



Neutral Citation Number: [2023] EWCA Civ 121

Case No: CA 2022/000203

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
UPPER TRIBUNAL TAX & CHANCERY DIVISION
Mr Justice Adam Johnson and Judge Ashley Greenbank
[2021] UKUT 0293 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 February 2023

Before:

LORD JUSTICE LEWISON
LORD JUSTICE NEWAY
and
LADY JUSTICE SIMLER

Between:

**THE COMMISSIONERS FOR HIS MAJESTY'S
REVENUE & CUSTOMS**

Appellant

- and -

GRAY & FARRAR INTERNATIONAL LLP

Respondent

Sarabjit Singh KC (instructed by **HMRC Solicitors Office & Legal Services**) for the
Appellant

David Milne KC & Barbara Belgrano (instructed by **Harbottle & Lewis LLP**) for the
Respondent

Hearing dates: 17 & 18 January 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 13 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Simler:

Introduction

1. This appeal concerns the liability of Gray & Farrar International LLP (“G&F”) for Value Added Tax (“VAT”) on matchmaking services provided to clients outside the UK and EU. The outcome turns on whether the single service supplied constitutes “*services of consultants ... and other similar services ... and the provision of information ...*” within article 59(c) of Council Directive 2006/112/EC (“the Principal VAT Directive”). If so, and the client is outside the UK and EU, the services are treated as supplied outside the EU and therefore outside the scope of VAT.
2. G&F charged no VAT on supplies of their services to clients (for VAT periods between December 2012 and September 2016) belonging outside the EU on the basis that the service fell within article 59(c) because what was provided was consultancy services. By a decision dated 30 August 2016, the Commissioners for HM Revenue and Customs (“HMRC”) concluded that G&F’s supplies of matchmaking services to clients outside the UK and the EU, did not qualify as consultancy, and were within the scope of VAT. Following an unsuccessful review, G&F appealed. The First-tier Tribunal (Judge Hellier and Ms Wilkins) (“the FTT”) agreed with HMRC (by majority, Judge Hellier having a casting vote) and dismissed G&F’s appeal by a decision dated 8 November 2019, reported at [2019] UKFTT 0684 (TC). The FTT gave permission to appeal.
3. On G&F’s further appeal, the Upper Tribunal (Tax and Chancery Chamber) (Adam Johnson J and Judge Greenbank) (“the UT”) allowed the appeal by a decision dated 25 November 2021, reported at [2021] UKUT 0293 (TCC), [2022] STC 94. The UT held that the FTT had erred in law by failing to apply the correct test for characterising the single service supplied, namely the “predominant element test” derived from EU law. The error led to the FTT’s failure properly to characterise the supply made by G&F to relevant clients. The UT set aside the FTT decision, and remade the decision, holding that G&F’s services were “*consultancy services ... or similar services ... and the provision of information*” within article 59(c).
4. HMRC appeal with leave of Andrews LJ. There are four free-standing grounds of appeal, all directed at the UT’s conclusion that the services supplied by G&F fall within article 59(c) and the domestic implementing legislation. They are:
 - i) Ground 1: the UT was wrong to set aside the FTT’s decision on the basis that the FTT had failed to consider the application of the predominant element test. There is no mandatory requirement to consider or apply this test.
 - ii) Ground 2: if there is a predominant element test, the UT failed to characterise G&F’s supply for VAT purposes as an introductory service and not within article 59(c) of the Principal VAT Directive.
 - iii) Ground 3: the UT wrongly found that G&F provided “services of consultants” (or similar services) within the meaning of article 59(c) of the Principal VAT Directive.

- iv) Ground 4: the UT wrongly found that it could read “data processing and provision of information” in article 59(c) disjunctively and that G&F benefited from that provision merely if it provided information but did not provide data processing.
- 5. The appeal is resisted by G&F who seeks to uphold the UT’s order for essentially the reasons it gave.
- 6. The parties are represented as they were below. Sarabjit Singh KC appears for HMRC and David Milne KC and Barbara Belgrano appear for G&F. The court has been assisted by their submissions, both written and oral.

The legislation

- 7. VAT is an EU tax charged on the supply of goods or services. The primary source of law on VAT was originally contained in Directive 77/388/EEC (“the Sixth Directive”), but on 1 January 2007 it was replaced by the Principal VAT Directive which applies to the period in issue in this case. As the two Directives contain effectively identical provision for present purposes, it is unnecessary to set out the corresponding provisions in the Sixth Directive (though they are discussed in the case law to which I shall refer).
- 8. Article 2.1 of the Principal VAT Directive defines the scope of VAT. It provides (among other things) that VAT is liable to be levied on “(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such ...”. There are definitions of “taxable person” in article 9 and “supply of services” in article 24 but they are not in issue and it is unnecessary to set these out.
- 9. The general rule is that the place where a service is supplied is deemed to be the place where the supplier has established his or her business or has a fixed establishment from which the service is supplied, or in the absence of either, the permanent address where the supplier usually resides. There are, however, exceptions, for example as provided by article 59. Article 59 is headed “Supply of services to non-taxable persons outside the Community”. It provides so far as relevant to this appeal:

“The place of supply of the following services to a non-taxable person who is established or has his permanent address or usually resides outside the Community, shall be the place where that person is established, has his permanent address or usually resides:

(c) the services of consultants, engineers, consultancy firms, lawyers, accounts and other similar services, as well as data processing and the provision of information;

...”

As already indicated, article 59(c) is in essentially identical terms to the third indent to article 9(2)(e) of the Sixth Directive. The only difference is the reference to “consultancy firms” in article 59(c) which replaced the words “consultancy bureaux”

in the third indent. Article 59(c) is therefore to be interpreted in the same way as the third indent.

10. Article 59(c) has been transposed into UK law by section 7(5) and schedule 4A, paragraph 16(2)(d) of the Value Added Tax Act 1994 (the “VAT Act 1994”). So far as relevant, paragraph 16 provides:

“(1) A supply consisting of the provision to a person (“the recipient”) who –

(a) is not a relevant business person, and

(b) belongs in a country which is not a member State (other than the Isle of Man),

of services to which this paragraph applies is to be treated as made in the country in which the recipient belongs.

(2) This paragraph applies to –

...

(d) service of consultants, engineers, consultancy bureaux, lawyers, accountants, and similar services, data processing and provision of information, other than any services relating to land,

...”

11. It is common ground in the appeal that the relevant supplies were not made to a “relevant business person”; that the person (or relevant client) “belongs in a country which is not a member State (other than the Isle of Man)”; and that the services were not services “relating to land”.
12. There is no dispute that the domestic legislation must be construed (so far as possible) in conformity with article 59(c) of the Principal VAT Directive. There is no suggestion that the domestic legislation has a different effect in this case. Accordingly I refer below to the words used in article 59(c) in preference to paragraph 16(2)(d) VAT Act 1994.

The Facts

13. The evidence before the FTT included witness evidence from Virginia Sweetingham, the founder of the business, and her daughter, Claire Sweetingham, the managing partner of G&F. The FTT made findings of fact set out at paragraphs 37 to 67 of the FTT decision. The UT summarised those findings at paragraph 10 of its decision and I gratefully adopt that summary as follows:

(1) G&F was founded by Virginia Sweetingham in 2005. In the early years of the business, she worked alongside her daughter, Claire Sweetingham. Claire Sweetingham took over the management of the business in 2010. She is the current managing partner.

(2) G&F describes its business in advertisements as a “matchmaking service”. It attracts potential clients through advertisements and word of mouth. When a potential client approaches G&F, generally by email or telephone, there will usually be a short telephone conversation in which the extent and nature of G&F’s services and terms will be discussed and there may be some intimation of the prospective client’s needs.

(3) A principle at the core of the business of G&F was and remains to take away some of the risks associated with dating by being an active intermediary. G&F’s service includes some form of face-to-face contact with a client before any introductions are made. This enables G&F to verify its clients; it makes it more difficult for a person to present himself or herself differently as someone might do on an unmediated dating site; and it also enables a better match. To this was added, where appropriate, advice to a client on how to modify his or her behaviour.

(4) G&F now offers three levels of matchmaking service: Club, Custom and Bespoke; between 2012 and 2016 it offered only two (Club and Bespoke):

(a) For the Club service G&F agreed that over a 12 month period of active membership it would provide a minimum of eight introductions to potential partners from G&F’s client base. An introduction occurs when each party, informed of the characteristics of the other, agrees to his or her telephone number being given to the other. Active membership can be paused while a relationship is ongoing or for other reasons such as holidays or work commitments. The fee for the Club service is £15,000 plus VAT.

(b) The Custom and Bespoke services were more expensive (£25,000 to £140,000) and encompassed searching for prospective matches outside G&F’s client base, or where a client had particular geographical or other preference. Claire Sweetingham thought that some 15% of G&F’s clients required the making of a search outside its client base.

(5) G&F’s terms and conditions are brief. Apart from matters of confidentiality the only express commitment by G&F is to provide the minimum of eight introductions which G&F considers suitable for the client’s requirements within the 12 months of active membership.

(6) G&F conducts some vetting of clients from publicly available data and, mainly in relation to Bespoke clients’ potential matches, with its network of contacts.

(7) When a client signs up to G&F’s terms and conditions, the client is interviewed. Approximately 320 new clients are interviewed each year. These interviews normally take 1½ to 2 hours and take place face-to-face or by Skype. After the interview (and perhaps after another meeting) G&F prepare a “brief” describing the client and the characteristics of the person he or she is seeking. These may include attributes such as sex, race, religion, location, wealth, age and appearance and also less tangible aspects such as characteristics and character. The brief is sent to the client for approval.

(8) After the brief has been agreed G&F identifies possible matches from its existing client base or, in the case of the more tailored services, searches for and identifies possible matches by approaching its network of contacts or placing appropriate advertisements. When a match is identified each party is given a description of the

other and some explanation of why the other might be a good match. If both are content, telephone numbers are provided.

(9) Thereafter G&F makes follow-up telephone calls often once or twice a week to the client, seeking feedback from each of its clients following an introduction: information as to whether the client had spoken to the counterparty and agreed a date, and on each client's impressions after the first and any subsequent dates. The feedback might give rise to amendments to the brief; if the date is successful or a relationship develops the client may put future introductions on hold; otherwise further introductions may be suggested. In the telephone calls, advice or coaching may be given to the client.

(10) Claire Sweetingham undertakes the majority of interviews with clients. The balance are undertaken by a second interviewer. On the evidence before it, the FTT proceeded on the basis that Claire Sweetingham undertook approximately 65% of interviews, although it accepted that this was an indicative figure and not precise.

(11) The second interviewer would not have the same extensive experience as Claire Sweetingham. If a client was interviewed by the second interviewer Claire Sweetingham would have some (non-email) contact with the client before or after the main interview, but before the brief was created. This interview would inform the brief.

(12) Claire Sweetingham was responsible for the drafting of the brief before it was sent to the client either by drafting the brief herself or by reviewing a draft prepared by the second interviewer.

(13) The brief would not simply record the wishes expressed by the client: sometimes a client would rely upon G&F to identify the type of person who would be a good match; sometimes Claire Sweetingham would identify requirements which the client had not articulated or realised. There were clients who articulated clear fixed requirements but there would be aspects of personality which could be teased out during the interview process which would be relevant to the brief: a client did not always know what he or she wanted even if they thought they did.

(14) Claire Sweetingham's experience enabled her to identify, by reading between the lines, from intuition, from body language and from general approach, personality traits which were relevant to the selection of a suitable partner, and such traits were, if accepted by the client, encapsulated in the brief and reflected in the introductions offered. However, a large part of the brief was usually either provided directly by the client or from factual enquiry.

(15) The matching of one client to another (or of clients to headhunted possible matches) was not done by a computer programme or by any sort of algorithm. Claire Sweetingham alone was responsible for the selection of introductions. The support team would tell her for which clients introductions were needed, she would devise a shortlist which would, inter alia, identify other clients within the target age range and sex, and she would look at the client's record and reports and the files on any previous introductions to find a new introduction.

(16) The support team consisted of some four assistants (the number varied over the period in question) who had varied backgrounds and did not have extensive expertise in all the aspects of G&F's business.

(17) Save in relation to those clients who opted for the most expensive service (who dealt exclusively with Claire Sweetingham), contact telephone calls to clients after the initial interview process were normally conducted by the support team.

(18) Although the support team generally communicated possible introductions to clients, sought feedback on how meetings and relationships (if formed) were going, and provided some coaching, counselling and support, G&F's offices were open plan and Claire Sweetingham could be brought into such conversations (or would ask to be brought into them) when needed and would also make follow up calls.

(19) The support team also provided the majority of the hand-holding contact with clients on or after the provision of the details of a possible match, but when things went wrong Claire Sweetingham became more involved.

The FTT and UT decisions

14. There was no suggestion before the FTT that what G&F supplied was not a single composite service (in other words, a service made up of a number of elements that are so closely linked that they form, objectively, a single indivisible economic supply which it would be artificial to split). The FTT regarded that approach as correct, and neither side has sought to go behind it, or any of the findings of fact made by the FTT.
15. As to how to characterise the supply and determine whether the service fell within article 59(c), the FTT reasoned as follows. First, the FTT indicated that this question might be answered by looking at the principal components of the supply and asking whether they all fall within article 59(c), with any ancillary components treated as subsumed within the principal element. Secondly, determining the nature of the service supplied was to be viewed from the perspective of a typical client (in other words, "a person seeking a partner with a view to a long-term relationship"). Thirdly, information about potential matches was provided, but on its own, this did not satisfy the client's purpose. To do that, the information had to come with G&F's advice that the person had been verified and might be compatible. That advice was part of what was provided when details of a match were given to the client. Fourthly, G&F support staff had regular telephone calls with clients after a date, seeking further information, providing a listening ear, which might enhance future advice; and behavioural advice in the form of coaching and counselling was provided by the liaison team (none of whom were experts). Fifthly, the way in which G&F provided or created the advice (for example, using intuition and experience) was not part of what it provided; it used various tools and methods to formulate the advice and decide on the information to provide, but they are not what was supplied. Overall, the information and the advice identified by the FTT were all the client received and were therefore the constituents of the supply by G&F.
16. The FTT concluded that the information provided plainly fell within the terms of article 59(c). The remaining question was whether the advice element provided was expert advice, based on a high degree of experience, amounting to consultancy. On that question, the FTT concluded that advice given by Claire Sweetingham, an expert

whose expertise lay in matchmaking, was within her sphere of competence and was expert advice.

17. The post-introduction liaison provided by the support team was not expert advice. It was not referred to in G&F's terms and conditions, but was an integral part of the composite matchmaking service provided by G&F. It differentiated G&F's service from an online dating service. It was an important and material feature of G&F's service from the perspective of a client, and not merely incidental to other parts of the service supplied. Ms Wilkins concluded that this should properly be regarded as ancillary to the expert advice provided. However, the presiding member of the FTT, Judge Hellier, disagreed. He concluded that the liaison team's actions promoted and helped the forging of a successful relationship but did not assist with the provision of information about a potential partner, nor did they serve the supply of Claire Sweetingham's advice. The support provided was in addition to the information and expert advice supplied. It was not sufficiently inconsequential to be just part of those elements. On that basis, he concluded "*that the service provided went beyond the provision of information and expert advice and did not fall within para (c)*". The FTT dismissed the appeal accordingly.
18. The UT agreed with much of the FTT's reasoning but differed with the FTT as to the means of characterising a composite supply for VAT purposes. In particular, the UT agreed with G&F that, following *Levob Verzekeringen BV and OV Bank NV v Staatssecretaris van Financiën* (Case C-41/04) [2006] STC 766 ("*Levob*") and *Město Žamberk Finanční ředitelství v Hradci Králové* (Case C-18/12) [2014] STC 1703 ("*Mesto*"), where it is possible to identify a predominant element amongst the elements that characterise the single complex supply, the primary test for characterising the supply is the predominant element test. Following *Mesto*, the predominant element must be determined from the viewpoint of the typical consumer having regard to an overall assessment of the objective characteristics of the supply. The UT acknowledged that there may be cases where "*the weighing up of the relevant characteristics of the supply does not produce a predominant element*". That might not always matter (for example where two elements are of equal importance and both fall within the relevant exemption or provision being considered) but where it does, the principal/ancillary test set out by the CJEU in *Card Protection Plan Ltd v Customs and Excise Commissioners* (Case C-349/96) [1999] 2 AC 601 ("*CPP*") is also an available test, but in most cases where this test applies, the predominant element test will also apply and produce the same result. The UT also acknowledged some support in domestic case law (see especially *College of Estate Management v Customs and Excise Commissioners* [2005] UKHL 62, [2005] 1 WLR 3351 and *Byrom (t/a Salon 24) v HMRC* [2006] EWHC 111 (Ch), [2006] STC 992) for a test involving the identification of the "overarching" nature of the supply. However, there were no examples of the application of this test by the CJEU.
19. On the question of classification, the FTT had assessed G&F's supply by reference to the "principal components" of the supply from the viewpoint of the typical client. However, the FTT made no reference to the predominant element test. Having apparently dismissed the application of the principal/ancillary test it was incumbent on the FTT to consider the potential application of the predominant element test derived from *Levob* and *Mesto* and the failure to do so was an error of law. The UT observed that the predominant element test permits of the possibility that there may be

a material element of the supply, which is not ancillary to a principal element (in the sense used in *CPP*) but which does not govern the characterisation of the supply because another element predominates. This was not considered by the FTT because it did not consider the application of the predominant element test. This meant that the FTT majority failed properly to characterise the supply made by G&F.

20. The UT decided to remake the decision. It sought to apply the predominant element test as set out in *Mesto*. I shall return in more detail to its approach below. It held in summary, that the qualitatively most important element of the supply to a typical consumer was the provision of the introduction to a prospective partner, an element incorporating advice and the provision of information about the potential match. Given the FTT findings, the predominant element of the supply from the point of view of a typical consumer was the advice provided as part of the matchmaking service *combined* with the information relating to a potential match. The addition of post-introduction liaison services was not sufficient to displace the conclusion that the combination of expert advice and the provision of information regarding a potential match was the predominant element of the supply made by G&F. The appeal was therefore allowed.
21. I should also explain in light of grounds 3 and 4, that in the course of its reasoning, the UT agreed with two conclusions reached by the FTT, about the proper interpretation of article 59(c), both of which continue to be challenged by HMRC.
22. First, in relation to the phrase “services of consultants” in article 59(c), HMRC have argued throughout these proceedings that the effect of the CJEU decision in *Maatschap M J M Linthorst, K G P Pouwels and J Scheres cs v Inspecteur der Belastingdienst/Ondernemingen Roermond* (Case C-167/95) [1997] STC 1287 (“*Linthorst*”) is to limit the meaning of this phrase to supplies made by members of the so-called “liberal professions”. The FTT rejected this contention, and the UT agreed. The UT held that the focus of article 59(c) is on the nature of the service supplied and not the characteristics or identity of the person providing it. The list of professionals in article 59(c) is used simply to define the nature of the activities. Although paragraph 20 of the CJEU’s decision in *Linthorst* noted that a common feature of the disparate activities mentioned in article 59(c) is that they all come within the heading of liberal professions, the following sentence and paragraph 21 make clear that it is the independent nature of the service being provided that is highlighted, rather than any characteristic of the person providing it.
23. Secondly, HMRC argued that the phrase “data processing and the provision of information” in article 59(c) should be treated as a single composite test so that a supply could only fall within it if it involved both the supply of data processing and the provision of information. The FTT rejected that argument, holding that the wording of article 59(c) (in particular the words “as well as” and the definite article before “provision of information”) suggested that the phrase should be read as referring to two separate activities. In other words, where either the processing of data for a customer or the provision of information to a customer is the characteristic element of the supply, or is part of other activities falling within article 59(c), that is sufficient. The UT agreed.

The parties' contentions in summary

24. For HMRC, Mr Singh KC concentrated on the first two grounds as his primary grounds on this appeal. First, he challenged the UT's conclusion that a predominant element test is mandatory, submitting that there is no legal requirement to consider, still less apply, the predominant element set out in *Mesto*. The approach identified in that case is purely interpretative guidance. Further, the existence of a predominant element test is inconsistent with *College of Estate Management* and has not been approved by the Court of Appeal or House of Lords/Supreme Court. Instead, domestic authorities point to an "overarching supply" test. It is legally permissible to assess the supply through the prism of either test. Judge Hellier's description of a supply which "went beyond the provision of advice and information" was in essence, a description of the application of the overarching supply test, and was entirely permissible.
25. Secondly, if it is necessary to consider the predominant element test, the UT erred in any event in identifying two combined elements as the predominant element of supply. This involved three errors: (i) the UT failed to identify a predominant element; (ii) there was in fact no predominant element; and (iii) the only conclusion open to the UT in light of the economic purpose of the contract, the aim of the typical consumer and the economic reality, was that, properly characterised, the supply was a single service concerned with the provision of introductions. The single introductory service was artificially split by the UT. The typical client contracted for a minimum number of introductions to potentially suitable, prospective partners, and not to receive advice from G&F or to be provided with information. The provision of information and advice were simply the means of performing the introductory service.
26. Thirdly, if the first two arguments fail, Mr Singh repeated the argument that the phrase "services of consultants" in article 59(c) is limited to supplies made by members of "liberal professions". This is the single common feature. The second sentence of paragraph 20 of *Linthorst* simply indicates that the wording does not cover all liberal professions, or all activities carried out in an independent manner. In other words, liberal professions not mentioned are not covered. The UT therefore erred by failing to limit the phrase accordingly when applying it here. The essential characteristics of a liberal profession are the services are of an intellectual character; they require a high-level of qualification; and they are subject to strict regulation. The UT failed to consider these features. Had it done so, it is clear that G&F's service does not meet this test.
27. Finally, and again if necessary, the phrase "data processing and the provision of information" in article 59(c) should be read conjunctively: if it was intended that the phrase should be read disjunctively, the word "or" would have been used. Reading the "provision of information" separately is incongruous with the other specifically defined terms in the clause. Further, the result of such a wide interpretation would be that many services never intended to fall within article 59(c) would in fact do so.
28. For G&F Mr Milne KC submitted that G&F's supply consisted of consultancy services (the provision of expert advice), the provision of information and the provision of customer liaison team support. Those elements did not constitute separate supplies, but formed part of one composite supply. It was therefore necessary to determine the overall character of the supply. In this regard, EU case law is clear: the predominant element test is the primary test for characterising a single complex

supply. This test has not been expressly approved by the Court of Appeal or above, but it has been applied by the Upper Tribunal in *HMRC v Metropolitan International Schools Ltd* [2017] UKUT 431 (TCC), [2017] STC 2523 (“*MIS*”) and *HMRC v Wetheralds Construction Ltd* [2018] UKUT 0173 (TCC). Mr Milne commended the hierarchy of tests identified by the Upper Tribunal in *MIS* at [78] as reflecting the correct approach. Notwithstanding the UK’s withdrawal from the EU, the decisions of the CJEU in *Levob* and *Mesto* remain binding authorities in cases before the tax tribunals and this is not a case in which it would be appropriate for this court to depart from these authorities. The FTT did not apply the predominant element test and accordingly, the UT was correct to set aside the FTT decision.

29. Nor was there any error in the UT’s application of the test to characterise G&F’s supply. On the FTT’s findings, the predominant elements of G&F’s services, as viewed by the typical client, are the provision of expert advice and information. The “liaison team support” element was not the predominant element. A supply can fall within article 59(c) if it comprises one or more of the activities within article 59(c). It need not fall within only one of the listed categories. It is therefore unnecessary in such a case to decide which element predominates.
30. Mr Milne accepted that the contract is the correct starting point, but emphasised that the FTT findings show that clients generally have one or two short telephone conversations in which the extent and nature of G&F’s services are discussed, fleshing out the short form contract before it is signed. The provision of introductions involved the combination of the core constituent components, the provision of information and expert advice. This is what met the typical client’s requirements, and is what he or she bargained for. The UT was correct to recognise that although the supply might be described as an introduction service, this is merely a label, and does not prevent the activities which constitute the supply falling within article 59(c).
31. In relation to grounds 3 and 4, Mr Milne submitted that both tribunals were correct to reach the conclusions they did for the reasons they gave. Article 59(c) falls to be applied by reference to the nature of the services supplied, as both the UT and FTT held. The test proposed by HMRC is flatly inconsistent with the CJEU’s decisions in *Linthorst, von Hoffman v Finland* (Case C-145/96) [1997] STC 1321 (“*von Hoffman*”) at [15] and *Commission of the European Communities v Germany* (C-401/06) [2008] STC 2906 (“*Commission v Germany*”) at [31]. As for “data processing and the provision of information”, it is evident from paragraph (c) and the rest of article 59 that “and” is used disjunctively. In any event, he submitted that G&F’s services do in fact include the processing of the client’s data.

Analysis and conclusions

32. Before addressing the grounds of appeal it is important to recognise, as Mr Milne emphasised, that like the corresponding provision in the Sixth Directive, article 59(c) of the Principal VAT Directive is not an exemption that must be strictly construed.
33. The general rule for VAT purposes is that VAT is normally levied at the place of establishment of the service provider. The object of the alternative rules provided for in article 59 is to identify the place where certain services are deemed to be supplied so that the customer is taxed at the place where the customer is established or has established his or her business, in order to avoid conflicts of jurisdiction which may

result in double taxation or non-taxation, albeit only as regards specific situations. The result, as the CJEU explained in *Commission v Germany*, is that:

“30. Consequently, when interpreting Article 9 of the Sixth Directive, Article 9(1) in no way takes precedence over Article 9(2). In every situation, the question which arises is whether it is covered by one of the instances mentioned in Article 9(2). If not, it falls within the scope of Article 9(1) (see, *inter alia*, *Dudda*, paragraph 21, and *SPI*, paragraph 16).”

34. In *Linthorst* the words “the services of consultants ... and other similar services” (used in both the third indent and article 59(c)) were considered in relation to the question whether veterinary services fell within the terms of the clause. The CJEU said this at paragraphs 20 to 30:

“20. It should be noted that the only common feature of the disparate activities mentioned in that provision is that they all come under the heading of liberal professions. Yet, as the German Government rightly observed, if the Community legislature had intended all activities carried on in an independent manner to be covered by that provision, it would have defined them in general terms.

21. Moreover, if the legislature had intended that provision to cover the medical profession generally, as an activity typically carried out in an independent manner, it would have included it in the list, since, as the national court and the Advocate General in paragraph 22 of his Opinion pertinently observe, other provisions of the Sixth Directive, such as in particular the transitional exception provided pursuant to Article 28(3)(b) in conjunction with Annex F, specifically mention the services of veterinary surgeons.

22. It is appropriate to add that, whereas veterinary surgeons' duties sometimes involve advisory or consultancy aspects, that fact is not enough to bring the principal and habitual activities of the profession of veterinary surgeon within the concepts of 'consultants' or 'consultancy bureaux' or to cause them to be regarded as 'similar'.

23. It must therefore be held that the typical duties of a veterinary surgeon do not fall within the third indent of Article 9(2)(e) of the Sixth Directive.”

35. In *von Hoffman* the same provision was considered in relation to whether the services of an arbitrator fell within its terms. In *Commission v Germany* the CJEU summarised the following conclusions drawn in those cases:

“31. In that regard, it must be stated that the third indent of Article 9(2)(e) of the Sixth Directive refers not to professions, such as those of lawyers, consultants, accounts or engineers,

but to services. The Community legislature has used the professions mentioned in that provision as a means of defining the categories of services to which it refers (see *von Hoffmann*, paragraph 15). The expression ‘other similar services’ refers not to some common feature of the disparate activities mentioned in the third indent of Article 9(2)(e) of the Sixth Directive but to services similar to those of each of these activities, viewed separately. A service must thus be regarded as similar to those of one of the activities mentioned in that provision when they both serve the same purpose (see, to that effect, Case C-167/95 *Linthorst, Pouwels en Scheres* [1997] ECR I-1195, paragraphs 19 to 22 and *von Hoffmann*, paragraphs 20 and 21).”

36. It follows that the question to be determined in G&F’s case is whether its services were, or were similar to, the services provided by consultants or consultancy firms, or fell within “data processing and the provision of information”. To answer the first part of the question, the services G&F provided must be compared with services “principally and habitually” provided by a consultant (see *Linthorst* at [22]). The necessary similarity is achieved if both types of service serve the same purpose.
37. Leaving aside the question raised by HMRC in ground 3, whether there is a separate requirement that consultants must be drawn from the “liberal professions”, in *American Express Services Europe Ltd v HMRC* [2010] EWHC 120 (Ch) [2010] STC 1023 at [80], Proudman J held that the services that consultants “principally and habitually supply” consist of the giving of “advice based on a high degree of expertise”. I did not understand either side to challenge that description and I agree with it.
38. The questions that must be answered on the first two grounds are whether in order to characterise the single composite service supplied, the predominant element test should have been applied; and if so, whether the UT correctly characterised the service for the purposes of deciding whether it fell within article 59(c). I turn to address those questions.

Is there a predominant element test?

39. HMRC contend that the predominant element test identified in the jurisprudence of the CJEU is not a mandatory test. It is common ground that such a test has not been recognised as such by the Court of Appeal or Supreme Court.
40. It is therefore necessary to consider whether EU law does establish a general principle of law for the characterisation of a supply, as the UT held. If it does, there is no dispute about the continuing supremacy of such a general principle. This is because section 2 of the European Union (Withdrawal) Act 2018 has preserved the effect of EU-derived domestic legislation (such as the VAT Act 1994) which is “retained EU law” as defined by section 6(7) of that Act. By section 6(3) of the same Act, retained case law and retained general principles of EU law (that is, retained domestic and EU case law and general principles) continue to apply to any question as to the meaning or effect of retained EU law: see section 5(2), section 6(3) and section 6(7) of the European Union (Withdrawal) Act 2018. Mr Singh did not seek to argue otherwise.

41. The predominant element test is most clearly identified in *Mesto*. The context was services supplied by an aquatic centre and whether they fell within a VAT exemption for “the supply of services closely linked to sport or physical education” (within article 132(1)(m) of the Principal VAT Directive which is an exemption). Two types of facility were supplied: sporting facilities such as a swimming pool divided into lanes, a beach-volleyball court and table tennis; and recreational facilities including a paddling pool, waterslides and a natural river for swimming. The CJEU referred to *Levob* where the predominant element test was used in the context of supplies of standard software that was customised to meet the customer’s business needs, to identify whether, if this was a single supply, it was a supply of goods or a supply of services, and if a supply of services, where those services were supplied. At paragraphs 29 and 30 the CJEU in *Mesto* held:

“29. In order to determine whether a single complex supply must be categorised as a supply closely linked to sport within the meaning of art 132(1)(m) of the VAT Directive although that supply also includes elements not having such a link, all the circumstances in which the transaction takes place must be taken into account in order to ascertain its characteristic elements and its predominant elements must be identified (see, to that effect, in particular, *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* (Case C-231/94) [1996] STC 774, [1996] ECR I-2395, paras 12 and 14; *Levob Verzekeringen and OV Bank*, para 27; and *Bog*, para 61)

30. It follows from the case law of the court that the predominant element must be determined from the point of view of the typical consumer (see, to that effect, in particular, *Levob Verzekeringen and OV Bank*, para 22, and *Everything Everywhere Ltd (formerly T-Mobile (UK) Ltd) v Revenue and Customs Comrs* (Case C-276/09) [2011] STC 316, [2010] ECR I-12359, para 26) and having regard, in an overall assessment, to the qualitative and not merely quantitative importance of the elements falling within the exemption provided for under art 132(1)(m) of the VAT Directive in relation to those not falling within that exemption (see, to that effect, *Bog*, para 62).”

42. The language used by the CJEU suggests that this is a mandatory requirement. The exercise is an objective one. The view of the typical consumer, determined by reference to objective factors, is critical. The question is what is the predominant element in what the typical consumer thinks he or she is acquiring. An overall assessment must be made of all elements of the supply to determine their importance to the typical consumer, both qualitatively and quantitatively, to decide which predominates.
43. Mr Singh’s challenge is limited to the suggestion that the test is mandatory. He relied on a number of domestic cases, all acknowledged as pre-dating *Mesto*, to make good his argument that there is no single test that must, as a matter of law, be applied. Instead, he submitted that there are differing tests that might be adopted according to the differing circumstances of any particular case. He submitted that a mandatory predominant element test is inconsistent with *College of Estate Management* at [12]-

[13] (Lord Rodger) and [32] (Lord Walker). In that case the House of Lords applied an “overarching” or “economic reality” test to decide whether for the purposes of determining whether a zero-rating provision for books applied, the College should properly be regarded as making a separate supply of printed materials or a single supply of education, of which the provision of the printed materials was merely one element. Lord Rodger held that the key lies in analysing the essential features of the transaction. He continued:

“12. ...The question is whether, for tax purposes, these are to be treated as separate supplies or merely as elements in some over-arching single supply. According to the Court of Justice in *Card Protection*, at para 29, for the purposes of the directive the criterion to be applied is whether there is a single supply “from an economic point of view”. If so, that supply should not be artificially split, so as not to distort (altérer) the functioning of the value added tax system. The answer will accordingly be found by ascertaining the essential features of the transaction under which the taxable person is operating when supplying the consumer, regarded as a typical consumer. Since the 1994 Act has not adopted any different mechanism to give effect to this aspect of the directive, the same approach must be applied in interpreting the provisions of the Act. The key lies in analysing the transaction.

13. In the present case the tribunal, having taken into account all the factors, concluded that the College made one supply, the provision of education. In my view, the tribunal were entitled to reach that conclusion on the basis of the findings which they made – especially their finding that the students took the courses in order to obtain the relevant qualification offered by the College. The transaction was therefore one which gave the students the opportunity, by successfully studying the printed materials and completing the other necessary steps, to obtain a valuable qualification. That was what the students were purchasing. ...”

44. In writing Mr Singh went further, submitting that the existence of any kind of predominant element test has been comprehensively rejected by our domestic courts. He relied (among others) on *Byrom (t/a Salon 24)* where at [70] it is apparent that Warren J did not adopt the predominant element test; and *David Baxendale Ltd v HMRC* [2009] EWHC 162 (Ch), [2009] STC 825 at [80], a decision of Morgan J upheld by the Court of Appeal ([2009] EWCA Civ 831, [2009] STC 2578) without reference to any predominant element test. These decisions pre-date *Mesto* and in any event, I do not read them as rejecting a predominant element test.
45. Mr Singh also relied on *Holland & Vigdor Ltd v HMRC* [2008] EWHC 2621 (Ch), [2009] STC 150, where the taxpayer argued that Warren J was wrong in *Byrom (t/a Salon 24)* to characterise the supply by reference to the economic and social reality rather than the predominant element in light of *Levob*. Blackburne J rejected this challenge, stating:

“78. ... As Warren J’s analysis has demonstrated (at paragraphs [44] to [46]) courts at the highest level, at any rate in this country, have been willing to characterise a single supply made up of several elements by an element which either is not, or may not, be the principal element within the overall supply.”

Blackburne J did make clear however (as Mr Singh acknowledged) that the point was not *acte clair*: see [79].

46. I accept Mr Singh’s submission that the case law shows that different tests have been adopted at different times and in different circumstances to answer the characterisation question. The CJEU has itself recognised the difficulty of prescribing a definitive test in the context of identifying the number of supplies for VAT purposes (see *CPP* at [27] to [29]) because the diversity of commercial operations made it impossible to give exhaustive guidance as to how to approach the problem correctly in all cases. The same may also be said of the closely related characterisation question. In *CPP* the principal/ancillary test was used to answer the question whether a supply was properly viewed as a single complex supply or as comprising multiple supplies, but could equally have been used to determine the appropriate characterisation of a single complex supply. However, that test can only be applied where it is possible to identify one principal supply (or element of the supply) to which the other supplies or elements are subordinate or so minor as to be capable of being disregarded. It is hard to see in what circumstances this test would produce a different answer from the predominance test since a principal element of a supply will almost always be predominant. I note in this context that the principal/ancillary test was applied by the CJEU in *Purple Parking v HMRC* (Case C-117/11) [2012] STC 1680 to decide whether there was a single complex supply of airport parking and transportation for passengers between the car park and the airport terminal, or whether these were distinct supplies. Nonetheless, in concluding that this was a single supply, the CJEU expressed the view that the parking service was predominant.
47. The question remains whether *Mesto* goes further than the earlier cases referred to, and has established a principle of EU law that the predominant element test is the primary test to be applied in characterising a supply for VAT purposes. I have concluded that it has. In *Mesto* the CJEU gave authoritative guidance on the test for deciding how a single complex supply must be categorised for VAT purposes. The language used by the CJEU in setting out this test is mandatory. Where it is possible to do so, the predominant element must be determined. This is the primary test to be applied for this purpose.
48. I acknowledge, as did the UT, that this may not always be possible. There may be cases where there is no predominant element in a single composite supply viewed through the eyes of a typical consumer. *College of Estate Management* might be regarded as such a case: in the context of a single supply of education, the typical student purchased the courses in order to obtain the qualification offered by the College. Viewed by the student, the supply of books was part of that larger composite supply of education with a view to qualification, and could not be said to predominate for the purposes of the *Mesto* test, even if the provision of books was regarded as an important element of the single supply. A similar analysis applies to *Byrom (t/a Salon 24)*, where the supply was of “massage parlour services” to those offering their services to clients. An important element of the single supply was the provision of a

room. But viewed from the perspective of the masseuse the provision of the room could not be said to predominate in the larger supply provided, which included toilet, changing and shower facilities, a seating and other areas for clients, bed linen and towels. In such cases, the overarching supply test might remain relevant, either to help decide whether a particular element predominates in the eyes of the typical consumer and the qualitative importance attached to a particular element of the single supply; or as reflecting how the typical consumer views the transaction where there is no predominant element so that the predominant element test cannot be applied. Equally, I do not rule out the possibility, given the diversity of commercial transactions to which these provisions might apply, that there may be cases where the economic reality justifies the application of the overarching supply test as a separate test to be applied.

49. In *MIS*, Mann J and Judge Ashley Greenbank reached the same conclusions and found that there was a hierarchy of tests to be applied in characterising a single supply for VAT purposes. They described it as follows at paragraph 78:

“(1) The *Mesto* predominance test should be the primary test to be applied in characterising a supply for VAT purposes.

(2) The principal/ancillary test is an available, though not the primary, test. It is only capable of being applied in cases where it is possible to identify a principal element to which all the other elements are minor or ancillary. In cases where it can apply, it is likely to yield the same result as the predominance test.

(3) The “overarching” test is not clearly established in the ECJ jurisprudence, but as a consideration the point should at least be taken into account in deciding averments of predominance in relation to individual elements, and may well be a useful test in its own right.”

50. I respectfully endorse that approach.
51. Accordingly, for these reasons, the UT was correct in this case to hold that if the predominant element can be applied, it should be. It is the primary test. The first ground of appeal therefore fails.

Did the UT correctly characterise G&F’s supply?

52. The question of classification of a supply for VAT purposes is a question of law. However, since it gives rise to questions of fact and degree, appellate courts do not interfere lightly with decisions of the tax tribunal, and certainly not merely because they themselves would have put the case on the other side of the line: see to this effect, *Beynon and Partners v Customs and Excise Commissioners* [2004] UKHL 53, [2005] STC 55 at [26] and [27]. Subject to that important consideration, this court can remake the decision if it concludes that the UT erred in characterising the supply.
53. The UT purported to apply the predominant element test at paragraphs 90 to 92 of the decision as follows:

“90. In applying that test, we have to consider what the typical consumer would regard as a qualitatively predominant element of the supply. In essence, we have to ask what is the typical consumer of the supply bargaining for? The FTT identified the typical consumer of G&F’s service as a person “seeking [a partner] with a view to a long-term relationship” (FTT [72]). **In our view, the qualitatively most important element to the typical consumer was the provision of the introduction to a prospective partner.** That element incorporated both the advice about a potential match involved in the matchmaking process and the provision of information about the potential match. The FTT’s findings at [72]-[77] are consistent with that conclusion. The FTT found that the other activities which G&F undertakes to create and deliver the advice are means by which the advice is provided not part of the supply (FTT [75]-[76]) and that the information (i.e. the details of the potential match) would only meet the typical client’s purpose if the information was provided in the context of the advice (FTT [73]).

91. Given those findings, we take the view that **the predominant element of the supply from the point of view of the typical consumer was the advice which was provided as part of the matchmaking service combined with the information relating to a potential match.** It was these aspects of the supply that fundamentally met the typical consumer’s requirements. It was what the typical consumer bargained for. The FTT found that the matchmaking advice was “expert advice” provided or supervised by Claire Sweetingham and accordingly that that advice fell within the scope of “services of consultants ...or similar services” in Article 59(c). The provision of information also falls within Article 59(c). As we have mentioned above, a supply can fall within Article 59(c) even if aspects of the supply fall within more than one of the categories of supply described in Article 59(c) (*Amex* [72]).

92. In their findings, the FTT go further (at FTT [79]) to consider the circumstances in which the role of advice provided to clients of G&F may be more limited than in other cases. In such cases, the FTT explained their view that “that does not matter because in those cases where the advice was of lesser significance, the provision of information about a potential match was correspondingly larger” (FTT [79]). If and to the extent that, in this passage, the FTT was suggesting that it was appropriate to consider the nature of supplies made by G&F by reference to the views of particular consumers of that supply, such approach would be inconsistent with the application of the predominant element test in *Mesto*, which must be applied by reference to the characteristics of the supply from the point of view of the typical consumer determined by reference to objective factors. However, in our view, this finding simply

confirms that **the typical consumer would regard the supply as comprising predominantly a combination of expert advice and information**, and the relative importance of those two aspects of the supply to individual consumers may vary. That finding is not inconsistent with the *Mesto* approach.” (My emphasis).

54. Thus, at paragraph 90 as the emphasised passages show, the UT said that the qualitatively most important element to the consumer was the provision of an introduction to a potential match. However, at paragraph 91 the UT appear to have considered that the predominant element was the advice, albeit combined with the provision of information. In other words, there was no single predominant element. That is the conclusion ultimately reached at paragraph 92, where the UT said that the predominant element was the combination of expert advice and information. There is no reference in these paragraphs to the terms of the contract between G&F and its clients.
55. In remaking the decision in this way, Mr Singh submits that the UT erred in identifying two elements as the predominant element without explaining which predominated. In fact the single supply should have been characterised as an introductions service viewed from the perspective of the typical consumer, and this was the predominant element and the only conclusion open to the UT. Alternatively, if all elements were of equal importance and none predominated, the overarching supply was an introduction service. On either view, the economic and commercial reality and purpose of the contract calculated to realise the parties’ respective interests was that G&F would introduce clients to a minimum number of prospective long-term partners. From an economic point of view, that was a single service that should not have been artificially split.
56. When deciding on the characterisation of a transaction governed by a written agreement and whether it falls within a particular legal description, the starting point, at least normally, is to identify the legal rights and obligations of the parties as a matter of contract and then consider whether that characterisation is vitiated by any relevant facts before going on to classify them: see *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v HMRC* [2014] UKSC 16, [2014] STC 937. At paragraph 29 Lord Neuberger (with whom the other members of the court agreed) quoted the CJEU in *HMRC v Newey* (Case C-653/11) [2013] STC 2432, as to the importance of the contract which normally reflects the economic and commercial reality of the transaction, the latter being a fundamental criterion for the application of the common system of VAT. At paragraph 31 he continued:

“Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties’ respective rights and obligations, unless it is established that it constitutes a sham.”

Lord Neuberger made clear that the subsequent behaviour or statements of the parties (while ordinarily irrelevant to construction of the contract) might also be relevant to

show that the written agreement represented only part of the totality of the parties' contractual relationship.

57. Thus, as Lord Neuberger made clear at paragraph 35, in order to decide whether the tax tribunal was entitled to reach the conclusion it did, it is necessary to identify the nature of the relationship between the supplier and the customer, and, in order to do that, the effect of the contractual documentation must be considered first, before deciding whether any conclusion drawn from the contract is undermined by the facts relied on by either party.
58. Accordingly, my starting point is the G&F contract. The contractual terms cannot by themselves be determinative of the VAT analysis, but may be conclusive unless inconsistent with the underlying economic and commercial reality. One would naturally expect the predominant part of a supply to be what the supplier has promised to supply and what the consumer has promised to pay for. The contract contains standard terms and conditions applicable to all clients:
- i) Clause 1 sets out G&F's obligation to the client to: "*...provide you, within 12 months of your becoming our client, with a minimum of 8 introductions that we consider suitable for your requirements. NB: For the sake of clarity, an introduction is classed as being when two people agree to their telephone numbers being exchanged with each other*".
 - ii) Clause 2 is a warranty that information supplied by the client to G&F is true, accurate and not misleading.
 - iii) By clause 5, G&F agree to treat information supplied by the client in strict confidence, and to observe the principles of data protection.
 - iv) Clause 4 concerns strict confidentiality. It provides "*You agree that you will treat all information about anyone you meet through us as strictly confidential and will not disclose or provide it to anyone else. This includes the name, address and personal details of the persons along with the fact that you met them through us. Any information we provide to you is and remains our confidential property*".
 - v) The fee charged by clause 6 is a fee for the provision of the introductions in clause 1.
59. G&F's only contractual obligation identified by the express terms of the contract was, accordingly, to supply introductions. The consideration paid by the client was for the supply of this service. While the contract contemplates that both parties will provide information to each other as part of that supply, the provision of information is not expressed as a freestanding obligation, and where information is provided by G&F, it remains the confidential property of G&F, not to be provided or disclosed to others. The provision of advice is not mentioned at all. Although the UT mentioned the contract in its recitation of the facts, it played no part in its identification of what it thought was the predominant element of the service supplied.
60. I accept, as is clear from the FTT's findings summarised at paragraph 13(2) above (reflecting findings at [41] of the FTT's decision) that there were pre-contract

discussions with clients and that additional elements of the service were or may have been discussed and agreed. There were also post-introduction liaison services not referred to in the contract. But even accepting that these elements also formed part of the service supplied, this does not in any sense undermine or vitiate the conclusion that the very purpose of the contract was for G&F to introduce its clients to a minimum number of suitable prospective partners in exchange for a fee. This was the economic and commercial reality of the transaction, and its economic purpose.

61. There can be no doubt that the typical consumer would regard the provision of introductions to prospective long-term partners as the qualitatively most important element of the service. Indeed, this was the UT's own conclusion at [90]. In light of the contract, this was the predominant element of the supply.
62. This conclusion is not inconsistent with the FTT's findings of fact as Mr Milne sought to argue. The FTT identified the typical consumer of G&F's service as a person seeking a partner with a view to a long-term relationship. What was supplied in pursuance of that purpose was introductions. This is not merely a label as the FTT suggested. It is the core of what was supplied. G&F advertises itself as a matchmaking service, and G&F's only contractual commitment is to provide introductions. What matters to the typical consumer is the introductions. Accordingly, that must be what the typical consumer is bargaining for.
63. Both tribunals identified the constituent parts of G&F's supply as the provision of advice and information. In fact, in light of the findings made by the FTT there appear to have been other elements as well not covered by those constituent elements. For example, on the findings made by the FTT there was at least one interview leading to the creation of a brief; there was verification and vetting of potential matches, which was an important element because the client sought access to a vetted group of individuals for introductions; then there was the identification of potential matches from G&F's client base or from its network of contacts or through advertisements; finally, there was post-introduction liaison. But none of these elements were provided in a freestanding way or was an end in itself. None is referred to in the contract. Rather, it seems to me that they are better viewed as forming part of the process and the means by which G&F were able to supply the "*qualitatively most important element to the typical consumer*" which was "*the provision of the introduction to a prospective partner*" expertly selected by Claire Sweetingham.
64. The approach adopted by both the FTT and the UT involved an artificial dissection of the introduction service supplied by G&F of a kind warned against by the CJEU. To treat this service as comprising two distinct components, the provision of expert (consultancy) advice and the provision of information, was an error of approach. It did not reflect the economic or commercial reality of the transaction. Just as the characterisation of the supply of education with a view to a qualification is not to be determined by dissecting the single service into its component parts and then deciding whether the books and printed matter or the lectures and teaching predominates, there is no basis for thinking that the typical consumer using G&F's service would view the G&F service as supplying advice and/or providing information. That is not what is contracted for.
65. In my judgment accordingly, the service provided by G&F was not a service habitually supplied by consultants or consultancy firms giving expert advice to a

client. What it did was different. Nor was the service either data processing or the supply of information. Accordingly, I would allow the appeal on ground 2 and restore the decision of the FTT. The service supplied by G&F to clients outside the UK and EU did not fall within article 59(c) and was within the scope of VAT accordingly.

66. My conclusions in relation to ground 2 make it unnecessary to go on and address the issues raised by grounds 3 and 4. I have not found these issues to be straight forward and since their resolution is not necessary for the disposal of this appeal, I prefer to leave these issues to another case.

Lord Justice Newey:

67. I agree.

Lord Justice Lewison:

68. I also agree.