Neutral Citation: **[2024] UKUT 00077 (TCC)**

Case Number: UT/2022/000101

UPPER TRIBUNAL
(Tax and Chancery Chamber)

The Royal Courts of Justice, Rolls Building, London

VALUE ADDED TAX - whether supply and fitting of "black box" device to cars as condition of insurance policy was a supply of goods or services for consideration to holders of insurance policies - whether supply was a deemed supply of goods

Heard on: 7 and 8 November 2023
Judgment date: 26 March 2024

Before

MR JUSTICE ADAM JOHNSON
JUDGE THOMAS SCOTT

Between

WTGIL LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Hui Ling McCarthy KC and Benjamin Parker, instructed by RSM UK Tax

For the Respondents: Peter Mantle, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. WTGIL Limited (the "Appellant") was formerly called Ingenie Limited ("Ingenie"). As that was its name at the time of the events relevant to this appeal, and it was referred to by that name in the decision under appeal, we shall refer to it below as Ingenie.

2. The appeal relates to the VAT treatment of certain supplies made by Ingenie Services Limited ("ISL"). Since ISL was a member of the VAT group of which Ingenie was the representative member, for VAT purposes those supplies were deemed to have been made by Ingenie, which is why it is the appellant in this case.

3. The supplies related to a telematics device installed in cars as part of an insurance policy underwritten by a third party. The device, sometimes known as a black box, captures and transmits information about the way the car is being driven. Ingenie made a claim to HMRC that the provision and fitting of the devices were taxable supplies made by ISL to policyholders, so that Ingenie could recover the input tax attributable to such supplies. HMRC denied that claim, and Ingenie appealed against that decision to the First-tier Tribunal (Tax Chamber) (the "FTT"). In a decision released on 1 June 2022 (the "Decision"), the FTT dismissed Ingenie's appeal.

4. Ingenie appeals against the Decision.

BACKGROUND AND RELEVANT FACTS

5. References below in the form "FTT[x]" are to paragraphs of the Decision.

Background

6. The FTT helpfully summarised the background to the appeal before it as follows, at FTT [3]-[5]:

> 3. ISL is an insurance intermediary which developed, marketed and sold telematics car insurance (also known as black box insurance) aimed primarily at 17 to 25 year olds. Ingenie and ISL are not insurers and the policies were underwritten by insurers from a panel appointed by ISL. As a condition of the insurance, a telematics device (the 'Device') must be fitted to the policyholder's car within ten days of the commencement of the policy. ISL agrees to provide the Device and fit it or arrange for it to be fitted. The Device captures and transmits information about the way the car is being driven, eg acceleration and deceleration/braking, cornering, speed, distance travelled, date and time of travel and location. ISL then collects and analyses the telematics data from the Device and provides an analysis of the policyholder's driving proficiency to the policyholder and to the insurer. The purpose of providing such data is to enable the policyholder to improve their driving and thus obtain cheaper car insurance. The data provided by ISL to the insurer allows it to monitor the policyholder's driving behaviour and to increase or decrease the premium accordingly.
>
> 4. On 30 August 2018, Ingenie made a claim by way of Error Correction Notice for a refund of £2,084,149 input tax incurred in relation to the provision and fitting of Devices in the VAT periods 07/14 to 07/18. The claim was based on the view that the provision and fitting of Devices were taxable supplies made by ISL to the policyholders, whether or not for consideration, and the input tax was attributable to such supplies.

> 5. In an undated letter sent on 25 July 2019, the Respondents ('HMRC') rejected the claim. HMRC decided that there was no contract under which ISL supplied the Device to the policyholders for consideration. HMRC took the view that the only consideration for ISL's supplies of providing and fitting the Device and any subsequent data analysis was the commission paid to ISL by the insurer which was consideration for an exempt supply of insurance intermediary services. Accordingly, any input tax relating to the Device was directly linked to an exempt supply by ISL and not deductible. HMRC also considered that charges in relation to the fitting of a new Device when the policyholders changed their car were either additional premium charged by the insurer or consideration for an exempt supply by ISL.

FTT's findings of fact

7. The only witness before the FTT was Luke Proctor-Wilson, for Ingenie, who was an employee of Ingenie. The FTT found him to be a credible witness and accepted his evidence of fact: FTT[14].

8. In summary, the FTT made the following findings of fact material to this appeal, at FTT[17]-[34]:

(1) The "telematics offering" was aimed particularly at new and inexperienced drivers aged 17 to 25 ("policyholders"), to enable them to obtain more affordable car insurance. The Devices were installed in the policyholders' cars and transmitted data about their driving to ISL, which was the customer-facing entity. ISL analysed the data and reported to insurers to enable them better to assess risk, both during the policy and on any renewal.

(2) ISL entered into contracts ("Broker Agreements") with insurers under which ISL arranged and administered insurance policies which required the use of the Device. It was agreed that a representative Broker Agreement would be that dated 27 November 2013 with Covea Insurance plc ("Covea") (the "Covea Business Agreement").

(3) ISL sub-contracted the performance of its services to Ageas Retail Limited ("ARL") under the "Third Party Administrator Agreement".

(4) The ISL website contained information about the Device, and stated that there was no additional cost for a Device as it was included in the amount paid for the insurance.

(5) Customers entering into a telematics insurance policy on the website accepted a Terms of Business Agreement ("TOBA") and Insurance Product Information Document ("IPID").

(6) ARL collected the insurance premium. Once the premium had been collected, ISL became entitled to the commission specified in the Covea Business Agreement. This provided that Covea would pay ISL commission for each policy, calculated as 10% of the premium, excluding insurance premium tax, plus £150 for the Device fitted to the policyholder's car. Where the policyholder already had a working Device fitted by ISL (for instance, on renewal) the £150 was not payable.

(7) Once a driver had entered into the policy, ISL would send various documents to the policyholder. These included the TOBA and the "Policy Booklet". The FTT was shown Policy Booklets from 2013, 2015 and 2017. There were no material variations in the wording of those documents.

Contractual documentation

9. We discuss below the contractual documentation relevant to the issues in the appeal. We have set out in Annex 1 to this decision the most relevant documents, being the 2015 Policy Booklet and the 2016 TOBA.

RELEVANT LEGISLATION

10. It was common ground that EU law remains applicable for the purposes of the appeal, since the supplies under appeal were made prior to withdrawal from the EU. Section 22 of the Retained EU Law (Revocation and Reform) Act 2023 also makes clear that various repeals contained in that Act do not apply to anything occurring before 31 December 2023.

11. It was also common ground that Council Directive 2006/112/EC (the "Principal VAT Directive" or "PVD") applied for the periods under appeal. The relevant provisions of the PVD, which we set out below, were transposed into domestic law by the Value Added Tax Act 1994 ("VATA 1994"), and it was again common ground that VATA 1994 must be construed so as to conform with the PVD.

12. In the Decision, the FTT referred primarily to the position under the PVD, as did the parties in this appeal, and we have followed that approach in this decision. For completeness, we have set out the relevant provisions of VATA 1994 in Annex 2 to this decision.

13. The relevant provisions of the PVD are as follows.

14. Article 2(1) has the effect that a transaction other than for consideration cannot be a supply for VAT purposes in the absence of an applicable deeming provision:

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

15. A supply of goods is defined by Article 14 as follows:

> 1. 'Supply of goods' shall mean the transfer of the right to dispose of tangible property as owner.
>
> 2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:
>
> …
>
> (b) the actual handing over of goods pursuant to a contract for the hire of goods for a certain period, or for the sale of goods on deferred terms, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment;

16. Where a taxable person disposes of goods which are part of the assets of the business free of charge, that is treated as a supply of goods for consideration, but only if the VAT incurred in relation to the goods was wholly or partly deductible. That is the effect of Article 16:

> The application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his

> business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible. However, the application of goods for business use as samples or as gifts of small value shall not be treated as a supply of goods for consideration.

17. Article 24(1) has the effect that a transaction that is not a supply of goods is a supply of services:

> 'Supply of services' shall mean any transaction which does not constitute a supply of goods
>
> …

18. In relation to supplies of goods and deemed supplies of goods, Articles 73 and 74 provide as follows:

> Article 73
>
> In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.
>
> Article 74
>
> Where a taxable person applies or disposes of goods forming part of his business assets, or where goods are retained by a taxable person, or by his successors, when his taxable economic activity ceases, as referred to in Articles 16 and 18, the taxable amount shall be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the application, disposal or retention takes place.

19. Under Article 135(1)(a), insurance transactions, including related services performed by insurance brokers and insurance agents, are exempt from VAT (and as a consequence VAT incurred on goods and services attributable to such transactions is not deductible):

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

20. Article 168 provides that VAT incurred by a taxable person on goods and services attributable to taxed transactions may be deducted from the VAT which the taxable person is liable to pay:

> In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;
> …

THE FTT'S DECISION

21. At FTT[6]-[11], the FTT helpfully summarised the grounds of appeal, the submissions of the parties, and the issues to be determined:

> 6. On 23 August 2019, Ingenie appealed to the Tribunal. In its grounds of appeal, as subsequently amended, Ingenie contended that the VAT incurred on the cost of purchasing and fitting the Devices was recoverable in full because it was directly attributable to taxable supplies made by ISL. Those taxable supplies were:
>
> (1) the first provision and fitting of a Device on commencement of a policy in return for either:
>
> (a) non-monetary consideration provided by the policyholder by entering into the contract of insurance with the insurer; or alternatively,
>
> (b) monetary consideration being £150 commission payable to ISL on the first provision and fitting of the Device ('the Device Amount'); and
>
> (2) any subsequent provision and fitting of a Device, eg when the policyholder changes their car, in return for the amount charged, according to a sliding scale, to the policyholder under the insurance contract as a contribution to the cost of providing and fitting the new Device; or
>
> (3) if there is no consideration for the provision and fitting of the Device, a deemed supply of goods under paragraph 5(1) of Schedule 4 to the VATA 1994 when the Device is transferred or disposed of so as no longer to form part of the assets of ISL, which supply also includes ancillary fitting services.
>
> 7. At the hearing, Ms Hui Ling McCarthy QC, who appeared with Mr Benjamin Parker for Ingenie, said that Ingenie's primary case was that there was a legal relationship between ISL and the policyholder under which ISL supplied and fitted the Devices then used them to collect data which ISL provided to the policyholder and the insurer in return for non-monetary consideration provided by the policyholder, namely entering into the contract of insurance with the insurer.
>
> 8. Mr Andrew Macnab, who appeared for HMRC, submitted that ISL made a single, indivisible supply of insurance intermediary services to the insurer in return for the commission or to the policyholder or to both.
>
> 9. I was not asked to determine the amount that would be repayable if Ingenie is successful in its appeal because the parties agreed that the issue of quantum could be deferred but I was asked to determine the basis on which output tax should be calculated. If ISL made taxable supplies, Ms McCarthy submitted that if the supplies were made for non-monetary consideration provided by the policyholder entering into the contract of insurance with the insurer:
>
> (1) no additional output tax was payable in order to prevent double taxation (applying *Thorn Plc v HMCE* (VAT Decision 15284) ('*Thorn*')); or alternatively,
>
> (2) additional output tax is calculated on the cost to Ingenie of supplying the Device (applying Case C-33/93 *Empire Stores v CCE* [1994] STC 623 ('*Empire Stores'*).

> 10. If, however, the supplies were not made for non-monetary consideration, Ms McCarthy submitted that the value of those supplies would be the Device Amount or other amounts payable under the insurance contract (the "insurance contract") for the provision and fitting of a Device.
>
> 11. It follows from the above that the issues that I must determine in this appeal are as follows:
>
> (1) Did ISL make supplies of the Device and related services to the policyholders for consideration?
>
> (2) If ISL did not make supplies to the policyholders for consideration, did ISL make a deemed supply of the Device?
>
> (3) If ISL made a taxable supply to the policyholder for consideration, how should the VAT chargeable on the supply be calculated?
>
> (4) If ISL made a deemed taxable supply of goods, how should the VAT chargeable on the deemed supply be calculated?

22. In summary, the FTT decided these issues as follows:

(1) The TOBA 2016 was of no real assistance in determining whether policyholders gave consideration for supplies of the Device and related services. Part One of the Policy Booklet did create a legal relationship between ISL and the policyholder. There was no supply of goods by ISL for VAT purposes. The installation of the Device and the data collection could constitute supplies of services, but only if made in return for consideration. Policyholders gave no monetary consideration, including on cancellation of a policy. While in principle there could be non-monetary consideration if policyholders actually entered into the insurance policy and/or agreed to allow ISL to install the Device in return for the installed Device, on a proper construction of the contractual arrangements they did not do so. There was no reason to believe that the contractual position did not reflect the economic and commercial reality of the transactions. Accordingly, there was no supply by ISL to policyholders for consideration for VAT purposes: FTT[63]-[95].

In light of this conclusion, there was no need to determine issue (3) i.e. the value of any non-monetary consideration and whether it could be expressed in monetary terms: FTT[96].

(2) In relation to whether, in the alternative, ISL made a deemed supply of goods for consideration, the issue was whether ISL satisfied the requirement, in Article 16 PVD and in paragraph 5 Schedule 4 VATA, that the VAT incurred in relation to the goods was wholly or partly deductible. The FTT decided, having considered the authorities, that this meant that there must in fact have been some actual recovery, and any recovery which might arise from a deemed supply was insufficient, so that in this case the requirement was not met and there was, therefore, no deemed supply for VAT purposes. The FTT also considered that no deemed supply arose because the Devices were acquired by ISL and provided to policyholders for the purposes of ISL's business: FTT[97]-[107].

In light of this conclusion, there was no need to determine issue (4) i.e. the calculation of the VAT chargeable on any deemed supply: FTT[108].

GROUNDS OF APPEAL

23. Ingenie's grounds of appeal can be summarised as follows:

(1) ***Primary argument*: *a supply for consideration***

The FTT made several errors of law in deciding that there was not a supply by ISL to policyholders for consideration. The FTT found that Part One of the Policy Booklet "created a legal relationship", and that relationship must have been a contract: if there was a contract, there must necessarily have been consideration. The FTT wrongly construed the contractual obligations of the parties, and policyholders must, as a matter of business reality, have had enforceable rights of redress for contractual breach against ISL. There is also no requirement in contract law for consideration to be express.

Before the FTT, Ingenie argued in the alternative that the supply by ISL of the Device and the fitting services to policyholders were made for third party consideration, being the £150 received for each fitted Device under the insurance contract i.e. the Device Amount. In addition, Ingenie argued that if a policyholder changed their vehicle during the term of the Policy (a "COV Event"), they would be required to pay for the provision and fitting of a new Device (the "COV Amount"), and that was also monetary consideration. FTT failed to address this alternative argument, and should have considered it and determined it in favour of ISL.

(2) ***Deemed supply argument*:** The FTT wrongly analysed the case law authorities, and erred in law in concluding that, in the alternative, there was not a deemed single supply of the Device.

24. These grounds raise two issues. First, did ISL make a supply to policyholders for consideration for VAT purposes? Second, if not, did ISL make a deemed supply to policyholders for VAT purposes? Other questions may arise, such as the basis of calculation of recoverable input tax, depending on our conclusions on these two issues.

DID ISL MAKE A SUPPLY TO POLICYHOLDERS FOR CONSIDERATION FOR VAT PURPOSES?

25. ISL's primary case, before the FTT and in this appeal, was that ISL made a supply to policyholders for non-monetary consideration, that non-monetary consideration being the entry by policyholders into the insurance contract and agreement to the installation of the Device and consequential data collection.

26. ISL's alternative contention, if its primary submission was not accepted, was that ISL made a supply to policyholders for monetary consideration, being the Device Amount paid by the insurer to ISL "out of the premium". This analysis was said to be "even clearer" in relation to amounts payable on cancellation of an insurance policy in certain circumstances.

27. We will first consider ISL's primary case.

A supply for non-monetary consideration?

28. Article 2 of the PVD treats as a supply for VAT purposes a "supply of goods for consideration" and a "supply of services for consideration". Section 5 VATA 1994 defines a "supply" for VAT purposes as any form of supply, "but not anything done otherwise than for a consideration".

29. Three issues arise. First, did ISL make a supply of goods or services to policyholders? Second, if so, what was the nature of the supply; in particular, was it, as HMRC contend, an exempt supply of insurance intermediary services? Third, if, as ISL contends, there was a taxable supply of services, was that supply for consideration? It is sensible to consider the issues in that order.

Did ISL make a supply of goods and/or services to policyholders?

30. ISL installed the Device in the vehicles of policyholders, and collected and analysed data produced by the Device. The FTT considered whether this resulted in a supply of goods (the Device) and/or a supply of services (the installation of the Device and data services).

31. However, in the VAT world very little is straightforward, and a further issue arose. For VAT purposes, where a supply comprises multiple elements, it may, depending on the facts, be treated as single supply, broadly by reference to the "predominant element" of the supply[1]. Before the FTT, Ms McCarthy submitted there was a single taxable supply of goods by ISL, with the supply of the Device being the predominant element to which the other services were merely ancillary, and as a result there was a single supply of goods. HMRC's position was also that ISL made a single supply, but that it was a supply of insurance intermediary services and was made to the insurers, and was exempt from VAT: FTT[70]. HMRC applied to amend their statement of case to argue that there the supplies of exempt intermediary services were made both to the insurers and to policyholders. The FTT stated that it did not have to decide whether to permit that amendment in light of its decision that there was no supply for consideration: FTT[70]-[72].

32. It does not appear from the Decision that the FTT resolved the question of whether there was a single supply, and, if so, its characterisation. It decided that:

(1) There was no supply of goods when the Device was installed.

(2) There was no supply of goods when the insurance contract lapsed or was cancelled.

(3) There were supplies of services, if but only if made for consideration, comprising the installation of the Device and the collection and analysis of consequential telematics data.

33. In this appeal, Ms McCarthy maintained the position that there was a supply of goods (the Device), at least when the insurance contract lapsed or was cancelled, but said that we did not need to determine that question, or whether there was a single supply, because on the FTT's findings there was in any event a supply of services by ISL to policyholders (assuming the supply was for consideration). HMRC agreed with the FTT's conclusion that there was no supply of goods, but their position as to whether there was a supply of services was not clear to us. Mr Mantle's skeleton argument described HMRC's "overarching position" as being that ISL made "a single, indivisible supply" of services, being exempt insurance intermediary services, both to the insurer and policyholder. That position necessarily entails acceptance that there was a supply (of services). However, HMRC also argued that ISL made no supply at all, because any apparent supplies were "no more than the necessary pre-condition" to the supply by insurers of the insurance.

34. It is in our view necessary to decide whether ISL did make a supply, and what the supply comprised, before one can properly determine whether the supply was for a consideration.

35. We agree with the FTT that there was no supply of goods by ISL to policyholders when the Device was installed. Article 14(1) of the PVD provides that a supply of goods means "the transfer of the right to dispose of tangible property as owner". Part One of the Policy Booklet states explicitly that "the ingenie device remains the property of ingenie and shall only become your property after your insurance has lapsed or been cancelled". This makes it clear that the

[1] The Court of Appeal has recently summarised the law in this area in *HMRC v Gray & Farrar International LLP* [2023] EWCA Civ 121.

right to dispose of the Device as owner does not arise on installation, so there was no supply of goods at that stage[2].

36. As to whether there was a supply of goods on the lapse or cancellation of an insurance policy, the FTT stated as follows, at FTT[84]:

> …I also consider that ISL does not make any promise in the 2015 Policy Booklet to transfer the ownership of the Device to the policyholder at some time in the future. ISL merely asserts its ownership of the Device during the lifetime of the policy. The statement that the Device will become the property of the policyholder when the insurance has lapsed or been cancelled seems to me to be too vague to be a contractual term for the supply of goods because there can be no certainty that property would ever pass to the policyholder. In the event that the policyholder's car were involved in an accident in which the Device was destroyed then the policy would continue and property in that Device would never pass to the policyholder. Even if such events are disregarded, insurance may not lapse or be cancelled for many years if the policy is renewed.

37. It is not clear whether in this passage the FTT was simply saying that at the point of installation there was no agreement to supply the Device on a future lapse or cancellation of the Policy, or whether it was saying that if a lapse or cancellation in fact occurred there would still be no supply of goods at that stage. The former conclusion is in our view correct, for the reasons given by the FTT. The latter conclusion is less straightforward. In reaching its conclusion (at FTT[108]) that there was no deemed supply by ISL on lapse or cancellation of the Policy, at FTT[107], the FTT stated that in its view "rather than disposing of the Device when the insurance ends, ISL merely abandons any claim to it because it no longer has any value or serves any purpose to ISL". That suggests that the FTT reached the latter conclusion. However, we do not need to determine that issue in relation to this ground of appeal, because ISL's primary claim relates to the first provision and fitting of a Device on commencement of a Policy. We agree with the FTT that at that stage there was no supply of goods or agreement to supply goods between ISL and a policyholder.

38. The FTT went on to state as follows, at FTT[86]:

> Although, in my view, there was no supply of goods pursuant to the first section of the 2015 Policy Booklet, that does not mean that there is no supply in relation to the Device. In the first section of the 2015 Policy Booklet, ISL agreed to arrange for a Device to be installed in the policyholder's car and then to use it to collect the telematics data which ISL used to give feedback to the policyholder and to provide more detailed information to the insurer. Those activities may constitute supplies of services but only if made in return for consideration.

39. We agree with the FTT that both the installation of the Device and the collection and analysis of the resultant data could constitute a supply of services by ISL if made for consideration. However, we were told by the parties that the VAT consequences of the data collection and analysis services were outside the scope of this appeal[3]. Therefore, we have

[2] The FTT also concluded that Article 14(2)(b) PVD, which treats as a supply certain provisions of goods under a hire purchase contract, did not apply. We agree, and ISL did not seek to challenge that conclusion in this appeal.
[3] Ms McCarthy's skeleton argument stated that "input tax on [data handling] services is outside the scope of this appeal and so the services are not referred to again hereafter".

proceeded on the basis that any supply of services by ISL to policyholders was confined to the installation of the Device.

40. Mr Mantle raised the argument that some provisions of goods or services, which viewed separately from the rest of the overall transaction, and in theory capable of constituting supplies, are deprived of the character of a supply when viewed in context. That is because they are no more than the necessary pre-condition to the supply of a service. This submission relied on the decision of the High Court in *MBNA Europe Bank Ltd v HMRC* [2006] EWHC 2326 (Ch) ("*MBNA*"), an authority not cited to the FTT. Mr Mantle argued that, viewed in context and in an economically realistic manner, the installation of the Device was no more than the necessary pre-condition to the supply of insurance to the policyholder by the insurer.

41. It is unclear whether this analysis was put forward by HMRC in relation to any putative supply of services, as well as goods. In any event, we do not accept that the present facts are sufficiently similar to the unusual facts in *MBNA* to sustain HMRC's argument. *MBNA* concerned a highly complex securitisation arrangement entered into by a bank, one element of which involved an assignment of receivables. Mr Mantle relied in particular on the following statement by Briggs J, at [102] of the decision:

> Put in bare outline, in my judgment the assignments were, viewed separately from the rest of the scheme, in theory capable of constituting supplies, but because they were no more than the necessary pre-condition to the supply of a securitisation service to the banks, by the SPVs set up to operate that service, they are thereby deprived of the character of a supply by the banks. They therefore constitute an addition to the exceptional class of transactions which look prima facie like a supply, but which lose that character when viewed in their context. Other examples are the sale of currency to a forex dealer to obtain an exchange service, the assignment of debts to a factor to obtain a factoring service, and the assignment of property to a lender as security for (i.e. to obtain) a loan.

42. We accept that, as matter of principle, a transaction which, at first blush and viewed in isolation, looks like a supply may not on closer examination be a supply. However, in considering whether there is a supply, *MBNA* does not detract from the proposition that the correct starting point is the relevant contracts. In *ING Intermediate Holdings Ltd v HMRC* [2017] EWCA Civ 2111 ("*ING*"), to which we were not referred, Arden LJ referred to *MBNA* as "the only case that counsel can produce where the court has considered whether there can be transactions ancillary to another transaction which falls outside VAT (because it is not a supply for VAT purposes) with the result that the ancillary transaction will, like the principal transaction, be treated as not involving a supply for those purposes, even if it would otherwise have been so treated": [22] of the decision. The taxpayer in *ING* had sought to argue on the authority of *MBNA* that in determining the existence of a supply, it was always necessary to determine the "essential nature" of the transaction. In a passage headed "My conclusion: purposes of contract to be found in the terms and conditions", Arden LJ reiterated the conventional approach, stating as follows, at [37]:

> I accept that, when determining the nature of a transaction for VAT purposes, the court must look at the economic purpose of the transaction. However, the starting point is to determine what the parties have agreed. In my judgment, the correct reading of *Newey* and *Secret Hotels2* is that the court only goes behind the contract if the contract does not reflect the true agreement between the parties.

43. In this case, the FTT recorded, at FTT[95], that since it was common ground that the contractual terms in the Policy Booklet were not artificial or drafted to achieve a particular VAT result, there was no reason to believe that the contractual position did not reflect the economic and commercial reality of the transactions. In those circumstances, we consider that since the Policy Booklet did set out terms as to the installation of the Device, it follows, subject to the issues below, that there was a supply of services by ISL to policyholders in that respect.

What was the nature of the supply?

44. HMRC said that its "overarching position" is that ISL "made only exempt supplies of services of an insurance intermediary, regardless of the direction of supply". Mr Mantle's skeleton argument set out the submission in terms that "ISL made a single, indivisible supply of insurance intermediary services to the Insurer in return for the commission pursuant to the [Covea Business Agreement], or to the policyholder pursuant to the TOBA, or to both". Mr Mantle argued that whether one started with the contracts or looked at the commercial and economic reality of the transactions, ISL was acting exclusively as an insurance intermediary, arranging and administering the relevant insurance policies. That was the case regardless of whether the recipient of those services was either or both of the insurer or the policyholder.

45. According to HMRC, any services provided by ISL fell within the following categories in Schedule 9 Group 2 VATA 1994:

> Item No.
>
> 1. Insurance transactions and reinsurance transactions.
>
> …
>
> 4. The provision by an insurance broker or insurance agent of any of the services of an insurance intermediary in a case in which those services—
>
> (a) are related (whether or not a contract of insurance or reinsurance is finally concluded) to an insurance transaction or a reinsurance transaction; and
>
> (b) are provided by that broker or agent in the course of his acting in an intermediary capacity.
>
> *Notes:*
>
> ...
>
> (1) For the purposes of item 4 services are services of an insurance intermediary if they fall within any of the following paragraphs—
>
> (a) the bringing together, with a view to the insurance or reinsurance of risks, of—
>
> (i) persons who are or may be seeking insurance or reinsurance, and
>
> (ii) persons who provide insurance or reinsurance;
>
> (b) the carrying out of work preparatory to the conclusion of contracts of insurance or reinsurance;
>
> (c) the provision of assistance in the administration and performance of such contracts, including the handling of claims;
>
> (d) the collection of premiums.
>
> (2) For the purposes of item 4 an insurance broker or insurance agent is acting "in an intermediary capacity" wherever he is acting as an intermediary, or one of the intermediaries, between—
>
> (a) a person who provides insurance or reinsurance, and

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

46. We do not accept HMRC's characterisation of the services supplied by ISL. The question of whether ISL acts in the overall arrangements as an insurance intermediary is not the issue. What matters for the purposes of this appeal is the nature of the particular services provided by ISL to policyholders under Part 1 of the 2015 Policy Booklet.

47. When we asked Mr Mantle to particularise the precise basis on which particular ISL services to policyholders fell within Items 1 or 4, interpreted consistently with the Notes to those provisions, it was telling that he found that task difficult. We agree with Ms McCarthy that, while ISL supplies insurance intermediary services to the insurer under the arrangements, there is simply no support in the contractual documentation for concluding that ISL's services to policyholders fall within Item 1 of Group 2 (insurance or reinsurance). As regards Item 4, in light of our statement above that we have proceeded on the basis that the supply by ISL to policyholders was a supply of services, comprising installation of the Device, HMRC's argument requires a conclusion that such a service was provided by ISL acting as broker or agent in the course of acting in an intermediary capacity. While it is possible to regard the act of installing the Device as a "service of an insurance intermediary", likely falling within Note 1(b), there is in our opinion no indication in Part 1 of the Policy Booklet, or the TOBA, or the arrangements viewed economically and realistically, that ISL was providing this service in the course of acting "in an intermediary capacity" as that requirement is explained by Note 2.

48. Mr Mantle also argued that ISL's overall services fell within Note 1(a), because ISL was "bringing together" the policyholder and the insurer. However, while in a general sense ISL's role may have facilitated the entry into of the insurance contract, it is unwarranted to categorise the service of installation of the Device in this way, and, as Ms McCarthy pointed out in reply, ISL is not remunerated by policyholders for any bringing together of the parties.

49. We conclude that the services provided by ISL to policyholders were not comprised exclusively of services falling within Group 2 of Schedule 9 VATA 1994.

50. So, ISL made a supply of services to policyholders, comprising the installation of the Device, which would be a taxable supply if made for consideration. We now turn to the most difficult question in this appeal.

Was the supply of services by ISL to policyholders a "supply for a consideration"?

51. To recap, ISL's primary argument is that the supply made by ISL was for non-monetary consideration, and its alternative argument, if we reject that submission, is that it was made for monetary consideration. We address both arguments in that order, but it is helpful to begin by looking at the meaning of consideration in relation to a VAT supply.

Consideration for VAT purposes

52. To a lawyer versed in the English law of contract, the concept of consideration has a reasonably clear and recognised meaning, and is often referred to as an essential ingredient in the existence of a contract. Indeed, since the FTT in this case determined (at FTT[80]) that Part One of the Policy Booklet "created a legal relationship between ISL and the policyholders", if that legal agreement was a contract, then (one might ask) surely it would follow necessarily that there was consideration, for all purposes?

53. However, at the risk of repetition, VAT is rarely straightforward. Sedley LJ memorably referred to "the world of VAT, a kind of fiscal theme park in which factual and legal realities

are suspended or inverted"[4], although that perhaps suggests a level of enjoyment not always inherent in navigating the process.

54. It must be recognised at the outset that the determination of whether a supply is done for consideration does not fall to be made under domestic law. The meaning and scope of "consideration" in Article 2 of the PVD depends not on the laws of Member States but on established EU law. As Advocate General Vilaca stated in his opinion in *Naturally Yours Cosmetics Limited v Commissioners of Customs & Excise* (Case 230/87) ("*Naturally Yours*") at [13], " the term to be interpreted ("consideration") appears in a provision of Community law which does not refer to the law of the Member States for determination of its meaning and scope, and therefore its interpretation cannot be left to the discretion of each Member State". It is not particularly helpful to think of the EU law meaning as wider or narrower than (say) the UK contract law meaning; it is different.

55. Several of the leading CJEU authorities on the meaning of consideration were drawn together by Advocate General Lenz in his opinion in *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) ("*Tolsma*"). At paragraph 10 onwards he said this:

> 10. Both texts show that the common system of VAT relates to the *stipulated exchange of mutually dependent services*— supply of goods or services on the one part, consideration on the other part. Thus in *Staatssecretaris van Financiën v Hong Kong Trade Development Council* (Case 89/81) [1982] ECR 1277 at 1286, para 10, the Court of Justice held that—'... services provided free of charge are different in character from taxable transactions which, within the framework of the value added tax system, *presuppose the stipulation of a* price or consideration [emphasis added].'
>
> …
>
> 13. It follows that…it is not sufficient in order to fulfil the requirement of 'consideration' that an individual actually receives income (possibly subject to income tax) for his activity and thus takes part in economic life. Despite the indisputably wide scope of the Sixth Directive (see the judgment in *van Tiem v Staatssecretaris van Financiën* (Case C-186/89) [1993] STC 91, [1990] ECR I-4363 at 4386, para 17)…in principle that requirement is met, in view of its context, only in the case of operations which contain an element of contractual exchange in the above sense…
>
> 14. Certain criteria have been developed in the case law to define this principle more closely: there must be a direct link between the service supplied (which in this case would be the music provided) and the consideration received (in this case the payments by passers-by) (see the judgments in *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats* (Case 154/80) [1981] ECR 445 at 454, para 12, *Apple and Pear Development Council v Customs and Excise Comrs* (Case 102/86) [1988] STC 221, [1988] ECR 1443 at 1468, para 11, and *Naturally Yours Cosmetics Ltd v Customs and Excise Comrs* (Case 230/87) [1988] STC 879, [1988] ECR 6365 at 6389, para 11). The link must be such that a relationship can be established between the level of the benefits which the recipients obtain from the services provided and the amount of the consideration (see the *Apple and Pear Development Council* judgment [1988] STC 221, [1988] ECR 1443 at 1468, para 15). The consideration must be capable of being expressed in money (see the *Coöperatieve Aardappelenbewaarplaats* judgment (at 454, para 13), and

[4] *Royal & Sun Alliance Insurance Group plc v Customs & Excise* [2001] EWCA Civ 1476 at [54].

> the *Naturally Yours Cosmetics* judgment [1988] STC 879, [1988] ECR 6365 at 6390, para 16). It must be a subjective value (see para 23 below), since the taxable amount is the consideration actually received and not a value estimated according to objective criteria. A service for which no subjective consideration is received is consequently not a service 'for consideration' (see the *Coöperatieve Aardappelenbewaarplaats* judgment (at 454, paras 10, 11), the *Naturally Yours Cosmetics* judgment [1988] STC 879, [1988] ECR 6365 at 6390, para 16).

56. Setting aside issues not relevant to this appeal, the CJEU authorities establish that in order for there to be a supply for a consideration, at least the following elements must be satisfied:

(1) There must be a **supply** of goods or services.

(2) There must be a **legal relationship** between supplier and recipient.

(3) There must be **reciprocal performance** pursuant to that relationship.

(4) Where the consideration is services, there must be a **direct link** between the supply by the supplier and the provision of services by the recipient.

(5) The value of the services supplied by the recipient must be **capable of being expressed in monetary terms**.

57. We look now at how the FTT reached its decision, and Ms McCarthy's arguments as to how it erred in law.

The FTT's decision on this issue

58. It is necessary in considering this ground of appeal to look at the FTT's decision in some detail.

59. The FTT's discussion of this issue began with a detailed and thorough analysis of the relevant documentation, being the Covea Business Agreement, the Third Party Administrator Agreement, the 2015 Policy Booklet and the TOBA: FTT[35]-[62]. Its conclusions and observations included the following:

(1) As part of its obligations to Covea under the Covea Business Agreement, ISL agreed to install or procure the installation of a Device in the vehicle of each new policyholder: FTT[38].

(2) Under the Covea Business Agreement, Covea agreed to pay ISL commission for each insurance policy sold or renewed calculated as follows: (1) £150 for each insurance policy sold to a policyholder who did not have a working Device already fitted by ISL, and (2) 10% of the premium payable for the policy excluding insurance premium tax and, if payable, the £150 element of the commission: FTT[41].

(3) The services to be provided by ISL under the Third Party Administrator Agreement included "managing the [Device] fitting process" as well as "providing Telematics Data to [ARL]" but the Agreement made no mention of providing Devices to policyholders: FTT[46].

(4) The Policy Booklet is in two parts. The first section is stated to be a contract between the policyholder and ISL: FTT[47].

(5) The Policy Booklet states that ISL will arrange for a Device to be fitted to the policyholder's car. After describing the Device and the telematics data that it collects, the Policy Booklet sets out how ISL will use the data: FTT[48].

(6) The Policy Booklet explains that, after it is installed in the policyholder's car, the Device remains the property of ISL and only becomes the property of the policyholder after their insurance has lapsed or been cancelled: FTT[49].

(7) The first section of the Policy Booklet ends with the following words: "This is the end of the ingenie section of this policy. The following pages contain the details of the insurance cover provided by your insurer.": FTT[50].

(8) The second section of the Policy Booklet is headed "Contract of Insurance" and the introduction states "This policy is a contract between **you** and **us**.". the term "you" means the policyholder and "we/us/our/insurer" means:

> The insurance Company as specified in the statement of insurance, the schedule and the certificate of motor insurance on whose behalf this document is issued. We/us/our can also mean ingenie where there is reference to the ingenie device, Telematics Data, Cancelling your policy, Sharing Information and Complaint Notification: FTT [51]-[52].

(9) The insurance contract contained in the second part of the Policy Booklet included the following:

> Cost of the device and its fitting
>
> You will not be charged for your first ingenie device or its fitting provided you do not cancel your policy during the period of insurance.
>
> If you cancel your policy within the first 12 months of this policy, and the ingenie device is fitted, you will need to pay £165 to contribute towards the cost of the device and its fitting. We reserve the right to deduct this £165 from any premium refund due.
>
> If you change your car we will not remove the ingenie device from your previous car, but you will need a new ingenie device.
>
> If you change your car within the period of insurance you will be charged £75 to contribute to the cost of a new device and it's fitting (£100 if you change your car a second time and £150 for any subsequent change of car).
>
> You will not be charged for a new ingenie device or its fitting if the car is deemed a total loss after a claim or if the device is damaged in an incident involving a claim under your policy. You are not liable for the cost of transmitting data to and from the ingenie device.: FTT[55].

(10) The second part of the Policy Booklet contained a schedule of charges to policyholders in relation to the Device in certain situations such as removal of the Device, change of vehicle and replacement of a faulty Device. The "cost of fitting your ingenie device for the first time" was stated to be £0.: FTT[57].

(11) The TOBA makes clear that, in certain circumstances, ARL and/or ISL may charge fees to the policyholder that are independent of any charges imposed by the insurer, including fees in relation to the Device or a replacement Device. Those fees were collected by ARL and paid to ISL: FTT[59] and [61].

60. The FTT's analysis of whether there was a supply for consideration is contained in FTT[63]-[95]. At this stage, we are concerned with its decision regarding whether there was non-monetary consideration. The FTT referred to some of the principles summarised in *Tolsma*, and stated that the consideration for a supply of goods may be the provision of services provided there is a direct link between the supply of goods and the provision of services and if the value of those services can be expressed in monetary terms. It noted that the legal relationship required for there to be a supply need not be a legally enforceable contract where the parties have agreed that the agreement shall be binding in honour only.

61. The FTT summarised the conventional approach, which it then adopted, to determining who makes and receives a supply, namely starting with the contractual position and then considering whether that is consistent with the economic and commercial reality: see, in particular, *Secret Hotels2 Ltd v HMRC* [2014] UKSC 16 ("*SH2*"). It referred to Lord Neuberger's statement at [32] of *SH2*:

> When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense.

62. The FTT began by considering the Covea Business Agreement. It rejected ISL's contention that a policyholder would have needed or desired a separate contract with ISL relating to the Device, stating that a policyholder would have been indifferent on this point: FTT[76].

63. Having described ISL's obligations to Covea under the Covea Business Agreement regarding the Device, the FTT concluded (at FTT[78]) that "the Commission [payable by Covea to ISL] was consideration for ISL performing its obligations, which included providing and installing the Devices in the policyholders' car and using them to provide driving data to Covea".

64. In relation to the TOBA, the FTT stated that there was " no provision in the TOBA 2016 by which the policyholder agreed to do anything or allow something to be done in return for the provision and fitting of the first Device". It concluded as follows, at FTT[79]:

> …in the absence of any reference to the initial fitting of the Device, the TOBA 2016 is not of any real assistance in this case. The inclusion of the fees for installing a new Device when the policyholder changed their car seem to me to be an anomaly, and a potential source of confusion, given that the fees were also included in the 2015 Policy Booklet.

65. Turning to the Policy Booklet, the FTT made this important statement, at FTT[80]:

> ISL relied on section one of the 2015 Policy Booklet as a contract between ISL and the policyholders for the supply of the Device. It seems to me that there can be no doubt that the first part of the 2015 Policy Booklet created a legal relationship between ISL and the policyholders. I also accept that, for VAT purposes, a contract does not have to be legally enforceable but can be binding in honour only. The issue, however, is not whether there was a legal relationship but whether ISL made a supply of goods or goods and services to the policyholders in return for consideration pursuant to that relationship.

66. Having explained its conclusion that ISL made no supply of goods to policyholders (as discussed in this decision above), the FTT stated that the activities of Device installation and

data analysis "may constitute supplies of services but only if made in return for consideration": FTT [86].

67. After concluding that there was no monetary consideration for a supply of services, the FTT addressed ISL's primary argument that a policyholder provided non-monetary consideration, comprising entry into the insurance contract with the insurer and observing its terms and/or agreeing to allow ISL to install the Device and analyse the data. Its full conclusions were as follows, at FTT[91]-[95]:

> 91. I accept that entering into a contract and/or allowing something to be done can be sufficient consideration for VAT purposes provided that it can be expressed in monetary terms. Subject to the question of monetary value, I accept that if the policyholder actually entered into the insurance contract and/or agreed to allow ISL to install a Device in return for the installed Device then that could be consideration. Mr Parker's case was that the policyholder entered into two agreements, a contract with ISL and the insurance contract, in the 2015 Policy Booklet at the same time. The difficulty that Mr Parker faced in this case is that the 2015 Policy Booklet does not contain any term under which the policyholder agreed to do anything or allow anything to be done in return for the provision of the first Device. The only reference to something being provided to the policyholder in return for consideration is in the contract with the insurer which states: "In return for you paying or agreeing to pay the premium, we will provide cover under the terms, exclusions, conditions and endorsements of this contract of insurance, during the period of insurance and within the geographical limits."
>
> 92. The fact that the policyholder enters into two contracts at same time does not necessarily mean that one is consideration for something done under the other even where the two are inextricably linked. Mr Parker suggested that it was clearly intended that the policyholder should have some remedy for defects in Device or if ISL mishandled the driving data and the policyholder could only obtain redress if they had a contract with ISL as they had no claim against the insurer. I do not accept this submission. Whether the policyholder is entitled to claim damages for a defect in the Device or its use from ISL or the insurer or neither is untested and, to my mind, unclear. The policyholder is required by the insurer to have a working Device fitted to their car and allow ISL to collect and use the driving data as a condition of the insurance policy. I do not consider that, in the absence of clear wording, entering into the insurance policy and complying with its terms and conditions is consideration for a separate supply by ISL. In my view, the policyholders simply enter into the insurance contract on particular terms which include having a working Device installed by ISL. There is no need for the policyholders to provide any further consideration than paying the premiums under the policy and they do not do so.
>
> …
>
> 94. For reasons discussed above, it seems to me that, subject to consideration of the economic and commercial reality, there is no supply of the Devices or any services relating to the Devices by ISL to the policyholder for VAT purposes.
>
> **Economic and commercial reality**
>
> 95. It was common ground that the contractual terms in the 2015 Policy Booklet were not artificial or drafted to achieve a particular VAT result.

> Accordingly, there is no reason to believe that the contractual position did not reflect the economic and commercial reality of the transactions. Ms McCarthy observed at the hearing that, if I did not accept ISL's analysis of the contracts then there was no need for me to consider economic reality in this case.

ISL's submissions

68. Ms McCarthy said that the FTT had erred in its analysis of the relevant contracts. There was a contract between ISL and each policyholder, whereby ISL agreed to supply the Device and to provide Device installation and data handling services. The Policy Booklet contained two separate contracts, the first between the policyholder and ISL and the second between the policyholder and the insurer. Part One sets out ISL's obligations to the policyholder, and contains terms about property rights in the Device and the allocation of risks between ISL and the policyholder. ISL's express contractual duties toward the policyholder include arranging for installation of the Device, data collection and analysis, and the provision of information to the policyholder and the insurer. It was implicit that ISL could be liable to the policyholder in respect of faults or damage to the Device that are caused by ISL. The contract would also contain terms to be implied by the operation of consumer law. The consideration provided by the policyholder in return for the contractual undertakings given by ISL consisted of (1) the policyholder's entry into the insurance contract with the insurer, and (2) the reciprocal agreements made by the policyholder with ISL to permit ISL to install the Device; to agree to the collection and analysis of data, and not to hold ISL liable for certain faults or defects in the Device.

Discussion

69. We have found this to be a difficult issue, for two main reasons.

70. First, ISL's case has a beguiling simplicity to it. It can be summarised in this way. If Part One of the Policy Booklet does give rise to a legal agreement between the parties, then as a matter of English contract law the policyholder must have provided consideration, and, as a matter of fact, policyholders did enter into both Parts of the Policy Booklet at the same time.

71. Second, the FTT's reasoning in the critical passages, set out above, is somewhat elliptical. By that we mean that the precise reason which led it to conclude that the supply of services by ISL to policyholders was not for consideration is not explicitly spelt out.

72. We turn now to the relevant criteria which, according to established CJEU law, must be satisfied on the facts in this case in order for ISL to establish that it made a taxable supply to policyholders. They are:

(1) A supply.

(2) A legal relationship.

(3) Reciprocal performance.

(4) A direct link.

(5) Consideration capable of being expressed in monetary terms.

73. We have dealt with the supply issue above. In agreement with the FTT, we have decided that there was no supply of goods by ISL but that there was a supply of services. Since the services of data collection and analysis are not the subject of the appeal in this case, we have proceeded on the basis that the services were the installation of the Device. So, criterion (1) was satisfied.

74. As regards the requirement for the supply to take place pursuant to a legal relationship, the FTT found (at FTT[80]) that Part One of the Policy Booklet gave rise to a legal relationship. We agree. Since CJEU law supports a wide meaning of this term (so that, in particular, the relationship does not need to be legally enforceable but can be binding in honour only) we note that the question of whether Part One gave rise to a contract under English law, as contrasted to a legal relationship, is not the relevant question. So, we have concluded that Part One of the Policy Booklet did give rise to a legal relationship in the relevant sense, meaning that criterion (2) was satisfied.

75. We return to criteria (3) and (4) below. At this stage, it is worth noting that the effect of those criteria is that not every contract in which consideration is found and a supply is made will necessarily result in a supply for consideration for VAT purposes.

76. We have not yet discussed criterion (5), which is that the consideration provided must be capable of being expressed in monetary terms. The FTT identified this requirement, at FTT[64] and [91], but stated (at FTT[96]) that it did not need to address this issue in view of its conclusion that there had been no supply for consideration.

77. For HMRC, Mr Mantle argued that the services allegedly provided by the policyholders, of entering into the insurance contract and agreeing to installation of the Device, failed to satisfy this criterion. He pointed out that ISL's own primary case in relation to the extent to which the input tax on any supply to policyholders should be reduced by output tax was that the non-monetary consideration provided by policyholders had a nil value. In any event, argued Mr Mantle, the services clearly had no monetary value because the policyholder and ISL had attributed no subjective value to the alleged exchange of services. ISL had not even attempted in its submissions to ascribe any monetary value to the consideration.

78. This requirement is referred to in the passage from *Tolsma* set out above, and is discussed in the *Coöperatieve Aardappelenbewaarplaats* judgment (at [13]), in *Naturally Yours* at [16] and in *Empire Stores.* These authorities establish that it is sufficient that then value of the services is *capable* of being expressed in monetary terms. The fact that valuation might be difficult or capable of being made on a number of bases does not prevent the requirement from being satisfied, and the precise methodology for the valuation is an issue for the court or tribunal. If we had needed to decide the output tax position, we would have needed to determine ISL's argument that the value of the consideration should be taken to be nil. However, since the supply we have assumed to take place was a supply of the service of installation of the Device, a benchmark such as the installation fee paid by ISL to the third party which performed that service would in our opinion render the consideration capable of expression in monetary terms. Nor do we accept that a subjective value for the alleged exchange of services would be impossible to establish. In *ING* (to which we refer above), Arden LJ stated (at [55] of the decision):

> The jurisprudence of the CJEU emphasises that the value of consideration for a supply is its value to the parties. No doubt that is because the imposition of VAT has to be fiscally neutral as between the transaction in issue and those in similar circumstances where the parties expressly agree the amount of the consideration. This makes valuation more difficult, but not impossible.

79. For these reasons, we have concluded that criterion (5) was satisfied.

80. Since the FTT concluded that there was not a supply by ISL to policyholders for consideration, this means that it must have done so on the basis that criteria (3) and/or (4) were not satisfied. The essential reason why the FTT reached its conclusion was that it did not

consider that there was a "direct link" in all the circumstances. Although it would have been preferable if this had been spelt out explicitly in the Decision, reading the decision in its entirety it is implicit in the reasons given by the FTT for reaching this conclusion.

81. We have concluded that the FTT reached a decision on this issue which did not involve any error of law and which was available to it on the basis of its findings of fact. We have reached this conclusion both as matter of contractual construction and as a matter of economic and commercial reality.

82. It is helpful to begin by returning to the opinion of Advocate General Lenz in *Tolsma* set out above. In *Coöperatieve Aardappelenbewaarplaats,* the CJEU stated, at [12]:

> So a provision of services is taxable, within the meaning of the Second Directive, when the service is provided against payment and the basis of assessment for such a service is everything which makes up the consideration for the service; there must therefore be a direct link between the service provided and the consideration received…

83. In its decision in *Tolsma*, the CJEU referred to reciprocal performance as one element of a direct link, at [13]-[14]:

> 13. In its judgments in Case 154/80 *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445, paragraph12, and Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365,paragraph 11, the Court stated on this point that the basis of assessment for a provision of services is everything which makes up the consideration for the service and that a provision of services is therefore taxable only if there is a direct link between the service provided and the consideration received (see also the judgment in Case 102/86 *Apple and Pear Development Council v Commissioners of Customs and Excise* [1988] ECR 1443, paragraphs 11 and 12).
>
> 14. It follows that a supply of services is effected 'for consideration' within the meaning of Article 2 (1) of the Sixth Directive, and hence is 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.

84. In this context, the concepts of direct link and reciprocal performance are addressed to the degree and nature of the connection between the supply and the consideration. It is helpful to consider the statements made by the Advocate General in *Tolsma*; at [10] of his Opinion he stresses the need for a "stipulated exchange of mutually dependent services" and the "stipulation of a price or consideration", and (at [11]) the need for "an element of contractual exchange" in this sense.

85. In *South African Tourist Board v HMRC* [2014] UKUT 0280 (TCC) ("*South African Tourist Board*"), the Upper Tribunal had to decide whether a contract (the "Performance Contract") satisfied these requirements. Having referred to the principles summarised in *Tolsma,* it expressed its conclusion in these terms (emphasis added to original), at [56]:

> In our judgment, on its own the Performance Agreement **falls far short of demonstrating the degree and nature of reciprocity required** to constitute the payments made by the Department to SATB as consideration for supplies by SATB. There is a link between the funding and the performance by SATB of its functions in accordance with the agreed business plan and objectives, but that is consistent with an arrangement of negotiated funding. There is

> nothing in the agreement to deflect away from that analysis towards a transaction of supply. **The linkage is not one of mutual exchange of supply and consideration for that supply.**

86. The facts in that case were very different to those in this appeal. However, we consider that the Upper Tribunal's approach to the process of assessing whether the requirements were met was both correct and consistent with the approach of the Advocate General in *Tolsma*.

87. As summarised above, in reaching its decision, the FTT analysed and took into account all of the material contracts and all relevant circumstances. That was in our opinion the right approach. In *Apple and Pear Development Council*, for example, the CJEU considered and weighed (at [14]-[15]) a number of factors in determining the direct link issue. We agree with the observation of the Upper Tribunal in *South African Tourist Board* (at [40]) that "*Apple and Pear* demonstrates that in any particular case there will be likely to be a range of factors to consider and that no one factor is conclusive".

88. The FTT was correct to distinguish (at FTT[80]) between the issue of whether there was a legal relationship between ISL and a policyholder and the issue of whether any supply was made in return for consideration pursuant to that relationship. We also consider it was correct at FTT[91] to accept that "entering into a contract and/or allowing something to be done can be sufficient consideration for VAT purposes", so that "if the policyholder actually entered into the insurance contract and/or agreed to allow ISL to install a Device in return for the installed Device then that could be consideration".

89. However, the critical issue was whether, on the facts found by the FTT, ISL had discharged the burden of proof which lay on it to establish that in fact the services given by a policyholder were given "in return for" the supply of installation services by ISL to a policyholder, as asserted by ISL. Put another way, was there a sufficiently direct link between any consideration given by a policyholder and the supply of services by ISL to the policyholder, and was there in fact a reciprocal bargain between the parties as asserted by ISL?

90. The FTT began by considering the contractual position: FTT[68]. There were two legal agreements between a policyholder and ISL, namely the TOBA and Part One of the Policy Booklet. The former is longer than the latter, but it contained no provision by which the policyholder agreed to do anything or allow something to be done in return for the provision and fitting of the first Device. ISL's case therefore rested entirely on Part One of the Policy Booklet.

91. In relation to the wording contained in Part One, in considering ISL's argument that a policyholder gave non-monetary consideration (by entering into the insurance contract and agreeing to Device installation and data analysis), the FTT stated that the difficulty with that case was that "the 2015 Policy Booklet does not contain any term under which the policyholder agreed to do anything or allow anything to be done in return for the provision of the first Device": FTT[91]. The FTT also noted "the absence of clear wording" relating to any such agreement by a policyholder: FTT[92]. Ms McCarthy said that this was an error of law because under English contract law there is no legal requirement for consideration to be expressed in clear wording. However, that is an incomplete answer to the question which was before the FTT. The question is not **only** whether there was consideration under contract law sufficient to create a contract but whether there was a direct link between ISL's installation of the Device and any services putatively supplied by a policyholder to ISL. In considering that question, it was highly relevant that there was no explicit wording to support ISL's suggested analysis. As we have seen, in *Tolsma* the Advocate General referred to the need for "a stipulated exchange

of mutually dependent services" and "the stipulation of a price or consideration". The FTT did not, as Ms McCarthy suggested in her skeleton argument, reach its conclusion solely for this reason, but it was clearly entitled, and in our opinion correct, to regard as materially relevant the wording in the contract relied on by ISL and the absence of any wording in that contract stipulating or referring to the agreements which ISL argued were given by a policyholder.

92. The FTT considered two other arguments raised by ISL. The first was that Part One was inextricably linked to the insurance contract, and the Device was provided, fitted and required to be used as a condition of the insurance policy; in effect, there was a tripartite contract. The second was that it was clearly objectively intended that a policyholder should have direct contractual remedies against ISL in relation to the Device. In this appeal, it was said by ISL that the FTT erred in law in failing to be persuaded by these arguments.

93. In relation to the first argument, Ms McCarthy referred to "the tripartite agreement" and "the two contracts created by the Policy Booklet" and said this in her skeleton argument:

> This inextricable and indissoluble link created the necessary mutuality or reciprocity between the two contracts. The whole purpose of ISL providing the Device to the policyholder was so that the Policyholder would enter into the contract of insurance with the Insurer, so that ISL would be paid (out of the monies handed over by the Policyholder) the Device Amount of £150 and its 10% commission from the premium.

94. The FTT said (at FTT[92]) that "the fact that the policyholder enters into two contracts at the same time does not necessarily mean that one is consideration for something done under the other even where the two are inextricably linked". We do not consider that the FTT made any error in this statement. There are, in our view, two problems with ISL's argument on this point. First, a direct link in relation to consideration requires more than the existence of a link (even an inextricable link) between the two contracts. In the absence of any clear or express wording, the FTT had to assess the extent to which there was a mutuality and reciprocity of exchange. The issue in this respect was not whether there was, in Ms McCarthy's words "mutuality or reciprocity between the two contracts", but whether there was mutuality and reciprocity between the supply by ISL, which we remind ourselves was a service of installing the Device, and the consideration for that installation said to have been given by a policyholder "in exchange for" that supply. Second, it is inherent in the nature of reciprocity and mutuality of exchange of supply and consideration for that supply that a critical issue to be determined by the FTT in the absence of clear contractual wording was not only the purpose of *ISL* in entering into Part One of the Policy Booklet, but the purpose of a *policyholder* in doing so. The FTT was in our opinion correct to interrogate what ISL asserted to be the position of the policyholder in that respect, particularly given the absence of clear wording in the contract. Put simply, did a policyholder take out an insurance policy and agree to installation of the Device as the price for installation of the Device, or for something else and for some other reason? That question is not answered simply by pointing to the linkage between Part One and the insurance contract.

95. The FTT was not persuaded that in fact a policyholder took out the insurance and agreed to installation of the Device as the price for installation of the Device (or for any other supply of services by ISL to a policyholder). ISL argued before the FTT that the fact that the Device was fitted and used as a condition of the insurance policy showed why a policyholder needed to have a direct contract with ISL in relation to the Device. The FTT did not accept that, stating as follows, at FTT[76]:

> I do not accept the last point. The policyholder was required to have a Device in their car but was, in my view, likely to be completely indifferent to the contractual arrangements relating to it. I do not see why a direct contract with ISL is necessary or places the policyholder in a better position. In this case, Covea required the policyholders, as a term of the insurance contract, to have a working Device installed in their cars. ISL agreed in the Covea Business Agreement that it would provide the Devices and fit them in the policyholders' cars. I can see no reason why the policyholder needed to have a direct contract with ISL for the provision and fitting of the Device in those circumstances.

96. Ms McCarthy argued that this finding was an error of law, because it was mere speculation and irrelevant in any event. We do not agree. The FTT was engaged in a legitimate enquiry as to the position of a policyholder under Part One, as we have explained, and was responding to an assertion made by ISL. The reason why the FTT did not accept the assertion was clear; a direct contact was unnecessary from the perspective of a policyholder in light of the obligations on the parties in the other contracts. That was an inference which the FTT was reasonably entitled to draw, having been invited to draw the opposite inference. We would add that in any event the issue in relation to the existence of a direct link was not reducible to whether a policyholder wanted or needed a contract with ISL; the question was whether a policyholder was paying for the installation of the Device by ISL by entering into Part One of the Policy Booklet.

97. At FTT[92], the FTT expanded on its reasons for rejecting this argument:

> The policyholder is required by the insurer to have a working Device fitted to their car and allow ISL to collect and use the driving data as a condition of the insurance policy. I do not consider that, in the absence of clear wording, entering into the insurance policy and complying with its terms and conditions is consideration for a separate supply by ISL. In my view, the policyholders simply enter into the insurance contract on particular terms which include having a working Device installed by ISL. There is no need for the policyholders to provide any further consideration than paying the premiums under the policy and they do not do so.

98. The FTT was in our opinion entitled to draw the conclusion that in entering into the insurance contract on terms that the Device must be fitted, the purpose of a policyholder was not to pay consideration to ISL for the installation but rather to comply with a requirement of the insurer. The FTT was not satisfied that there was a direct link between any policyholder obligations reflected in Part One of the Policy Booklet and installation of the Device by ISL. In the terminology used in *Tolsma*, there was no "contractual exchange" in the necessary sense for there to be consideration for a supply by ISL for VAT purposes.

99. The FTT was also not persuaded by the argument, renewed by Ms McCarthy, that objectively it must clearly have been intended that a policyholder should have directly enforceable rights against ISL in respect of defects in the Device and in other circumstances. We were given examples of situations in which, it was asserted, a policyholder would have no redress absent some contract with ISL. At FTT[92], the FTT described the position in such a situation as "untested and…unclear". For our part, we consider that again this argument is looking at the wrong question, because, as the FTT correctly said at FTT[80], "the issue is …not whether there was a legal relationship but whether ISL made a supply of goods and services to the policyholders in return for consideration pursuant to that relationship". Put simply, we have accepted that there was a legal relationship between ISL and a policyholder as a result of Part One of the Policy Booklet, but that does not resolve the question of whether,

pursuant to that relationship, there was consideration given by a policyholder in exchange for a supply to a policyholder of installation services by ISL.

100. So, we have concluded that the FTT did not err in law in finding that, in the absence of clear wording in Part One of the Policy Booklet the TOBA or any other document, ISL had not established that a policyholder was paying ISL for a service of installing the Device by entering into the insurance contract and accepting that installation. Although the FTT did not have to consider the position as a matter of economic and commercial reality in accordance with the "second stage" approach in SH2, the FTT did consider the wider commercial arrangements, and all the contracts, and determined that its conclusion was consistent with those arrangements.

101. We agree with the FTT. In our opinion, the correctness of the FTT's conclusion, and the lack of commercial substance to ISL's analysis, becomes clearer the more one stands back and considers the contractual documentation as a whole, rather than just Part One of the Policy Booklet. The FTT identified one aspect of the transaction as a whole as the primary rationale for a policyholder, which was to obtain insurance, and do what was necessary to do so. Although not expressed in these terms by the FTT, we consider that ISL's analysis for VAT purposes effectively involves an impermissible element of double counting. That is not only the case from the perspective of a policyholder. It is also because the supplies in relation to the Device which are said by ISL to be made to policyholders for consideration are in all material respects supplies which ISL already contracts to make to the insurer under the Covea Business Agreement. Moreover, in terms of the price to be received by ISL for those supplies, ISL earns its return by being paid its commission by the insurer out of the premiums received: see paragraphs 59 and 63 above summarising the FTT's findings. That does not mean it was impossible for ISL also to make a separate supply to a separate person in relation to the same activities, and be paid twice (once in money and once in non-monetary consideration), but the wider picture does not lend support to ISL's contractual construction, which asserts that, notwithstanding the absence of explicit wording, that was the effect of Part One of the Policy Booklet.

102. In conclusion, we consider that the FTT was justified in concluding that policyholders did not give non-monetary consideration in return for a supply of services by ISL and that its decision was reached essentially for the right reasons.

A supply for monetary consideration?

103. Since we have found that the FTT did not err in law in concluding that there was no supply by ISL to policyholders for non-monetary consideration, it is necessary to consider ISL's alternative submission that there was a supply between those parties for monetary consideration.

104. Since ISL argues in this appeal that the FTT failed to consider all aspects of this submission, we begin by setting out the position as summarised in ISL's skeleton argument before the FTT:

> If the Tribunal…holds that Ingenie does not receive non-monetary consideration, Ingenie contends in the alternative that the consideration for the supplies of the Device and Device Fitting Services it makes to the Policyholders is the Device Amount paid to ISL out of the premium. In particular, Ingenie contends that the provision of the Device and Device Fitting Services on a COV Event is a supply for monetary consideration consisting of the Device Amount.

105. There is no reference in the Decision to the term "COV Event", but it stands for a "change of vehicle event", describing the position which occurs when a policyholder changes vehicle during the term of an insurance policy, and is required to pay an amount in respect of the installation and fitting of a Device in the new vehicle.

106. We have considered the monetary consideration argument firstly on installation of the Device and secondly in relation to the amount payable on a COV Event.

107. The alternative submission is that a policyholder gives monetary consideration for a supply by ISL, namely the Device Amount of £150. This is the amount payable on first fitting of a Device. There is also a fee of £165 payable if the insurance policy is cancelled within the first twelve months, and that is also said to be monetary consideration payable to ISL.

108. The FTT rejected this argument, at FTT[87]-[88], as follows:

> 87. I now consider whether there was any consideration provided for the provision and fitting of the Device. It is clear that there was no monetary consideration for the supply and fitting of the first Device. The second section of the 2015 Policy Booklet, ie the contract between the insurer and the policyholder, states in a paragraph on the cost of the Device that the policyholder will not be charged for their first Device or its fitting provided they do not cancel their policy during the first period of insurance. That section is followed by a table of fitting charges relating to the Device which showed the cost of fitting the Device for the first time as "£0". The same part of the Policy Booklet also states that the policyholder is not liable for the cost of transmitting data to and from the Device.
>
> 88. I do not regard the position as any different where the policy is cancelled within the first year and the policyholder is required to pay £165 towards the cost of the Device and its fitting. The fact that, in the insurance contract section of the 2015 Policy Booklet, the insurer reserves the right to deduct the £165 from any refund of premium shows that the payment relates to the cancellation of the insurance rather than the original free supply of the Device. Further the TOBA 2016 provides for a fee of £166 "to cover the black box fitting if the policy is cancelled within the first period of insurance" and refers to a fee for "early cancellation of the insurance by you during the first period of insurance". In my view, both references indicate that the payment is made for cancelling the insurance within the first period of insurance rather than to acquire ownership of the Device or as consideration for its fitting.

109. Ms McCarthy described the Device Amount as a "fee paid by the Policyholder to ARL, and then duly retained by ISL pursuant to its contractual agreement with the insurers". She said that policyholders were "aware of the fact that although there is no separate charge for the Device, its cost is included in the premium which the policyholder pays for their insurance". Ms McCarthy also argued that since there was a contract between ISL and a policyholder, if there was no non-monetary consideration, then there must necessarily be monetary consideration. Further, she submitted, the FTT was wrong to look at Part Two of the Policy Booklet to find terms governing the policyholder's relationship with ISL.

110. We do not accept Ms McCarthy's arguments. The FTT made no error in reaching its conclusions on this issue, with which we agree.

111. In contrast to ISL's primary argument, this alternative argument relies on a characterisation of the policyholders' contractual obligations which is contradictory to the wording of the Policy Booklet. We have nothing to add to the description of those contractual

obligations at FTT[87]. The FTT was fully entitled to consider the terms of the Policy Booklet in its entirety in addressing ISL's argument that, because the source of the payment to ISL of the Device Amount was the premium, it should be regarded as consideration given by a policyholder to ISL. The contractual position was, as the FTT found, clear, and did not support that argument. That position was not altered by the mechanics of calculating and paying the net fee earned by ISL from the insurer. For VAT purposes, the insurer obtains the entire premium paid by a policyholder, but allows ARL to retain and pay to ISL an amount equal to the consideration due from the insurer to ISL in return for ISL's supply of insurance intermediary services to the insurer. Ms McCarthy referred to various authorities regarding the value of supplies, including *H. J. Glawe Spiel-und Unterhaltungsgerate Aufstellungsgesellschaft mbH & Co. KG v Finanzamt Hamburg-Barmbek-Uhlenhorst* [1994] EUECJ C-38/93 (5 May 1994), but they have no relevance to the factual situation in this case.

112. In any event, we have agreed with the FTT's finding that there was no supply of the Device for VAT purposes, for consideration or otherwise, but only a supply of services. There is nothing in the contractual documentation to support the analysis that the £150 paid by the insurer to ISL was a payment by a policyholder not for the Device but for services from ISL.

113. Ms McCarthy's argument that if there is no non-monetary consideration there must be monetary consideration is again based on the fallacious conflation of the alleged position under English contract law with the question of whether there was monetary consideration for VAT purposes, including the need for reciprocal performance and a direct link. The VAT criteria discussed above are clearly not met in relation to the Device Amount payment.

114. In relation to the payment due from a policyholder in the event of early cancellation of a policy, we agree with the FTT at FTT[88]. That analysis should be read together with the FTT's statement regarding evidence given on behalf of ISL at FTT[33] (also referred to at FTT[56]), as follows:

> Mr Proctor-Wilton said that the fee payable for the fitting of the Device (£166 in the TOBA 2016) in the event of cancellation during the first period (but excluding cancellation during the 14 day cooling off period) was not charged in practice. He said that the provision was intended to ensure that any policyholder who cancelled their policy during their first period of insurance would not be entitled to a refund relating to the Device. In other words, a policyholder who cancelled their policy in the first year would only be entitled to receive a refund of a proportion of the net premium paid to the insurer and ISL's commission excluding that part of the commission (£166 at the time) which related to the Device.

115. ISL argued that "in particular" there was monetary consideration provided by a policyholder to ISL on a COV Event. At FTT[6], this ground of appeal was recorded as being that there was a taxable supply on "any subsequent provision and fitting of a Device, eg when the policyholder changes their car, in return for the amount charged, according to a sliding scale, to the policyholder under the insurance contract as a contribution to the cost of providing and fitting the new Device". This is presumably a reference to the statement in the contract between the policyholder and the insurer in Part Two of the Policy Booklet (repeated in tabular form at the end of Part Two) that:

> If you change your car we will not remove the ingenie device from your previous car, but you will need a new ingenie device.

> If you change your car within the period of insurance you will be charged £75 to contribute to the cost of a new device and it's [sic] fitting (£100 if you change your car a second time and £150 for any subsequent change of car)

116. At first sight, the COV argument would seem to suffer from the same flaws as those regarding the argument in relation to the first fitting of a Device, namely that under the Policy Booklet the monetary obligations operate as between a policyholder and the insurer (not ISL) and that there was in any event no supply of a Device. However, the TOBA, a contract between a policyholder and ISL/ARL, also stated that in certain circumstances, ARL and/or ISL "may" charge fees to the policyholder, including the sliding scale charges on a COV.

117. Notwithstanding the terms of the TOBA, the FTT recorded that on ISL's own case the TOBA were of no material assistance, and found as follows, at FTT[79]:

> The inclusion [in the TOBA 2016] of the fees for installing a new Device when the policyholder changed their car seem to me to be an anomaly, and a potential source of confusion, given that the fees were also included in the 2015 Policy Booklet.

118. Ms McCarthy criticised the FTT for simply failing to address the argument that fees payable on a COV Event were monetary consideration paid by a policyholder to ISL. However, that criticism is misplaced. The FTT did address this argument. At FTT[92], the FTT concluded its rejection of ISL's primary argument that there was non-monetary consideration, for the reasons we have discussed above, and then continued, at FTT[93]:

> I consider that the same analysis applies where a policyholder changed their car during the lifetime of the insurance policy. The second section of the 2015 Policy Booklet, ie the insurance contract, provides that the policyholder would be charged an amount for fitting a new Device which increased with each change of vehicle up to the third after which it remained stable. Mr Parker [counsel for ISL] submitted that the amount paid on the change of a vehicle was consideration for ISL providing and fitting a new Device. Mr Macnab [counsel for HMRC] contended that all payments for further Devices in the 2015 Policy Booklet are payments for insurance provided under the insurance contract. I agree with Mr Macnab. The insurance contract is with the insurer. Payment is collected by ARL in the same way as premiums. The contract provides that a failure to pay the additional fees when requested may result in the policy being cancelled. It seems to me that the payments for new Devices are additional consideration for the insurance cover.

119. Once it is accepted that the COV Event charges set out in the TOBA cannot be taken at face value (a finding not challenged by ISL), we consider that the FTT was entitled to reach the conclusion it did at FTT[93]. Those charges are not consideration for VAT purposes for a supply by ISL, satisfying the criteria we discuss above, but for insurance.

120. In conclusion, we reject ISL's alternative argument that a policyholder gave monetary consideration for a supply by ISL on first fitting, early cancellation of a policy or a COV Event.

DID ISL MAKE A DEEMED SUPPLY TO POLICYHOLDERS FOR VAT PURPOSES?

121. Since we have concluded that ISL did not make a supply to policyholders, it is necessary to consider the alternative argument that ISL satisfied the conditions for a deemed supply for VAT purposes.

122. Article 16 PVD provides that a disposal of goods which are part of the assets of a business free of charge by a taxable person is treated as a supply of goods for consideration, "where the VAT on those goods or the component parts thereof was wholly or partly deductible". Article 16 is implemented in the UK by paragraph 5 VATA 1994. Paragraph 5, so far as relevant to this appeal, is worded slightly differently, and, in particular, states in paragraph 5(5) that the treatment as a deemed supply under paragraph 5(1) applies only in a case where the person disposing of the goods is a person who (disregarding paragraph 5) has or will become entitled to an input tax deduction for the whole or part of any VAT on the goods.

123. Since we have concluded that there was no supply by ISL to policyholders for consideration, it follows that on this basis if there was a disposal by ISL to policyholders, it was free of charge.

124. The first point to note is that Article 16 applies only to disposals of goods, not to a provision of services. Ms McCarthy submitted that Article 16 could potentially apply because the provision and fitting of the Device was a single supply, with the Device being the principal element to which the fitting services were merely ancillary, and as a result there was a single supply of goods: FTT[98]. Mr McNab for HMRC submitted that any deemed supply could not take place when the Device was fitted, but only when title to the Device passed to the policyholder after the insurance lapsed or was cancelled: FTT[99]. We cannot discern in the Decision any explicit resolution by the FTT of the issue of whether the supply was a single supply of goods in the context of the deemed supply analysis. The FTT reached its decision on other grounds, discussed below. It appears to have accepted Mr McNab's submission regarding the timing of any supply of the Device and proceeded on the basis either that it accepted Ms McCarthy's submission as to a single supply of goods, or that it would analyse the other issues on the assumption that that submission was correct. For reasons which will become apparent, we have also proceeded on this basis.

125. Before the FTT, and in this appeal, the debate focussed on the requirement in Article 16 that input tax on the goods deemed to be disposed of must have been wholly or partly deductible. It was common ground that in fact ISL had treated the Devices as costs components of an exempt supply of insurance intermediary services, with the result that the input tax on them was wholly non-deductible. However, Ms McCarthy argued that where Article 16 otherwise applied to deem a supply to occur, then on the authority of *Church of England Children's Society v HMRC* [2005] STC 1644 ("*Children's Society*") input tax would be deductible in respect of that deemed supply.

126. The FTT rejected that argument, concluding that *Children's Society* was inconsistent with subsequent decisions of the CJEU, stating as follows, at FTT[104]:

> I consider that the CJEU cases show that the deemed supply under Article 16 PVD and, therefore, paragraph 5(1) of Schedule 4 to the VATA 1994 only arises where the taxable person has recovered some or all of the input VAT incurred on the assets concerned and the deemed supply is necessary to ensure that the goods are not retained or consumed without bearing VAT. If a taxable person were able to deduct input VAT on goods, originally treated as non-deductible, on the basis that it is attributable to a deemed taxable supply of the goods then all disposals of business assets free of charge would be subject to VAT and the condition in Article 16 and paragraph 5(5) of Schedule 4 to the VATA 1994 would be meaningless.

127. We consider that the FTT was right to reach this conclusion, although we have reached the same conclusion by a more straightforward process of reasoning than that adopted by the FTT.

128. In terms of the wording of Article 16, the use of the past tense ("was wholly or partly deductible") is consistent with a requirement that there has in fact been some input tax deduction in respect of the goods deemed to be supplied. In paragraph 5(5), the wording "has or will become entitled to" an input tax deduction is less clear, but the reference in parentheses to the entitlement being one which arises "disregarding this paragraph" (namely paragraph 5, including sub-paragraph (1)) strongly indicates that the requirement is that there must in fact have been an input tax deduction.

129. As with any provision of the PVD, Article 16 falls to be construed teleologically. In terms of the purpose of Article 16, its broad purpose is to ensure equal treatment between the input tax and output tax position where business goods are disposed of other than for consideration. So, if input tax has been wholly or partly deducted on goods, Article 16 ensures that output tax would arise on a deemed disposal as well as an actual disposal. If no input tax has been deducted, then no need to deem any disposal would arise. A construction of the wording imposing the relevant condition in Article 16 and paragraph 5(5) of Schedule 4 VATA by reference only to an actual deduction achieves this equal treatment. In the words of Advocate General Fennelly in his opinion in *Kuwait Petroleum (GB) Ltd v Customs & Excise Commissioners* (Case C-48/97) [1999] STC 488, at paragraph 26:

> It is, thus, clear that the authors of the Second Directive were concerned that goods obtained by taxable persons in circumstances giving rise to a right to claim a deduction should not be capable of being supplied free of charge without the imposition of a corresponding charge to VAT. This objective was maintained in the Commission's proposal for the Sixth Directive.

130. Ms McCarthy reaffirmed ISL's reliance on *Children's Society* in arguing that (in effect) input tax by reference to the deemed disposal would suffice to satisfy the wording. We do not consider that the decision supports that proposition.

131. *Children's Society* was a decision of the High Court in which one of the issues related to a deemed supply in respect of newsletters distributed by the Society, which was registered for VAT, to certain donors ("committed givers") and the amount of input tax that could be recovered on goods and services used in the production and distribution of the newsletter. The construction and effect of paragraph 5 of Schedule 4 VATA 1994 arose from a cross-appeal by HMRC against the decision of the VAT and Duties Tribunal. The issue was not whether paragraph 5(1) applied: it was common ground between the parties that paragraph 5(1) applied since the newsletter was provided otherwise than for consideration: [37] of the decision. The dispute was as to the extent to which input tax **actually paid** by the Society in respect of supplies to it which had gone into the production and distribution of the newsletter would be recoverable: [38] of the decision. Before it began to distribute the newsletters free to committed givers, the Society had treated the VAT it had in fact paid on supplies connected with its newsletters as residual input tax: [6] of the decision. Put simply, HMRC argued for a lesser proportion of the input tax paid to be deductible by virtue of the deemed supply.

132. It is essential to appreciate that this was the context in which Blackburne J reached the following conclusion, which was relied on by Ms McCarthy, at [59]:

> I see nothing odd in treating as a supply, to its fullest extent, a disposal of goods, made otherwise than for a consideration, even where the original input

> tax has been restricted. It will only have been restricted because it has not been possible to attribute the input costs to an output transaction. But once an output transaction is identified, as paragraph 5(1) of Schedule 4 requires in the circumstances set out in that provision, it is merely a question of identifying the input costs relating to the deemed supply and all else follows.

133. Contrary to Ms McCarthy's submission, this passage was not dealing with the situation in this appeal, where in fact ISL deducted **no** input tax in respect of any deemed supply of the Device, but with the question of how much of the input tax which had in fact been incurred could be deducted on the deemed supply. That is why the court referred to the original input tax being "restricted". It also explains the court's detailed discussion of *Customs & Excise Commissioners v West Herts College* [2001] STC 1245, another case which concerned the extent to which input tax actually incurred in relation to a deemed supply could be deducted.

134. A further reason why we do not accept that *Children's Society* supports ISL's analysis is that the court omitted to refer to critical wording in paragraph 5(5). At [40], the decision sets out paragraph 5 as follows:

> So far as material, paragraph 5 of Schedule 4 provides as follows:
>
> "(1) Subject to sub-paragraph (2) below, where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, that is a supply by him of goods…
>
> (5) Neither sub-paragraph (1) nor sub-paragraph (4) above shall require anything which a person carrying on a business does otherwise than for a consideration in relation to any goods to be treated as a supply except in a case where that person … has or will come entitled –
>
> (a) under sections 25 and 26, to credits for the whole or any part of the VAT on the supply … of those goods or of anything comprised in them …"

135. As we have described, paragraph 5(5) in fact states "except in a case where that person… is a person who **(disregarding this paragraph)** has or will become entitled –" (emphasis added to original). The wording in parentheses strongly supports the construction of paragraph 5 which we have arrived at, because it makes clear that an entitlement to input tax which arises solely by virtue of paragraph 5(1) does not suffice. The fact that the court in *Children's Society* did not include this wording in its description of paragraph 5[5] may indicate that it was seen as irrelevant (because, as we have said, it was common ground that input tax had in fact been paid) or may have been an oversight. In either event, the decision is not authority for the proposition on which ISL rely in relation to the deemed supply argument.

136. The FTT distinguished *Children's Society* on the basis of certain decisions of the CJEU which it considered had superseded it. The FTT also considered that no deemed supply arose for a different reason, namely that the Devices were not disposed of by ISL for purposes other than those of its business: FTT[106]-[107]. Since our conclusion that there was no deemed supply has been reached simply on the basis of the construction on Article 16 and paragraph 5 and an analysis of *Children's Society*, we need not comment on those aspects of the FTT's reasoning, and we do not do so.

[5] The relevant wording was introduced with effect from 17 March 1988 by section 21(4) Finance Act 1988, so was in force for the periods under appeal in *Children's Society*.

137. ISL did not make a deemed supply for the purposes of Article 16 and paragraph 5 Schedule 4 VATA 1994 because there had been no input tax deduction in respect of any deemed supply. The appeal on this ground is dismissed.

DISPOSITION

138. The appeal is dismissed.

MR JUSTICE ADAM JOHNSON
JUDGE THOMAS SCOTT

Release date: 26 March 2024

ANNEX 1
2015 POLICY BOOKLET AND 2016 TOBA

2015 POLICY BOOKLET – INGENIE CAR INSURANCE POLICY WORDING

Introduction to ingenie

For this section only, this contract is between **you** and **Ingenie** Services Limited.

All through this section there are certain words printed in bold. These words have special meanings that are shown in the definitions section on pages 7 and 8.

About **ingenie**

Car insurance for young drivers aged 17 to 25.

ingenie is a specialist car insurance brand for younger drivers.

The latest in-car telematics technology is used to assess **your** driving style. ingenie gives feedback on how **you** drive at www.**ingenie**.com or via a free mobile phone application.

An **ingenie device** will be installed in **the car**. This captures **telematics data** on a range of driving characteristics including speed, braking, acceleration and cornering.

ingenie can help **you** to be a better driver and influence the cost of **your** car insurance. **ingenie device ingenie** will arrange for a device to be fitted to **the car**. This is about the size of a mobile phone and uses the latest telematics technology, including highspeed accelerometers, to capture data on how **the car** is driven.

You then receive feedback on how **you** are driving, with useful tips available on the free **ingenie** app and at www.**ingenie**.com. These tips are designed to help **you** improve **your** driving style and become a better driver.

The **telematics data**

The **telematics data** that **ingenie** collects from **your ingenie device** includes:

- Speed throughout **your** journey
- Braking frequency and force
- Acceleration
- Cornering and sudden manoeuvres
- Miles travelled
- The type of routes **you** take (e.g. A-roads, motorways, country lanes)
- Time and date of travel
- The car's GPS location

How **ingenie** uses **your** data

ingenie will use **your** personal data as follows:

- **ingenie** will pass the **telematics data** from **your ingenie device** to **your Insurer** to help them to manage **your** insurance, including using the data in the assessment of liability of any claims or to identify the location of **the car** following a theft claim. The **telematics data** will be used by **your Insurer** to evaluate whether **your** premium should change.
- **ingenie** will pass the **telematics data** to **your insurer** to allow them to help prevent fraud (including sharing **your** information with operators of registers used by the insurance industry to check information).
- **ingenie** may from time to time use a different **insurer** to quote or to provide **you** with insurance and will provide the **telematics data** to that different **insurer**.
- **ingenie** may use **your** personal information to give **you** information about other products and services offered by **ingenie**. If **you** do not want **ingenie** to use **your** information for marketing purposes, please email, write or telephone **ingenie** using the details shown on any of **ingenie's** letters or on **our** website, www.**ingenie**.com.

Looking after **your ingenie device**

ingenie will aim to install your **ingenie device** in **the car** within 10 days of **your** insurance policy commencing. The i**ngenie device** remains the property of **ingenie** and shall only become **your** property after **your** insurance has lapsed or been cancelled.

ingenie will not be responsible for any faults or damage or the cost of replacing the **ingenie device** if the fault or damage is caused by **you** or anyone appointed by **you** (such as a mechanic) or anyone other than **ingenie** or **ingenie's** representatives.

This is the end of the **ingenie** section of this policy. The following pages contain the details of the insurance cover provided by **your insurer**.

Contract of insurance

Introduction

The information **you** provided, and the declaration **you** or anyone representing **you** agreed to, along with this policy booklet, **your schedule** and **your certificate of motor insurance** are all part of **your** policy. Please read them all together.

If **you** or anyone representing you:

- Provides **us** with inaccurate or incorrect information when applying for, changing or renewing this insurance
- Deliberately misleads **us** to obtain cover, gain a cheaper premium or more favourable terms
- Makes a fraudulent payment by bank account and/or card
- Provides **us** with false documents For example, this could include:
- not telling **us** about motor or criminal convictions
- not telling **us** about previous accidents or losses, even if a claim was not made
- not telling **us** about modifications to **your** car
- giving **us** false information about who is the registered keeper or owner of **your** car
- giving **us** false information about where **your** vehicle is kept overnight
- using a credit card without the credit card holder's permission

This is not a full list and if **you** are in any doubt about the information **you** have provided to **us** then please contact **us** immediately.

We may:

- Agree to amend **your** policy and apply any relevant policy terms and conditions and collect any additional premium due including any premium adjustment charge to cover **our** administration costs
- Reject a claim or reduce the amount of payment **we** make
- Cancel or avoid **your** policy (treat it as if it never existed), and apply a cancellation fee.

Where fraud is identified **we** will:

- Not return any premium paid by **you**
- Recover from **you** any costs **we've** incurred
- Pass details to fraud prevention and law enforcement agencies who may access and use this information. Other insurers may also access this information

This policy is a contract between **you** and **us**. It is not **our** intention that the Contracts (Rights of Third Parties) Act 1999 gives anyone else either any rights under this policy or the right to enforce any part of it.

In return for **you** paying or agreeing to pay the premium, **we** will provide cover under the terms, exclusions, conditions and **endorsements** of this contract of insurance, during the **period of insurance** and within the **geographical limits**.

Under the Road Traffic Act it is an offence to make a false statement or withhold information for the purposes of obtaining a **certificate of motor insurance**.

You are required by the provisions of the Consumer Insurance (Disclosure and Representations) Act to take care to answer all questions honestly and to the best of **your** knowledge. Failure to supply accurate and complete answers may result in **your** policy

being cancelled or treated as if it never existed, or **your** claim rejected or not fully paid. If **you** are in any doubt whether a piece of information is relevant to **your** answer, **we** will be happy to give **you** advice.

You must read this policy, the **certificate of motor insurance** and the **schedule** together.

Please check all documents carefully to make sure that they give **you** the cover **you** want.

The law and language applicable to this policy

English law will apply to this contract unless **we** agree with **you** in writing otherwise. The contractual terms and conditions and other information relating to this contract will be in English Language.

This is your insurance policy. It is a contract of insurance between you and us.

Throughout this policy certain words and phrases are printed in **bold**. These have the meanings set out below.

Black messages

Black messages are created as a result of monitored **driver behaviour** and will be issued if **the car** is being driven dangerously, such as driving 30 mph over the speed limit, or if **you** have received multiple red messages.

Certificate of Motor Insurance

The proof of the motor insurance **you** need by law. The **certificate of motor insurance** shows:

1. what car is covered;
2. who is allowed to drive **the car**; and
3. what **the car** can be used for.

Driver behaviour

Your ingenie device will measure and transmit various aspects of how **the car** is driven. These measurements will include (but are not limited to) the speed throughout the journey, braking frequency and force, acceleration, cornering and sudden manoeuvres, miles travelled, the types of routes taken (e.g. A-roads, motorways, country lanes), time and date of travel and **the car's** location.

This **telematics data** will be used by **us** to determine **driver behaviour.**

For more information about the **telematics data** that will be collected and how it will be used please go to www.**ingenie**.com

…

ingenie

Ingenie Services Limited.

ingenie device / device

A telematics box fitted to **the car** which transmits **telematics data** to **ingenie**.

…

Period of insurance

The length of time that the contract of insurance applies for. This is shown in the **schedule**.

Schedule

The latest **schedule we** have issued to **you**. This forms part of the contract of insurance. It gives details of the **period of insurance**, **the car** which is insured and details of any **excesses** or **endorsements**.

Selected installer

Any **telematics device** fitting company that has been authorised by **ingenie** to install or remove the **ingenie device** from **the car**.

Statement of insurance

The form that shows the information that **you** give **us**, including information given on **your** behalf and verbal information **you** give prior to commencement of the policy.

Telematics data

Information collected and transmitted by **your ingenie device** that enables analysis of **driver behaviour**.

The car

Any motor car that **you** have given **us** details of and for which **we** have issued a **certificate of motor insurance. The car's** registration number will be shown on **your** latest **certificate of motor insurance**.

Accessories and spare parts are included in the definition of **the car** when they are with **the car** or locked in **your** own garage.

We/Us/Our/Insurer

The insurance Company as specified in the **statement of insurance**, the **schedule** and the **certificate of motor insurance** on whose behalf this document is issued. **We/us/our** can also mean **ingenie** where there is reference to the **ingenie device, Telematics Data,** Cancelling **your** policy, Sharing Information and Complaint Notification.

You/your

The person shown under 'Policyholder details' on the **schedule**.

…

Before the **ingenie device** can be installed

You have the responsibility to ensure that **you** have the agreement of anybody with a legal interest in **the car** to the fitting of an **ingenie device**.

Cost of the **device** and its fitting

You will not be charged for **your** first **ingenie device** or its fitting provided **you** do not cancel **your** policy during the **period of insurance.**

If **you** cancel **your** policy within the first **12 months of this policy**, and the **ingenie device** is fitted, **you** will need to pay £165 to contribute towards the cost of the **device** and its fitting. **We** reserve the right to deduct this £165 from any premium refund due.

If **you** change **your** car **we** will not remove the **ingenie device** from **your** previous car, but **you** will need a new **ingenie device**.

If **you** change **your** car within the **period of insurance you** will be charged

£75 to contribute to the cost of a new **device** and it's fitting (£100 if you change **your car** a second time and £150 for any subsequent change of car).

You will not be charged for a new **ingenie device** or its fitting if **the car** is deemed a total loss after a claim or if the **device** is damaged in an incident involving a claim under **your** policy. **You** are not liable for the cost of transmitting data to and from the **ingenie device.**

Timescale of fitting

The **ingenie device** must be fitted within 10 days of **your** policy commencing, or 10 days from when **you** notify **us** of a change of car. If the **device** is not fitted within these timescales **we** reserve **our** right to cancel **your** policy as per section 8 on page 42 and 43.

The **selected installer** will fit the **ingenie device** at a mutually convenient time at (or near) **your** home or place of work or study within mainland Great Britain and Northern Ireland, provided it is safe to fit the **device** at the proposed place.

Documents required for fitting

On the day of **your ingenie device** fitting **you** must present the following documents to the fitter acting for the **selected installer:**

- Vehicle registration document (V5C)
- **Your** driving licence photocard
- Proof of No Claim Discount (if appropriate).

If **you** need a new **ingenie device** because **you** have changed **your car** then **you** only need to supply the **selected installer** with **your** driving licence and Vehicle Registration Document (V5C).

No Claim Discount must be in **your** name, be less than 24 months old, contain the previous policy number and expiry date of the previous policy, indicate the number of years claim free, and detail any accidents.

Damage caused through fitting

If any damage is directly caused to **your car** because of the **ingenie device** fitting then it will be repaired at no cost to **you**.

We will not be responsible for any depreciation in the value of **the car** caused by the fitting of the **ingenie device**.

The **device**

ingenie will own the **device** until the insurance has lapsed or been cancelled, after which point **you** will own the **device**.

If the **device** is damaged due to **you,** or anyone acting on **your** instruction or on **your** behalf**,** maliciously tampering or interfering with the **device**, or **you** deliberately prevent it from working, **we** reserve **our** right to cancel **your** policy under section 8 on page 42 and 43. If the **device** is maliciously damaged, or deliberately prevented from working, and **you** do not cover the cost of fitting a new **device** then **we** reserve **our** right to cancel **your** policy under section 8 on page 42 and 43.

You will be liable for any costs incurred through repairing, removing or replacing the **device**. **You** will not be liable for manufacturer faults (see '**device** faults' below).

Device faults

Should the **device** develop a fault **ingenie** will notify **you** and arrange a mutually suitable time to replace the **device**. **You** must allow **ingenie**, or their **selected installer**, access to

your car within 14 days of **ingenie** notifying **you** of the fault. If **you** do not allow **ingenie**, or their **selected installer**, access to **your** car within this timescale then **we** reserve **our** right to cancel **your** policy under section 8 on page 42 and 43.

Telematics data collection

ingenie will collect **telematics data** from **the car** throughout the **period of insurance** and will pass it to **us**. All **telematics data** transmitted to and from the **ingenie Device** is secure.

The **ingenie device** will measure and transmit various aspects of how **the car** is driven. These measurements will include (but are not limited to) speed throughout journeys, braking frequency and force, acceleration, cornering, and sudden manoeuvres, miles travelled, the type of routes taken (e.g. Aroads, motorways, country lanes), time and date of travel and **the car's** location.

We will use the **telematics data** to determine **driver behaviour. We** may also use the **telematics data** collected from **your ingenie Device** in the assessment of liability in the event of a claim, in calculating **your** premium, and in **our** statistical analysis**.**

ingenie will attempt to capture **telematics data** at all times during the **period of insurance**. If **telematics data** is not collected for any period of the insurance (for example for the following reasons):

- **You** drive another car without an **ingenie device**
- **The car** is driven into a geographic area not covered by the **ingenie device** or where the **device** cannot operate
- The **ingenie device** develops a fault or is damaged by an insurable event; then **driver behaviour** for this period may not be recorded. This will not affect **your** cover.

If **telematics data** is captured for less than 75% of the **period of insurance** then this may impact **our** ability to use telematics **data** including: not being able to use the **telematics data** to assist in any claim **you** may have or to help calculate **your** premium.

If **you** allow other drivers to use **the car** during the **period of insurance**, please note their driving will have an impact on the **telematics data** collected by **ingenie** and could impact **your** premium.

How telematics can affect **your** premium

We will assess the **telematics data** from **your ingenie device** against **our** guidelines three times a year and at renewal to determine **driver behaviour**.

The FAQ section of the **ingenie** web site contains information about how **your** premium may increase or decrease based on **driver behaviour** during the **period of insurance** as a result of the **driver behaviour**.

If after **our** assessment **we** consider the **driver behaviour** to be safe then **you** may receive a discount on **your** premium, alternatively if the **driver behaviour** is considered to be unsafe then **your** premium may increase but only up to the maximum price **you** were quoted at inception, renewal or following a change to **your** policy.

If as a result of **driver behaviour you** receive a **black message we** will monitor the driving performance and if **we** don't see an improvement or if **driver behaviour** is consistently poor then **we** reserve the right to cancel **your** policy under section 8 on page 42 and 43. **We** may cancel **your** policy under section 8 on page 42 and 43 if **you** drive at unacceptably high speeds.

We will not wait until renewal to increase or decrease **your** premium; if applicable to **you** this will be done approximately 3 times during the year (approximately every 90 days). **We** will give **you** 7 days' notice before applying any changes to **your** premium.

If **you** have already paid **your** annual premium and **your** premium decreases because of **driver behaviour**, **you** may receive a premium rebate. If **you** have already paid **your** annual premium and **your** premium increases because of **driver behaviour** then **you** may be asked to pay the additional premium immediately.

This will be collected from **your** card details if **you** have provided them.

If **you** pay **your** premium by monthly instalments then **your** payment plan will be automatically amended to reflect **your** increased or decreased premium.

If as a result of **your driver behaviour you** receive a **black message** in the 6 weeks before **your** renewal date, which has not been considered in **your** renewal calculation, **we** may amend **your** renewal premium and/or change the compulsory **excess** with effect from the renewal date or withdraw the invitation to renew **your** policy. **We** will confirm these changes to **you** in writing. **We** may cancel **your** policy, under section 8 on page 42 and 43, if **you** drive at unacceptably high speeds.

Cooling off period

You have the right to cancel **your** policy under section 8 on page 42 and 43.

If **you** cancel **your** policy within 14 days from either the start date of the policy or the date **you** receive the policy documents, whichever is the later date, within the first 12 months of this policy, and the ingenie device has been fitted, you will need to pay £165 to contribute towards the cost of the box and its fitting. We reserve the right to deduct £165 from any premium refund due.

If the policy is cancelled

If the policy is cancelled after the cooling off period but within the first 12 months of this policy, you will need to pay £165 to contribute towards the cost of the device and its fitting. We reserve the right to deduct this £165 from any premium refund due.

If the policy is cancelled, or lapses, the device will remain in the car. ingenie will cease collecting telematics data within 7 days of cancellation, or as soon as possible thereafter, meaning the device will not transmit any further telematics data to ingenie. Any telematics data collected remains the property of ingenie, subject to the requirements of the Data Protection Act (1998) and ingenie's Data Protection Notice on page 3, and our Data Protection Notice on pages 46 – 49.

Fitting charges relating to ingenie device and document inspection		
1	Cost of fitting **your ingenie device** for the first time	£0
2	If **you** miss an arranged **ingenie device** fitting, repair or replacement appointment without giving **us** at least 24 hours' notice	£45
3	Removal of **ingenie device** at **your** request	£80
4	First change of car (fitting new **ingenie device** in this replacement car)	£75

5	Second change of car (fitting new **ingenie device** in this second replacement car)	£100
6	Subsequent change of car (fitting new **ingenie device** in this subsequent replacement car)	£150
7	Fee to cover the **ingenie device** fitting if the policy is cancelled within the first **period of insurance**	£165
8	Replacing a faulty ingenie device	£0
9	If **the car** is modified, converted, customised or in an unfit state to install an **ingenie device** and **we** decide not to fit one	£45
10	If **you** damage or tamper with the **ingenie device, we** reserve the right to cancel **your** policy and/or charge **you**.	£150

We may debit these additional payments from the debit or credit card details **you** provided when **you** bought this policy.

If **we** do not have **your** credit or debit card details then **you** may be invoiced for any additional charges and payment should be made within 14 days. Failure to pay these additional fees when requested may result in **your** policy being cancelled.

…

Cancelling **your** policy

a. Cooling off period - **you** have 14 days from when **you** receive the policy documents or the purchase date of the policy, whichever is later, to cancel the cover. This is known as a cooling off period. **You** can cancel by phoning **us**.

…

If **you** cancel **your** policy within 14 days from either the start date of the policy or the date **you** receive the policy documents, whichever is the later date, within the first 12 months of this policy, and the **ingenie device** has been fitted, **you** will need to pay £165 to contribute towards the cost of the box and its fitting. **We** reserve the right to deduct £165 from any premium refund due.

…

b. After the 14-day cooling off period **you** can cancel this policy at any time by phoning **us**. If no claims have been made during the current period of insurance **we** will charge **you** for the period of cover that has been provided and refund **you** for any cover **you** have paid for but haven't used.

If **you** cancel **your** policy within the first 12 months of this policy and the **ingenie device** has been fitted, **you** will need to pay £165 to contribute towards the cost of the box and its fitting. **We** reserve the right to deduct this £165 from any premium refund due.

TOBA 2016

Terms Of Business Agreement

Definitions: In this Terms of Business Agreement "**we**", "**us**" and "**our**" means Ageas Retail Limited and/or Ingenie Services Limited. We are an intermediary acting on your behalf offering products and services from insurers to meet your requirements. Ingenie Services Limited … introduces you to Ageas Retail Limited who will arrange and administer your policy of insurance.

…

Your Agreement To These Terms Of Business: In seeking insurance through us you agree to the Terms of Business Agreement and to **us** acting as your agent. This does not affect your normal statutory rights.

About Our Service: … **Our** service includes: arranging your insurance and processing any required changes that you may wish to make to your policy.

If you speak to one of **our** advisors about the taking out of, amendment to, renewal or cancellation of your policy then you will do so on an advised basis. This will include the provision of advice and recommendations where appropriate in order to ensure insurance discussed is suitable for your needs.

If you choose to take out, amend, renew or cancel your policy without speaking to one of **our** operators (for example through **our** website) then you will do so on a non-advised basis. This means information will be provided in order for you to make an informed decision about any insurance transactions undertaken by you.

You agree to receive your policy documents including the certificate of insurance electronically, where appropriate to do so.

About The Products We Offer:

We offer products from Ageas Insurance Limited, Covea Insurance plc, Highway Insurance Company Limited and Royal and Sun Alliance for motor insurance contracts.

We offer a number of optional extra products from a limited number of specialist insurers. You can request a list of the insurers from us.

Important Information: Please take care to answer all questions honestly and to the best of your knowledge. If you don't your policy may be cancelled, treated as if it never existed, or your claim rejected or not fully paid.

You should read and retain all the documents **we** have sent or may send in the future. You should make sure the documents are accurate and contact **us** if the documents contain any errors. If you have any queries about your policy or do not understand it, please inform **us** immediately and we shall be pleased to assist you.

Remuneration And Fees:

We may make a charge and our charges are detailed below. These charges are independent of any charges imposed by the insurer.

These fees are non refundable with the exception of the cooling off period set out below:

A fee of £10 to issue you with a duplicate insurance document;

A fee of £25 when you ask us to make a change to your insurance policy;

A fee of £12 for Direct Debit defaults and returned cheques;

A fee of £45 if you miss an arranged black box fitting, repair or replacement appointment without giving us at least 24 hours notice;

A fee of £45 if we cannot or decide not to fit your box because your car is modified in any way, is in an unfit state or parked in an unsuitable location;

A fee of £80 for removal of the black box at your request;

A fee of £75 for the first change of car (fitting a new black box in this replacement car);

A fee of £100 for the second change of car (fitting a new black box in this second replacement car);

A fee of £150 for subsequent change of car (fitting a new black box in this subsequent replacement car);

A fee of £166 to cover the black box fitting if the policy is cancelled within the first period of insurance;

A fee of £150 if you damage or tamper with the black box, we reserve the right to cancel your policy and/or charge you.

…

Cancellation fees are as follows:

1. Within 14 days from the later of either the start date of the policy or the date you receive your policy documents - the cooling off period:

We will retain an administration fee of £10 for the setup of your policy.

Your insurers may make a pro rata on risk charge plus an administration charge, please refer to the Policy Summary or Policy Wording for further details.

2. After the 14 day period:

We will retain a cancellation fee of £35 in the event of the policy being cancelled outside of the cooling period.

Any fees **we** apply to your policy will be independent of any charges imposed by the insurer. Any add on products that you may have purchased will be charged at the full price in the event of cancellation.

Please note that your insurance premium may have included a discount. If this is the case (the letter accompanying your insurance documents will tell you) in the event you cancel your policy before its expiry date, **we** will still include this discount.

If you wish to cancel your insurance contract you should advise **us** of this by writing (and return all insurance documents) …

If your policy is cancelled and there are unpaid monies, **we** may withhold any relevant documents, such as proof of no claims discount, until full payment has been received. **We** also reserve the right to refer the matter to a debt recovery agency to collect any unpaid monies owed to **us**. This may result in you incurring further costs, which you will be notified of in advance.

Certain fees (as shown in the Remuneration and Fees section) may apply to cover, or contribute to, costs incurred by ingenie in respect of the ingenie telematics devices. These include missed appointment fees, early cancellation of the insurance by you during the first period of insurance, a request by you to remove an ingenie device or the need to fit additional or replacement ingenie devices following a change of car or damage by you to

the ingenie device, please see the ingenie website for details www.ingenie.com/fees-andcharges or check the Policy Wording.

Validity Period: Where **we** have provided a quotation we operate in a real time live environment where rates change on a daily basis. Therefore rates are only guaranteed at the time the quote is obtained.

Claims: **We** do not process claims for your insurer. When you tell **us** about a claim **we** will need to take your name, address, policy number and enough detail about the claim so that your insurer can best decide how to proceed. In these circumstances, **we** are acting as your agent. Full details of how to make a claim are included in your policy booklet. Please note that your insurer shall have no responsibility in handling any claim if the incident date is after the date of a cancellation or the lapse or end date of your policy.

Client Money: **We** act as agent for the insurer for the collection of premiums and payment of premiums. This means that premiums are treated as being received by the insurer when received in **our** bank account and any premium refund is treated as received by you when it is actually paid over to you.

Confidentiality: We will treat information received from you relating to this Terms of Business Agreement and to the insurance business as confidential and will not disclose it to any other person not entitled to receive such information except as may be necessary to fulfil our obligations in the conduct of insurance business and except as may be required by law or by the FCA. For the avoidance of doubt we shall be entitled to disclose such information where necessary to insurers or reinsurers, actuaries, auditors, professional agents and advisers and other Group companies. This paragraph will not apply to information which was rightfully in the possession of us prior to this Terms of Business Agreement, which is already public knowledge or becomes so at a future date (otherwise than as a result of a breach of this paragraph) or which is trivial or obvious.

Use Of Your Personal information: Please read this notice carefully as it contains important information about **our** use of your personal information in this notice, **we**, **us** and **our** means Ageas Retail Limited and Ingenie Services Limited which includes any holding companies, subsidiaries and other linked companies. Your personal information means any information **we** hold about you or anyone else in connection with any product or service **we** are providing for you.

By taking out this insurance policy, you confirm that **we** may use your personal information for the purposes explained below.

You should also show this notice to anyone else whose name you give to **us** in connection with your insurance policy as it will also apply to them.

How We Use Your Personal Information: **We** will pass your personal information to your insurer or potential insurer ahead of renewal to enable them and **us** to manage your insurance policy including handling underwriting and claims and issuing renewal documents.

We and your insurer may also release your personal information to others if **we** need to prevent fraud or **we** are required or permitted to do this by law (for example, if we receive a legitimate request by the police or other authority); or there are any other circumstances where you have given your permission.

…

Marketing Purposes: **We** also may use, analyse and assess your personal information to give you information about other products and services offered by **us**. **We** use e-mail, telephone, post or SMS to do this.

If you do not want **us** to use your information for marketing purposes please telephone, email or write to **us** using the details shown on any of **our** letters.

…

Change Of Insurer: As your agent acting on your behalf, **we** may from time to time use a different insurer(s) to provide you with insurance. A change of insurer(s) may take place on the renewal date of your policy or at any other time. **We** will notify you prior to any change of insurer(s)and advise you of any change in the policy terms. Accordingly, you authorise **us** as your agent to place your insurance with insurers other than those named in your schedule or certificate. You will have the opportunity to terminate that policy both before and after such a change becomes effective.

Outstanding Monies Owed: You shall pay **us** on demand all outstanding monies arising from any contract you place with **us**. You agree that **we** can obtain these monies from the original debt or credit card using the details you supplied to pay the deposit to set up the insurance contract. However, **we** will write to you in good time to inform you of our intention to do so.

In the event of a valid claim made on your insurance contract, and subject to the relevant authority of your insurer, **we** shall offset any outstanding monies owed to **us** by you, from any financial settlement provided by your insurer under the terms of your insurance contract.

…

ANNEX 2

RELEVANT PROVISIONS OF THE VALUE ADDED TAX ACT 1994

Section 1 — Value added tax

(1) Value added tax shall be charged, in accordance with the provisions of this Act—

on the supply of goods or services in the United Kingdom (including anything treated as such a supply) … and references in this Act to VAT are references to value added tax.

Section 4 — Scope of VAT on taxable supplies

(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.

(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

Section 5 — Meaning of supply: alteration by Treasury order

(1) Schedule 4 shall apply for determining what is, or is to be treated as, a supply of goods or a supply of services.

(2) Subject to any provision made by that Schedule and to Treasury orders under subsections (3) to (6) below—

(a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;

(b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services.

Section 19 — Value of supply of goods or services

…

(4) Where a supply of any goods or services is not the only matter to which a consideration in money relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it.

Section 24 — Input tax and output tax

(1) Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say—

(a) VAT on the supply to him of any goods or services;

… being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.

(2) Subject to the following provisions of this section, "output tax", in relation to a taxable person, means VAT on supplies which he makes …

Section 25 — Payment by reference to accounting periods and credit for input tax against output tax.

(1) A taxable person shall—

(a) in respect of supplies made by him,

…

account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

(3) If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections (4) and (5) below, the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as a "VAT credit".

Section 26 — Input tax allowable under section 25

(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—

(a) taxable supplies;

…

Section 31 — Exempt supplies and acquisitions

(1) A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 and an acquisition of goods from another member State is an exempt acquisition if the goods are acquired in pursuance of an exempt supply …

Schedule 4 Matters to be treated as supply of goods or services

Paragraph 5

(1) Subject to sub-paragraph (2) below, where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, that is a supply by him of goods.

…

(5) Neither sub-paragraph (1) nor sub-paragraph (4) above shall require anything which a person carrying on a business does otherwise than for a consideration in relation to any goods to be treated as a supply except in a case where that person…is a person who (disregarding this paragraph) has or will become entitled–

(a) under sections 25 and 26, to credit for the whole or any part of the VAT on the supply, acquisition or importation of those goods or of anything comprised in them;

…

Schedule 6 Valuation: special cases

Paragraph 6

(1) Where there is a supply of goods by virtue of –

…

(b) paragraph 5(1) or 6 of Schedule 4 but otherwise than for a consideration…

then except where the person making the supply opts under paragraph A1(3) above for valuation on the flat-rate basis or paragraph 10 below applies, the value of the supply shall be determined as follows.

(2) The value of the supply shall be taken to be –

(a) such consideration in money as would be payable by the person making the supply if he were, at the time of the supply, to purchase goods identical in every respect (including age and condition) to the goods concerned; or

(b) where the value cannot be ascertained in accordance with paragraph (a) above, such consideration in money as would be payable by that person if he were, at that time, to purchase goods similar to, and of the same age and condition as the goods concerned; or

(c) where the value can be ascertained in accordance with neither paragraph (a) nor paragraph (b) above, the cost of producing the goods concerned if they were produced at that time.

(3) For the purposes of sub-paragraph (2) above the amount of consideration in money that would be payable by any person if he were to purchase any goods shall be taken to be the amount that would be so after the deduction of any amount included in the purchase price in respect of VAT on the supply of the goods to that person.

Schedule 9 Exemptions

Group 2 Insurance

Item No.

1. Insurance transactions and reinsurance transactions.

…

4. The provision by an insurance broker or insurance agent of any of the services of an insurance intermediary in a case in which those services—

(a) are related (whether or not a contract of insurance or reinsurance is finally concluded) to an insurance transaction or a reinsurance transaction; and

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

Notes:

...

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

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

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

(ii) persons who provide insurance or reinsurance;

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

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

(d) the collection of premiums.

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

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

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