Advocate General J Mischco in *Taksatorringen* (paragraph 21 above), namely:

"to act on behalf of a person seeking insurance in finding an insurance company that will offer cover exactly suited to his needs."

See also the description of what a broker does given by Mann J in *RBS* at [48], which starts with the customer engaging or dealing through or approaching a broker, who then has freedom of choice as to the insurer to whom referrals are made.

61. Further elucidation of the European concept of a broker is given by Advocate General Saggio in *Skandia*, who referred to a broker having a legal relationship with the insured, by the ECJ in *Taksatorringen* which referred to professionals who have a relationship with both the insurer and the insured party, and by Advocate General M Poiares Maduro in *Arthur Andersen* who referred to the finding and introducing of customers and insurers.

62. In other words a broker in essence provides a service to a potential insured party who is looking for insurance by finding suitable insurance for him (and is the converse of an agent who in essence provides a service to an insurance company by seeking potential insureds for it).

63. Given that this is what a broker does, was the FTT entitled to conclude that the services Westinsure was providing were not the services of a broker ? It seems to me that they were. Westinsure does not negotiate (or 'broker') the terms of any particular transaction: it does not act for a client seeking insurance; it does not assess the needs of a client; or find insurance suitable to those needs. This is effectively what the FTT said at [90] where it said that in order for the services that Westinsure provides to constitute the services of a broker or agent they would need to go further and actually enter the facility themselves, participating in the intermediary services that are conducted through the facility. It was for the FTT to assess whether Westinsure's services were characteristic of a broker, and I do not see any error of law in their conclusion that they were not.

64. Thus in *InsuranceWide* Etherton LJ said at [85(7)] that it was an essential characteristic of being a broker or agent that they were engaged in the business of putting insurance companies in touch with potential clients, or more generally acting as intermediaries between insurance companies and clients or potential clients. Mr Southern emphasised the words 'more generally' but the essential characteristic is acting as an intermediary between insurance companies and potential clients. Westinsure does not however deal, directly or indirectly, with potential clients. What it does is provide access to particular insurers, and particular products, for its broker members so that they can broker insurance for their clients.

65. Mr Southern said that *Beheer* established that it was not necessary for the intermediary to have a direct relationship with the contracting parties, and that an indirect relationship suffices. This is so, as explained by the Court of Appeal in *InsuranceWide*: see per Etherton LJ at [85(8)] where he says that it

is sufficient if a person is one of a chain of persons bringing together an insurance company and a potential insured. I agree that *Beheer* establishes that a broker may be part of a chain of intermediaries so that the client may use the services of broker A who in turn uses the services of broker B and that in such a case broker B may have no direct relationship with the client at all, but only with broker A. However as the FTT pointed out (at [91]), in both *Beheer* and *InsuranceWide* the intermediary was part of a chain linking the ultimate client and the insurer in respect of the conclusion of a particular transaction. In such case a broker who is in the chain is still providing a brokering service to the party seeking insurance: broker B is assessing the needs of broker A's client and looking for insurance to meet those needs, even though he has only an indirect relationship with the client. Neither *Beheer* nor *InsuranceWide* establishes that it is sufficient to be a broker for a person to seek out, appraise and negotiate with insurers without any particular transaction in view but with a view to signing up suitable Partner Insurers and persuading them to offer appropriate products and better commission terms for its brokers as Westinsure does. In such a case Westinsure does not have a relationship, direct or indirect or at all, with the brokers' clients.

66. Mr Southern said that the reference to a 'chain' was a metaphor and that metaphors should be handled with caution as they are apt to be misleading. No doubt one should be careful not to be led astray by the use of metaphors but they can be useful and illuminating, as indeed is Mr Southern's own metaphor of Westinsure being the gatekeeper of a facility where brokers and insurers can do business together. In the present case the reference to a chain expresses a simple idea which is readily understood, namely that a broker who places insurance for a client with an insurer may not deal directly with the insurer but through others. In such a case each of the intermediate links in the chain has a relationship, albeit not necessarily direct, with the insurer and insured party. It seems to me that the FTT's conclusion to the effect that Westinsure 'does not participate in the chain' (at [91]) and that it provides services 'but it does not do so as part of the transaction chain' (at [93]) expresses a real distinction between Westinsure's activity and that of parties who do participate in a chain, or provide services as part of the transaction chain, as does the distinction drawn by the FTT, adopting Mr Southern's gatekeeper description, between Westinsure controlling access to the facility where brokers and insurers can deal with each other, and entering the facility itself and participating in the services conducted through it.

67. Mr Southern referred to the decision of the Court of Appeal in *Customs and Excise Commissioners v Civil Service Motoring Association Ltd* [1998] STC 111 (***"CSMA"***). Here CSMA, a non-profit making voluntary association with a large number of members, agreed with FBS, a provider of credit, that FBS would make its credit card available to CSMA's members on favourable terms. FBS paid CSMA a commission on all credit transactions concluded between CSMA's members and FBS. The question was whether the commission was exempt from VAT. That turned on whether the services provided by CSMA to FBS were the 'negotiation of credit' under art

13B(d)(1) of the Sixth Directive. The Court of Appeal held that they were, rejecting a submission for the Commissioners that the exemption was limited to the arranging of particular credit transactions: see per Mummery LJ at 118g-119a. Mr Southern said that HMRC in the present case were seeking to rely on a similar submission to that rejected by the Court of Appeal in *CSMA*.

68. I have already said (paragraph 54 above) that although there is clearly an analogy between the VAT exemption for negotiation (of credit or of financial transactions or the like) and the exemption for the services of an insurance agent or broker, this does not mean that one can simply transpose a decision about what constitutes negotiation into the different context as to what it is to be an agent or broker. But in any event I accept Miss Mitrophanous's submissions as to the *CSMA* case. These were that the decision in *CSMA* must now be read in the light of the ECJ decision in *CSC* which elucidated the concept of 'negotiation', and the subsequent decision of the Court of Appeal in *Customs & Excise Commissioners v BAA plc* [2002] EWCA Civ 1814 (***"BAA"***). This was another case where an organisation, BAAE, had negotiated particular terms for credit cards to be offered to its members, and was remunerated by commission payable both on the opening of a credit account by one of its members, and on the card being used.

69. In his judgment Morritt V-C accepted that the ECJ in *CSC* had gone further than the Court of Appeal in *CSMA* in holding that 'negotiation' required a 'distinct act of mediation', although he said that the actual decision in *CSMA* was consistent with that requirement (at [31]). He went on to hold that BAAE did introduce its members to the credit provider, that it was paid commission on card accounts being opened and used, and that it was thus being remunerated for a distinct act of introduction or mediation (at [35]-[37]).

70. Thus *CSMA* can no longer stand as authority that no distinct act of introduction or mediation is required for services to be exempt as negotiation. The decisions of the ECJ establish that the characteristic services of a broker require the broker to have a relationship, direct or indirect, with the insured. In *CSMA* and *BAA* the organisations did have a relationship with their members, did introduce their members to the credit card providers, and were remunerated by commission paid on the taking out of a credit card or on the use of the card. It was this that Morritt V-C regarded as the distinct act of introduction or mediation required for the services to constitute negotiation. In the present case, by contrast, Westinsure do not introduce the insureds to the insurers, nor are they remunerated by the brokers for doing so. Rather, as the FTT held, they provide a facility which enables the brokers to do this. In these circumstances I do not regard the *CSMA* or *BAA* decisions as casting doubt on the correctness of the FTT's conclusion.

71. Mr Southern pointed to the wording of Item no 4(a) in sch 9, Group 2 of VATA ('whether or not a contract of insurance or reinsurance is finally concluded') as supporting the submission that it is not necessary for there to be involvement in a particular transaction. I do not think this point assists

him: if anything, the wording ('finally concluded') suggests that what the draftsman had in mind is that a broker or agent may enjoy the exemption if he acts in relation to a proposed transaction even if the transaction in question does not in fact come off, not that a broker or agent may enjoy the exemption by acting without reference to any particular transaction.

72. Mr Southern referred me to the decision of the VAT Tribunal in *Countrywide Insurance Marketing Ltd v Commissioners of Customs and Excise* [1994] 3 CMLR 125 as being a case where the facts had some similarity to the present case, Countrywide having a somewhat similar business to Westinsure, and where the Tribunal accepted that it was not necessary in order for Countrywide to enjoy an exemption that it was negotiating a specific contract or policy. But as Miss Mitrophanous pointed out, that was a decision on the wording of the UK legislation as it then stood, which referred to the 'making of arrangements for the provision of any insurance', and was before the ECJ decisions referred to above. In any event what was in issue in that case was the commission income received by Countrywide from insurers which was only paid when a policy was sold; it was accepted that the membership and introductory fees paid by member brokers were subject to VAT at the standard rate [20]. It does not therefore assist on the issue which arises in the present case which is the nature of the services provided by Westinsure to the Westinsure Brokers.

73. I therefore do not accept Mr Southern's criticisms of the FTT's decision on this issue. In my judgment the FTT was entitled to find that the services provided by Westinsure to its broker members did not constitute the services of a broker or agent, and hence that those services were not exempt either under art 135.1(a) of the VAT Directive or under VATA.

74. That makes it strictly unnecessary to consider Mr Southern's other submissions, but I will consider them briefly.

Submission (2) –Westinsure's services were insurance-related

75. The FTT found (at [34]) that Westinsure's services were related to the supply of insurance, but (at [90]) that the services did not have a sufficiently close connection to the insurance transactions themselves.

76. Mr Southern accepts that for services to be 'related services' within the meaning of art 135.1(a), they must satisfy the requirement set out by Jacob J in *Century Life*, namely that that there must be a close nexus between the service and the insurance transaction concerned (paragraph 33 above). Thus it is not enough for the services to be related to *insurance*; they must be related to one or more *insurance transactions*. (As noted at paragraph 33 above, Advocate General Fennelly took a more expansive view in *CPP*, but this has not been endorsed by the ECJ).

77. Thus although Mr Southern graphically said of Westinsure that its whole

business 'oozes insurance', this is not by itself enough. Certainly some of the services that Westinsure provides to its brokers have no close connection to any transactions – for example general business support, on-line forums, negotiating discounts with the Chartered Insurance Institute, and assistance with regulatory compliance. These are what might generically be termed "member support services" and while no doubt related to insurance (in that the brokers' businesses are all insurance-related) have no connection with any particular transactions.

78. Other services – the negotiation of special policy terms or lower premiums – could be said to be related to the policies later written on those terms. (The negotiation of better commission rates might also be said to be related to the policies later written, but is more debatable as the rate of commission payable is not a matter that generally affects the transaction between insured and insurer, but only the relations between the insurer and the broker). The question however is whether the negotiation of these terms has a sufficiently close nexus to each of the future transactions.

79. Whether the nexus is sufficiently close is prima facie a matter for the FTT to assess as the tribunal of fact. In accordance with well-known principles the FTT's assessment that it was not can only be disturbed on appeal if the conclusion was one that was not properly open to them. I am not persuaded that the only reasonable and true conclusion was that there was a sufficiently close connection, or that it is possible to disturb their assessment on appeal. Since this is not determinative of the appeal in any event, I do not think it necessary to give lengthy reasons why: in essence I accept the submission of Miss Mitrophanous that what Westinsure does is not directly related to any insurance transaction – it stands at one remove from, or outside, the relationship between the insurers and insured which the brokers subsequently bring about: compare *Agentevent Ltd v Commissioners for Customs and Excise* (26 April 2002) at [26]-[28].

80. Mr Southern pointed to *Century Life* as an example where a review of pensions mis-selling was held to have a sufficiently close nexus with the policies concerned. But it appears from the facts in *Century Life* that the pensions mis-selling review involved a review of each individual policy concerned and an assessment of the appropriate redress (if any) for the individual policyholder: see per Jacob J at [3]. Thus although the review no doubt included a review of the general way in which Lincoln had sold its policies, it was 'intimately related' to each policy reviewed: "the very nature of the individual policy is under scrutiny": see per Jacob J at [16]. This does not seem to me to provide any support for the submission that 'related services' do not need to be related to particular transactions; indeed it tends to suggest the opposite, namely that a close connection is needed to an individual policy.

81. I therefore conclude that the FTT made no error of law in this respect.

Submission (3) –Westinsure's services were not administrative and support services

82. Mr Southern said it was irrational of the FTT to have classified Westinsure's services as administrative and support services. In fact what the FTT said was that Westinsure's services were 'more akin' to the support services provided in *Arthur Andersen* or the services of a lawyer who drafts the policy terms for an insurer or the terms of business for a broker (at [90]).

83. I do not see any error of law here. The FTT did not deny Westinsure the benefit of the exemption because they were only providing support services. The FTT denied Westinsure exemption because its services were not sufficiently closely connected with particular transactions and were not the services of a broker or agent. Instead as the FTT said Westinsure prepared the ground for other market participants to intermediate. Having reached such a view I see nothing inapt in describing this preparation of the ground as akin to support services.

Submission (5) – the result does not accord with commercial realities

84. Mr Southern said that the economic reality was that Westinsure's business was wholly concerned with the insurance market, and that it was making arrangements for the terms on which insurance would subsequently be granted. It made no sense for this not to be exempt where there would be an exemption if the arrangements were made for particular clients. Westinsure could invite their brokers to let them know when they had a client and Westinsure could then put the broker in touch with the insurers. This would presumably be exempt, but it would be inefficient and run counter to the whole raison d'être of the business. Businesses should not have to organise themselves inefficiently purely for tax purposes.

85. I accept that it is desirable as a matter of general principle (and may also be required by the European principle of fiscal neutrality, which I was not specifically addressed on) that the provision of services which are in essence similar should be taxed similarly. But it is inevitable that wherever the boundaries of an exemption (strictly construed) are drawn there will be activities which fall outside the boundary, but may not be very different in commercial or economic terms to those inside it. In the case of the insurance exemption, the requirement laid down by the Court of Appeal in *Century Life* that the services have a close nexus with insurance transactions means that services which have too remote a connection will not be exempt, however otherwise similar they might be.

86. The duty of the FTT was to assess whether the services in fact provided by Westinsure were exempt. This is what they did. I do not consider that their conclusion is undermined by the fact that if Westinsure had provided different services they might have been exempt.

Conclusion

87. For the reasons I have given I do not accept Mr Southern's criticisms of the decision of the FTT. I will therefore dismiss this appeal.

MR JUSTICE NUGEE

RELEASE DATE: 13 OCTOBER 2014