[2015] UKUT 0300 (TCC)

Appeal number: FTC/76/2010

VAT – scheme to avoid irrecoverable input tax on supplies of advertising services to loan broking business – establishment of loan broking business in Jersey with processing services provided by UK business – whether UK business made supplies of loan broking services – whether scheme an abuse – F-tT decision holding supplies of advertising services made to Jersey business and no abuse – HMRC's appeal dismissed

UPPER TRIBUNAL

TAX AND CHANCERY CHAMBER

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

- and -

PAUL NEWEY (t/a OCEAN FINANCE) **Respondent**

TRIBUNAL: MR JUSTICE WARREN

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 4 and 5 November 2014

Owain Thomas and Isabel McArdle, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants
Julian Ghosh QC, Elizabeth Wilson and Jonathan Bremner instructed by Ashurst LLP for the Respondent

DECISION

Introduction

1. This appeal concerns the effect for VAT purposes of a scheme designed to obtain a tax advantage. It involves the creation of a company in Jersey (initially Lichfield (CI) Ltd ("**Lichfield**") and later Alabaster (CI) Ltd ("**Alabaster**") to which the respondent ("**Mr Newey**"), who traded as Ocean Finance, transferred a loan broking business previously carried on by him in the UK. His position is that after the transfer it was Lichfield and then Alabaster, rather than he himself, which made supplies of loan brokerage services to various UK lenders and that it was those companies, rather than Mr Newey himself, which received supplies of advertising services. The questions in the appeal before the First-tier Tribunal were:

a. Who made the supplies of loan brokerage and correspondingly who was in receipt of the advertising supplies for VAT purposes in the relevant period (*ie* was it Alabaster or Mr Newey who received the supplies of advertising services)? and
b. If Alabaster was the recipient, is that conclusion altered by the principle of abuse of law?

2. In their decision released on 23 April 2010 ("**the Decision**"), Judge Berner and Mrs Neill ("**the Tribunal**") held that it was Alabaster, and not Mr Newey, which made the supplies of loan brokerage services and which was the recipient of advertising supplies. Further, while holding that the essential aim of the structure involving Alabaster was to gain a tax advantage, there was no abuse as neither the scheme nor any of the arrangement involving Alabaster was contrary to the purposes of Directive 77/388/EEC ("**the Sixth Directive**"). The Appellants ("**HMRC**") were

given permission to appeal. The Upper Tribunal referred 6 questions to the Court of Justice of the European Union ("**the CJEU**") on 13 December 2011. The CJEU Judgment was delivered on 20 June 2013 by the Third Chamber without having received an Advocate-General's opinion. I shall refer to it in this decision as "**the CJEU Judgment"** and to its paragraph numbers as CJEU.

3. I will come to some of the detail of the Decision and of the CJEU Judgment in due course. In summary, HMRC say that the CJEU was giving new guidance when it said that the correct approach was to assess the economic and commercial reality of the transactions at issue and that the contractual arrangements were a factor, but only a factor, to be taken into account. They say that the Tribunal was in error because it did not apply that approach but instead assigned decisive importance to the contractual structure which had been brought about solely for the purpose of obtaining a tax advantage rather than for any commercial reason. Mr Newey contends that the CJEU was doing no more that to re-state existing established principles and that the Tribunal applied those principles correctly.

4. The parties have argued the appeal by reference to, essentially, the same issues as were argued before the Tribunal, the issues identified by them being:

a. Whether the Tribunal erred in its approach to the characterisation of the supplies of loan broking services as made by Alabaster and of advertising services received by Alabaster (rather than Mr Newey in each case) by failing to have regard to the economic reality in contrast with the position as set out in the relevant contractual documentation ("**the Characterisation of Supplies Issue**"); and

b. Whether the Tribunal erred in deciding that neither the arrangements as a whole nor any part of them produced a tax advantage which was contrary to the Sixth Directive ("**the Abuse Issue**").

5. In the light of the CJEU Judgment, it is not possible in my view to draw the sharp line between those two Issues which their formulation might suggest although both characterisation of the supplies and the principle of abuse are features which need to be addressed.

The facts

6. It is helpful to have a summary of the main facts at the outset although I will need to say more about the facts at various points in this decision. I take much of this section from the skeleton argument on behalf of HMRC prepared by Mr Thomas and Ms McArdle. A fuller statement of the facts which can be taken as common ground can be found in paragraphs 30 to 84 of the Reference to the CJEU.

Mr Newey's loan broking business

7. From May 1991 until January 1997, Mr Newey had been in business in partnership with a Mr Horton in Staffordshire as a loan broker, where they had a processing centre. They traded as Ocean Finance providing services as licensed credit brokers. After seeing an advertisement for loans, individuals who wished to borrow would call the Ocean Finance processing centre, details would be taken and a loan application processed. All of the relevant lenders were in the UK and all the borrowers and potential borrowers were in the UK. The partnership was not registered for VAT as it was making only exempt supplies. It therefore incurred irrecoverable VAT on advertising and other supplies received for the purposes of the business.

The creation of Lichfield

8. It is said that Mr Newey became aware that some of Ocean Finance's competitor brokers were apparently obtaining advertising services VAT-free. He sought advice from Moore Stephens and following that advice Ocean Finance carried out a restructuring with effect from 1 March 1996 the essential element of which was the creation of Lichfield in Jersey:

a. The only shareholders of Lichfield were Mr Horton and Mr Newey;
b. It was intended that Lichfield would carry out the loan brokerage services which hitherto Mr Horton and Mr Newey had carried out;
c. Lichfield obtained a consumer credit licence in the UK and entered into agreements with various lenders to act as loan brokers in return for which Lichfield would be paid commission;
d. Mr Newey and Mr Horton entered into an agreement with Lichfield to carry out the processing of the loan applications;
e. This agreement also permitted Lichfield to use the trading name "Ocean Finance";
f. Lichfield further entered into an agreement with First Island Properties Ltd, a nominee shareholder company of Moore Stephens based at their offices in Jersey. Pursuant to that agreement, furnished office facilities were provided for Lichfield at those offices;
g. Lichfield then engaged an advertising agency in Jersey to provide it with advertising services.

The purported VAT effect of the scheme

9. The advertising services were treated as not being subject to UK VAT because they were provided in Jersey. As before, all the UK loan applicants were in the UK,

all the lenders were UK lenders, the loan processing work was carried on in the UK with only the final approval being made in Jersey and all the advertising was in the UK media.

10. The loan brokerage services were made in the UK and were treated as exempt under Article 16 of the VAT (Place of Supply of Services) Order 1992 and Schedule 9 to the VAT Act 1994.

The creation of Alabaster

11. With effect from January 1997 Mr Newey became the sole proprietor of the business previously carried on by Mr Horton and him; he continued to provide the loan processing services. Alabaster was formed and registered in Jersey on 15th May 1997. It purported to take over the broker activities carried out by Lichfield. Alabaster's shares were held by First Island Nominees Ltd and First Island Services Ltd in trust for Mr Newey who was the beneficial owner of Alabaster.

12. Alabaster entered into substantially similar agreements with various UK lenders, First Island Properties Limited, the advertising agency (Abacus Advertising and Marketing (Jersey) Limited ("**Abacus**")) and Mr Newey to those which Lichfield had made. Abacus was succeeded by Wallace Barnaby & Associates Ltd ("**Wallace Barnaby**") from 26 November 2001.

13. Pursuant to the agreement with First Island Properties Ltd dated 2 October 1997, Alabaster was to be provided with:

a. a private office with a floor area of not less than 50 square feet;
b. a desk, chair, filing facilities, telephone/fax lines (through First Island's switchboard) and a networked workstation with printer;

c. the use of an unspecified room as required in which to hold directors' meetings; and

d. access to common areas and toilet facilities.

14. Pursuant to an agreement between Mr Newey and Alabaster also dated 2 October 1997 ("**the Services Agreement**"), Mr Newey agreed to:

a. deal with all enquiries from prospective borrowers in response to advertisements placed by Alabaster;

b. receive and vet completed application forms using lenders' specified criteria and forward an offer authority form to Alabaster with Ocean Finance's underwriting approval;

c. obtain valuation reports where required by a lender;

d. undertake credit status checks; and

e. on receipt of Alabaster's approval of the application, forward it to the lender.

15. However, under Alabaster's constitution and the law in force in Jersey, its directors were responsible for managing and exercising the powers of the company and Mr Newey played no part in its management.

16. The staff employed by Mr Newey at his Staffordshire processing centre performed the services described in the preceding paragraph. They alone had contact with potential borrowers, they undertook all checks on applications and removed any unsuitable ones, and they presented the "final recommendation" to Alabaster for what is asserted by Mr Newey to be approval. The fee payable to Mr Newey by Alabaster amounted to 50% (later 60%) of the commission received by Alabaster from the

lenders, plus reimbursement of valuation fees and credit search costs. Mr Newey also received commission for loan protection policies taken out by the borrower.

17. The final recommendations for loan applications, were presented to Alabaster, they were faxed on lists to the offices in Jersey and approved by the directors. The directors took it in turns to approve these recommendations. Only the final approval is said to have been carried out by Alabaster. Applications accepted by Mr Newey were invariably approved by Alabaster.

18. Mr Newey relied on Alabaster's agreements with the advertising agencies in Jersey to provide advertising services in the UK media as evidenced by the documentation before the Tribunal.

The purported VAT effect of the scheme

19. The purported effect of the scheme was as follows. The advertising services, which pre-scheme resulted in irrecoverable VAT paid by Mr Newey, were treated by Alabaster as not subject to UK VAT as being made in Jersey. The supplies of loan brokerage were made in the UK and were exempt. This was so even though all the loan applicants were UK residents, all the lenders were UK lenders, all the advertising took place in the UK media and all the contact from potential applicants was handled in the UK at the Staffordshire premises of Mr Newey.

The legislation

(1) EU legislation – the Sixth Directive

20. Article 9 dealt with the place of supply of services. The general rule (Article 9(1)) was that the place of supply was the place where the supplier had established his business.

21. However, under Article 9(2)(e), the place where advertising services were supplied when performed for customers outside the Community (as it then was) was where the customer had established his business or had a fixed establishment to which the service was supplied. But in order to avoid double taxation, non-taxation or the distortion of competition, Member States were entitled, under Article 9(3)(b), to consider the place of supply of advertising services which would otherwise be outside the Community as being within the territory of the country where the effective use and enjoyment of the services takes place within the territory of the country.

22. Article 13B(d) provided exemption for certain supplies of financial services including "the granting and negotiation of credit…." and "the negotiation of or any dealings in credit guarantees or any other security for money…". This includes loan broking services such as those in the present case.

23. Articles 17 to 20 provided for the deduction of input tax insofar as such input tax was used for the purposes of taxable transactions but not insofar as they were used for the purposes of exempt transactions. Thus irrecoverable VAT was borne on inputs used for exempt supplies.

24. More generally, HMRC rely on the way the matter was put by the Advocate-General in Case C-255/02 *Halifax Plc v CCE* [2006] STC 919 ("***Halifax***") at [93]:

> "VAT is, in effect, an indirect general tax on consumption meant to be borne by the individual consumers. Correspondingly the same principle requires that a taxable person must not be entitled to deduct or recover the input VAT paid on supplies received for its exempted transactions. As long as no VAT is charged on the goods or services provided by taxable persons, the Sixth Directive necessarily seeks to prevent them from recovering the corresponding input VAT. This entails the consequence emphasised by the Commission at the hearing that exemption from VAT within the meaning of the Sixth Directive does not mean that the Sixth Directive was intended to free the final consumer completely from every tax burden".

(2) UK legislation

25. The relevant UK provisions reflecting those provisions of the Sixth Directive were found in the Value Added Tax Act 1994 ("**VAT Act**") at sections 4(1), 7(10), 8(1) and (2) (the reverse charge; advertising services fell within that provision) and 9(1) to (4). I set out the detailed provisions in Annex 1 to this decision. In addition, the supply of intermediary services such as loan broking services is exempt under section 31 and item 5 of Group 5 of Schedule 9 VAT Act 1994.

26. It is common ground that Mr Newey did not constitute a "fixed establishment" of Alabaster, that Alabaster had no other fixed establishment in the UK. Accordingly, it is common ground that Alabaster "belonged" in Jersey and thus outside the UK.

27. It is also common ground that Mr Newey "belonged" in the UK, that Wallace Barnaby "belonged" in Jersey and that the advertising businesses in the UK from which Wallace Barnaby procured advertising services "belonged" in the UK.

The VAT consequences of the transactions in dispute

28. Ignoring for the moment the Abuse Issue, on the basis (as found by the Tribunal and as contended for by Mr Newey) that it was Alabaster which made the supplies of loan broking services and received the supplies of advertising services, the VAT consequences of the transactions in dispute are as follows:

a. The loan brokerage services made by Alabaster were treated as supplied where the recipient of the supplies belonged: Article 16 of the VAT (Place of Supply of Services) Order 1992, Article 9(2)(e) Sixth Directive.
b. Since the recipients were UK lenders, the loan broking services were treated as supplied in the UK and were exempt in accordance with section 31 and Schedule 9 VAT Act, and Article 13B(d) Sixth Directive.

c. The advertising services were treated as not subject to UK VAT at all because they were made in Jersey; both the supplier, Wallace Barnaby, and the recipient, Alabaster, belonged there and nowhere else and hence no VAT was chargeable on the provision of those services.

29. In contrast, on the basis (as contended for by HRMC) that it was Mr Newey who made the supplies of loan broking services and received the supplies of advertising services, the VAT consequences of the transactions in dispute are as follows:

a. The loan brokerage services were made by Mr Newey in the UK on the basis that both the supplier, Mr Newey, and the recipients belonged in the UK: section 7(1) VAT Act and Article 9(1) Sixth Directive.
b. They were exempt pursuant to section 31 and Schedule 9 VAT Act and Article 13B(d) Sixth Directive.
c. The advertising services were subject to the reverse charge provisions in section 8 VAT Act on the basis that they were "relevant services" for the purposes of those provisions, they were made by Wallace Barnaby who belonged outside the UK and the recipient, Mr Newey, belonged in the UK: section 8 VAT Act, and Article 9(2)(e) Sixth Directive.
d. Mr Newey was as a result himself required to account for VAT on those supplies as if he had made them himself. He was prevented from recovering input tax because the advertising costs all related to exempt transactions in the UK.

The CJEU reference in the present case

30. I set out in Annex 2 the questions referred to the CJEU. HMRC, at least, regarded the previous guidance from the CJEU as inadequate. The first four questions were each asked "in circumstances such as those in the present case". The first question

was what weight should be given to contracts in determining whether a person makes a supply of services and in particular whether the contractual position was determinative. The second to fourth questions asked, in effect, what approach should be taken if the contractual position is not determinative, with the third question asking to what extent various factors identified were relevant.

31. The CJEU took the first to fourth questions together regarding the questions raised as asking, in essence, whether the contractual terms were decisive for the purposes of identifying the supplier and the recipient in a "supply of services" and if the answer was in the negative under what circumstances those terms may be recharacterised. The CJEU ruled that

> "Contractual terms, even though they constitute a factor to be taken into consideration, are not decisive for the purposes of identifying the supplier and the recipient of a 'supply or services'….. They may in particular be disregarded if it becomes apparent that they do not reflect economic and commercial reality, but constitute a wholly artificial arrangement which does not reflect economic reality and was set up with the sole aim of obtaining a tax advantage, which it is for the national court to decide."

32. It was hardly surprising, one might think, in the light of the case law that the first question was thereby answered in the way which it was. Perhaps the question was asked simply to obtain confirmation and to set the context for the second to fourth questions. It was equally unsurprising, one might also think, that the fourth question was said to be one for the national court. Had the CJEU answered directly the fourth question with a yes or no answer, it would in practice have been answering the ultimate question which, as is well established, is one for the national court. Further, it was hardly surprising that the CJEU reformulated the first to fourth questions to give a single answer to them. Finally, it was to be expected that the CJEU would not

answer the questions in such a way that enabled the national court to know what weight to attach to any particular factor.

33. In a moment I will be examining the reasoning of the CJEU. It is important to do so since it is only through such an examination that such guidance as is given by the judgment can be understood. And it is only through an examination of that reasoning that it is possible to address Mr Ghosh's submission that the judgment added nothing new, his case being that the Tribunal correctly applied the law as it was understood prior to the judgment of CJEU and that the proper understanding of the law did not change as a result of it. But before I do that, it is worth noting that the CJEU was well aware from the material placed before it that the arrangements concerned were not shams, that money flowed in accordance with the contractual provisions and that Alabaster was not simply rubber-stamping everything put before it.

34. At CJEU [39] and [40], the CJEU gave a reminder that the Sixth Directive established a common system of VAT based, among other matters, on a uniform definition of taxable transactions (reference being made to *Halifax*, at [48]). Under Article 2(1) of the Sixth Directive, "the supply of goods or services effected for consideration" is to be subject to VAT. A supply of services "for consideration" is effected so as to be taxable

> "only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient".

35. I interpose here to observe that the reference to a legal relationship is not to be understood as a requirement that there should be a binding agreement. Although the test of legal relationship had been adopted in the case law of the CJEU (see for

instance *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) [1994] STC 509), it was common ground before the Tribunal that the approach to the question whether a supply was "for a consideration" had developed from the *Tolsma* test of legal relationship to one of reciprocity, even in the absence of a legally binding agreement: see [73] of the Decision.

36. At CJEU [41], the CJEU noted the case law establishing that the term "supply of services" is

> "objective in nature and applies without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out enquiries to determine the intention of the taxable person"

reference again being made to *Halifax*, at [56] and [57].

37. And at CJEU [42], the Court stated that, as regards the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case-law "according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT" (reference being made to Joined Cases C-53/09 and C-55/09 *Loyalty Management UK and Baxi Group* [2010] ECR I-9187, paragraphs 39 and 40 and the case-laws cited).

38. At CJEU [43] and [45], the CJEU said this:

> "43. Given that the contractual position normally reflects the economic and commercial reality of the transaction and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient…. have to be identified.
> 44. It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.
> 45. That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the commercial reality of the transactions"

39. It was noted at CJEU [46] that preventing possible evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (reference again being made to *Halifax*, at [71]) and that "the effect of the principle that the abuse of rights is prohibited is to bar wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage" (reference being made to Case C-162/07 *Ampliscientifica and Amplifin* [2008] ECR I-5019 at [51], Case C-504/10 *Tanoarach* [2011] ECR I-000 at [51] and Case C-326/11 *JJ Komen en Zonene Beheer Heerhugowaard* [2012] ECR 1-0000 at [35]).

40. In CJEU [47] it was recognised that formally, in accordance with the contractual terms, Alabaster provided the lenders with the supplies of loan broking services and was the recipient of the supplies of advertising services provided by Wallace Barnaby. Accordingly, the guidance found in the judgment was given by the CJEU on the basis of the actual transactions in place and the actual behaviour of the parties. The CJEU nonetheless concluded (see CJEU [48]) that

> "… taking account the economic reality of the business relationships between, on the one hand, Mr Newey, Alabaster and the lenders and, on the other hand, Mr Newey, Alabaster and Wallace Barnaby, as apparent from the order for reference and, in particular the matters of fact mentioned by the Upper Tribunal (Tax and Chancery Chamber) in the third question, it is conceivable that the effective use and enjoyment of the services at issue [*ie* the advertising services provided by Wallace Barnaby] took place in the UK and that Mr Newey profited therefrom".

This demonstrates the considerable breadth of principle in place. It is particularly important to note from this passage that the CJEU considered the fact that Mr Newey might have profited from the advertising services to be a relevant factor.

41. It should be noted that in the same paragraph the CJEU, in expressing that conclusion, referred in particular to the matters of fact mentioned in the third question

referred (as to which see Annex 2 to this decision). Clearly the CJEU saw those facts as relevant to establishing the economic and commercial reality of the transactions.

42. And so, in CJEU [49] and [50], it was stated that it is for the national court to ascertain whether contractual terms do not genuinely reflect economic reality and whether it is Mr Newey, and not Alabaster, who was actually the supplier of the loan services and the recipient of the supplies of advertising services. And it is to do so "by means of an analysis of all the circumstances of the dispute in the main proceedings". If the contractual terms do not reflect the reality, then (see CJEU [50]) "those contractual terms would have to be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice" (reference, again, being made to *Halifax*, at [90]).

43. In the present case, that would mean that the services agreement and the advertising arrangements concluded between Alabaster and Wallace Barnaby "could not be relied upon against [HMRC], who could legitimately regard Mr Newey as actually being the supplier of the loan broking services and the recipient of the supplies of advertising services". That is not, of course, to say that the formal agreement would not have full contractual force as between the parties.

44. In the light of those considerations, the CJEU gave the ruling quoted above in relation to the first to fourth questions referred; and in view of its answers to those questions, it said that there was no need to reply to the fifth and sixth questions. It can be seen, therefore, that the CJEU did not address the abuse issue separately from its consideration of the circumstances in which it was appropriate to depart from the contractual position.

45. Mr Thomas has referred to another CJEU authority to illustrate the approach taken. It is Case C-426/06 *Ministero dell'Economica v Part Service Srl* [2008] STC 3132 ("***Part Service***"). That case concerned the leasing of cars. That activity had been split into different elements each of which was supplied by a separate person under a separate contract without an overarching contract. The reference to the CJEU concerned the correct approach to the application of the abuse principle. A prior question, however, was whether the contractual separation which purportedly resulted in there being more than one supplier of services was effective for VAT purposes. Mr Thomas refers to [48] to [54] of the judgment which I do not propose to set out here. I do not find this decision as providing helpful guidance to the issue of who is the supplier in relation to what, on any view, is a single supply.

46. Of perhaps more relevance is another case relied on by Mr Thomas, Case C-185/01 *Auto-Lease v Bundesamt für Finanzen* [2005] STC 598. The questions referred related in particular to identifying who was the recipient of the supply of fuel delivered to a leased vehicle. The CJEU restated its finding in an earlier case that a "supply of goods" does not refer to the transfer of ownership in accordance with the procedures of national law but covers any transfer of tangible property by one party which empower the other party actually to dispose of it as if he were the owner. The question, then, was whether it was the lessor or lessee of the vehicle to whom the right to dispose of the fuel was transferred. As to that, the CJEU noted the common ground that

> "the lessee is empowered to dispose of the fuel as if he were the owner of that property. He obtains the fuel directly at filling stations and Auto Lease does not at any time have the right to decide in what way the fuel must be used or to what end" (see [34] of the judgment).

The answer to the question referred was therefore that there was not a supply of fuel by the lessor of a vehicle to the lessee where the lessee fills up the leased vehicle at filling stations even if the vehicle is filled up in the name or and at the expense of the lessor.

47. At least that case, unlike *Part Service*, provides an example where the contractual provision does not determine to whom the supply of goods is made. It is, however, a far cry from that to the result for which Mr Thomas contends, namely that the supplies of the loan broking services were by Mr Newey, rather than by Alabaster and that the supplies of advertising services were made to him rather than to it. The guidance given by the CJEU in *Auto-Lease* is certainly not determinative of the present case and for my part I do not find it of much assistance.

48. Before leaving the case-law of the CJEU and turning to the Decision, I should mention Mr Ghosh's reliance on *Secret Hotels2 Ltd v HMRC* [2014] STC 937 (SC) ("***Secret Hotels2***"). It is worth noting the following paragraphs of the judgment of Lord Neuberger (with whom the other Justices agreed):

a. [24]: Lord Neuberger referred to the observations of the CJEU in *HMRC v* Case C-277/09 *RBS Deutschland Holding GmbH* [2011] STC 345 ("***RBS Deutschland***") at [53] that "taxable persons are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purposes of limiting their tax burdens", albeit subject to the *Halifax* exception for abusive transactions.

b. [29]: Lord Neuberger cited [42] to [45] of the CJEU Judgment. He went on, at [30], to reiterate the previous approach of the Supreme Court itself

that, where the question at issue involves more than one contractual arrangement between different parties, in deciding who supplies what services to whom "regard must be had to all the circumstances in which the transaction or combination of transactions takes place". This requires the whole of the relationships between the various parties to be considered. Mr Ghosh says that giving consideration to the whole relationship is precisely what the Tribunal did in the present case. Having reached their conclusions as matters of fact, there can, he submits, be no appeal since the appeal is restricted to points of law. I would add that, clearly, Lord Neuberger saw the previous approach of the Supreme Court to be entirely consonant with the approach of the CJEU in the present case and did not see it as saying anything radically new.

c. [55]: Lord Neuberger detected a similarity between, on the one hand, a contract which does not reflect economic reality and a purely artificial arrangement and, on the other hand, the shams, rectifiable agreements and other arrangements which he had considered at [33]. Mr Ghosh reads what Lord Neuberger said as saying that CJEU [45] is directed at (by which I understand him to mean directed only at) the sorts of case mentioned by Lord Neuberger in [33]. I do not read Lord Neuberger that way. He was not engaged in the task of interpreting what the CJEU had said in the CJEU Judgment; he was, I consider, saying only that the cases to which the CJEU guidance applied (*ie* a contract which does not reflect the economic and commercial reality and a purely artificial arrangement) share some characteristics with shams *etc* that is to say that it is not the case that "what you see is what you get" or, to use another metaphor, you

must look beyond the label on the tin and see what is inside. I agree with HMRC that what Lord Neuberger said does not tell the whole story.

d. This is so notwithstanding [56] and [57] of Lord Neuberger's judgment, in particular his note of caution at the end of [57]:

> "Further, one must be careful before stigmatising the contractual documentation as being "artificial", bearing in mind that EU law, like English law, treats parties as free to arrange or structure their relationship so as to maximise its commercial attraction, including the incidence of taxation – see *RBS Deutschland* cited in para 24 above."

e. Mr Ghosh is correct when, referring to CJEU [49], that it is irrelevant whether a differently constituted panel in the First-tier Tribunal might have reached a different conclusion on the facts from that reached by the Tribunal. That, however, is subject to two caveats: the first is that, if the Tribunal failed to apply the correct approach as a matter of law, their decision is open to review and the second is that their decision on the facts is, in principle, open to an *Edwards v Bairstow* challenge even if they did apply the correct test (although no such challenge is, or could in my view be, made).

49. At this stage, I want to make two points about the CJEU Judgment. The first concerns the description which the Court provided of the principle of abuse of rights in a VAT context. As noted, the CJEU referred to *Ampliscientifica.* In that case, abusive practices were described as transactions carried out, not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining tax advantages provided for in EU law; this wording no doubt reflects [69] of the judgment in *Halifax*. The effect of the principle was, however, in the context of VAT stated to be to prohibit wholly artificial arrangements which do not reflect economic reality and set up with the sole aim of obtaining a tax advantage. This last statement

is repeated in *Tanoarach* and *JJ Komen*. Those statements can, I think, be taken as providing further guidance about what the CJEU meant when it said, in [74] of *Halifax* that the transactions concerned result in the accrual of a tax advantage which would be contrary to the purposes of the provisions of the Sixth Directive, with the various statements made in the different cases being reflective of each other. Thus, it seems to me, where one finds wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage, the transactions carried out pursuant to the arrangements will be the paradigm of transactions which are carried out, not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining tax advantages and, in turn will result in the accrual of a tax advantage contrary to the purposes of the Sixth Directive.

50. That is fully consistent with [69] of the judgment in *Halifax* where abusive practices generally (not just in a tax context) were stated to be "transactions carried out not in the context of normal commercially operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law". This translates, in the context of VAT (see [74] of the judgment), to "a tax advantage the grant of which would be contrary to the purposes of the provisions [of the Sixth Directive]".

51. It is also consistent with [80] and [81] of the judgment in *Halifax*. In [80], in giving further guidance, the CJEU referred to a case where, in the context of the normal commercial operations of a taxable person, no transactions conforming with the deduction rules would have enabled them actually to deduct input tax. That approach was entirely consonant with the wider proposition stated in [74]. In [81], in

giving guidance about the second element (*ie* the essential aim) it was for the national court to determine "the real substance and significance of the transactions concerned". In that context, it may take account of the purely artificial nature the transactions and the links of a legal, economic and/or personal nature between the operators involved. Again, that approach is entirely consonant with the wider proposition stated in [75].

52. Accordingly, I agree with Mr Ghosh that the CJEU Judgment was not saying anything significantly new; it was applying the established jurisprudence. It was, however, applying that jurisprudence in a new factual situation, providing some further guidance. Although the adoption of the approach exemplified in *Ampliscientifica*, *Tanoarach* and *JJ Komen*, to the effect that the principle of abuse of rights was to prohibit wholly artificial arrangements which do not reflect economic reality and set up with the sole aim of obtaining a tax advantage, the meaning of that statement must take account of the different ways in which the principle has been expressed, particularly in *Halifax*. The statement of principle is not an entirely fresh one standing on its own and open to a wide interpretation inconsistent with *Halifax*. Conversely, the statement of principle as made in those cases and in the present case illuminates the scope of the principle; as I have said, the different expressions are reflective of each other.

53. The second point I wish to make about the judgment relates to the extent of the guidance which the CJEU was intending to give. As I have pointed out, the CJEU said that there was no need to reply to the fifth and sixth questions in the light of its answers to the first to fourth questions. It can be seen, therefore, that the CJEU did not address the abuse issue separately from its consideration of the circumstances in which it was appropriate to depart from the contractual position. This was because

the CJEU was formulating its answers to the first to fourth questions in a way which took account of the principle of abuse of rights as one of the circumstances in which it was permissible to depart from the strict contractual position and, in that context, addressed the situation in terms of the economic and commercial reality. In particular, contractual terms might not reflect that reality because they constitute a purely artificial arrangement not corresponding with that reality. The fifth and sixth questions were asked on the basis that the answer to the fourth question (*ie* should the national court depart from the contractual analysis) was "No": the answer to the fourth question was not "No" but was to the effect that it all depends on a close analysis of all the circumstances. Since the answer was not "No" the fifth and sixth questions referred did not arise as separate questions.

54. The CJEU says, in CJEU [44] that it may become apparent that contractual terms do not wholly reflect the economic and commercial reality of the transactions. Although it says in CJEU [46] that this may be so "**in particular**" if it becomes apparent that those terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions, I do not read the judgment as a whole as supporting the propositions, in all cases where the contractual terms do not wholly reflect the economic and commercial reality of the transactions,

(1) that it is appropriate to depart from the contractual arrangements in identifying the identity of the supplier and recipient of supplies, even in the absence of abuse, or

(2) that the case is one where abuse is established.

55. It was not only the case that the CJEU did not consider the abuse issue separately. In the context of the facts in the present case, the CJEU did not, in my view, perceive any scope for departure from the contractual terms unless the arrangements were wholly artificial and did not reflect the economic and commercial reality although the judgment should not be taken as ruling out the possibility of some other abuse which would justify departure from those terms. A situation in which the contractual terms did not genuinely reflect economic reality was precisely a situation which the CJEU saw as potentially falling within the abuse principle in the first place. The reference in CJEU [49] to a genuine reflection of economic reality is a reference back to the "artificial arrangements which do not reflect economic reality" in CJEU [46], a conclusion which is reinforced by CJEU [50] where it is said that if "that were the case" (*ie* that the contractual terms did not genuinely reflect economic reality so that it was Mr Newey who was the maker and recipient of the relevant supplies) then the contractual terms would have to be redefined to re-establish the position which would have prevailed "in the absence of the transactions constituting that abusive practice", reference being made to *Halifax*. In other words, the CJEU did not contemplate that the contractual position in the present case might reflect the economic reality but that nonetheless it was Mr Newey who was the maker and recipient of the supplies. The case is not, therefore, one like *Reed* (as to which see paragraph 69 below) where the contractual terms did reflect the economic reality but where those terms were not conclusive in the identification of the recipient of the supplies.

The Decision

56. Mr Thomas and Mr Ghosh each took me at some length through the Decision. I take account, of course, of everything they said as they went along. I will refer to the

Decision so far as it is necessary to do so. HMRC do not take issue with the Tribunal's primary findings of fact; what they do challenge is the Tribunal's characterisation of the supplies at issue and the application of the abuse principle to the facts as found. They submit, in essence, that the Tribunal (who did not have the benefit of the guidance of the CJEU subsequently obtained following the reference by the UT) applied a narrow test, giving exclusive – or, if not exclusive, undue – weight to the contractual position whereas, following that guidance, it can be seen that the contractual position is only one factor to be taken into account. Unlike the CJEU, the Tribunal considered the abuse issue as a separate issue and did not roll it up into the consideration of a single question.

57. Having said that, the following facts and matters appearing from the earlier part of the Decision (on which I make some comments as I go along) were noted by the Tribunal (the format "[xx]" or "Decision [xx]" being paragraph numbers of the Decision):

a. Mr Newey's sole reason for implementing the arrangements was to avoid VAT [11] and [101]. But as Mr Ghosh correctly points out, the purpose of the transactions then carried out within the context of those arrangements was to make a profit, and it was the making of that profit which was Alabaster's commercial purpose. That is a different issue, however, from the issue whether the structure had any economic and commercial purpose (apart from the tax advantage).
b. The Services Agreement (see [15]) entered into between Mr Newey and Alabaster in 1997, which set out the contractual relationship between Mr Newey and Alabaster, was not an agreement at arm's length [23].

c. Alabaster conducted no business with third parties although the Services Agreement permitted this [25].

d. The Services Agreement lacked commercial detail which might be expected in an arm's length contract between independent third parties [26]. Whilst making that finding, HMRC submit that the Tribunal did not here, or anywhere else, engage in an analysis and evaluation which took account of this.

e. The Tribunal rejected HMRC's description that the Services Agreement was a tax-driven document. They appear to also have rejected the more general theme that the agreements entered into by Alabaster with third party lenders and Wallace Barnaby, and the decisions taken by Alabaster in the course of its business, were tax driven. They accepted that the original reason for setting up the Jersey business was tax driven but were of the view that that did not result in all the activities of the business being for tax reasons. Nonetheless, the Tribunal did make a finding at [11] and [101] that the sole reason for implementing the arrangements referred to in that paragraph was to avoid VAT which appears to go further than a finding that the original reason for setting up the Jersey business was tax driven. Those arrangements would appear to include at least the matters referred to in [12] to [19] and thus include the Services Agreement [15], the agreement with First Island Properties Ltd [16], the recruitment of directors of Alabaster [17], the secondment of Moore Stephens personnel [18] and the provision of accountancy and related services by Moore Stephens [19].

f. Although the Services Agreement was not at arm's length, it did "represent and reflect the real activities of [Mr Newey] and Alabaster" [28]. For my part, I read that as a factual finding to the effect that it was not a sham. The Tribunal said nothing at this stage about whether those real activities represented the economic and commercial reality by reference to which the VAT result of those activities is to be judged. The Tribunal noted that, although Alabaster did not have the infrastructure in Jersey which would have allowed it to conduct a loan broking business, it outsourced the processing operation to Mr Newey [28], from which they concluded that the fact that there were only limited resources in Jersey itself did not have any impact on the carrying on by Alabaster of the loan broking business. I read that as a factual finding to the effect that Alabaster was not simply an agent for Mr Newey in conducting that business but, again, the Tribunal said nothing at this stage about the VAT result of the manner in which the loan broking business was conducted.

g. The Tribunal found at [31] that all loan broking was effected pursuant to the agreements between Alabaster and the lenders and all payments of commission for the loan broking services were made by the lenders to Alabaster. Mr Newey did not have any contracts with lenders with respect to loan broking.

58. At [35], the Tribunal addressed the arrangements which had been put in place in relation to advertising initially through Ekay Advertising. It concluded that Mr Newey's involvement was limited to discussion about the content of the advertisements and yields on particular advertisements with Mr Powell of Ekay Advertising. He monitored the advertisements and shared his views with Mr Powell.

The Tribunal rejected HMRC's case that Ekay's client in terms of obtaining instructions was Mr Newey. I do not consider that that conclusion can now be challenged by HMRC and I do not understand it to be challenged in fact. Rather, HMRC's complaint is that these facts were not appropriately factored into the assessment of the economic and commercial reality but were simply discounted because the Tribunal's focus was on the contractual analysis. In other words, the Tribunal's evaluation is said to be faulty.

59. A similar complaint is made in relation to [39] and [40]. Thus in [39], the Tribunal referred to an advertisement in Yellow Pages where references are found to "we" which clearly meant Mr Newey not Alabaster. This was said by the Tribunal to be not material:

> "the object of the advertising was to encourage loan applicants to contact Alabaster's outsourced processing capability in the UK. It has no relevance in our view to the proper analysis of the respective business activities of Alabaster and [Mr Newey]".

60. That may be correct; but whether it has relevance to the economic and commercial reality is a different matter. This is important because the guidance from the CJEU is that business relationships (in contrast with purely contractual relationships) are of relevance. Mr Thomas submits that the application of that guidance (had it been available to the Tribunal) would have required them to ask whether the reciprocity which needs to be found in the VAT context was between Wallace Barnaby and Alabaster. His submission is that, when a proper evaluation is carried out, there was no real reciprocity between Wallace Barnaby and Alabaster. I do not agree with that conclusion. The matter must be looked at not only from Alabaster's perspective but also from Wallace Barnaby's perspective. The view that Wallace Barnaby had no reciprocal relationship with Alabaster is one which does not itself reflect economic

and commercial reality. Wallace Barnaby and Alabaster were not only the contracting parties under real, and not sham, contracts, but each could look only to the other in the operation of the commercial relationship. In particular, the matters identified at Decision [36] seem to me to establish a genuine relationship.

61. As to Decision [40], the Tribunal recorded a complaint which had been made to the Advertising Standards Authority about an Ocean Finance advertisement. It was Mr Newey, not Alabaster, who dealt with the complaint. The Tribunal dismissed this as a relevant factor saying that it "was readily explicable by the fact that the ASA had written to [Mr Newey] (as the address for contact in the advert), the complaint impacted upon the reputation of Ocean Finance, which trade name was owned by [Mr Newey], and [Mr Newey's] role under the Services Agreement". It may have been readily explicable by reference to those factors, but equally it would be readily explicable if the economic and commercial reality had been that Mr Newey was making and receiving the relevant supplies for VAT purposes. HMRC's complaint is that the Tribunal did not factor those matters into any assessment of the economic and commercial reality of the arrangements. Indeed, one might think that the licence for Alabaster to use the Ocean Finance trade name was a factor which might be of some significance in that assessment, but it does not appear to have featured at all.

62. In Decision [41] to [49], the Tribunal addressed the loan broking and processing operations. At [46], the Tribunal noted that the provisional offer letter sent to an applicant for a loan was on Mr Newey's headed notepaper and the address and phone number was of Ocean Finance in the UK. He was named as the proprietor and it was the consumer credit number of Mr Newey, not of Alabaster, which was referred to.

HMRC submitted to the Tribunal that it was clear from this that Mr Newey was providing credit broking services.

63. The Tribunal rejected that submission, saying this:

> "In a case where processing services, including all the interface with applicants, has been sub-contracted, as here by virtue of the Services Agreement, it is consistent with that outsourcing arrangement for the correspondence with the applicants to be conducted by the sub-contractor in his own name. The identity of the loan broker itself is not material to the applicant. The correspondence would be material only to the extent that it reflected the true sub-contract arrangement. It did not, and we reject the argument that it has any material relevance to the analysis of the business of [Mr Newey]."

64. At Decision [50] to [53] appears a section headed "*Further findings of fact*". In Decision [50], whilst accepting that the arrangements lacked certain commercial features which it would be expected to find in arrangements between independent parties acting at arm's length and that the loan broking business could have been carried on the UK with an integrated, rather than a sub-contracted, processing service, the Tribunal nonetheless found that Alabaster carried on a commercial business:

> "It was itself a commercial enterprise, carrying on economic activities of loan broking for which it equipped itself to a limited extent with its own staff and directors, and to a large extent through engaging the services of the Appellant under the Services Agreement. This was no brass plate company….."

65. In Decision [51], the Tribunal rejected the suggestion that a submission made by Mr Newey to the Office of Fair Trading ("the **OFT**") was indicative of the true relationship between him and Alabaster, considering that submission to be irrelevant to a consideration of the nature of Mr Newey's business. In that submission, Mr Newey described the way in which the Ocean Finance business operated and did not distinguish between him and Alabaster. The Tribunal's view was that the true relationship and also the nature of Mr Newey's business were established by the contractual arrangements and the actual course of dealings, and not by a summary

which they considered to be directed at a completely different purpose for which the actual business structure would not be of any relevance. In my view, the Tribunal were entitled to take this approach and to attach no weight to the submission to the OFT.

66. The Tribunal recognised, in [52] that the scale of Mr Newey's operation in the UK was substantial. Senior staff and underwriters in the UK were paid substantial sums when contrasted with the remuneration of the Alabaster directors and the member of staff, Lucy Woodworth, in Jersey. As to that, the Tribunal's finding was this:

> "However, this merely emphasises the extent of the processing operation that Alabaster had contracted to equip itself to conduct its loan broking business. We do not infer from this that it must have been [Mr Newey] that was carrying on the loan broking business. We are satisfied that the loan broking business was carried on by Alabaster, with the services of [Mr Newey] provided through the Services Agreement."

67. In [53], the Tribunal rejected the submission that the directors of Alabaster were simply "rubber stamping" the decisions of others (*ie* of Mr Newey and his staff in the UK) and rejected the description of Alabaster's activities as "window dressing":

> "Those expressions [rubber stamping and window dressing] might be apt in a case where documents are merely signed mindlessly, but we find that is not the case here. Alabaster obtained advice and recommendations, for example in relation to advertising, and it contracted underwriting and other administrative services to the Appellant. It relied on [Mr Newey] to provide input into the advertising campaigns and the terms on which lenders were added to its panel. Having obtained such advice and assistance, it had its own staff to collate certain of the material. The fact that, having engaged all those services, it consistently chose to follow and adopt them does not in our view amount to rubber stamping or window dressing, and we so find."

68. The Tribunal then turned to address the issues.

Decision [54] to [78] – the Characterisation of Supplies Issue

69. They dealt with the Characterisation of Supplies Issue in Decision [54] to [78]. They referred to the definition of "supply" in section 5(2) VAT Act (see [55]). At

[56], they referred to *C&EC Reed Personnel Services Ltd* [1995] STC 558 ***("Reed")*** recognising that questions of the characterisation of a supply cannot be determined by reference to the concept of a contractual duty. Whilst construction of a contract between two or more parties is relevant, it is not determinative. Nevertheless, the contract is one of the factors on which an overall view must be taken. The Tribunal's discussion of *Reed* through to Decision [60] makes clear that they took account of all of the interlinking contracts in addressing the issue of what supplies were made to whom. Moreover, the Tribunal noted in a number of places (see in particular Decision [71], [72] and [77]) that the contractual terms are not necessarily determinative.

70. Mr Thomas is critical of the way in which the Tribunal acknowledges that contractual terms are not determinative: it fails, he says, to reflect the importance which is attached to economic and commercial realities as a fundamental criterion for the application of the common system of VAT as emphasised in CJEU [42]. I do not agree. The Tribunal's analysis gives far more than a passing nod to the principle that the economic and commercial realities are fundamental.

71. The Tribunal considered some other domestic authorities including *Customs and Excise Commissioners v Redrow Group plc* [1999] STC 161 ("***Redrow***") and *WHA Ltd and another v Customs and Excise Commissioners* [2004] STC 1081 ("***WHA***") appear sufficiently in Decision [61] and [62]. I do not need to set them out again.

72. After some lengthy citation from *WHA*, the Tribunal recorded Mr Ghosh's submission to the effect that the features identified in *WHA* as leading to the conclusion that the garage supplied its services to WHA were essentially replicated in this case as regards the advertising services. Thus, first, the instructions to Wallace

Barnaby in respect of those advertising services were given by Alabaster in the form of Alabaster's acceptance of the recommendations made to it by Wallace Barnaby. Secondly, the only commercial relationship in respect of those services was between Alabaster and Wallace Barnaby. Thirdly, only Alabaster was liable to pay Wallace Barnaby.

73. In Decision [54] through to [77], the Tribunal carried out a full and careful review of the authorities in Decision [54] to [77] and made some observations and reached certain conclusions which HMRC now challenge, demonstrating, in Mr Thomas' submission, errors in their approach by focusing almost entirely on the contractual documents and their effects and placing undue weight on the terms of the contractual structure. The Tribunal, he says, failed (through no real fault of their own because they were without the guidance subsequently given by the CJEU) to engage in a proper assessment of the factors which should have been taken into account. In order to understand that submission, it is necessary to set out some rather long quotes from the Decision:

a. [66]: "Unlike in *WHA*, in this case there is no agreement whereby one party is to pay for services to be supplied to another. In *WHA*, once it was determined that WHA was the payer for the services to be rendered by the garage to the car owners, the only question was whether WHA would receive anything at all for the carrying out of the work. In this case, Alabaster received the advertising services itself for the purposes of its business, under a contract between Alabaster and Wallace Barnaby. Alabaster paid the whole consideration for those services. There was therefore in our judgment only a supply of the advertising services to Alabaster and not to the Appellant. This conclusion is not affected by the fact that, indirectly, the Appellant also benefited from the advertising that was supplied. It enabled the Appellant to receive enquiries from prospective borrowers which, if converted into loans, resulted in the Appellant earning commission under the Services Agreement. But that does not mean that the circumstances can result in the Appellant being regarded for VAT purposes as having received a supply of the advertising services itself."

b. [66]: "On the facts we have found, Alabaster was a commercial enterprise carrying on its own economic activities, for which it had equipped itself to perform through the Services Agreement with the Appellant. Although we consider that the question of the proper analysis of the supplies in this case must be approached by consideration of the whole facts and not just the contracts under which the services are provided, having done so there is nothing in the factual situation in this case that would lead us to conclude that either the advertising supplies were made to the Appellant or the loan broking supplies were made by the Appellant."

c. [67]: In WHA, HMRC argued that *WHA* was distinguishable on the basis that WHA had not only a contractual relationship with the garages but also had a business relationship whereas in the present case, despite the contractual relationship between Alabaster and the lenders, there was no business relationship, the real business relationship being between the Appellant and the lenders. The Tribunal said this:

> "We do not accept this submission. We consider that on the facts of this case it was Alabaster that had a business relationship with the lenders. Just as if it had done so through its own staff in Jersey, Alabaster carried on that business relationship, having equipped itself to do so through the Services Agreement with the Appellant. The mere fact that functions are performed through an outsourcing arrangement does not mean that the principal who has sub-contracted those functions out to another party should be regarded as not having the business relationship with its own contractual counterparties.

d. [70]: Having decided that there was no question of Mr Newey somehow having ultimately paid for the services of Wallace Barnaby, the Tribunal said this:

> "We do not consider that the fact that the arrangements between the Appellant and Alabaster were not at arm's length can lead to the conclusion that the Appellant had ultimate responsibility for the payment for Wallace Barnaby's services. We find that the Appellant did not bear financial responsibility for the consideration for the services provided by Wallace Barnaby to Alabaster."

e. [71]: They examined the decision of the CJEU in *Belgian State v Temco Europe SA* [2005] STC 1451, referring to it as doing no more for present purposes

> "than confirming that, in considering the nature of the supply, all the circumstances surrounding the relevant transaction should be considered in order to establish its characteristic, and that this includes the essential object of the relevant contracts. *Temco* reiterates the principle that in considering the legal effect of a transaction the entire transaction must be examined and that, as *Reed* tells us, the terms contractually agreed and the legal rights and obligations of the parties may not be determinative as to the true nature and effect of the transaction for VAT purposes. Our only observation is that, when all the facts and circumstances have been taken into account, it remains the case that the proper analysis of the supply might well be consistent with the contractual position."

f. [72]: They referred to *Tesco v Customs and Excise Commissioners* [2003] STC 1561 where they identified the approach of Jonathan Parker LJ to the scheme in question was

> "to examine the entire cycle of transactions in order to determine objectively ….. and having regard to the scheme's economic purpose, whether its legal effect is such that the vouchers were issued for "consideration" in the Community sense of that term."

They also noted that the judge referred with approval to *Reed*

> "in concluding that the that the terms contractually agreed may not be determinative of the true nature and effect of a scheme and that it was necessary to consider what is the economic purpose of the scheme, or "the precise way in which performance satisfies the interests of the parties", as the Advocate General (Tizzano) put it in *Customs and Excise Commissioners v Mirror Group plc* (Case C-409/98) [2001] STC 1453 (at para 27)".

g. [75]: It was common ground that the approach to the question whether a supply was "for a consideration" was a test of reciprocity, even in the absence of a legally binding agreement. The Tribunal rejected the submission that there was reciprocity in the required sense between Mr Newey and the lenders or between him and Wallace Barnaby. They said this:

"…. Mere business relationships of the nature we have found in this case do not amount to reciprocal performance such as to conclude that a supply has been made on the basis of those relationships for a consideration. The services provided by the Appellant were to Alabaster and Alabaster provided the consideration, in each case under the Services Agreement. That was a legal relationship under which there was full reciprocity and, although it is not necessary for there to be a legal agreement in order to find reciprocity, we do not detect in the relationships and dealings between the Appellant and the lenders anything in the nature of a link between service and payment sufficient for there to be a transaction between them "for consideration". We find the same in relation to the advertising services of Wallace Barnaby. The role played by the Appellant in that respect was wholly consistent with the supplies it made to Alabaster under the Services Agreement, for which the Appellant received consideration from Alabaster. There was no relevant link between the Appellant and Wallace Barnaby; certainly not one that could lead us to conclude that there was a transaction between Wallace Barnaby and the Appellant for consideration. Contrary to Mr Vajda's submission, the advertising services were in our view supplied to Alabaster for the purposes of its business, which it carried on with the benefit of the services of the Appellant under the Services Agreement."

h. [77]: "We accept that we must have regard to the economic purpose of the contracts. However, we do not consider that this would entitle us to reach a conclusion that ignores the substance of how that economic purpose is achieved. Indeed, in this context, economic purpose is the economic purpose of the contract, described, …. in para 27 of his opinion in *Mirror Group* by Advocate-General *Tizzano* as "the precise way in which performance satisfies the interests of the parties". The activities of the Appellant were all carried out under the Services Agreement. Performance of that agreement satisfied the interests of Alabaster and the Appellant. Performance by Alabaster of its contracts with the lenders satisfied both parties to those respective contracts. Performance of the contract between Alabaster and Wallace Barnaby did likewise. Where A provides services to B for consideration, the fact that A may thereby have business dealings on behalf of B with C, with whom B has a contract for supplies of services, and that A, whether through its commission arrangements with B, or through any financial interest in B, benefits from B's own contractual relationships with C, does not have the effect that A must be treated as making or receiving supplies made by or to B. That in our view would be to regard economic effect as a test, which the Court of Appeal in *Customs and Excise Commissioners v Littlewoods Organisation plc* [2001] STC 1568 (per Chadwick LJ at [84]) rejected. It seems to us that Mr Vadja's argument on economic purpose essentially invited us to ignore the transactions involving Alabaster. In our view the proper approach to the analysis of a supply does not permit such a course."

74. This is a convenient point at which to deal with the Tribunal's reference to *Littlewoods*. It is true that Chadwick LJ had something to say about economic effect. But the context in which he said it was very different from the context of the present case. That case was heard with three other appeals, one of which was *Lex Services plc v HMRC* concerning the sale of new vehicles involving part-exchange of the customer's existing vehicle. In *Lex*, there was no issue about who made each relevant supply by or to whom it was made: the supply was by the dealer to the customer. The issue was the value to be attached to the consideration (cash plus the part exchange vehicle) which was given for the supply of the new car. It was argued that the sale of the new car was equivalent to a transaction for cash of an amount equal to the sum of the actual cash paid together with the trade value of the part-exchange car rather than for the values which the parties had, by their contract, attributed to the new car and the part-exchange car. It was said that it was this latter value which represented the consideration for the new car rather than the list price which the parties had adopted as the sale price. It was in that context that Chadwick LJ said this at [84] of his judgment:

> "We reject the submission that there is any principle that transactions which have the same economic effect are, necessarily, to be treated in the same way for the purposes of VAT."

and then, after addressing the principle of neutrality as explained in *Elida Gibbs*, he stated that that principle did not provide an answer to the question "what monetary equivalent did the parties attribute to the part exchange car?".

75. What Chadwick LJ said cannot be read in a way which is inconsistent, or even cuts across, the clear jurisprudence of the CJEU relating to economic and commercial reality; or, if it is inconsistent, it cannot stand with the more recent case-law of the CJEU. In any case, the submission which he rejected was that there was a principle

which led to transactions having the same economic effect as necessarily being treated in the same way. He did not reject the proposition that transactions which do have the same economic effect might fall to be treated in the same way for VAT purposes.

76. I am troubled, therefore, by the example which the Tribunal gave in Decision [77]. They seem to be saying that, to treat A as making or receiving supplies made by or to B would be to regard economic effect as the test; but since that test is to be rejected, it is not possible to treat A in that way. However, that conclusion does not follow from what Chadwick LJ said. In *Lex*, the transaction was the sale of a new car: however the consideration for the new car was to be ascertained, the commercial and economic reality was that the new car had been sold for a consideration by Lex to the customer. The principle of equivalence did not require a sale at the value attributed to it by the parties to be treated as a sale at a different value which the parties to the particular transaction had not agreed. It was just as real, commercially and economically from the viewpoints of both parties, to regard the value agreed between the parties as the price as it was to regard the cash element plus the trade value of the part-exchange car as that price. In contrast, in the present case, the exercise required is to ascertain the nature of the supply. The fact that, contractually, matters are arranged between A, B and C in the manner described in the example does not, as the case law of the CJEU clearly establishes, necessarily result in the supplies made by or to B being incapable of being treated as supplies made to or by A. It may, on a more detailed examination of the facts, be the case that such a treatment is indeed to be given, consistently with the judgment of CJEU in the present case. If one were to add the word "necessarily" so that the relevant phrase in Decision [66] reads "does not necessarily have the effect that A must be treated….", then I would agree. But then it would not be possible to

say that this would be to regard economic effect as the test, at least not the test rejected by Chadwick LJ.

Decision [79] to [108]

77. The Tribunal dealt with the Abuse Issue in Decision [79] to [108]. The issue, as they put it, was whether the transactions involving Alabaster in making supplies of loan broking services and of receiving supplies of advertising services, was an abuse of the Sixth Directive. In Decision [80] to [85], the Tribunal discussed *Halifax* and *WHA* in the Court of Appeal. They then proceeded to address the first two of the four questions relevant to establishing abuse identified by Lord Neuberger in *WHA*:

a. Is the scheme or part of it contrary to the purpose of the Sixth Directive? [See Decision [86] to [95]. They concluded that it was not.
b. Was the essential aim of the scheme to obtain a tax advantage? [See Decision [96] to [102]. They concluded that it was.

78. They also addressed the fourth question in case they were wrong on the first question: Can, and must, the scheme or the relevant part be redefined? They held that it should be and this would be done by treating Mr Newey as having received in the UK the supplies of advertising services which under the arrangements were made in Jersey to Alabaster and as making in the UK the supplies of loan broking services that were by Alabaster.

79. As to the first question, the first step was to identify the relevant purpose of the Sixth Directive and what is required by "fiscal neutrality". The first critical part of the Tribunal's answer was their rejection at Decision [89] of HMRC's characterisation of the structure as the "insertion" of Alabaster. They saw this as amounting to the suggestion that Alabaster had simply been introduced into a series of

transactions that otherwise remained intact. Instead, what took place was a wholesale reorganisation of the basis upon which the overall business was operated, with Alabaster undertaking the loan broking services and receiving the advertising services, and Mr Newey ceasing to carry on loan broking but instead carrying on the business of processor for Alabaster under the Service Agreement. They also rejected the description of the structure as the "Jersey loop": there was no loop similar to that found in *WHA* (the so-called Gibraltar loop).

80. The Tribunal (see Decision [90]) considered that, at all stages, HMRC's argument sought to compare the results of the transactions actually entered into by Alabaster with what would have resulted if exempt supplies had been made in the UK going on to say this:

> "To characterise as abusive transactions which result in VAT being recoverable or no VAT being incurred, that VAT must, in our view, be capable of being regarded as irrecoverable by reference to the actual facts and circumstances, such as the making of exempt supplies in the UK, as was the case both in *Halifax* and in *WHA*. If an exempt supplier [*ie* Mr Newey, under the original arrangements] engineers a scheme to create a deduction or to prevent VAT which would be irrecoverable [*ie* the VAT on the advertising services, which could not be recovered under the original arrangements] from being incurred, then we can see the argument (depending on the circumstances) that this could be regarded as contrary to the purpose of the VAT directives. But in our view this cannot be the case if there is no actual exempt supply that would render any VAT irrecoverable. Mr Vajda [for HMRC] recognised the factual difference between *WHA* and the instant case in that in *WHA* there was a recovery of input tax whereas in this case no input tax is incurred because the supplies of advertising services were made in Jersey, but he argued that this was not material in the context of the abuse argument. We agree that there is no material difference between recovery of VAT otherwise irrecoverable as being attributed to an exempt supply, and not incurring VAT that would otherwise be irrecoverable. However, there is nothing in the actual circumstances of the transactions with which we are concerned to create that irrecoverability; in our view **the absence of any exempt supply in the actual transactions** that would render VAT attributable to that exempt supply irrecoverable means that there is no purpose of the VAT legislation to which these arrangements can be contrary."

81. In Decision [92], the Tribunal refer again to the absence of exempt supplies:

> "There were no exempt supplies to which irrecoverable VAT could be attributed, and accordingly no identifiable requirement of the VAT regime that there should be an overall liability to VAT equal to VAT that would have been charged on the supplies of advertising services if those supplies had been made, or treated as made, in the UK."

82. The words which I have highlighted in those quoted passages are said by HMRC to be wrong. I will come to that argument in due course.

83. The Tribunal then went on, in Decision [91] and [92] to reject the proposition that it was permissible simply to compare what had been done with what might have been done: it is not abusive within *Halifax* for traders to conduct business in a particular way and they may do so to limit their liability to tax. They rejected also the proposition that it was valid to compare a structure that a trader might have adopted in the past with the new structure and to conclude that, if the latter is more favourable, it was in consequence contrary to the purpose of the Sixth Directive. Instead, the new arrangements should be viewed as a whole on their own merits and without being associated with other possible transactions or arrangements. The question is whether the new arrangements are of themselves contrary to the purposes of the Sixth Directive:

> "It seems to us that it would not accord with the principle of fiscal neutrality, or the requirement for legal certainty, if the VAT treatment of transactions or arrangements could differ depending on whether the trader, or a connected or associated person, previously undertook similar transactions through a different structure, and those past transactions gave rise to a more onerous liability to VAT than the transactions or arrangements in question. This would be the case whether or not the purpose of putting in place the new transactions or arrangements was to obtain a tax advantage. The two tests for abuse are separate, and the question whether a scheme is contrary to the purpose of the VAT legislation must, in our view, be considered independently of the tax advantage purpose test."

84. The Tribunal were clearly correct in saying that the mere obtaining of a tax advantage by adopting one structure rather than another is not an abuse. The obtaining of a tax advantage is a necessary, but not sufficient, feature of abuse, as the

first limb of the test set out in [74] of the CJEU Judgment in *Halifax* demonstrates. For there to be an abusive practice, the obtaining of that tax advantage must be contrary to the purpose of provisions of the Sixth Directive. But even that is not enough for abuse to be established. The second limb of the test is that the essential aim of the transactions concerned is to obtain the tax advantage: where the economic activity carried may have some other explanation other than the attainment of tax advantages, there is no abuse.

85. Decision [92] is of importance. In that paragraph, the Tribunal considered the reference to "normal commercial operations" in [16] of Lord Neuberger's judgment in *WHA*. The reference to "normal commercial operations" no doubt comes from [80] of the judgment of CJEU in *Halifax*:

> "To allow taxable persons to deduct all input VAT even though, in the context of their normal commercial operations, no transactions conforming with the deduction rules of the Sixth Directive or of the national legislation transposing it would have enable them to deduct such VAT, or would have allowed them to deduct only a part, would be contrary to the principles of fiscal neutrality and, therefore, contrary to the purpose of those rules."

86. The Tribunal saw the normal commercial operations in *WHA* as exemplified by the earlier arrangements which were replaced by the Gibraltar scheme; they did not regard Lord Neuberger's reference (see the citation at Decision [86]) to those operations as

> "enabling a prior structure that did involve exempt supplies to be used as the benchmark for the recoverability of VAT against which a new structure not involving exempt supplies should be tested. It seems to us that, in the context of *WHA*, the normal commercial operations were postulated on the existence of an insurer making exempt supplies in the UK…. In this case, by contrast, as we have found, the supplies of loan broking services to the lenders were made by Alabaster, which had no establishment in the UK, and not by [Mr Newey]. There were no exempt supplies to which irrecoverable VAT could be attributed, and accordingly no identifiable requirement of the VAT regime that there should be an overall liability to VAT equal to VAT that would have

> been charged on the supplies of advertising services if those supplies had been made, or treated as made, in the UK."

87. Finally, on the first element of the *Halifax* test, the Tribunal expressly accepted Mr Ghosh's argument that the VAT code expressly recognises third countries (those outside the EU), in UK law through section 26 of the VATA and Article 16 of the VAT (Place of Supply of Services) Order 1992. The fact that the VAT legislation itself provides for the consequences of business being carried on through an establishment in a third country demonstrated that something more than such a mere establishment must be found if elements of the scheme were to be regarded as contrary to the purposes of the VAT legislation.

88. The Tribunal's conclusion was that the arrangements in the present case were not contrary to the purposes of the VAT legislation.

89. This made it strictly unnecessary to consider the second element of the *Halifax* test. The Tribunal nonetheless addressed the question in Decision [96] to [102], concluding that the essential aim of the Alabaster structure was to obtain a tax advantage. At Decision [101] they said this:

> "Looked at objectively, we conclude that there could have been no purpose in the establishment of either the Lichfield or Alabaster structures other than to obtain the desired tax advantage. In the context of the Appellant's former business of loan broking there was no commercial justification for the Appellant ceasing to carry on loan broking and instead to commence the provision of processing services to an associated company in Jersey. The Alabaster structure would not have been put in place but for the tax advantage sought to be derived. Furthermore, the way in which the Alabaster arrangements were structured, on the advice of Moore Stephens who provided detailed instructions on how the business was to be conducted to meet the tax requirements, and with directors, staff and premises sourced or provided by Moore Stephens, serves to confirm on an objective view, that this was a structure designed solely for the purpose of obtaining the tax advantage."

90. Because of the approach which they had taken to the Abuse Issue, and the first of the *Halifax* tests, this was a perfectly rational outcome.

The correct approach to the two Issues

91. In the appeal before me, the parties continued to address the two Issues separately. However, the focus of Mr Thomas' argument in relation to the Categorisation of Supplies issue was on the commercial and economic reality of the transactions. The submissions relied in essence on the proposition that the actual transactions were artificial; the arrangements were not what they apparently seemed. It seems to me, therefore, that Mr Thomas was really including within his argument on the Categorisation of Supplies Issue aspects of the arrangements which were relevant to abuse, that is to say the matters with which the CJEU was concerned in CJEU [44] to [49].

92. It was not always clear that commercial and economic reality was being relied on by Mr Thomas in the sense which is relevant to the principle of abuse of rights, that is to say where the arrangements are wholly artificial and do not reflect economic and commercial reality. It is important not to divorce those two elements ("wholly artificial" and "do not reflect economic and commercial reality") which, together, describe one type of abusive practice. I gained the impression on occasions from Mr Thomas' submissions that there was said to be some free-standing concept of commercial and economic reality allowing for a less strict test than that laid down in *Halifax* albeit subject to the nuanced explanation of that test in *Ampliscientifica*, *Tanoarach* and *JJ Komen* and that this looser concept would justify a departure from the contractual position. Of course I accept that, when carrying out the analysis which is needed to establish the identity of the maker and recipient of a supply for VAT purposes, it is necessary to view the actual transactions and to assess what the real effect of those transactions is for VAT purposes. In this context I note, at risk of

repeating myself, that cases such as *Reed* show that there can be a departure from the contractual position even in the absence of any abuse or artificial arrangements (a conclusion reflected, I think, in the discussion in *Redrow* and *WHA*). But once the argument moves onto an examination of the reality in the context of wholly artificial arrangements, it seems to me that one is moving into the realms of abusive practice.

93. Accordingly, if the Characterisation of Supplies Issue is intended to ignore the allegedly abusive aspects of the scheme, then the starting point is that the transactions in the present case took place within a genuine structure which was not "wholly artificial and not reflective of commercial and economic reality" and took place in the course of the normal commercial operations of the relevant entity, that is to say Alabaster. It is because, and in my view only because, those commercial operations are said to take place within the context of a set of wholly artificial arrangements that they can be said to be non-commercial. But that is part of the issue of abuse and not part of a simple characterisation of the supplies.

94. I have spent some time on this aspect for two reasons. The first is that the Tribunal's approach was to deal with the Categorisation of Supplies Issue as entirely distinct from the Abuse Issue. *Halifax* was not mentioned in the section of the Decision dealing with the first of those Issues; nor did the Tribunal address or take account of the allegedly artificial nature of the Alabaster arrangements as a whole in considering the Categorisation of Supplies Issue. It appears to me that the Tribunal ignored in that part of the Decision the possibility that the facts which it was finding and analysing might give rise to an abusive practice. They adopted a conventional approach and asked themselves who supplied what to whom in the objective way required by the Sixth Directive.

95. When it came to the Abuse Issue, the Tribunal took what I might call a higher level approach, that is to say they considered the law about abuse in the context of some particular aspects of the case without addressing the detail of the facts and then relating the legal principles to those facts. They no doubt had in mind the findings of fact which they had made in the earlier parts of the Decision but it is not always entirely easy to see precisely how those facts were taken account of in reaching the conclusions on the Abuse Issue. The focus of their reasoning, reflecting the arguments made, was on the purposes of the Sixth Directive and the accrual of a tax advantage which would be contrary to those purposes. They did not, therefore, separately examine in that part of their reasoning, whether the arrangements were "wholly artificial transactions" which did not reflect the commercial and economic reality.

96. I need to say something about Decision [101]. Applying *Halifax*, as they did, the Tribunal correctly considered the two tests laid down. It might be asked why two tests are necessary. It could be suggested that, where one finds arrangements the essential aim of which is to obtain a tax advantage, those arrangements are necessarily abusive. That is not correct: a transaction which results in the accrual of a tax advantage contrary to the purpose of the Directive, even where that was the essential aim of the transaction, may represent economic activity which has some explanation other than the mere attainment of tax advantages. Equally, there may be cases where, even though obtaining a tax advantage is an essential aim of the transaction, the transaction is not contrary to the purpose of the Sixth Directive.

97. In paragraph 55 above, I have expressed the view, in effect, that the only circumstance in which a departure from the contractual position might be justified, on

the facts of the present case, is where there is an abusive practice. Although Mr Thomas has focused on what he submits is the economic and commercial reality of Alabaster arrangements, he nonetheless maintains, as I understand it, that the effect of those arrangements is that the relevant supplies were made, for VAT purposes, by and to Mr Newey without any need to redefine them in accordance with *Halifax* principles as explained at [50] and [51] in the CJEU Judgment. If I am right in what I have said in paragraph 55 above, that argument is not open.

98. But in case I am wrong, it is necessary for me to address the Categorisation of Supplies Issue separately from the Abuse Issue just as the Tribunal did. It is, in any case, necessary to address HMRC's criticisms of the Tribunal's evaluation of the primary facts found in the course of their consideration of that Issue, since those criticisms will feed in to the correct answer to the enquiry which the CJEU contemplated in [49] of the CJEU Judgment.

99. For his part, Mr Ghosh observed, correctly as I see it, that the CJEU wrapped up economic reality with abuse; and his submissions on the Categorisation of Supplies Issue are equally apposite to the Abuse Issue.

HMRC's case – the Categorisation of Supplies Issue

100. Mr Thomas has referred me to the passages in the Decision mentioned in paragraph 73 above which demonstrate, it is said by HMRC, the Tribunal's erroneous approach to the Characterisation of Supplies Issue. There is nothing else material in the Decision which shows whether, and if so how, the various factors which HMRC say should have been taken account in the light of the guidance from the CJEU were taken into account. It cannot be assumed that they were taken account of or, if they were, that the appropriate weight was attached to them. The passages also show that

the Tribunal based its decision almost exclusively on a question of contract notwithstanding that they accepted that the question of who supplies what to whom for the purposes of VAT cannot be determined simply be reference to an analysis of contractual obligations. Further, they failed to analyse the question of characterisation of the supply from an economic view and ignored how those transactions might be artificially presented. The Tribunal's conclusion at [67] that Alabaster had a business relationship with the lenders is a further demonstration of the narrow contractual approach. It is said by HMRC that the evidence before the Tribunal showed that the business relationship, as distinct from the contractual relationship, was with Mr Newey. I do not accept this particular criticism. It is quite possibly the case, as HMRC suggest, that the lenders were prepared to deal with Alabaster only because of Mr Newey's relationship with it and his introductions. It does not follow from the (real) relationship between Mr Newey and the lenders that there could not be a perfectly genuine relationship between Alabaster and the lenders as well. Indeed, there was a contractual relationship which, unless it was something close to a sham, was not to be ignored. It is not a case of a relationship subsisting between Mr Newey and the lenders or Alabaster and the lenders, but not both.

101. HMRC's case is that the Tribunal's decision cannot, in the light of these criticisms, stand. It is therefore for the Upper Tribunal, on appeal to apply that guidance and revisit the decision.

102. Referring to the passage at paragraph 73a above, Mr Thomas submits that it demonstrates an incorrect starting point. The Tribunal reached a conclusion based solely on the contractual position. It was because Alabaster received the advertising services itself for the purposes of its business, under a contract between Alabaster and

Wallace Barnaby and because Alabaster paid the whole consideration for those services that the Tribunal concluded the supply of the advertising services was provided **only** to Alabaster and not to the Appellant. They then asked themselves whether that conclusion was displaced by the fact that those advertising services indirectly benefited Mr Newey by enabling him to receive enquiries from prospective borrowers which, if converted into loans, resulted in his earning commission under the Services Agreement. This, it is said, discloses two errors: first, it fails to take into account all of the relevant factors appropriate to deciding the economic and commercial realities of the transactions and secondly it is inconsistent with CJEU [48] where it was said to be conceivable that the effective use and enjoyment of the advertising services provided by Wallace Barnaby took place in the UK and that Mr Newey profited therefrom. For the Tribunal, it appears to have been wholly irrelevant that Mr Newey might have profited, an approach which cannot be reconciled with the guidance given in CJEU [48].

103. Further, in deciding whether there was a relevant business relationship between Mr Newey and anyone other than Alabaster, the Tribunal again, it is said, adopted a blinkered approach by considering only the contractual relationships and failing to take account of a number of factors which should have been taken into account. By relevant business relationship, I mean a relationship which is capable of giving rise to the reciprocity in the context of which VAT supplies for a consideration are to be identified. Again, CJEU [48] appears to consider that there could be a relevant relationship between Mr Newey and the lenders and between Mr Newey and Wallace Barnaby.

104. I do not agree with the criticisms of the Tribunal addressed in the preceding two paragraphs. Decision [66] must be read as a whole. It is not right to read the Tribunal as saying the contractual position was that Alabaster received and paid for the advertising services and that therefore the supply was to be taken as made to Alabaster regardless of other consideration. Quite clearly, the Tribunal did take into account that Mr Newey would benefit indirectly from the advertising. But, in reaching the conclusion which they did in Decision [66], they also took account of their previous finding that Alabaster was a commercial enterprise carrying its own economic activities; and they also reached their conclusions approaching the matter, expressly, by a consideration of the whole facts and not just the contracts. The Tribunal were aware of the facts on which HMRC now rely, for instance Mr Newey's significant input into, perhaps even control over, the level and nature of the advertising. I do not consider that the Tribunal can be criticised for not referring, in Decision [66] or in this part of their discussion, to every factor which they took into account or for not explaining the weight they attached to each such factor. They were well aware of HMRC's case on this and, indeed, did comment on a number of aspects of it.

105. Unless HMRC can successfully attack the finding that Alabaster was a commercial enterprise carrying on its own economic activities, I consider that they were entitled to reject HMRC's argument based on the indirect commercial benefit to Mr Newey of the provision of advertising services to Alabaster.

106. HMRC submit that the Tribunal was in error in failing to take a whole raft of factors into account. Importantly, they did not apparently consider the impact of the factors (see Annex 2 to this decision) identified in the third question (and which the

CJEU clearly thought could be material otherwise they would not have been mentioned in CJEU [48]). Further, they took no account of the fact that Alabaster did not negotiate any contracts with lenders, something which was done by Mr Newey, they took no account of the reality that Alabaster's role was simply that of a contractual counterparty and they took no account of the fact that the real business relationship in relation to the supplies of loan broking services was with Mr Newey not with Alabaster.

107. I have already noted that Mr Newey's sole reason for implementing the arrangements was to avoid VAT: see paragraph 57.a above. According to HMRC, there is nothing in the Decision to suggest that the agreements between Alabaster and the lenders were driven by any perceived commercial advantage. Indeed, in cross-examination, Mr Newey accepted (although these matters are not recorded in the Decision) that they were the product simply of the scheme to produce a tax saving and that the reason for all the decisions (*eg* accepting loan applications, placing advertising) was again driven by tax, and not commercial, considerations. Mr Thomas' submission is that, applying the CJEU's approach, the conclusion to be drawn from these fundamental features is that Alabaster was devoid of any commercial purpose and its involvement in these transactions was not remotely reflective of economic and commercial reality. The contractual effect of its involvement notwithstanding, it was wholly artificial. I will consider this argument further in the context of the Abuse Issue, but it seems to me that it gets HMRC nowhere in relation to categorisation in the absence of abuse in the light of the Tribunal's findings of primary fact.

108. In paragraphs 52 to 119 of their skeleton argument on behalf of HMRC, Mr Thomas and Ms McArdle have identified a large number of facts/factors which it is said the Tribunal either failed to take into account or to which they attached inappropriate weight. Mr Ghosh, Ms Wilson and Mr Bremner have prepared a table listing those facts/factors in one column with Mr Newey's responses in another column. The table runs to 11 pages. I was not taken through it in detail, but as is becoming customary in hearings both in the tribunals and courts, the parties have set me some homework, inviting me to read the table and take its contents into account in reaching my decision. I have complied with that invitation albeit not with great enthusiasm. Notwithstanding the additional length of this decision that this entails, I consider that I must record (see paragraphs 109 to 175 below) the result of my homework so I now turn to address the propositions and responses contained in the table reaching some conclusions as I go along.

109.To be fair to Mr Ghosh, he submits that it is not open to HMRC to raise the challenges which it now does on the basis that (i) some of those challenges are effectively challenges to the findings of fact which cannot be raised on an appeal on a point of law (there being no *Edwards v Bairstow* challenge to the findings of primary fact) and (ii) that other challenges are to the way in which the Tribunal evaluated the whole of the evidence, challenges which are open to a similar objection. I will deal with that submission in due course. He is correct in relation to (i) although for my part I do not think HMRC are making a challenge to the findings of primary fact. As to (ii), it is unfortunately (from my point of view) the case that the submission cannot be fairly dealt with without a full understanding of what it is that HMRC do challenge which, of itself, requires a fairly full investigation of the matters raised in the table which I have referred to. This is particularly so because part of HMRC's case is that

the Tribunal's approach did not properly reflect the factors which the CJEU Judgment has shown to be relevant. In the ultimate analysis, Mr Ghosh may be right, or he may be wrong, in saying that the evaluation of the Tribunal was one which cannot be overturned on an appeal. But I do not think that I can reach a conclusion on that without an investigation of the evaluation which was undertaken.

HMRC's factual propositions and Mr Newey's responses

(i) The decision to set up Alabaster in Jersey and enter into the Service Agreement and HMRC's skeleton argument paragraphs 46 to 51

110. HMRC say that this decision was solely driven by what Mr Newey perceived to be the VAT advantages of the scheme. The agreements between the lenders and Alabaster were not driven by any commercial advantage and were the product simply of the scheme to produce a tax saving. The reasons for Alabaster's so-called decisions were all tax driven and not for any commercial advantage. The evidence from Mr Newey's own witnesses was that there was no business advantage to the operation of Alabaster in Jersey. It was not run in a normal commercial manner. The activities of signing-off forms such as OAFs were not a normal commercial practice. The advertising arrangements were not commercial. It was not commercial for Moore Stephens to instruct a company how to run its decision-making process. Applying the CJEU's approach, the conclusion to be drawn from the fundamental features of the factual context is that Alabaster was devoid of commercial purpose and its involvement in these transactions was not remotely reflective of economic and commercial reality. The contractual effect of its involvement notwithstanding, it was wholly artificial.

111. Mr Ghosh responds that although the Tribunal found that Alabaster was created by Mr Newey for the sole purpose of avoiding VAT, his intention in founding Alabaster is irrelevant to the characterisation of the supply for VAT purposes precisely because that characterisation must be objective. I agree with that for the reasons already discussed if one ignores the issue of abuse. But this does not answer the question whether the Alabaster arrangements were ones which were wholly artificial and not such as to reflect economic and commercial reality.

(ii) Mr Newey's activities in the UK: credit broking and HMRC's skeleton argument paragraphs 52 to 64

112. Paragraphs 52 to 64 deal with aspects of the credit broking business in the UK in which Mr Newey was, to use a neutral word, involved. The Tribunal's conclusion at Decision [29] was that Mr Newey's activities were carried out under the Services Agreement and not as a loan broker in his own right. Mr Ghosh says that the Tribunal were entitled to reach that conclusion. I do not understand HMRC to challenge that conclusion as a matter of law. Instead, it is said that the loan broking services supplied to lenders (and correspondingly the receipt of advertising services supplied by Wallace Barnaby) were supplies for VAT purposes by (or to) Mr Newey notwithstanding that the relevant contracts were made with Alabaster and not Mr Newey. The Tribunal's conclusion is not determinative of the nature of the VAT supplies although the contractual position is certainly a factor to be taken into account.

113.HMRC rely on a number of points set out in paragraphs 52*ff* of the skeleton argument. I deal with them so far as necessary in the following paragraphs.

114.Point 1: The letter to the OFT referred to in Decision [52]. As the Tribunal recorded, that letter had been written by its recently-appointed compliance officer, who had previously worked as an underwriter in the business. That submission had been made in response to a fact-finding study by the OFT into the UK debt consolidation market. It described the way the Ocean Finance business operated. It does not mention Alabaster at all. The Tribunal did not find this to be indicative of the true relationship between Mr Newey and Alabaster, or as being relevant to a consideration of the nature of Mr Newey's business which was to be established by the contractual arrangements and the actual course of dealings. Mr Ghosh says that the Tribunal were entitled to reach the conclusion which they did, especially given Mr Newey's evidence that he did not write the letter himself or even approve it at the time although it should be mentioned that he also accepted that the substance was accurate. I agree with Mr Ghosh on this point. The actual nature of Mr Newey's business and his relationship with other parties is to be ascertained by reference to the contractual documents and the way in which his activities were in fact carried out. It is not suggested that the arrangements were a sham, albeit that they might be described as artificial. The letter might be of relevance in resolving areas of doubt or obscurity, but it cannot be seen as contradicting conclusions about the nature of his business and his relationships which, on the evidence ignoring the letter, are established.

115. Point 2: Mr Newey maintained a consumer credit licence to include carrying on business as a credit broker. The Tribunal were, however, well aware of this and, according to Mr Ghosh, attached appropriate weight to it. I agree with Mr Ghosh that the Tribunal were well aware of this and took it into account. The weight which they were entitled to attach to it is a matter for them.

116. Point 3: Contracts with lenders were negotiated by Mr Newey, with Alabaster having no input into the terms of contracts with lenders. The Tribunal again took this into account, noting that the final approval and signing rested with the directors of Alabaster. Mr Ghosh points out that the evidence was that without that approval, that item of business would not have been transacted. The evidence was also that lenders paid similar levels of commission for borrowers with a particular status. Again, I agree with Mr Ghosh that the Tribunal were well aware of these matters and took them into account. Again, the question of weight was for them.

117. Point 4: The business of loan broking involves personal contact with lenders. HMRC's skeleton argument relies on a number of factors to show that this was so notwithstanding Mr Newey's suggested attempts to play down this aspect of the case. It is submitted that it is not credible to think that lenders would have dealt with Alabaster without having the reassurance that Mr Newey stood behind it and that it would be Mr Newey who would be carrying out the loan broking activity: virtually every obligation in a lender's contract with Alabaster would be carried out by Newey and his staff. For Mr Ghosh's response, see below after point 5.

118. Point 5: In the light of its role and the experience of its employees and directors, Alabaster was not in a position to judge three factors which Mr Newey had identified as enabling lenders to compete for a broker's business namely (i) quality of service offered by lenders (ii) rates of interest offered by lenders and (iii) commission offered by lenders.

119. In response to points 4 and 5, Mr Ghosh notes that the Tribunal appreciated that Alabaster had procedures in place to enable the directors to review and authorise the work prepared by Mr Newey's staff. The Tribunal's conclusions were, he says,

justified by the evidence. My observation on that response it that what Mr Ghosh says may be correct, but the response does not actually meet either of points 4 or 5. The criticism made by HMRC is that the Tribunal did not address the role which Alabaster could play and Alabaster's limitations in the commercial arena of loan broking. The procedures in place did not allow for Alabaster itself, through its officers and staff, to judge the three factors identified; the criticism is that the Tribunal did not bring these factors into the evaluation which it was required to undertake. Point 6 addresses commission further.

120. Point 6: Commission rates do vary from lender to lender as well as varying with the risk represented by the borrower. They are a factor of competition between lenders; and where special deals are negotiated, lenders wish to keep the rates secret for reasons of commercial confidentiality (see further under point 7). Mr Newey accepted that commission rates do vary to some degree between lenders. But even if the variation is small, in a volume business such as Ocean Finance, small variations can be significant. Mr Newey accepted that he tried to get the best terms possible; moreover, he accepted that there was more room for variation in the amount of "override" commission.

121. Mr Ghosh's response to point 6 is that the Tribunal found that commission rates did vary depending on the type of loan produce offered but that within given categories there was little variation. The Tribunal were, it is said, entitled to reach that conclusion on the evidence before them. That may be so. But he does not address the second element of point 6 made in paragraph 120 above.

122. Point 7: There were a number of one-off negotiated agreements. Mr Ghosh responds that, although there may have been some such agreements, contracts were

generally on standard terms available in the market as whole and not subject to negotiation. Even in cases where Mr Newey did have discussions with lenders, Alabaster's approval was always required and without its approval the business would not have been conducted. Mr Ghosh's response may be factually correct, but it does not address the underlying point which is that this factor is one which indicates the economic and commercial reality of the arrangements of the structure adopted and is a factor which was not properly taken into account by the Tribunal in the light of the guidance subsequently received from the CJEU.

123. And so, in relation to commission, HMRC's case is that (i) there was variation between lenders on commission rates, especially "override" commission (ii) it was Mr Newey who negotiated these agreements (iii) the rates were of some relevance to the underwriter (*ie* a person on Mr Newey's side of the division of responsibilities between him and Alabaster) in deciding which lender to match to which particular applicant for a loan and (iv) Alabaster had no knowledge of and no involvement in that process. Mr Thomas submits that Decision [30], which is what Mr Ghosh relies on, does not mention all of those features or evaluate the evidence in the context of the supply in question.

124. Point 8: Mr Newey provided all the necessary features of a successful loan broking business. These included the provision of senior staff and underwriters and the provision of a compliance department. Mr Ghosh states that HMRC's complaint is not understood. It was common ground before the Tribunal that Mr Newey's operation in the UK was substantial. Nonetheless, the Tribunal held that

> "Alabaster carried on a commercial business. It was itself a commercial enterprise, carrying on economic activities of loan broking for which it equipped itself to a limited extent with its own staff and directors, and to a

> large extent through engaging the services of the Appellant under the Services Agreement. This was no brass plate company."

125. Further, the Tribunal was referred to the salaries of senior staff and underwriters in the UK, which it acknowledged were substantial when contrasted with those of the Alabaster directors and Lucy Woodworth. However, this merely emphasised, in their view, the extent of the processing operation that Alabaster had contracted to equip itself to conduct its loan broking business.

126. Mr Ghosh submits that the Tribunal's conclusion was amply justified. The evidence was that Alabaster had the resources to carry out its loan broking business. Without setting out all of the points which he makes, I can say that I agree with that submission. Mr Ghosh also submits Alabaster bore the commercial risks and was entitled to the commercial rewards. Whilst that is true, one must not lose sight of the fact that Mr Newey was the owner of Alabaster and its commercial success or failure would have a direct impact on Mr Newey personally. Further, although here I merely speculate, the failure of Alabaster might damage the Ocean Finance brand and thus Mr Newey directly as the owner of that name and the IP rights it carried. I consider the aspect of risk and reward further at paragraph 167 below.

(iii) The loan broking process and HMRC's skeleton argument paragraphs 65 to 66

127. Alabaster's role in the loan broking process was confined to the formalities which were required by the contractual structure and does not amount to any significant involvement in loan broking as it is to be understood in commercial terms. Mr Thomas contends that this conclusion is amply demonstrated by the Tribunal's findings: see the various passages where they describe how the process ran and the

involvement, such as it was, of Alabaster (through Ms Woodworth and its directors). Mr Ghosh's response is that the Tribunal rejected HMRC's analysis finding, in particular, that all loan broking was done pursuant to the agreements between Alabaster and the lenders: see Decision [31]. What the Tribunal decided in Decision [31] was this:

> "We find that all loan broking was done pursuant to the agreements (whether written or oral, or established by conduct) between Alabaster and the lenders, and all payments of commission for the loan broking services were made by the lenders to Alabaster. The Appellant did not have any contracts with lenders with respect to loan broking."

128. Mr Ghosh places reliance in particular on these factors:

a. Alabaster had the resources to carry out its loan broking business.

b. Mr Newey's evidence was that no documents requiring approval from Alabaster would be sent out by his staff without approval from Alabaster.

c. Commissions were only generated once approvals were given by Alabaster because only then could the loan be approved by a lender. If Alabaster rejected a valuation request (with a 24 period) or an offer authority form or a case to bank submission, no loan would have been approved and no commission would have been generated. If a loan was not approved, there would have been no business.

129. Mr Thomas submits that Decision [31] actually supports his case rather than that of Mr Newey. It demonstrates, he says, that the Tribunal's focus was on the contractual relationship to which they attached too much, if not exclusive, weight; the point is not that Alabaster was not carrying on a loan broking business or that Mr Newey himself was carrying such a business in the sense of having contractual relations with the lenders. I would add that the CJEU, which itself was aware of the

arrangements between Alabaster, Mr Newey and the lenders and between Alabaster, Mr Newey and Wallace Barnaby, envisaged at least as a possibility that supplies were made by or to Mr Newey notwithstanding the contractual arrangements and did so in the knowledge that Alabaster was, or had been held to be, carrying on the loan broking business, with Mr Newey doing what he did only by virtue of the Services Agreement, although the approach of the Court was based on a possible abuse of rights.

130. I do not agree with Mr Thomas' argument. The Tribunal was not simply saying that the contractual position was that Alabaster was, contractually, the provider of loan broking services. It is clear that the Tribunal was going much further than saying that the contracts were not shams and that the legal relationships between the parties were governed by the contracts. They were saying also, it seems to me, that the substance of the arrangements was that loan broking was conducted not simply in formal terms but also in substantive terms between Alabaster and the lenders. This was an evaluation which, in my judgment, they were entitled to make.

(iv) The typical transaction documentation and HMRC's skeleton argument paragraphs 67 to 72

131. Reliance is placed by HMRC on a sample letter to a borrower which, it was accepted, was typical of thousands of transactions. HMRC place emphasis on the absence in the letter of any mention at all of Alabaster. It is on Mr Newey's headed notepaper, the phone number and address is of Ocean Finance in the UK, Mr Newey, not Alabaster, is named as the proprietor and it is Mr Newey's consumer credit licence which is referred to. The letter contains references to "**our** lender", "**we** are required to give you a 'consideration period'" where "our" and "we" are clearly

references to Mr Newey and not Alabaster. Although not recorded by the Tribunal, Mr Newey's evidence was that Alabaster was irrelevant to the underwriters' activities in Ocean Finance and that some of the underwriters may not even have been aware of the existence of Alabaster. Mr Thomas accordingly submits that it is clear that Mr Newey was providing credit broking services.

132.Mr Thomas submits that the Tribunal's conclusion (found at Decision [46]) is essentially confined to a contractual analysis. In that paragraph, the Tribunal rejected the submission on behalf of HMRC that it was clear from this document that Mr Newey was providing credit broking services, saying this:

> "We do not agree. In a case where processing services, including all the interface with applicants, has been sub-contracted, as here by virtue of the Services Agreement, it is consistent with that outsourcing arrangement for the correspondence with the applicants to be conducted by the sub-contractor in his own name. The identity of the loan broker itself is not material to the applicant. The correspondence would be material only to the extent that it reflected the true sub-contract arrangement. It did not, and we reject the argument that it has any material relevance to the analysis of the business of [Mr Newey]."

133. It is submitted that, from a VAT perspective, this is incorrect. The fact that from the customer's point of view the loan broking itself is being conducted by Mr Newey cannot properly be regarded as an irrelevant feature. It is said that the CJEU's case law is replete with references to the need to consider transactions from the point of view of the customer, being a typical consumer, reference being made to Case C-349/96 *Card Protection Plan Card Protection Plan Ltd v Customs and Excise Commissioners* [1999] STC 270 at [29].

134. In contrast, Mr Ghosh says that the Tribunal made detailed findings in Decision [41] to [49] in relation to the loan broking and processing operations and the relevant

documentation. That is perfectly correct and I do not understand the factual findings to be challenged. Mr Ghosh further submits that HMRC's argument was addressed and rejected in Decision [46] and that the Tribunal's conclusion was entirely justified. In particular, the documentation was wholly consistent with the fact that Alabaster had a licence to use the name "Ocean Finance" and had subcontracted certain services to Mr Newey. Although HMRC does not challenge the primary factual findings, what they do challenge is the categorisation of the transactions for VAT purposes which flows from those factual findings including the reasoning by which the Tribunal rejected the conclusion urged on them on behalf of HMRC, in particular in Decision [46].

135. I do not consider this point has any real significance in determining the identity of the supplier assuming that abuse cannot be established. In any case, the customer, in the context of the typical consumer, is surely the person to whom the loan broking services are supplied for a consideration, that is to say the lenders. The lenders clearly knew the contractual position under which it was Alabaster, and not Mr Newey, which was making the supply of loan broking services. Nor do I consider that it is of anything other that marginal relevance to the Abuse Issue. It would be of more relevance to an argument that the arrangements were a sham and that both Alabaster and Mr Newey knew and intended that, as between them, the real contracting party was Mr Newey. But that is not an argument which HMRC raise.

(v) Decision making of Alabaster and HMRC's skeleton argument paragraphs 73 to 77

136. The activities of Alabaster were all driven by tax advice which underpinned the scheme and added no commercial value to the activities of Mr Newey. Alabaster

added no commercial value to the process. There are four types of decision which HMRC perceive as the foundation for Mr Newey's argument that it was Alabaster which was the entity which for VAT purposes was making supplies of loan broking services and receiving supplies of advertising. It is these four types of decision which underpinned Alabaster's operations as a commercial loan broker:

a. The approval by Alabaster of Offer Authority Requests faxed to it by Ocean Finance in the UK.
b. The approval by Alabaster of the Valuation Requests faxed to it by Ocean Finance in the UK.
c. The approval by Alabaster of Case to Bank requests faxed to it by Ocean Finance in the UK.
d. The approval on a weekly basis of the recommendations of the advertising agency including the amount of the coming week's advertising spend.

137. The Tribunal heard the evidence on each of these four elements. HMRC's case is that none of the decisions had any commercial justification or added any commercial value. It is acknowledged that the Tribunal referred to Alabaster as "no brass plate company" and that it decided (see Decision [53]) that the approvals just mentioned were not mere rubber-stamping. HMRC's case, whether or not the decisions can be characterised as rubber-stamping, is that the decisions were clearly made at a formal level and are wholly inadequate to demonstrate that Alabaster was engaged in the loan broking business as a matter of economic and commercial reality. It is said that the Tribunal appears to have concluded that the relevant documents were not mindlessly signed by or on behalf of Alabaster; but the question is not whether these paper exercises were mindless but whether there is any economic or commercial rationale for them.

138. Mr Ghosh's response to the point is that the Tribunal was entitled to find that Alabaster's activities did not amount to rubber-stamping or mere window dressing. I do not disagree with that submission. The submission does not, however, address HMRC's criticism that there was no economic or commercial purpose behind those decisions.

139. It seems to me that the point may be of significance in the context of abuse but is not of real significance in relation to the Categorisation of Supplies Issue in the absence of any abuse. Given that the structure is not a sham, it was necessary for Alabaster to carry out each of the four activities; and, absent abuse, it is not easy to see why the commerciality or otherwise of the need for these operations to be carried out by Alabaster is relevant to the identification of the supplier. The first three of these matters are subject to more detailed analysis by Mr Thomas, an analysis which appears in the subsequent paragraphs of HMRC's skeleton argument.

(vi) The OAF/OAR forms and HMRC's skeleton argument [78] to [83]

140. HMRC relies on the allegedly insubstantial character of certain checks. The OAF/OAR documentation was addressed by the Tribunal in Decision [44] to [46]. HMRC's position is as follows:

a. The only process carried out in Jersey prior to the signing off by a director of Alabaster of an OAR form was carried out by a clerk who received the faxed form and carried out simple checks on its accuracy and completeness. There was nothing more than a clerical check
b. The context of the check demonstrates its simple nature. Prior to the receipt of the OAR form, the relevant application (i) had been analysed by an underwriter at Ocean Finance in the UK and (ii) had been processed by

the processing staff in the UK who had the benefit of the actual information by then gathered from the borrower and the underwriting sheet. The activity of Alabaster in checking had no commercial value to the work of Ocean Finance in the UK. Why this check was necessary at all in commercial terms was never explained, let alone why it was better carried out in Jersey than in the UK (apart, for course, from the expected VAT benefit).

c. The Tribunal did not make clear (see Decision [43] where this matter was dealt with) whether any formal lending criteria were used by Mrs Woodworth when checking the forms. There was good evidence that the process in Jersey did not involve cross-checking the application against the individual lender's criteria. I note, but do not set out, the matters identified in paragraph 80 of HMRC's skeleton argument which have not been challenged by Mr Ghosh (although, as I will explain, he does have something to say about the evidence concerning the OAF/OARs).

d. Thereafter, the process for the directors was confined to picking up glaring errors according to the evidence of Mr Boylan. The director's signature added nothing of value and was a pure paper exercise. There is no evidence to suggest that any OARs were ever refused.

e. All final checks (before the borrower was introduced to the lender) were carried out at Mr Newey's premises in the UK.

141. Mr Ghosh's response to this point is that the evidence was clear and that the authority to make the introduction to the lender rested with Alabaster. I agree. Thus

a. It was only once the OAR had been approved by Alabaster that Mr Newey's staff could send out a letter to a potential borrower.

b. Mr Boylan maintained the view that the information in the OAR "was useful, certainly in terms of media source".

c. Alabaster bore the costs of the valuations. It would not have approved a valuation report if Alabaster had not been in funds to pay the costs of the valuation.

d. The directors of Alabaster checked that a member of Mr Newey's staff had prepared the proper documents to send to the lender and only then approved the case to bank submission.

e. Mr Newey gave evidence that no document requiring approval from Alabaster would be sent out by his staff without approval from Alabaster.

(vii) The Valuation Reports and HMRC's skeleton argument [84] to [89]

142. HMRC suggest that the process of obtaining a valuation report was automatic. The request was acted upon by Mr Newey unless told otherwise. There was no point in not authorising a valuation report since Mr Newey had already determined that the lender required one to be done and there was no decision for Alabaster to make. There was no evidence that anyone at Alabaster ever queried whether a valuation report was necessary (pursuant to the lender's criteria or otherwise) and in practice none was ever refused. The valuation requests were rubber-stamped, as Mr Boylan accepted in evidence. [I interpose here to say that, although not recorded in the Decision, it is clear from the transcript that that is what he said.] Whilst it is the case that the Tribunal rejected a characterisation of many activities as rubber-stamping or window dressing, on the grounds that the signatures were not mindlessly applied, they did not, as I read Decision [53] include the approval of Valuation Reports in that rejection. But even if they did, HMRC's point is that they failed to grasp the entirely insubstantial nature of this activity in commercial terms. The decision making in

relation to Valuation Reports was effectively carried out and executed by Mr Newey and his staff.

143.Mr Ghosh relies, of course, on the rejection of HMRC's characterisation as rubber-stamping. In particular he relies on:

a. The need for an approval before a loan could be approved by a lender giving rise to a commission.
b. Alabaster bore the cost of the valuations and unless it was in funds, it would not have approved a valuation report.

As to that, I do not, as I have said, read Decision [53] (the only relevant paragraph) as a rejection of rubber-stamping in relation to the valuation reports, and, in the light of Mr Boylan's evidence, the Tribunal could not properly have rejected the description. And so, as to paragraph a. it is true in the technical sense but the obtaining of that approval was a rubber-stamping exercise. As to paragraph b., the point here is that Alabaster would in fact always have been in funds before being asked to approve a Valuation Report.

(viii) The case to bank requests and HMRC's skeleton argument [90] to [94]

144. HMRC's position is that no decision on the part of Alabaster was required at all. A case to bank request arose only where Mr Newey's staff had, following receipt and analysis of the relevant information from the borrower, determined that a lender would be prepared to offer a loan in principle, a valuation if required had been carried out and all the information which Mr Newey had decided was necessary to be collated had been collated by him. The authority to proceed was, according to HMRC, a wholly otiose step in the process which involved no decision at all. The request document consisted of nothing more than a series of boxes ticked, or not, to signify

what information Mr Newey had received. The underlying material was not sent to Alabaster. Alabaster had no way of knowing whether the boxes were correctly ticked or whether a box should have been ticked but was not. There was no evidence of any query arising in relation to the case to bank submission forms. A sheet containing many such requests would take one minute to complete. No request was ever refused. By this stage, the loan agreement had already been signed by the borrower which, it is said, underlines the pointlessness of the whole exercise. As Mr Thomas puts it "Given the fact that the borrower has been given an in principle decision that their "loan request has been accepted by our lender…."… it is difficult to see how Mr Newey's staff could have done anything other than forward the requested documents to the lenders". At Decision [48], the Tribunal described the process and the short time for accomplishing the task, but did not, according to HMRC grapple with the features identified above.

145. Mr Ghosh's response to this point is that the Tribunal was perfectly entitled to reject HMRC's rubber-stamping characterisation. The evidence was that:

a. The directors of Alabaster checked that a member of Mr Newey's staff had prepared the proper documents to send to the lender and only then approved the case to bank submission.
b. In response to the suggestion that the process was no more than rubber-stamping, Mr Boylan's answer was that if Alabaster had not authorised a case to bank submission, it could not have been submitted and there would have been no business.

c. If Alabaster were to reject a case to bank submission (I note that it never did) no loan would have been approved and no commission would have been generated by that customer.

146. I agree with Mr Ghosh that the Tribunal were entitled to reach the conclusion that these activities were not mere rubber-stamping or window dressing. Accordingly, I again think that HMRC's argument on the Characterisation of Supplies Issue is not assisted by this point. However, in relation to the Abuse Issue, the points made by HMRC do have some force and need to be taken into account.

(ix) Alabaster's knowledge of the credit-broking business and HMRC's skeleton argument [95] to [98]

147. It was accepted by Mr Newey that none of the directors of Alabaster had any relevant direct experience of loan broking and the Tribunal so found at Decision [17]. Alabaster's employees consisted on one clerk with no training or experience in loan broking. The activities of the directors were essentially confined to one director attending for an hour or so at the end of each day to sign off the various documents and attending an informal meeting each week to accept the weekly advertising spend. Mr Ghosh's response to this is that it was taken into account by the Tribunal. That is true. This is how the Tribunal put it:

> "We further find that, whilst Alabaster did not itself have the infrastructure in Jersey to conduct a loan broking business, it equipped itself to conduct such a business by outsourcing the processing operation to the Appellant. Given this, we do not consider that the fact that there were only limited resources in Jersey itself has any impact on the carrying on by Alabaster of the loan broking business. Whilst we accept that certain information known to the Appellant in respect of Alabaster's business, such as its profitability, and income and costs, might not be known to an arm's length sub-contractor, it would be known to a 100% shareholder, and there is nothing in this fact that suggests that the contractual relationship between the Appellant and Alabaster was anything other than contractor and sub-contractor."

148. That, of course, is a correct conclusion so far as concerns the contractual relationship. But it does not expressly address the commercial reality in the sense that that concept is relevant to the Abuse Issue. It is an important point to which I need to return.

(x) The working hours and level of remuneration of the Jersey Directors and HMRC's skeleton argument [99]

149. HMRC's case is that the working hours and level of remuneration of the directors were out of keeping with any real loan broking activity being carried on in Jersey. Mr Ghosh says that this is pure assertion and in any event, the Tribunal took into account at Decision [52] HMRC's reliance on contrasting salaries of senior staff and underwriters in the UK as compared with the directors and Mrs Woodworth. The Tribunal perceived the contrast as merely emphasising the extent of the processing operation that Alabaster had contracted to equip itself to conduct its loan broking business. They declined to infer that it must have been Mr Newey who was carrying on the loan broking business. I agree with Mr Ghosh, certainly insofar as the point impacts on the Characterisation of Supplies Issue. It is a point to be taken into account in assessing the economic and commercial reality of the arrangements in the context of abuse but even there it carries, in my view, very little weight.

(xi) Advertising and HMRC's skeleton argument [100] to [105]

150. HMRC point to the following factors:

a. Mr Newey had a veto over the form and content of the advertising. Alabaster did not undertake any scrutiny of the content of the adverts nor of the choice of media.

b. It was Mr Newey who analysed the information concerning the advertising of Ocean Finance.

c. It was Mr Newey who would discuss the analysis and the current requirement for advertising with the UK Advertising negotiator, initially Mr Powell of Ekay. Mr Powell obtained his instructions from Mr Newey and not from Alabaster.

d. Mr Powell would, with Mr Newey's consent, put forward recommendations concerning advertisement placement to the advertising agency, initially Abacus and then Wallace Barnaby, which then forwarded the recommendation to Alabaster.

e. Alabaster approved the recommendation at regular Friday meetings at Moore Stephen's offices and never rejected a recommendation.

f. Abacus or Wallace Barnaby would then purchase the advertising space.

g. The proposal for the weekly spend was limited by Mr Newey's own processing capacity.

h. The only complaint to the Advertising Standards Authority was dealt with by Mr Newey.

i. Mr Newey satisfied himself that the advertising complied with the relevant legal requirements.

j. New initiatives concerning advertising were initiated by Mr Newey. Alabaster simply approved – or as HMRC would say, rubber-stamped – Mr Powell's recommendation.

k. Alabaster approved the advertising on all occasion and was in no position to do anything else. Again, HMRC's case is that Alabaster simply rubber-stamped the recommendations of Abacus and Wallace Barnaby. It is

plain, according to HMRC, that the real decisions were made by Mr Newey in conjunction with Mr Powell and that the recommendation was in reality an instruction.

151. And so HMRC's position is that, applying the guidance of the CJEU, Alabaster's involvement in the advertising transaction does not extend further than a formal contractual relationship with the Jersey advertising agency and this was a purely artificial arrangement not reflecting the economic and commercial reality.

152. Mr Ghosh's response to this point is that the Tribunal made detailed findings as the process concerning advertising at Decision [32] to [40], rejecting HMRC's contentions on rubber-stamping. What the Tribunal actually said was this:

> "Alabaster obtained advice and recommendations, for example in relation to advertising, and it contracted underwriting and other administrative services to the Appellant. It relied on the Appellant to provide input into the advertising campaigns and the terms on which lenders were added to its panel. Having obtained such advice and assistance, it had its own staff to collate certain of the material. The fact that, having engaged all those services, it consistently chose to follow and adopt them does not in our view amount to rubber stamping or window dressing, and we so find."

153. I do not detect anything in that passage which is inconsistent with HMRC's submissions directed at advertising. However, in Decision [53], the Tribunal clearly did include advertising approvals in their rejection of the rubber-stamping suggestion. That is a conclusion which I do not consider is open to challenge. Moreover, although the material referred to by the Tribunal in relation to advertising may be sparse, Mr Ghosh points to evidence which he says clearly justified the Tribunal in reaching a conclusion that there was no rubber-stamping in relation to advertising any more than in relation to any other aspects:

a. Alabaster paid for the supply of advertising from Wallace Barnaby out of its own funds which were derived from commissions paid to it by lenders.

b. Mr Newey gave no guarantee in relation to the advertising costs payable by Alabaster or for any other losses of damages suffered in relation to the contract with Wallace Barnaby.

c. Wallace Barnaby had no contract with Mr Newey and was therefore taking a payment risk against Alabaster alone.

d. Alabaster executed contracts with the lenders.

e. Alabaster placed the orders for advertising with Wallace Barnaby. The directors considered, approved and sent a weekly advertising budget to Wallace Barnaby.

f. Alabaster benefited from the supply of advertising from Wallace Barnaby and Yell and Mirror because the advertising attracted applicants which in turn led to lender introduction commissions which were paid to Alabaster.

g. Absent the decisions by the directors of Alabaster on advertising spend, there would have been no advertising commissioned.

h. Neither Mr Newey nor Ekay ever contractually bound Alabaster or placed adverts on its behalf.

i. Ekay could not and did not bind Wallace Barnaby.

j. Mr Newey never spoke to any Wallace Barnaby personnel.

154. I consider that the Tribunal were entitled to take the view about the advertising aspects which they did insofar as that relates to the characterisation of supplies absent abuse. Further, it is clearly the case that advertising services were required whether it

was Alabaster or Mr Newey who carried on the loan broking business. Mr Newey himself was not equipped to deal with all aspects of advertising without provisional input. The provision of advertising services was a normal activity of the business; it could not be suggested that the provision of these services was unnecessary and fulfilled no economic or commercial purpose. I accept that, if the application of the abuse principle leads to the conclusion that it was Mr Newey who was properly to be seen as the supplier of loan broking services, then he is also properly to be seen as the recipient of the advertising services. But this is not because the provision of those services was not a genuine commercial activity but because the advertising services were, on any view, relevant to the loan broking activity making it illogical to regard Mr Newey as the provider of loan broking services but not the recipient of the advertising services. This is consistent with what the Tribunal said in Decision [35].

(xii) The Yellow Pages advertisement and HMRC's skeleton argument [106]

155. HMRC contend that the Yellow Pages advertisement makes no mention of Alabaster at all and that Alabaster did not negotiate the Yellow Pages contract. Mr Ghosh responds that these matters were taken into account by the Tribunal at Decision [38] and [39]. In fact the evidence was that Paul Thomson of Yellow Pages, at his own instigation, travelled to Jersey to meet Mr Boylan and as a result entered into the contract, to cover a period of one year. Clearly the Tribunal accepted that evidence. I do not think that the Tribunal can be criticised for the way in which they dealt with the Yellow Pages advertisement. The advertisement is, accordingly, not supportive of HMRC's case on the Characterisation of Supplies Issue or, indeed, the Abuse Issue.

(xiii) The Service Agreement and HMRC's skeleton argument [107] to [116]

156. Point 19: HMRC's skeleton argument addresses the Service Agreement at some length. HMRC contend that the Service Agreement is a tax-driven document which does not fully or accurately describe the true nature of the relationship of the parties to it. The Tribunal, however, rejected the description of the Service Agreement as a tax driven document: see the opening words of Decision [28]. That rejection was part of the rejection of a wider point relating to a similar description of the agreements entered into by Alabaster with third party lenders and the advertising agency, and the decisions taken by Alabaster in the course of its operations. The Tribunal did not accept this description of Alabaster's activities. It did find that the original reason for deciding to set up the Jersey business was a tax reason, namely to avoid the irrecoverable VAT on advertising costs, but that did not in the Tribunal's view result in all the activities of the business itself being for tax reasons. As the Tribunal put it:

> "28. If a certain course of action is decided upon for tax reasons, it follows of course that agreements and processes will be put in place to achieve that purpose. In some cases a tax purpose may be achieved by agreements and transactions that are themselves wholly tax-motivated. In other cases, however, for example where the tax purpose is achieved by carrying on business in a tax-efficient form, the individual components of that business operation will not aptly be described as themselves tax-driven. If an individual, unincorporated, taxpayer decides to incorporate his business for tax reasons, that does not mean that the company's transactions will forever be tainted with that original tax purpose. Similarly, if a business decides to establish all or part of its operations outside the UK, that may be attractive for tax reasons, and indeed the purpose may be to avoid UK tax, but it does not follow that the offshore business, its contracts and operations, must be regarded as themselves tax-driven.
>
> 29. We find that, whilst not an arm's length agreement, the Services Agreement did represent and reflect the real activities of the Appellant and Alabaster….."

157. It seems to me that the difference between HMRC and the Tribunal is essentially a semantic one. It is clear that the decision to set up the business in Jersey was tax driven. But it was not only that the decision to set up the business in Jersey was tax

driven: it was also the case that the essential structure of the enterprise was tax driven. It would not have been effective if, for instance, Mr Newey had been appointed the agent of Alabaster to conduct, on its behalf as its agent, a loan broking business in the UK. In that sense, the Service Agreement was an essential part of the implementation of the decision to set up the business in Jersey, a decision taken for wholly tax purposes. It seems to me, with respect to the Tribunal, a perfectly sensible use of language to describe the Service Agreement as tax driven. That is not to say that once entered into, the Service Agreement did not represent the context in which, and the agreement by which, perfectly genuine transactions as between Alabaster and Mr Newey were to be governed. It does not follow that, because the Service Agreement can be described as tax driven in that sense, that each and every transaction governed by it is tax driven. However, if the structure itself is solely tax driven and, being wholly artificial, serves no economic or commercial purpose, it may be perfectly proper to describe the transactions themselves as tax driven. Thus, I do not disagree with the Tribunal when they said what they did about a trader incorporating his business. But that situation is entirely different from the present case. It may be that the decision to incorporate is tax driven, but that the resulting structure is nonetheless one which is the opposite of artificial and which does reflect the economic and commercial reality: it is simply one way in which the business can properly be carried on. One question in the present case, in the context of the Abuse Issue at least, is whether the new structure, as well as being implemented solely for tax purposes, is one which is also wholly artificial, having no economic or commercial purpose, or whether it is one among several alternative ways in which the business could be structured from a genuine economic and commercial perspective. For the Tribunal to say that the Service Agreement was not tax-driven is therefore, in my view, to beg a

serious question; or, if they intended to answer the question and to say that the structure had a genuine and commercial reality, they did not explain their reasons for the answer.

158. Next, HMRC contend that there is no basis for the suggestion made on behalf of Mr Newey that the Service Agreement was a typical outsourcing agreement and that the Tribunal's findings of fact do not support that. The Service Agreement does not fully or accurately describe the true nature of the legal relationship between Alabaster and Mr Newey.

159. More importantly, HMRC submit that the way the Service Agreement in fact operated did not preclude a finding that it was Mr Newey who made the supplies of loan broking services for VAT. They rely on the provisions relating to (i) the maintenance of the credit broking licence (clause 5(f)) and (ii) the cross indemnity (clause 5(a)) which are fully consistent with Mr Newey undertaking credit broking and suggest that Mr Newey was carrying on broking.

160. HMRC comment that there was no evidence that the Service Agreement was consulted by either party and that Mr Newey regarded it as the means by which the tax advantages of the scheme could be obtained. But that comment, it seems to me, goes to an argument about whether the Service Agreement was a sham. The Tribunal were clearly of the view that it, like the overall arrangements, was not a sham and they were entitled, in my view, to reach that conclusion. In any case, I do not understand HMRC to contend before me that the Service Agreement was a sham.

161. HMRC's comment is, however, relevant to the nature of the economic and commercial reality and supports the conclusion that the supplies, for VAT purposes, of loan broking services were made by Mr Newey. The same applies, they contend,

to a number of other observations made by HMRC in relation to the provisions of the Service Agreement and the extent to which they corresponded (or rather did not correspond) with the reality of how the Service Agreement was implemented. The Tribunal, whilst attaching importance to the Service Agreement, did not expressly address these aspects of it. Thus:

a. Recital 4 refers to Alabaster's instructions but no explanation could be given of what this meant.
b. Clause 1(a) refers to the "procedures" and "systems" for the vetting of applicants laid down by Alabaster. Again no explanation could be given of what this meant and no procedures or systems have been produced.
c. Clause 2(b) provided for Alabaster to detail the name of a lender for each application. This was not in fact done by Alabaster but was done by Mr Newey. This was, I agree, the case.
d. Clause 2(c) envisaged that Alabaster would maintain its own underwriting procedures. It did not do so: the only underwriting procedures were those of Mr Newey. This again was, I agree, the case.
e. Although the Service Agreement contemplates a non-exclusive arrangement between the parties, Ocean Finance in the UK never dealt with anyone save for Alabaster and Alabaster never dealt with anyone save for Ocean Finance in the UK.
f. Alabaster was never asked to spend more money on advertising than was commensurate with the processing capacity of Mr Newey.
g. Clause 4a provided for a commission fee for Mr Newey of 50%. There was no evidence that the level of this fee was negotiated at arm's length.

h. Other aspects of the allegedly non-commercial nature of the Service Agreement were (i) a 20% increase in commission to Mr Newey from 50% to 60% of the commissions paid by the lenders which does not appear to have been commercially negotiated and (ii) the right to use the Ocean Finance name, which was, according to Mr Newey himself, an important brand in the market free of charge.

162. HMRC also contend that the reasons given for the increase in commission further demonstrate that the relationship between Mr Newey and Alabaster was not one of contractor and sub-contractor. They submit:

a. The fact that Mr Newey's costs were going to increase because he was to going to expand his processing capacity does not provide an obvious reason why his share of the commission should rise as opposed to him reaping the benefit of the extra volume of applications going through by earning more at the same level of commission.

b. In evidence Mr Newey's position was that the reason for the increase was that he thought that Alabaster was retaining too much commission from the lenders (particularly in view of the override commission). It is said that this demonstrates that Mr Newey was both aware of the level of commission Alabaster was receiving and that the relationship was not one of contractor and sub-contractor. Sub-contractors are not normally in a position to demand an increase in remuneration on the basis that the main contractor is profiting too much. The more so where this remuneration is derived from an income stream, here override commissions, to which the sub-contractor has no entitlement.

c. Nor do sub-contractors have access to detailed figures of the costs and income of the contractor.

d. HMRC accept, however, that the findings of the Tribunal on this aspect of the case do take account to some extent of the economic and commercial reality but it is submitted that its findings (*eg* that the Services Agreement was not an arm's length agreement and lacked expected detail) are supportive of HMRC's contention that Mr Newey the supplied the loan broking services.

163. Further, the Tribunal did not consider, expressly at least, the transactions from the point of view of the consumer. There was a degree of continuity from the business previously carried on by Mr Newey and Mr Horton by the use of the Ocean Finance name.

164. In summary, HMRC contend that the Tribunal did not ask themselves the right questions and did not evaluate the impact of the Service Contract when assessing the economic and commercial consequences of the arrangements.

165. All that Mr Ghosh has to say about this is that the Tribunal analysed the Service Agreement and its relationship to the wider commercial background in detail at Decision [20] to [28]. It specifically held that the Service Agreement did represent and reflect the real activities of Mr Newey and Alabaster. He says that the Tribunal were plainly entitled to reach the conclusions which they did.

166. As to that, I have already discussed the Tribunal's rejection of the description of the Services Agreement as a tax-driven document. So far as concerns the conclusion that the Services Agreement represented and reflected the real activities of Mr Newey and Alabaster, the Tribunal were, in my view, entitled to reach that conclusion. That

is a factor in support of Mr Newey's case on the Categorisation of Supplies Issue. But that conclusion is not an answer to the question whether those real activities (in contrast with mere shams) reflected the commercial and economic reality or whether they were part of a set of wholly artificial arrangements which do not reflect that reality.

(xiv) Commercial Risk and HMRC's skeleton argument [117]

167. HMRC contends that the commercial risk of the Ocean Finance broking operation was run by Mr Newey and that the cross indemnity between Mr Newey and Alabaster was misconstrued by the Tribunal. They rely on what is said to be clear evidence to the following effect:

a. At the outset, Mr Newey provided a substantial unsecured interest free loan, apparently without any written agreement.

b. Save for Mr Newey's commissions the major item of expenditure for Alabaster was advertising. Initially, Alabaster bore no risk on this given the loan from Mr Newey. [I interpose here to say that it cannot be said that Alabaster bore no risk: it is not suggested that the loan, although interest free, was not recoverable so that, if the enterprise had failed, Mr Newey would still be a creditor.] Subsequently, Alabaster always paid advertising out of the funds which it had available. Mr Newey's own evidence was that he had access to the information about Alabaster's income and expenditure. HMRC submit, and I agree, that it is plain that Mr Newey and Mr Powell were in a position to formulate a proposed level of advertising expenditure each week of expenditure which it was known Alabaster could meet.

c. To be contrasted with that almost entirely risk-free activity, Mr Newey's whole UK operation presented a real and substantial commercial risk. His was a large undertaking employing substantial numbers of people; it was wholly dependent on completed transactions generating commission. He was not paid a fee by Alabaster for each application processed.

d. The commercial risk of Alabaster rested with Mr Newey in any event as the only shareholder.

168. In addition, there was, at clause 5a of the Services Agreement, a cross indemnity between Mr Newey and Alabaster pursuant to which they agreed

> "that they will indemnify the other against the consequences of breach by either of them of any Statute or subsidiary legislation or non-statutory Code of Practice applying to the loans or their advertising"

HMRC contend that this indemnity covered an indemnity given by Alabaster to Wallace Barnaby: that latter indemnity is to be found at clause 1 of an agreement between Alabaster to Wallace Barnaby under which Alabaster agreed to indemnify Wallace Barnaby against any actual loss or damages arising from the content of advertising placed on behalf of Alabaster in cases where Wallace Barnaby was not responsible for the creation of production of the material and it had been approved by Alabaster.

169. According to HMRC, the clause in the Service Agreement was misconstrued by the Tribunal at Decision [24] where they held that it created no more than "a normal cross-indemnity" without explaining what they meant by that. They acknowledged that the indemnity could have been drafted more clearly, but "did not consider that it created potential liability for the Appellant beyond the Appellant's own breaches". HMRC contend that this is not the proper meaning of the indemnity.

170. Mr Ghosh's response is that it is clear from the Tribunal's findings that, contrary to HMRC's contentions, that it was Alabaster which bore the commercial risks and rewards of its operations. He relies on the finding that Alabaster contracted with Wallace Barnaby as contractor (see Decision [65]) and that Mr Newey did not bear financial responsibility for the services provided by Wallace Barnaby (see Decision [70]). There is no basis, he submits, for HMRC's contention that the indemnity was misconstrued by the Tribunal.

171. I agree with Mr Ghosh that it clear from the Tribunal's findings that Alabaster bore some risk in the sense that, contractually, it was responsible for the liabilities which it incurred. However, the significant cost, in contractual terms, for Alabaster was the advertising cost; but in reality such costs would not be incurred unless Alabaster had funds in hand to pay those costs. Advertising might fail to generate the desired business, but if it did not, Alabaster would not face insolvency because of an inability to pay Wallace Barnaby. But equally, it is clear that Mr Newey himself did take a significant commercial risk viewing the enterprise as a whole. The large costs of the enterprise included the running costs of the processing operation in the UK. Mr Newey incurred all of those costs which he had to meet out of his share of the commission income generated on loans completed (not on introductions effected). These features do not, in my view, have any impact on the Categorisation of Supplies Issue in the absence of any abuse of rights. Nor, I think, do they have any significant impact on the Abuse Issue: the Tribunal were entitled to conclude that Alabaster did take real, and not fanciful, commercial risks and, given that conclusion, it is only a slight factor in judging whether the tests for abuse are satisfied.

172. I have to say that I do not understand HMRC's submissions in relation to the indemnity. Mr Thomas provided no clear explanation of what, on HMRC's interpretation, it did mean and no explanation of why Mr Newey might be liable to indemnify Alabaster in respect of any liability which it might incur in relation to the indemnity which it had given to Wallace Barnaby.

(xv) Other findings and HMRC's skeleton argument [118] to [119]

173. When Alabaster applied for a revision of its licence pursuant to the Consumer Credit Act in 1997 to add the name "Diamond Loans", it could have done so only under the instruction of Mr Newey. Mr Ghosh's response is that the Tribunal were aware of the revision of the licence (see Decision [14]) but clearly declined to find that the revision was applied for under the instructions of Mr Newey. That they did not make such a finding is, I agree, clear; but equally clearly, they did not make a contrary finding and such a contrary finding is certainly not implicit in anything which the Tribunal said anywhere in the Decision. On any view, this point is of marginal relevance even in relation to the Abuse Issue and probably of no relevance in relation to the Characterisation of Supplies Issue in the absence of any abuse.

174. The parties did not act at arm's length in relation to the negotiation of commission for third party introductions. However, Mr Ghosh points out that, in relation to commissions, the Tribunal themselves held that the Service Agreement was not an arm's length arrangement: see Decision [23]. The weight to be attached to that was a matter for the Tribunal in reaching their ultimate conclusion that there was, for VAT purposes, no supply of loan broking services by Mr Newey and no receipt of advertising services by him.

175. Again, it seems to me that this point carried no weight in relation to the Categorisation of Supplies Issue in the absence of any abuse. The fact that the parties were not at arm's length and that the commission arrangements may not have been commercial is, however, a factor to be taken into account in ascertaining the economic and commercial reality in the context of the Abuse Issue.

176. That completes my review of the table of HMRC's propositions and Mr Newey's responses. HMRC's case is that the Tribunal has adopted a wrong approach because they did not evaluate the economic and commercial effect of the arrangements. The conclusions which they drew concerning the VAT effects of those arrangements were flawed because they were based on that erroneous approach. Their decision must therefore be set aside. If it is set aside, then HMRC submit that, applying the correct approach, it is clear that the supplies for VAT purposes of the relevant advertising services were made to Mr Newey. It is said that I should make a ruling to that effect rather than remit the case to the Tribunal for it to evaluate the evidence which it received applying the correct approach.

HMRC's case – the Abuse Issue

177. HMRC's skeleton argument addresses the Abuse Issue on the basis that contrary to their case on the Categorisation of Supplies Issue, Alabaster was the maker and receiver of the relevant supplies. HMRC's case is that the scheme was abusive because (i) it did not accord with economic and commercial reality and its essential aim was to obtain a tax advantage and (ii) because it resulted in avoidance of irrecoverable input tax and its essential aim was to obtain a tax advantage.

178. HMRC identify the CJEU's concept of abuse in its judgment in the present case as prohibiting reliance on schemes which are entered into:

a. which do not reflect economic reality; and

b. with the sole aim of obtaining a tax advantage.

I agree with that, subject to the addition that such schemes must be wholly artificial arrangements: see [46] of the CJEU Judgment.

179. HMRC's position is that, if I were to find for them on the first issue (so that it was Mr Newey who made and received the relevant services), this automatically means that I will find for HMRC on the Abuse Issue since it is common ground that the scheme involving Alabaster was put in place solely for the purposes of avoiding tax. I agree with that conclusion although not perhaps for the reasons which HMRC would give. The conclusion is correct because, applying the CJEU guidance, it will, on the facts of the present case, be permissible to depart from the contractual position if, but only if (for the reasons already given), the contractual terms do not reflect the economic and commercial reality, that is to say that they are wholly artificial arrangements, being arrangements set up with the sole aim of obtaining a tax advantage. But if it were possible to conclude (contrary to my reading of the CJEU Judgment) that Mr Newey was the maker and recipient of the relevant supplies but without the need to redefine the contractual arrangements (as in *Reed*), then it would not follow that there was an abuse of rights. Redefinition of the contractual arrangements is a consequence of a finding of abuse; if there is no need for redefinition, it follows that there may not have been any abuse. Indeed, if the proper analysis of the transactions (as for instance in *Reed*) is that the contractual position may be departed from, there is no scope of invocation of the abuse principle in the first place.

180. HMRC submit that the concept of abuse of rights goes wider in its application than simply to schemes which do not reflect economic reality and which are entered into with the sole aim of obtaining a tax advantage. In that respect, they refer to the two-stage test in *Halifax*. HMRC's position is that, even if Alabaster is found to be a supplier of the loan broking services, the scheme constitutes an abuse of the Sixth Directive, because its aim is to prevent a supplier of loan broking services, exclusively made in the UK to UK lenders, wholly consumed in the UK by the lenders, and in respect of UK borrowers who have responded to UK advertising, from being liable for irrecoverable input tax incurred in making those supplies. They therefore submit that the Tribunal was wrong in finding in favour of Mr Newey on the application of the first limb of the *Halifax* test.

181. HMRC contend that the Tribunal was in error in two respects in concluding that there was no abuse.

a. First, they say that the Tribunal concluded in Decision [90] and [92] (as to which see paragraphs 80 and 81 above), that there was an absence of any exempt supply in the UK by Alabaster. They contend that there were exempt supplies by Alabaster in the UK.
b. Secondly, the Tribunal failed to consider the scheme as a whole in the light of the purposes of the legislation rather than simply the position of Alabaster.

Exempt supply

182. It is common ground that Alabaster did make exempt supplies in the UK. This is because the loan broking services supplied by Alabaster were supplied in the UK by virtue of Article 16 of the VAT (Place of Supply of Services) Order 1992 and the

supplies are exempt under item 5 Group 5 Schedule 9 VAT Act 1994. On HMRC's reading of the Decision, the Tribunal are to be taken as saying that there were no exempt supplies made by Alabaster in the UK and consequently incorrectly characterised the supplies made by Alabaster. Had they not made that error, then applying their own reasoning in Decision [90] to [92] they ought to have found that the scheme was contrary to the purposes of the Sixth Directive because it would render VAT attributable to that exempt supply recoverable, thus offending fiscal neutrality in the process.

183. In making that submission Mr Thomas relies on the acknowledgment in Decision [90] of the argument that the engineering of a scheme to create a deduction or to prevent VAT which would be irrecoverable being incurred could be contrary to the purpose of the VAT directives; in that context, the Tribunal stated that there was no material difference between recovery of VAT otherwise irrecoverable as being attributed to an exempt supply and not incurring VAT which would otherwise be irrecoverable.

Scheme as a whole

184. HMRC submit that, in their discussion of the Abuse Issue, the Tribunal concentrated solely on Alabaster. They failed to consider the arrangements as a whole and to consider whether those arrangements gave rise to an abuse. They suggest that Alabaster would not exist at all but for the scheme implemented for the sole purpose of gaining a tax advantage. Their concentration on Alabaster caused them to lose sight of the fact that the tax advantage sought by the scheme was not relief from VAT on supplies of advertising services provided by Wallace Barnaby to Alabaster but the avoidance of irrecoverable input tax by Mr Newey: the supply of

VAT-free advertising services to Alabaster was the means by which the tax advantage was secured.

185. HMRC accept, indeed positively assert, that no irrecoverable VAT arose in Alabaster which is attributable to an exempt supply. This is not, however, because there is no exempt supply but because no VAT arose on any supply by Wallace Barnaby to Alabaster since both were in Jersey. But, they contend, the significance of this fact is no more than a conclusion that the scheme worked at the technical level. As they point out, this will almost always be the position in an abuse case because it is precisely the type of advantage which the allegedly abusive scheme seeks to achieve.

Purpose of the legislation

186. Mr Thomas has referred me to a number of provisions of the Sixth Directive to demonstrate the uncontroversial proposition that VAT is intended to be a general tax on consumption of goods and services in the EU but not on consumption outside the EU (*eg* Jersey). That proposition has to be qualified, however, by the detailed provisions of the legislation governing the place of supply. This is dealt with by Article 9 the provisions of which (in particular Articles 9(2)(e) and (3)) I have considered in paragraph 20 above. In the present case, it is said that the advertising supplies were consumed, for this purpose, in the UK not Jersey. It would be contrary to the purpose of the Sixth Directive for the advertising services provided to Alabaster and consumed in the UK to fall outside the charge to tax.

187. Further, it is said that one purpose of the legislation is to avoid non-taxation; it cannot realistically be argued, according to HMRC, that the result of the Alabaster structure is consistent with this purpose since Alabaster used the UK resources to provide exempt loan broking services consumed in the UK by avoiding paying

irrecoverable input tax. The mere establishment in Jersey cannot prevent the application of the abuse principle in the present case: the question is whether the structure as a whole was an artificial structure which abusively engaged the ordinary rules on the division of tax competence between the UK and Jersey.

188. HMRC contend that the Tribunal's reliance on a comparison between the positions of Alabaster and Halifax and between the positions of Alabaster and WHA is misconceived. In both cases, the relevant person, Halifax and WHA (or Viscount Reinsurance), was the party which sought to obtain a tax advantage through the use of a scheme involving third parties. In the present case, in contrast, Alabaster is the *creation* of the scheme and the appropriate comparator for Alabaster in *WHA* and *Halifax* are the various other parties created for the purpose of the schemes in those cases. The analogue for Halifax and WHA in this case is said to be Mr Newey who, absent the scheme would, just like Halifax and Viscount Reinsurance/WHA, have suffered irrecoverable input tax.

189. And so it is said that the Tribunal failed accurately to characterise the tax advantage sought as being the avoidance of irrecoverable input tax by Mr Newey. Mr Thomas relies on the passage from Decision [89] the substance of which I have identified at paragraph 89 above, which he says demonstrates the erroneous approach of the Tribunal. By focussing on the position of Alabaster only, (especially the lack of attention to the fact that the supplies of loan broking services were made in the UK, to UK lenders and wholly consumed in the UK by the lenders and in respect of borrowers who responded to UK advertising), it is said that the Tribunal ignored the fact that Alabaster's role in the scheme was to prevent input tax arising on advertising services which advertised the exempt loan broking services in the UK. Mr Newey

thus avoided irrecoverable input tax on advertising services which were used to make exempt supplies in the UK.

190.Mr Thomas says that the way in which the Tribunal relied on *WHA* was not correct. The Tribunal set out, at Decision [86] two paragraphs, [16] and [17] of Lord Neuberger's judgment but failed properly to take account of the successful argument of HMRC referred to by him. In [17] he said this:

> "….. Although Gibraltar companies, namely Viscount and Crystal, are involved in the chain, the truth is that the provision of the services comprising of the repairs and parts are provided in the EU to WHA, and what WHA provides, albeit through two Gibraltar companies in the same group, is the provision of claims handling, again in the EU, to a supplier of exempt services in the EU, namely NIG."

191. Mr Thomas contends that this is simply a reiteration of the principle that persons making exempt supplies consumed in the EU should suffer the input tax incurred in making those supplies: this is required by the principle of fiscal neutrality as otherwise distortion in the market is risked. His submission is that the Tribunal failed to recognise this. Thus he says that the insertion (to continue the description rejected by the Tribunal) of Alabaster as the ostensible provider of loan broking services results in the consumption by Alabaster of the advertising services in Jersey and to be outside the scope of VAT. In fact, the loan broking supplies are made in the UK, consumed by UK lenders only, all loan applicants are resident in the UK and all advertising appears in the UK media. Consequently, input tax should be incurred on the advertising.

192. And so it is submitted that the insertion of Alabaster constitutes objective circumstances which, despite formal observance of the conditions of EU law, results in the purpose of the Community rules not being achieved.

Mr Newey's case

The Categorisation of Supplies Issue

193. So far as concerns the Categorisation of Supplies Issue, Mr Newey's case in a nutshell is that the Tribunal applied the correct approach. Although they did not have the guidance given by the CJEU on the reference in the present case, that guidance really contained nothing new but was simply a restatement of established principle. It has never been Mr Newey's case that the contractual arrangements concluded the questions in issue and that was not the approach which the Tribunal itself took. Having applied the correct approach, the Tribunal's assessment of the evidence is unassailable: they reached conclusions which they were entitled to reach on the evidence before them. The Tribunal took everything into account: their conclusion was that the contractual position was not to be disturbed as a reflection of the reality. The facts are, Mr Ghosh says, that Mr Newey set up a company, Alabaster, in Jersey and that the loan broking business is now being conducted through that company. However HMRC seek to characterise their case, it is in effect an attack on the findings of fact of the Tribunal. That simple case was, of course, presented in detail in the skeleton argument on behalf of Mr Newey, in Mr Ghosh's oral submissions and in the responses in the table to which I have referred at length above. He asked me to take account of all of the factors set out in that table, which of course I do. Of the matters which he addressed orally, he described as critical the "risk and reward" aspect (identified at paragraphs 167*ff* above).

194.Mr Ghosh contends that the Tribunal did, properly, take an overview. He relies in particular on the following paragraphs of the Decision:

a. Decision [65]: questions of the characterisation of a supply cannot be determined wholly by reference to the concept of contractual duty. The construction of a contract is not determinative. Nevertheless, it is a factor.

b. Decision [60]: the contracts all fell to be considered as part of the overall factual circumstances.

c. Decision [66]: the Tribunal reached its decision by reference the "whole facts".

195. As to the CJEU Judgment, the guidance given comes to this in Mr Ghosh's submission, and it says nothing new: the correct starting position remains the contractual position but other factors may indicate that the true nature of the supply is not that which an examination of the contractual arrangements alone would suggest. Instead, all relevant factors must be taken into account and it is for the national court to assign the appropriate weight to those factors and to reach a conclusion. It is only by such an examination and assignment of weight that the correct answer can be arrived at.

196. I have addressed at paragraphs 49 to 52 above whether the guidance given by the CJEU in the present case adds anything new to the jurisprudence. I do not need to say more about this aspect. I agree broadly with Mr Ghosh.

197.He submits that HMRC cannot derive any assistance from the matters referred to in paragraphs 45 to 119 of their skeleton argument, which I have addressed by reference to the table prepared by Mr Ghosh and his team. I will consider that submission in my discussion later in this decision.

198. He submits, in any case, that the characterisation of supply for VAT purposes is a matter of law. However, it requires a tribunal to make an evaluative judgment which involves a multifactorial assessment on the basis of its findings of fact and thus involves matters of fact and degree. An appellate tribunal or court should not interfere with the evaluation of the first-instances decision maker unless there has been an error in principle, reliance being placed on *College of Estate Management v Customs & Excise Commissioners* [2005] STC 1597 (HL) at [35] to [36] and *Procter & Gamble UK v HMRC* [2009] STC 1990 (CA) [9] to [11]. I agree. An appellate tribunal must approach an evaluation of this sort with a large measure of circumspection, especially given that such an evaluation will have been carried out by a tribunal which has had the advantage of hearing all of the material evidence. As was said in the *College of Estate Management* case, not every nuance of a first-instance tribunal's assessment of the evidence can be conveyed in its written reasons, however carefully prepared. A decision should be overturned only if the tribunal has erred in principle.

199. Mr Ghosh submits that HMRC comes nowhere near showing that the Tribunal erred in principle. The table which he and his team has prepared demonstrates, he says, that the factual proposition relied on by HMRC are all (i) contradicted by the Tribunal's findings of fact or (ii) unsupported or contradicted by the evidence or were taken appropriately into account by the Tribunal in reaching its decision. Thus the Tribunal held, and was entitled to hold:

a. The Services Agreement represented and reflected the real activities of Mr Newey and of Alabaster: Decision [28].

b. It was Alabaster (and not Mr Newey) which had a business relationship with the lenders: Decision [67]. It was Alabaster which carried on that business relationship, having equipped itself to do so through the Services Agreement with Mr Newey: Decision [67]. Alabaster contracted for and received advertising services from Wallace Barnaby as principal **for the purposes of its business**: Decision [65]. Alabaster paid the whole consideration for the advertising services: Decision [66].

c. Mr Newey did not bear financial responsibility for the services provided by Wallace Barnaby to Alabaster: Decision [70].

d. As to a. above, I ought to interrupt myself here to say that a business relationship with Alabaster does not preclude a business relationship with Mr Newey: I do not read the Tribunal as saying, in Decision [67], that there was no business relationship with Mr Newey.

200. Mr Ghosh has referred me to the reverse charge provisions in section 8 VATA. He says that HMRC are attempting to sidestep the provisions of that section by ignoring Alabaster and by saying that it is Mr Newey who is making supplies in the UK. It has always been open to the UK to adopt legislation, consistently with the relevant EU Directives, which would have enabled them to treat Mr Newey in the way which they now seek to do. But such legislation was not adopted and it should not be permissible to seek to achieve by the back door that which has not been permitted by the front door.

201. He has referred me, in that context, to Article 9 of the Sixth Directive, as to which see paragraph 20 above. In particular, Article 9(3) would have authorised national legislation which would have treated the place of supply of the advertising

services provided in Jersey to Alabaster by Wallace Barnaby as being within the UK, since it was in the UK that the effective use and enjoyment of the advertising services took place. Had the UK adopted this option, it would have needed to replace the "place of belonging" test under section 8 in such cases. As a general rule, the Sixth Directive has no impact on transactions between parties with no relevant presence in a Member State. Where a Member State has an option to tax but does not exercise that option, it cannot be said in a case such as the present that the purpose of the Sixth Directive has been thwarted (to use my description). It is not the nature of the transactions and the structure within which they take place which results in there being no charge to VAT; rather, it is the failure of the Member State to exercise the option which it had. Contrary to HMRC's approach, the relevant transactions all took place outside the UK. Had the UK exercised the option to tax by reference to the place of consumption, matters would be different: but they did not do so.

202. Mr Ghosh urges some caution on me in approaching the CJEU Judgment. He suggests that the UK government adopted a highly selective approach in its oral submissions to the facts set out in the Order for Reference. It was also selective in its oral submissions. This affected the stance which the CJEU took. I do not think there is anything in this point. The CJEU also heard from Mr Newey's representatives. It had the facts as set out in the Order for Reference before it. The CJEU Judgment must be taken as representing a fully-informed decision. It cannot be that it is to be interpreted in some special way because of the nature of the submissions made by the UK government; if that were so, no reader of the judgment would be able to understand it properly without those submissions to hand, a proposition which only has to be stated to be rejected.

203. Mr Ghosh relies, as I have said, on the judgment of the Supreme Court in *Secret Hotels2*. I have already mentioned the relevant paragraphs in the judgment at paragraph 48 above. In effect, Mr Ghosh submits that you can set up whatever structure you like unless it is abusive. The transactions taking place within that structure are then to have effect for tax purposes according to the reality which is imposed by that structure. I have addressed his submission that a fuller understanding of the concept of economic and commercial reality can be derived from [55] and do not consider that [55] to [57] take Mr Ghosh as far as he might wish.

The Abuse Issue

204. In relation to the Abuse Issue, Mr Ghosh first addressed HMRC's two arguments to the effect that the Tribunal wrongly held that there was no exempt supply in the UK and that they failed to consider the scheme as a whole in the light of the purposes of the legislation rather than simply the position of Alabaster.

205. The first criticism is, he says, unfounded. He says that the Tribunal did not conclude that Alabaster's supplies of loan broking services were exempt supplies. He refers to the passage in Decision [92] quoted at paragraph 86 above. The point being made was that it was the absence of any link between (i) irrecoverable VAT and (ii) an exempt supply that was critical to the Tribunal's reasoning. They certainly did not hold that the supplies made by Alabaster were anything other than exempt supplies.

206. As to the second criticism, it cannot, Mr Ghosh submits, stand given what the Tribunal said in Decision [91] to the effect that, in considering the first limb of the *Halifax* test, the existing arrangements should be "viewed as a whole". He submits that the Tribunal correctly assessed whether the arrangements as a whole were contrary to the purposes of the Sixth Directive and did not, incorrectly, assess the

question of abuse by reference to some other arrangements which might have resulted in more tax.

207. As to HMRC's central argument (namely that that there is an abuse because the loan broking services were provided in the UK to UK lenders, wholly consumed in the UK by UK lenders in respect of UK borrowers responding to adverts placed in UK media), Mr Ghosh submits that it is entirely unexceptional that a person belonging outside the UK should not incur VAT on supplies to it whatever the use to which those supplies are put. This is a consequence of the place of supply rules which are the critical rules for the allocation of tax competence in relation to VAT.

208. He relies on the *RBS Deutschland Holdings GmbH* (and in particular the passage appearing in paragraph 48a. above in the citation) to show that it is wrong to approach the assessment of a tax advantage by the comparison just mentioned.

209. I have already mentioned Article 9(3): see paragraphs 20 and 197 above. It cannot be abusive, it is said, for Mr Newey to construct arrangements which take advantage of the place of supply rules when there was available to the UK what Mr Ghosh describes as a legislative fix which was expressly contemplated by the Sixth Directive. Had the UK taken advantage of Article 9(3), the supplies of advertising services would have been treated as made in the UK. Thus the scheme of the EU legislation is that there is no VAT on Alabaster (and is the "right result" as Mr Ghosh puts it given that Alabaster is not in the UK). Article 9(3) recognises that there may be cases where a member state should be permitted to modify that result. Had that course been taken, a VAT liability would have arisen but, importantly, the charge would not have been imposed on Mr Newey.

210. Mr Ghosh contrasts the artificiality of the arrangements in *Halifax*, in Case C-223/01 *Huddersfield Higher Education Corporation v Customs & Excise Commissioners* and in *Part Service* with the facts of the present case. In the present case, the advertising generated leads which led to contracts between Alabaster and its panel of lenders which generated arm's length returns; and the Service Agreement with Mr Newey allowed Alabaster to outsource most of the loan processing to Mr Newey. All of these elements were "commercial" in the sense that each element had a real part to play in generating Alabaster's profits. It is not to be overlooked that the profits were genuinely those of Alabaster and not of Mr Newey, albeit that he was the 100% shareholder of Alabaster.

211. The final submission made by Mr Ghosh relates to the decision of the Court of Appeal in *Pendragon v HMRC* [2013] EWCA Civ 868, [2014] STC 844. Mr Ghosh relies on it to show the care which must be taken by the Upper Tribunal exercising an appellate jurisdiction in upsetting the F-tT's findings and evaluations. I take into account in particular [141], [142], [144] and [161] to [163] of the judgment of Lloyd LJ. I am bound by what he says although it does take a fairly narrow view of the UT's role under the Tribunals, Courts and Enforcement Act 2007. An appeal in *Pendragon* has now been heard by the Supreme Court and judgment is awaited. What Mr Ghosh did not refer to was [157] of that judgment. It is worth setting it out:

> "The European Court in paragraph 81 of *Halifax* refers to taking account of "the purely artificial nature" of the transactions. In many, perhaps all, cases, there is likely to be a real commercial exercise which underlies the transactions, as the building of the call centres was in *Halifax* and the reinsurance of the underwriting liabilities in *WHA*. For that reason it is natural to focus on the elements which are said to be artificial in the particular scheme, even though those may be only a part of the transactions as a whole. Thus the scheme as a whole may not be artificial and may have a genuine commercial purpose, but one or more discrete elements in the arrangements may be artificial, without any independent economic or commercial justification. But if the focus of attention is on one element in a series of arrangements, then while there may be cases in which one can isolate a

> particular step and characterise it as completely unnecessary from an ordinary commercial point of view (as in *Halifax* itself, or in *WHA*), in other cases the element in question may be one of several possible ways of carrying out something which would itself be a normal part of the arrangement. It may be unusual, but it may also be difficult to say that there is no economic justification for it at all. For something of that kind to be undertaken would be a normal course. What would have been a normal thing to be done may have been done in a relatively unusual way. Given that parties are allowed to choose in what way they organise their affairs, and can legitimately take account of the natural wish of a commercial undertaking to reduce its fiscal exposure in so doing, it may be more difficult to treat such a step as abusive and artificial if it can be regarded as no more than one of a number of possible ways of carrying out a stage in the arrangements which is, in itself, normal and responsive to ordinary commercial concerns."

Discussion

212. After that lengthy discussion of the facts and arguments, I come to my own decision.

The Categorisation of Supplies Issue

213. I can deal with the Characterisation of Supplies Issue (ignoring the abuse aspects) quite briefly. In the first place, it is, for reasons already given, implicit in the CJEU Judgment that in order to depart from the contractual provisions on the facts of the present case, it is necessary to show an abuse of rights and then to redefine the contractual terms. HMRC can succeed if, but only if, they can establish abuse. If they fail on abuse, they cannot succeed on the facts of the present case in establishing that the relevant supplies were made to and by Mr Newey for VAT purposes.

214. But in case that is wrong, I need to deal with the position on the basis that it is open on the facts of the present case to establish that the relevant supplies were made to and by Mr Newey without the need to redefine the contractual arrangements as envisaged in CJEU [50].

215. In those circumstances, I consider that the Tribunal were entitled to reach the conclusion that the relevant supplies were made by and to Alabaster and not Mr Newey. Indeed, I would have reached the same conclusion myself. Although there is force in some of the criticisms made by HMRC (which I have dealt with when considering the Table prepared by Mr Ghosh and his team), I do not consider that, even taken cumulatively, they cast serious doubt on the Tribunal's conclusion in relation to this Issue. The position, as I see it, is that Mr Newey has set up Alabaster in Jersey, as he was entitled to do. Alabaster has commenced trading as a loan broker as it is entitled to do. That business was its own business; the Service Agreement and the contract with Wallace Barnaby were genuine (in the sense that they were not shams). On the hypothesis under consideration, none of transactions constituted abusive conduct. It is incorrect the compare the new structure with the old arrangements and then to say that the transactions of Alabaster were not normal commercial transactions of Mr Newey.

216. In my view, therefore, there can accordingly, be no redefinition of the contractual arrangements since such redefinition is the consequence of abuse: if no abuse exists, the findings of fact made by the Tribunal lead inevitably to the conclusion that the relevant supplies were made to and by Alabaster. This leaves no scope, in my judgment, for the conclusion that the relevant supplies were made to and by Mr Newey. Unless the structure within which the parties operated can be demolished as an abuse, it is the structure which governs the supplies; and although there can, within a structure, be a departure from the contractual position (as in *Reed*) when establishing who makes and receives a supply for VAT purposes, this is not a case where, in my view, that can be done.

The Abuse Issue

217. Under this heading I deal with both (i) the abuse alleged on the basis that the Alabaster arrangements are wholly artificial arrangements which do not reflect the economic and commercial reality in the sense in which those words are to be understood in [46] of the CJEU Judgment and (ii) Mr Thomas' wider approach to *Halifax* and the purpose of the Sixth Directive. At the outset, I should say that I do not consider that the CJEU Judgment precludes the second approach. Although the focus of the CJEU was principally on the first approach, I do not consider that it is implicit in its ruling that a different abuse of rights could not be found in the same structure and transactions. This contrasts with my conclusion in relation to the possibility of categorising the relevant supplies as made to and by Mr Newey without any abuse being present where I have held that it is implicit in the approach of the CJEU that, in the absence of abuse, a departure from the contractual terms as touchstone for identifying who supplies what to whom cannot be justified.

218. In discussing the CJEU Judgment, I have already expressed my broad agreement with Mr Ghosh's submission that it does not add anything significant to the pre-existing jurisprudence although it does throw some further light on what might amount to abuse in a case such as the present. There are, nonetheless, two points which emerge from the Judgment which I mention. The first is the description of what abuse means in the context of VAT as including a case where contractual terms constitute purely artificial arrangements which do not correspond with the economic and commercial reality of the transactions. The focus of the language is on that reality rather than on the accrual of a tax advantage the grant of which would be contrary to the purposes of Sixth Directive, which is the focus one finds in *Halifax*.

219. The second point which emerges from the CJEU Judgment is that, in principle, an abusive practice can be found to exist even where the abusive transactions are not simply inserted into an existing structure but where a completely new structure is adopted. Thus, in the present case, the business of loan broking was carried on, in terms of the formal structure, by Alabaster and not by Mr Newey, a fact of which the CJEU was well aware; Mr Newey did not carry on that business but carried on a different business, namely the processing operation, as a sub-contractor to Alabaster. Nonetheless, the CJEU considered (see CJEU [48]) that the economic and commercial reality of the various business relationships made it conceivable that the relevant supplies were made to and by Mr Newey. If that were so, the contractual terms would be redefined, with Mr Newey being regarded as the supplier and recipient of the relevant services (see CJEU [50] and [51]).

220. The fact that Alabaster carried on business on its own account in legal and formal terms does not, therefore, necessarily entail that, for VAT purposes, supplies to and by it could not be treated, for VAT purposes, as made to and by Mr Newey; and this is so, in my view, even if the structure could not be said to be a sham in terms of English-law classification. On any view, in order to establish abuse, there needs to be a comparison between two outcomes. One essential requirement is that there is a tax advantage; an advantage can only arise if situation A produces a better tax outcome for the taxpayer than situation B. In theory – it will depend on an analysis of the facts – that comparison could be between the new arrangements under which the loan broking business is, in formal and legal terms, carried on by Alabaster, and the old arrangements under which the business was carried on by Mr Newey. The commercial operations of Alabaster, which may be described as normal commercial transactions from the point of view of Alabaster, are not then to be seen a normal

commercial transactions in the context of abusive practice, that is to say the normal commercial transactions of Mr Newey.

221. It follows that it is not possible to say, *a priori*, that the adoption of the Alabaster arrangements in the present case could not be an abuse of rights because it was only Alabaster (a separate legal personality from Mr Newey) which actually carried on the loan broking business and did so in Jersey.

222.The next question to address is whether the contractual terms do genuinely reflect economic reality within the meaning of CJEU [48]. For reasons which I have already given, the words economic reality in that paragraph are a reference back to the words of CJEU [45] and [46]. It therefore has to be established that the scheme comprises "wholly artificial arrangements which do not reflect economic reality" or that "the contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions".

223. The Tribunal did not in terms address that question. Their discussion of the Abuse Issue was in the context of Mr Thomas' submissions concerning the relevant purpose of the Sixth Directive and whether the arrangements subverted that purpose as explained above. But they did discuss, when dealing with the Categorisation of Supplies Issue, the relevant issues. Their findings of primary fact are applicable to the Abuse Issue as much as to the Categorisation of Supplies Issue; and aspects of their evaluation are apposite to the redefinition of the contractual terms as the result of abusive practice just as much as to the categorisation of the supplies absent any abuse.

224. In order to assess the impact of what the Tribunal did decide in relation to the question which it did not in terms address, I turn to consider that part of the Decision in which they dealt with the argument about abuse. I have summarised the relevant

parts of the Decision at paragraphs 77*ff* above where the Tribunal were dealing with the first element of *Halifax* test. The argument before the Tribunal, as before me, was that the logic of VAT requires that persons making exempt supplies in the EU should suffer the tax incurred in making those supplies. Thus the supplies were of loan broking services wholly consumed in the UK by UK Lenders to UK borrowers whose contact arose as a result of advertising in the UK. Moreover, there was no difference in principle between an abusive scheme which operated on the basis of creating an entitlement to deduct VAT and one which operated on the basis of preventing VAT which would be irrecoverable from arising in the first place.

225. As noted in paragraph 79 above, the Tribunal rejected the characterisation of the structure adopted as involving the "insertion" of Alabaster: see Decision [89]. I do not think that the Tribunal can be criticised in that respect; they were simply rejecting the use of language which suggested something different from the reality and stating the actual position arising under the contractual arrangements. Having done so, and having also rejected the description of the structure as a "Jersey loop" (a reference to the "Gibraltar loop" found in *WHA*), the critical evaluations are to be found in Decision [90] to [92] the relevant text of which I have set out at paragraphs 81 and 82 above.

226. The Tribunal rejected HMRC's arguments. It is plain that the Tribunal considered that HMRC were making the wrong comparison. HMRC were, as the Tribunal saw it, comparing the results of the transactions entered into by Alabaster with what would have resulted "if exempt supplies had been made in the UK". The Tribunal accepted that there was no difference in principle between recovery of VAT otherwise irrecoverable as being attributable to an exempt supply and not incurring

VAT which would be otherwise irrecoverable (see the suggestion of an exempt supplier engineering a scheme to create a deduction or to prevent VAT which would be irrecoverable from being incurred). However "this cannot be the case if there is no actual exempt supply that would render any VAT irrecoverable". There was nothing in the present case to create that irrecoverability. It was the Tribunal's view that "the absence of any exempt supply in the actual transactions that would render VAT attributable to that exempt supply irrecoverable" means that there was no relevant purpose to which the arrangements could be contrary. All of this appears from Decision [91].

227. And then, in Decision [92], the Tribunal, in addressing *WHA*, contrasted the present case recording their finding that the supplies of loan broking services to the lenders were made by Alabaster, which had no establishment in the UK. And so there "were no exempt supplies to which irrecoverable VAT could be attributed".

228. HMRC submit that what the Tribunal must be taken as saying is that there were no exempt supplies in the UK, a proposition which, it is common ground, is incorrect: Alabaster's supplies were in fact exempt supplies and they were made in the UK. Mr Ghosh submits to the contrary: it was the absence of any link between (i) irrecoverable VAT and (ii) an exempt supply that was critical.

229. HMRC's submission has more than a superficial attraction. A literal reading of what the Tribunal said does appear to be based on the assumption that Alabaster was not making exempt supplies in the UK. For reasons I will come to in a moment, I do not think that the Tribunal can be read in that way. Mr Ghosh may be right to say that the link (or rather its absence) which he describes was critical. However, if one is to take from what the Tribunal said that the absence of link was critical, there is no

reasoning to demonstrate why there was no such link. The ultimate conclusion that there was no abuse follows, inevitably, from the absence of any link. The criticism which can be made is that the Tribunal has not explained the reasoning by which it reached that conclusion. Mr Ghosh's submission that the Tribunal based that conclusion on the absence of the link does not provide an explanation of why there was no link.

230. If the Tribunal is to be read in the way which HMRC suggest, then their reasoning is not applicable on the facts of the present case. The reasoning would be based on a counter-factual position namely that Alabaster was not making exempt supplies in the UK; the Tribunal's statement in the middle of Decision [90] ("But in our view this cannot be the case if there is no actual exempt supply that would render any VAT irrecoverable") would be irrelevant since the supplies were, on the contrary, exempt supplies. The same can be said of the conclusion, also in Decision [90], that "there is nothing in the actual circumstances of the transactions with we are concerned to create that irrecoverability" since that conclusion would be based on a faulty premise. The Tribunal's further conclusion at the end of Decision [90] that there would be no purpose of the legislation to which the arrangements could be contrary does not then follow (which is not to say that it may not be correct). And, again, a mistake would have to be attributed to the Tribunal when it said, in Decision [92], that the old arrangements involving exempt supplies could not be used as a benchmark "against which a new structure not involving exempt supplies should be tested".

231. I am bound to say that I am reluctant to reach a conclusion that the Tribunal simply got this point wrong. It is hardly likely that they overlooked in Decision [90] to [92] that Alabaster was itself making exempt supplies in the UK in the light of

Decision [94] where they identify the relevant statutory provisions. Further, it was never HMRC's argument to compare the results of the transactions entered into by Alabaster with what would have resulted if exempt supplies had been made in the UK, for the good reason that such an argument would be meaningless simply because Alabaster itself did make exempt supplies in the UK. Rather, the argument was based on a comparison with what would have resulted if exempt supplies had been made in the UK by a person with a place of belonging in the UK, *ie* Mr Newey. If one reads Decision [90] to [92] in that way, it makes perfect sense although whether it is right or wrong is a different matter. That is the way in which I consider it should be read and I proceed accordingly.

232. Adopting that approach, the conclusion set out in paragraph 231 above becomes this: "But in our view this cannot be the case if there is no actual exempt supply [in the UK by a person with a place of belonging in the UK] that would render any VAT irrecoverable". That appears to be stated as a matter of law so that, if the transactions carried out by Alabaster were genuine and not shams (as the Tribunal clearly held to be the case), it would be impossible to make a finding of abuse. That conclusion would, however, be contrary to the judgment of CJEU in the present case. Quite clearly, in my view, that Court held that the possibility could not be ruled out (it was "conceivable") that the relevant supplies were made to or by Mr Newey, that is to say through the route of redefinition of the transactions which is itself a consequence of abusive practices. Similar points can be made in relation to the conclusion at the end of Decision [92].

233. That is not an end of this aspect of the argument. In Decision [91] the Tribunal had more to say, in the context of the first element of the *Halifax* test about what

traders could properly do. Thus it was clear to the Tribunal from *Halifax* that it is not abusive for traders to conduct their business in a particular way, and may do so to limit their liability to tax. The Tribunal did not consider that it was correct to compare a structure that a trader, or group of traders, might have adopted in the past with the current structure, and to conclude that, if the current structure is more favourable for VAT purposes than the former, the current structure is in consequence contrary to the purposes of the VAT legislation. Their view was that, in considering the first element of the *Halifax* test, the existing arrangements should be viewed as a whole, on their own merits and without being associated with other possible transactions or arrangements, or with transactions or arrangements that might have applied in the past, and on that basis a determination should be made whether the existing arrangements are in themselves contrary to the purposes of the VAT legislation.

234. I agree with that. The question is whether the structure (and transactions within it) gives rise to abusive practice in the context of the overall factual matrix; the question is not whether the change in structure results in a tax advantage as compared with the pre-existing structure. For the purposes of the first element of the *Halifax* test, it seems to me that a given structure should not be capable of giving rise to a tax advantage contrary to the purpose of the Sixth Directive in relation to one taxpayer but not another in a similar position: nor should it make any difference whether Mr Newey set up the current arrangements from an existing business or whether he had started the business from scratch using the new structure. As the Tribunal put it, it would not accord with the principle of fiscal neutrality, or the requirement for legal certainty, if the VAT treatment of transactions or arrangements could differ depending on whether the trader, or a connected or associated person, previously undertook

similar transactions through a different structure, and those past transactions gave rise to a more onerous liability to VAT than the transactions or arrangements in question.

235. It follows from this discussion, and in particular the conclusion in paragraph 233 above, that the reasoning by which the Tribunal reached their conclusion on the first element of the *Halifax* test cannot stand in the light of the CJEU Judgment. But that does not mean that the actual conclusions of the Tribunal cannot be correct. It might be said that their findings elsewhere in the Decision lead inevitably to the conclusion that there was no abuse even applying the guidance in the CJEU Judgment. On the other hand, it might be said that their findings elsewhere in the Decision lead inevitably to the opposite conclusion.

236. Before turning to that debate, I wish to return to the other aspect of abuse, namely the question whether the scheme comprises wholly artificial arrangements which do not reflect economic and commercial reality and are set up with the sole aim of obtaining a tax advantage. I have already indicated the rationale for the existence of two tests in *Halifax*. Given that the CJEU Judgment is simply a reflection of earlier authority, it is hardly surprising that there remain two elements in establishing abuse: to use the language of the CJEU Judgment they are (i) wholly artificial arrangements which do not reflect economic and commercial reality and (ii) the sole aim of avoiding tax.

237. Whether a scheme falls within the first element is a question which, in my view, is to be answered by reference to the same objective criteria as apply to the first element of the *Halifax* test. The second element (the “sole aim” requirement) reflects the second element of the *Halifax;* the use of the words "sole aim" cannot have been intended to depart from the guidance in *Part Service.* Even a finding that the aim was

not merely an essential aim but was the sole aim would not obviate the requirement to establish wholly artificial arrangements which do not reflect economic and commercial reality.

238. However, the Tribunal's actual finding in Decision [101] (see paragraph 89 above) may be said to have gone beyond a finding that objectively (as well, obviously subjectively on the part of Mr Newey) the sole purpose of the arrangements was to obtain a tax advantage. They held that, in the context of Mr Newey's former business of loan broking, there was no commercial justification for his ceasing to carry on loan broking and instead to commence the provision of processing services to an associated company in Jersey. The Alabaster structure would not have been put in place but for the tax advantage sought to be derived. It could therefore be suggested that that finding is inconsistent with a conclusion that the scheme was not a wholly artificial arrangement which did not reflect economic and commercial reality.

239. I would reject such a suggestion. The Tribunal were here dealing with the second element of the *Halifax* test which is concerned with the essential aim of the transactions. Although the essential aim has to be ascertained by reference to objective criteria, those criteria must be assessed in the context the actual facts on the ground. In the present case, one of those actual facts was the old structure in which the loan broking business was being carried on. The Tribunal's finding was that, given the starting point of the old structure, the new structure would not have been put in place but for the tax advantage which came with it as compared with the old structure and that there was no commercial justification, in the context of the old business, to cease loan broking and to commence the provision of processing services to a company in Jersey. There is nothing inconsistent between that finding and a

conclusion that the new structure did not constitute wholly artificial arrangements having no economic or commercial reality which, as I have explained, is to be judged by the same objective criteria as apply to the first element of the *Halifax* test. The fact that a change of structure is wholly tax-driven does not mean that the resulting structure, had it been set up initially, would have given rise to an abusive practice.

240. Let me give a parallel. A sole trader might incorporate his business. It is possible (although perhaps unlikely) that his decision to do so was based solely on tax (VAT, income tax, corporation tax, capital gains tax) considerations. The resulting structure could not, I think, properly be described as wholly artificial having no commercial or economic purpose. Indeed, one set of normal commercial transactions (*ie* those of the sole trader) would have ceased and another set (*ie* those of the company) would have commenced. And so, in the present case, the question whether the new arrangements amount to wholly artificial arrangements having no economic or commercial reality must be judged objectively by reference to the context in which they were set up and operated and not by reference to the reason for the change from an existing structure.

241. With Decision [101] out of the way, I now turn to the question whether the Alabaster arrangements are wholly artificial arrangements having no economic or commercial reality (in the sense which I have discussed at length and thus reflecting the first element of the *Halifax* test). The Tribunal carried out an evaluation of the primary facts in its consideration of the Categorisation of Supplies Issue but it did not carry out any separate evaluation when discussing the Abuse Issue. The nearest they got to adopting that evaluation when discussing the Abuse Issue was in Decision [92]

when they recorded, and relied on, their conclusion that the supplies had been made by Alabaster which did not have an establishment in the UK.

242. Although the Tribunal carried out their evaluation in the context of the Categorisation of Supplies Issue, many of their conclusions are relevant to the question whether the arrangements were wholly artificial not reflecting economic and commercial reality. If the attacks made by HMRC on the findings of fact which I have dealt with at length by reference to the table prepared by Mr Ghosh and his team, were all to fail, then there would be no prospect, in my view, of successfully establishing a case of abuse. There would then be no arrangements having no economic or commercial reality (according to the CJEU approach in the present case) nor would the first element of the *Halifax* test be satisfied.

243. As to the first element of the *Halifax* test, consider the case of a Jersey resident company owned by a number of investors in Jersey providing loan broking services but which out-sources its processing operation to a UK resident (such as Mr Newey) under an arm's length agreement and which obtains advertising services from a Jersey provider which formulates its advice and places advertising without any element of veto from the UK provider of processing services. In such a case, I do not consider that the structure and its implementation and operation would give rise to any question of abusive practice.

244. Accordingly, I do not accept HMRC's contention that abuse is to be found in the present case simply because (and without more) there is a supply in the UK of loan broking services to UK lenders who make loans to UK borrowers following from introductions arising as result of advertising in UK media; and in rejecting those contentions, I also reject Mr Thomas' description of the relevant purpose of the Sixth

Directive. And so, on the Tribunal's findings of fact and their evaluation of the facts in the context of the Categorisation of Supplies Issue, it follows that the Alabaster arrangements cannot be said to comprise wholly artificial arrangements which do not reflect economic and commercial reality; nor can the scheme be said to result in the accrual of a tax advantage the grant of which would be contrary to the purposes of the provisions of the Sixth Directive. Although they did not say so in so many words, they considered that the Alabaster arrangements did reflect an economic and commercial reality which did not produce a result contrary to the purpose of the Sixth Directive. Had they expressed their conclusion in the language of the CJEU Judgment, it is clear, in my view, that they would have concluded that the arrangements were not wholly artificial arrangements which did not reflect economic and commercial reality. It is not just that I consider this is what they would have said: I perceive what they actually said as inconsistent with a contrary conclusion.

245. Can the Tribunal's conclusion on abuse nonetheless be overturned on the basis of the errors which HMRC allege? In this context, the question is not whether I would have reached the same conclusion but whether the evaluation of the Tribunal in the light of the unchallenged findings of primary fact displays an error of law.

246. Although HMRC have demonstrated a number of areas where the Tribunal have not expressly dealt with factors on which HMRC now rely and where the Tribunal has attached weight which HMRC consider to be wrong, I do not consider that the criticisms are sufficient for me to say that the Tribunal has erred in law in reaching its conclusions. I comment on the main criticisms of the evaluation in the following paragraphs. I do not address each and every criticism and where I do not do so it is because I do not consider that the criticism, even if justified, leads to an error in

relation to the overall evaluation. I do, however, take all the factors into account in reaching my overall conclusion.

247. At paragraph 66 above, I referred to Decision [52] concerning the scale of Mr Newey's operations, setting out a passage from the Decision. Although the quoted passage was not expressly directed at, or at any stage expressly taken into account in relation to, the question of abuse, it seems to me to be inconsistent with the view that the Alabaster arrangements were wholly artificial and ones which did not reflect economic and commercial reality. The Tribunal's conclusion is one which I do not consider is open to challenge.

248. Nor do I accept HMRC's submission that Alabaster had no relevant relationship with the lenders. The Tribunal rejected the same submission: see paragraph 73.e above and Decision [67]. Again, The Tribunal's conclusion is one which I do not consider is open to challenge.

249. The Tribunal rejected HMRC's description of Alabaster as having been "inserted" into the arrangements. They rejected it because they saw the new arrangements as being a wholesale reorganisation. Although a wholesale reorganisation is not necessarily inconsistent with the presence of abusive practice, the language used by the Tribunal is suggestive of a conclusion that the reorganisation itself was not a scheme of wholly artificial arrangements not reflecting economic and commercial reality: indeed, I read the Tribunal as suggesting quite the reverse. It is no doubt the case that Alabaster was created for the purpose of the scheme, as the Tribunal effectively recognise in Decision [101]. But it does not follow from that that the creation was in any sense part of a set of artificial arrangements.

250. At paragraph 101 and 102, I have identified HMRC's criticisms in relation to the Tribunal's treatment of advertising and the business relationship between Mr Newey and the lenders (as to the latter of which see also at paragraph 101 above). I rejected those criticisms in paragraph 104. My focus there, however, was on the categorisation of the supplies in the absence of any abusive element. However, as I read the Decision, the Tribunal were not making the narrow point that there was *prima facie* a supply to Alabaster of the advertising services which could not be said in reality to be a supply to, let alone only to, Mr Newey. Rather, they took account of the possible benefit to Mr Newey's business as a factor in demonstrating the economic and commercial reality of Alabaster's business. Their evaluation is one with which HMRC disagree; but it is not, in my view, one which I can disturb.

251. They therefore in effect took into account the point subsequently made in [48] of the judgment of CJEU that the effective use and enjoyment of the services at issue [*ie* the advertising services provided by Wallace Barnaby] might have taken place in the UK and that Mr Newey profited therefrom.

252. In paragraph 107 (and see also paragraph 111 above), I addressed HMRC's criticism that the Decision takes no account of the fact that Alabaster was devoid of any commercial purpose. I said that the argument got HMRC nowhere in the context of the correct categorisation of the relevant supplies in the absence of any abusive practice. Returning now to those arguments in the context of abusive practice, I do not consider that they assist HMRC here either. The assertion that Alabaster was devoid of any commercial purpose is to beg the question at issue. It is the case, as the Tribunal found, that there was no commercial justification for Mr Newey to cease to carry on business as a loan broker and that the structure would not have been put in

place apart from the tax advantages. But those facts go to the second test – what was the sole aim of the arrangements – not to the question whether those arrangements were wholly artificial and did not reflect the economic and commercial reality in the sense discussed *ie* as reflective of the first element of the *Halifax* test. They do not provide an answer to the question whether the Alabaster arrangements were wholly artificial and did not reflect economic and commercial reality in the language of the CJEU Judgment or were contrary to the purpose of the Sixth Directive in the language of the first element of the *Halifax* test.

253. In paragraphs 117 to 119 above, I referred to two complaints made by HMRC (see points 4 and 5). I have already dealt with their criticisms concerning point 4 the identification of the relevant business relationships: see paragraph 100 above. In relation to point 5 (the failure of the Tribunal to take into account the inability of Alabaster to judge three essential aspects of any loan broking business), I consider that there is some force in the submission that Alabaster was not able itself to judge these three aspects. It is the case that the Tribunal did not expressly mention this aspect as part of its evaluation. However, that is not to say that this aspect was in fact overlooked or deliberately ignored and not taken into account. The Tribunal was clearly aware of the limited relevant experience of the directors but nonetheless formed the view that they were not simply rubber-stamping Mr Newey's decisions. They formed the view that Alabaster was not a "brass-plate" company and they decided as a matter of fact that Mr Newey played no part in the management of Alabaster. They carried out, in effect, the evaluation which is envisaged by the CJEU Judgment. In my judgment, the Tribunal were entitled to reach the conclusions which they did in spite of the alleged inability of Alabaster to judge these three aspects of the business without outside assistance.

254. As to point 7 (see paragraph 123 above) concerning commission, the Tribunal did take account of the impact of commission on the business. I would not myself be unduly critical of the absence of the sort of analysis which Mr Thomas now contends is so important in relation to one particular aspect – negotiation of one-off agreements – of the overall evaluation.

255. As I have said, I see force in the criticisms made of the Tribunal's approach to Alabaster's decision making as discussed in paragraphs 136 to 146 above assuming, of course, in Mr Newey's favour that the Tribunal intended its evaluation to apply in relation to the first element of the *Halifax* test and that they were addressing the economic and commercial realities as we now know is an exercise required by the CJEU Judgment. I say in Mr Newey's favour since, if the Tribunal's evaluation cannot be taken as addressing the substance which is relevant to the test emerging from the CJEU Judgment, then there has been no evaluation at all and HMRC's appeal would have to be allowed, at least to the extent of requiring an evaluation to be carried out either on a remitter to the First-tier Tribunal or by me.

256. At paragraph 147 above, I have identified HMRC's submission relating to Alabaster's lack of knowledge of the credit broking business; and I have there referred to Decision [17] where the Tribunal concluded that none of its directors had any direct experience of loan broking. I can well understand the conclusion that, even so, the correct categorisation of the relevant supplies was that they were made and received by Alabaster and Mr Newey if any aspect of abuse is left out of account. But absent from Decision [17], or anywhere else in the Tribunal's evaluation, is how this lack of experience feeds into an assessment of the economic and commercial reality of the structure or the transaction carried on within it. The focus of the Tribunal in

Decision [17] was on something different: they were addressing the fact that Alabaster did not have the infrastructure to carry on the loan broking business but equipped itself to do so by sub-contracting the processing operation to Mr Newey. What they did not address expressly was how Alabaster itself could conduct the loan broking business making use of the sub-contracted processing operation without any experience of the business. HMRC would say that the only answer could be that it relied on someone else to make the relevant decisions. That "someone else" could only be Mr Newey. This consideration is, I think, the high point of HMRC's case that the Tribunal has failed to carry out the evaluation which is necessary to determine whether there has been an abuse of practice.

257. From this discussion it will be apparent that I consider the only significant criticisms which HMRC can seek to maintain as sufficient to throw into doubt the validity of the Tribunal's overall evaluation are those mentioned in paragraphs 255 and 256 above. In my judgment, the Tribunal were entitled to reach the conclusions which they did. Although the Tribunal did not expressly state that they had, and if so how they had done so, taken into account the factors relied on by HMRC in making those criticisms, it is implicit, in my view, from what the Tribunal actually did say in the Decision that they were of the view that the structure was not wholly artificial and that it did not fail to reflect any economic or commercial reality.

258. I do not say that, were the matter for me, I would have made the same evaluation. What I do say is that the evaluation which the Tribunal did make is one which they were entitled to make and one with which I should not interfere. Accordingly, I do not consider that the decision of the Tribunal on the Abuse Issue can or should be overturned on this appeal on a point of law.

Article 9(3) of the Sixth Directive

259. Mr Ghosh does not, in the light of these conclusions, need to rely on his submissions in relation to Article 9(3) of the Sixth Directive. I would nonetheless say that I do not accept them. The fact that there may be a legislative "fix" to change the place of supply so that the relevant advertising services would be treated as supplied in the UK is not an answer to HMRC's case. There may be all sorts of factors which a member state might wish to take into account before deciding whether or not to exercise the option under Article 9(3) including, quite possibly a majority, cases where no question of abuse could arise. The fact that a derogation from the normal rules concerning place of supply is available does not mean that every case which could, in theory, be legislated against pursuant to the derogation is thereby precluded from being an abuse. It does not follow that, just because a scheme is not expressly neutralised by legislation which is expressly permitted under the Sixth Directive, the scheme is incapable of giving rise to an abuse.

Disposition

260. HMRC's appeal is dismissed.

ANNEX 1
Provisions of VAT Act

Section 4(1):

> "VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him."

Section 7(10):

> "A supply of services shall be treated as made-

(a) in the United Kingdom if the supplier belongs in the United Kingdom; and
(b) in another country (and not in the United Kingdom) if the supplier belongs in that other country."

Section 8(1) and (2):

"(1)…where relevant services are-

(a) supplied by a person who belongs in a country other than the United Kingdom, and
(b) received by a person ("the recipient") who belongs in the United Kingdom for the purposes of any business carried on by him,

then all the same consequences shall follow under this Act (and particularly so much as charges VAT on a supply and entitles a taxable person to credit for input tax) as if the recipient himself supplied the services in the United Kingdom in the course or furtherance of his business, and that supply were a taxable supply.

(2) In this section "relevant services" means services of any of the descriptions specified in Schedule 5 not being services within any of the descriptions specified in Schedule 9."

Paragraph 2 of Schedule 5 specifies: "Advertising services."

Subsection (1) to (4) of section 9:

"(1) Subsection (2) below shall apply for determining, in relation to any supply of services, whether the supplier belongs in one country or another and subsections (3) and (4) below shall apply (subject to any provision made under section 8(6)) for determining, in relation to any supply of services, whether the recipient belongs in one country or another.

(2) The supplier of services shall be treated as belonging in a country if-
(a) he has there a business establishment or some other fixed establishment and no such establishment elsewhere; or
(b) he has no such establishment (there or elsewhere) but his usual place of residence is there; or
(c) he has such establishments both in that country and elsewhere and the establishment of his which is most directly concerned with the supply is there.

(3) If the supply of services is made to an individual and received by him otherwise than for the purposes of any business carried on by him , he shall be treated as belonging in whatever country he has his usual place of business;

(4) Where subsection (3) above does not apply, the person to whom the supply is made shall be treated as belonging in a country if –

> (a) either of the conditions mentioned in paragraphs (a) and (b) of subsection (2) above is satisfied; or
> (b) he has such establishments as are mentioned in subsection (2) above both in that country and elsewhere and the establishment of his at which , or for the purposes of which, the services are most directly used or to be used is in that country."

The supply of intermediary services, by virtue of section 31 and item 5 of Group 5 of Schedule 9 VATA 1994 are exempt: "the provision of intermediary services in relation to any transactions comprised in Item 1, 2, 3, 4 or 6…by a person acting in an intermediary capacity".

Article 16 of the VAT (Place of Supply of Services) Order 1992 applied to the supplies of loan broking services if they were made by Alabaster. It provided that, if a supply fell within Schedule 5 VAT Act and the recipient of that supply was a person who belonged in a Member State but in a country different from that in which the supplier belonged, then subject to certain other conditions which are fulfilled in the present case, such supplies were treated as being made where the recipient belonged.

ANNEX 2

QUESTIONS REFERRED TO the CJEU

(1) In circumstances such as those in the present case, what weight should a national court give to contracts in determining the question of which person made a supply of services for the purposes of VAT? In particular, is the contractual position decisive in determining the VAT supply position?

(2) In circumstances such as those in the present case, if the contractual position is not decisive, in what circumstances should a national court depart from the contractual position?

(3) In circumstances such as those in the present case, in particular, to what extent is it relevant:

(a) Whether the person who makes the supply as a matter of contract is under the overall control of another person?

(b) Whether the business knowledge, commercial relationship and experience rests with a person other than that which enters into the contract?

(c) Whether all or most of the decisive elements in the supply are performed by a person other than that which enters into the contract?

(d) Whether the commercial risk of financial and reputational loss arising from the supply rests with someone other than that which enters into the contracts?

(e) Whether the person making the supply, as a matter of contract, sub-contracts decisive elements necessary for such supply to a person controlling that first person and such sub-contracting arrangements lack certain commercial features?

(4) In circumstances such as those in the present case, should the national court depart from the contractual analysis?

(5) If the answer to question 4 is "no", is the tax result of arrangements such as those in this case a tax advantage the grant of which would be contrary to the purpose of the Sixth Directive within the meaning of paragraphs 74 to 86 of [*Halifax*]?

(6) If the answer to question 5 is yes, how should arrangements such as those in the present case be recharacterised?

Mr Justice Warren

Release Date: 2 June 2015