



[2019] UKFTT 512 (TC)

*Article 135(1)(a) of the Principal VAT Directive (2006/112/EC). Insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents exempt. Whether supply of Appellant's services amounted to insurance transactions and/ or were related to an insurance transaction. Claims for recovery of compensation for mis-sold Payment Protection Insurance. Card Protection Plan Ltd v C & E Comrs (Case C-349/96) [1999] STC 270 applied. Lubbock Fine v HMRC [1994] STC 10 considered and distinguished. Re Forsakringsaktiebolaget Skandia (publ) (Case C – 240/99) [2001] STC 754 and InsuranceWide.com Services Ltd v Revenue and Customs Comrs [2010] EWCA Civ 422, [2010] STC 1572 applied. Century Life [2001] STC 38 considered distinguished. **Held: Appellant was supplying the services of assisting its customers with the making of claims for compensation and not the termination of insurance relationships and was not providing insurance transactions or services related to insurance contracts.***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TC07308

Appeal number: TC/2013/04493

BETWEEN

CLAIMS ADVISORY GROUP LIMITED

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE ASIF MALEK
REBECCA NEWNS**

Sitting in public at Taylor House 88 Rosebery Avenue, London EC1R 4QU on 11-12 June 2019

Roderick Cordara QC and Edmund King QC, instructed by Rosetta Tax Ltd, for the Appellant

Sarabjit Singh QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal from decisions of HMRC dated 10 June 2013 that the Appellant (a) makes supplies that are liable to VAT at the standard rate, and (b) should be registered for VAT with effect from 1 June 2009. The issue before the Tribunal is whether or not the supplies made by the Appellant are exempt supplies under article 135(1)(a) of the PVD and VATA Schedule 9 Group 2.

THE LEGISLATIVE FRAMEWORK

2. We are gratefully adopt counsels' skeleton arguments in relation to the applicable law which we summarise below.

3. Article 135(1)(a) of the Principal VAT Directive (2006/112/EC) ("PVD") provides that Member states shall exempt: "*insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents*".

4. Under the domestic legislation implementing the exemption, "Insurance transactions and reinsurance transactions" are exempt under Item No. 1 of Group 2 of Schedule 9 to the Value Added Tax Act 1994 ("VATA"), and related services performed by insurance brokers and insurance agents are exempt under Item No. 4.

5. Item 4 exempts:

"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

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

6. Note 1 to Group 2 defines what "services of an insurance intermediary" for the purposes of item 4 are, stating as follows:

"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"

7. Note 2 to Group 2 defines what acting "in an intermediary capacity" for the purposes of item 4 is:

"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”

8. Article 135(1)(a) of the PVD is of direct effect.

FACTS AND THE SUPPLIES IN ISSUE

9. The parties provided some very helpful background information to put the services provided by the Appellant into proper context and we summarise this here. In short, financial institutions in the UK were incentivised to sell Payment Protection Insurance (“PPI”) to their customers as additions to the loans that were provided. The large scale miss-selling of PPI by these financial institutions was subsequently widely reported and has since been referred to as the “PPI scandal”. The reporting led to greater public awareness and customers affected began to seek redress from those institutions that had miss-sold this product to them. This is, effectively, where the Appellant came in.

10. The facts pertaining to this particular appeal are not contentious and can largely be found in the two statements provided by Mr. Kelly, who is a former director of the Appellant [C/1/1] and [C/2/28]. Again we are indebted to counsel for their summaries of the evidence and especially to Mr. Singh (whose skeleton we relied heavily on to produce the summary below).

11. The Appellant describes its main business activities as “*Recovery, on behalf of consumers, of overcharged fees levied by banks and other financial institutions*” in its application for VAT registration dated 26 November 2009 (B/p.15).

12. The process that the Appellant followed can be summarised as follows. Firstly, the Appellant contacted members of the public via telephone in order “*to prompt consumers who consider that they have been mis-sold PPI to make a claim against the financial institution that sold the insurance to them, and to do so using [the Appellant’s] services as their representative*” (B/ p.179).

13. Next, if during the telephone conversation the prospective customer is amenable a documentation pack is sent out by the Appellant to the customer, which contains, inter alia, a letter of engagement, a letter of authority, a questionnaire and a copy of the Appellant’s terms and conditions (see Mr Kelly’s first statement at para 13, C/ pp.3-4).

14. The engagement letter states that: “*By signing this letter, you are making a legally binding agreement with Claims Advisory Group Ltd...in relation to payment protection policies (‘the PPI policies’) you were sold and or unreasonable or erroneous credit card charges levied. We agree to review your complaint/s and (if appropriate) claim compensation for PPI policies or credit card charges...The full terms of our agreement with you are set out in the terms and conditions document that is enclosed with this letter...If we are successful in claiming compensation for you, we will charge a fee of 39% of the value of the compensation...*” (C/ p.6).

15. The letter of authority states, inter alia, that: “*I have appointed Claims Advisory Group Limited...to act as my sole representative....and generally to review my complaint and if appropriate make and pursue a claim or claims on my behalf for compensation in respect of the payment protection insurance policy or policies that I was sold in relation to my loans, credit cards, other products or other accounts that I have with you, or unreasonable or erroneous credit card charges...*” (C/ p.7).

16. The Appellant’s terms and conditions (B/ p.52) describe the Appellant’s services to customers as follows, under the heading “*The service*”:

“2.1 We will request and gather documentation that we believe are relevant to your claim or claims for compensation.

2.2 We will consider and review this information and confirm whether we will go ahead with a claim...

2.3 If we decide to go ahead with a claim, we will update you on our progress in line with our normal procedures.

2.4 We will review any offers of settlement made by the person against whom the claim has been made. You agree that we can accept any reasonable offer of settlement on your behalf such as where the offer is for the full amount of your claim, or for the full amount of your claim but excluding interest where the interest is not a significant part of your claim and that we can enter into any binding agreements, and do everything as we may consider reasonably necessary. If we receive an offer of settlement which is unreasonable, we will recommend that you reject the offer.

2.5 We will meet our responsibilities as a claims management company in providing information to you about your claim in accordance with the Conduct of Authorised Persons Rules published by the Ministry of Justice...

2.6 If we receive any amounts to settle your claim, we will deduct any fees due to us for providing our services in accordance with this agreement and send the rest of the funds to you within 10 days of receipt.

2.7 We will provide our services with reasonable skill and care.

2.8 You accept that even if we decide to make the claim there is no guarantee that the claim will be totally or partially successful”

17. The terms and conditions reiterate that the Appellant’s fees are 39% of any compensation which is paid (or due to be paid) for each claim the Appellant makes on the customer’s behalf (para 5.1). They also indicate that generally no fees are payable to the Appellant if any claim is not successful or if the Appellant considers that a claim is unlikely to be successful (para 6.1).

18. The end of the first page of the terms and conditions states as follows, in large print: “*Sign your name, make your claim*” (B/ p.52).

19. The questionnaire the Appellant sends to the prospective customer seeks to establish whether they may have been mis-sold PPI, for example by asking questions such as “*Were you told that taking out a PPI policy would increase the chances of your application being approved?*”, “*Did you feel pressured into applying for a PPI policy?*”, “*Did you find that a PPI policy had been added, even though you hadn’t asked for it?*”, and “*Was it made clear to you that a PPI policy was optional?*” (C/ p.8).

20. If a customer signs up and the Appellant agrees to act on the customer’s behalf, the Appellant will make a claim for compensation/ complaint on the customer’s behalf to the financial institution that is said to have mis-sold that customer PPI.

21. The Appellant will then write a letter of complaint on behalf of its customer to the financial institution concerned. A typical example of this letter is to be found at B269 and provides

“We are appointed by the Policy Holder in relation to a complaint regarding the sale of a Payment Protection Insurance Policy (“the Policy”) attached to the Loan referred to above (“the Claim”)...

Our client’s account of events from the time of the sale has led us to believe that the PPI was mis-sold.

Our Client's position is that:

1. It was not made clear that the PPI Policy is optional.
2. I was not aware that PPI Policy was paid up-front by a single premium.
3. I was not told that I would have to pay interest on the single premium for the duration of the PPI Policy.

The Policy Holder wishes to proceed with the Claim and demands repayment of all premium(s) paid to date, all interest charges applied in respect of the premium(s) & 8% statutory interest.

Please issue your Final Response to this complaint in accordance with FSA complaint handling guidelines. Please also provide a copy of the Policy Holder's Loan Agreement and statement of Demands and Needs".

22. The financial institution will then acknowledge the complaint (e.g. see the acknowledgment letter by MBNA at B/ p.270, by Lloyds/ TSB at B/ p.98 and by RBS at C/ p.31). If following further correspondence the financial institution does not pay up, the Appellant may threaten to involve the Financial Ombudsman Service ("FOS") or proceed to make a complaint about the financial institution on the customer's behalf to the FOS (paras 15-18 of Mr Kelly's statement at C/ pp. 4-5).

23. If an offer of settlement by way of payment of compensation is made by the financial institution and accepted by the Appellant on behalf of the customer, the customer will receive 61% of that compensation and the Appellant will receive 39%, in consideration of its service to the customer of successfully obtaining compensation from the financial institution on the customer's behalf.

THE ISSUES

24. By the time that this appeal was heard the issues had crystallised into just two considerations: (1) were the supplies provided by the Appellant to its customers insurance transactions; and, (2) if they were not, were they in the alternative, services performed by an insurance broker, agent or intermediary that are related to insurance transactions.

25. There is a preliminary procedural issue which it is convenient to deal with first.

Preliminary issue: expert evidence

26. Part way through the hearing on the first day Mr. Cordara made an application in the face of the court seeking permission to adduce the evidence of Mr. Emblin as an expert witness pursuant to rule 15 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. We decided that we would allow Mr. Emblin's evidence with reasons to be provided in our written determination.

27. Rule 15(1)(c) provides that the "Tribunal may give directions as to...whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence".

28. Rule 6(1) provides that the Tribunal may give a direction on the application of one or more of the parties. Subsection 2 provides that "an application for a direction may be made...orally during the course of a hearing".

29. Any procedural decision made by the Tribunal must be made in furtherance of its overriding objective to deal with cases fairly and justly. Dealing with a case fairly and justly includes avoiding unnecessary formality and seeking flexibility in the proceedings and

avoiding delay, so far as compatible with proper consideration of the issues (per Rule 2).

30. The Supreme Court also gave some helpful guidance (which although not referred to by the parties, we found useful to consider in our deliberations) on the admissibility of expert evidence in *Kennedy v Cordia (services) LLP [2016] UKSC 6*, where it said:

“There are in our view four considerations which govern the admissibility of skilled evidence:

- (i) whether the proposed skilled evidence will assist the court in its task;
- (ii) whether the witness has the necessary knowledge and experience;
- (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and
- (iv) whether there is a reliable body of knowledge or experience to underpin the expert’s evidence” [par 44].

31. The consideration engaged in this appeal was whether the proposed skilled evidence would assist the court in its task.

32. Mr. Singh submitted that whilst he accepted that there was no prejudice to the Respondent given that the report of Mr. Emblin had been served some two and half years ago the Respondent nonetheless objected to us seeing the report. The grounds relied upon, in summary, were as follows:

- (1) No direction to allow Mr. Emblin’s evidence had been given or, to date, sought;
- (2) An application was only now being made in the face of the court for such a direction;
- (3) The evidence of Mr. Emblin dealt with UK market practices and we were dealing with EU law and concepts and it was, therefore, unnecessary and would not assist the Tribunal;
- (4) Mr. Emblin was seeking to usurp the function of the Tribunal by offering his opinion on matters of law and fact that were for the Tribunal to decide.

33. Mr. Cordara submitted, in summary:

- (1) There was no prejudice to the Respondent and that point had been conceded.
- (2) Mr. Singh’s remaining points as to the value of Mr. Emblin went to “weight” and not “admissibility” and as such it would only be possible for the Tribunal to form a true view of this after the evidence had been admitted and considered. A “no harm” test.
- (3) The Tribunal would be wise to Mr. Emblin seeking to usurp its function – particularly now that the Tribunal was alert to it.

34. The first point we need to consider is whether the manner of the application or the delay in making the application for a direction permitting Mr. Emblin’s evidence should mean that we should not consider it all. Rule 6(1) and 2 do not favour such an approach and we say no more about this.

35. Our initial reading of Mr. Emblin’s evidence led us to the tentative conclusion that it was unlikely to be very helpful to us. Equally, Mr. Emblin, no doubt in an effort to be helpful, strays dangerously close to offering an answer to the questions that are for this Tribunal to consider (see by way of example his answers e-f). Accordingly, there was some force to Mr. Singh’s submissions. However, the helpfulness or otherwise of Mr. Emblin’s evidence, in our view, really goes to weight. Likewise, we are (and would be in any event) alert to the usurping

of our function by an expert. We have the luxury of disregarding any evidence which we feel might tend to do that.

36. One further considerations helped tipped the balance in favour of allowing the evidence of Mr. Emblin. That is that there has been, and nor can there be, any prejudice to the respondents in view of the length of time that has elapsed between the service of that evidence on them and this hearing.

37. However, our subsequent reading of Mr. Emblin's report confirmed our initial suspicions (set out at paragraph 35 above). Mr. Emblin's evidence was of little assistance because (a) his experience of the UK market can be of only very limited help when dealing with EU law and (b) because his comments with regards to the activities carried on by the Appellant (answers to questions (d) –(f)) fall squarely in the circumference of matters before this Tribunal. Accordingly, we gave Mr. Emblin's evidence little, if any, weight.

First issue: are the Appellant's supplies insurance transactions?

38. In *Card Protection Plan Ltd v C & E Comrs (Case C-349/96) [1999] STC 270*, the ECJ gave some guidance on the meaning of "insurance transaction":

"17. With respect, first, to the interpretation of the expression 'insurance transactions', it must be observed that EC Council Directive 73/329 does not define the concept of insurance either. However, as the Advocate General states at para 34 of his opinion, the essentials of the an insurance transaction are, as generally understood, the insurer undertakes, in return for prior payment of a premium to provide the insured, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded."

39. In more detail and in the same decision Advocate General Fennelly stated that:

"34. The essentials of an insurance transaction are, as generally understood, that one party, the insurer, undertakes to indemnify another, the insured, against the risk of loss (including liability for losses for which the insured may become liable to a third party) in consideration of the payment of a sum of money called a premium: it is the giving of the indemnity that constitutes the insurance and, thus, the supply of the service"

40. The Appellant's position can be succinctly stated. It submits that the Appellant's terms and conditions gave it delegated authority under paragraph 2.4 to :

"...enter into any binding agreements, and do everything as we consider reasonably necessary."

41. This, it is argued, gave the Appellant authority to terminate inappropriate insurance, thereby voiding the policy *ab initio*, and to claim a refund of the premium.

42. The Appellant then relies upon the principle found in *Lubbock Fine v HMRC [1994] STC 10* to make good its contention that the provision of a service terminating insurance is the supply of an insurance transaction.

43. No point was taken by the Respondent on whether or not the authority provided was sufficient to encompass the termination of an insurance contract. We have some reservations about that, but take it as read given the Respondent's position.

44. The principle in *Lubbock Fine* is agreed between the parties and can be stated thus:

"9. where a given transaction, such as letting immovable property, which would be taxed on the basis of the rent paid, fell within the scope of an exemption provided for by the Sixth Directive, a change in the contractual

relationship, such as termination of the lease for consideration, was also to be regarded as falling within the scope of that exemption”

45. However, the Respondent argues that context is everything and point to the following passages in the judgment where Advocate General Darmon said:

“47. Where the parties agree on the surrender of a lease, the tenant waives the right to enjoyment of the property for the remainder of the lease and allows the landlord either to occupy the property, to let it to another tenant or to dispose of it. The compensation paid on the occasion of such a surrender by the landlord is the consideration for the placing of the property at his disposal, and the amount thereof depends on the remaining term of the lease.

48. There is no doubt that the tenant supplies a service—measurable in economic terms—to the landlord and that what he returns to the landlord is of exactly the same nature as that which he could give to a third party under a sub-lease: enjoyment of the premises for the remaining term of the lease, even if the landlord also has the power—which he never lost—to dispose of the property”

46. With respect to the Appellant’s argument in regards to this point it, seems to us, to be misconceived. The exempt transaction in question in *Lubbock Fine* was the letting of immovable property. In the present case, by analogy, it must be the provision of a contract of insurance. In *Lubbock Fine* it was the termination of the lease that was regarded as falling within the scope of that exemption and, therefore, the consideration provided for the termination was exempt. By analogy it must be the termination of the insurance contract that was exempt and, therefore, the consideration received (i.e. the refund of premia paid) that must be exempt from VAT. Here what is being suggested is that the service provided for the recovery of the premia paid is also exempt from VAT. In the case of *Lubbock Fine* it would have meant that the services of, say, the solicitors used to secure the consideration for the termination of the lease were also exempt from VAT. This cannot be right and would lead to absurd results. This point, we think, is put in a slightly different way by Mr. Singh in his skeleton argument at paragraph 47; but the end result is the same.

47. We also agree with Mr. Singh when he says that the reason why the ECJ held in *Lubbock Fine* that the surrender of the lease amounted to an exempt transaction is because the surrender had the characteristic of the letting of immovable property. It was not because the surrender amounted to a termination of the lease. When looked through this lense the circularity of the Appellant’s argument is exposed: If it is accepted that the services supplied by the Appellant do not have the characteristics of insurance transactions then *Lubbock Fine* cannot be used to embue the transactions with those very same characteristics

48. We do not understand the Appellant to be arguing that the supplies made by the Appellant to its customers contain the essential elements of an insurance transaction as set out *Card Protection Plan Ltd*, without invoking the *Lubbock Fine* principle (as it saw it). If that is the Appellant’s position then we reject it. At no point can it be said that the Appellant agreed to indemnify its customers against any loss in return for the receipt of a premium or enter into a contractual relationship with its customer which can be described as a contract of insurance.

49. If we have erred in our thinking, as set out above, with regards to the *Lubbock Fine* principle it becomes pertinent to examine the services provided by the Appellant and to conclude what those services, as a matter of fact, were. To answer this question, and to aid clarity, we might put the question as follows: was the service provided the “assessment of insurance” followed by a “termination of that insurance” with the consequence being that there would be a refund of the premium? Or was the service the assessment and subsequent making of a “claim for compensation” with the consequence that such a claim, if successful, would

always result in the payment of compensation and would generally, but by no means always, result in termination of the insurance contract?

50. The starting point might be to begin with the customer and ask what service did the Appellant's customers think they were buying/obtaining? The answer, in our judgment, is clear from the documentation pack sent to customers by the Appellant. Nowhere is there any mention of the "termination of insurance". There is, by contrast, ample mention of "claim", "compensation" and "complaint". In particular paragraph 2.4 of the terms and conditions provides that: "*You agree that we can accept any reasonable offer of settlement on your behalf...[Emphasis added]*". There can be little doubt that the customer thought that they engaged the Appellant for the purposes of making a claim for compensation.

51. We turn next to the other side of the coin. What did the Appellant have in mind? Mr. Kelly seems to suggest that it was to "*assess the suitability of this insurance, to seek refunds of the premiums paid, where the insurance is found to be unsuitable, plus interest and to arrange for the cancellation of those policies.*"[par 8 C/3]. He goes on at paragraph 12 to point out that the Appellant's staff are trained to assess the "*appropriateness of an insurance policy*".

52. This evidence needs to be assessed in the light of other documentary evidence such as the VAT registration dated 26 November 2009 in which the Appellant described its main business activities as the recovery of overcharged fees on behalf consumers and not, as one might expect, the termination of insurance contracts. This position appears to be confirmed in a letter from the Appellant to the Respondent dated 10 June 2013 wherein the Appellant describes the purpose of the initial telephone contact with prospective customers as being to prompt them to make a claim and not to terminate insurance contracts [B/179]. Lastly, the letter of claim sent on behalf of the customer by the Appellant (referred to earlier in this decision) refers to a "claim" which is defined as "*complaint regarding the sale of a Payment Protection Insurance Policy*". Again there is no mention of insurance being terminated. In our judgment the assessment, such as it was, carried out by the Appellant's employees was to assess the prospects of successfully making a claim for compensation and not to assess the suitability of the insurance cover.

53. Whilst there might be something in the submission that the use of terms such as "claim" and "compensation" were "mere puffs" to get the attention of a general public educated by day time TV in the making of claims for personal injury and what mattered were the economic realities of the transaction, we would need to see real evidence that the reality of the transactions were somehow different. None was provided.

54. We agree that it is the "cause"¹ and economic purpose of the contract between the Appellant and its customers that we must have regard to. The economic purpose of the contract for the customers is, we think, to obtain a sum of money which is compensatory in nature. That sum may be more (because there is an element of interest compensation in the award) or less (because the authority provided by the customer expressly allows the Appellant to accept any reasonable offer of settlement) than the premiums paid. The economic purpose for the Appellant is to obtain a fee for the service provided. In the present case the service is provided on a "contingent fee" basis and the Appellant is entitled to 39% of the "compensation". That is to say that the Appellant will get nothing for the work that it has done if the claim does not succeed, but 39% of the compensation if the claim does succeed. The fee for the work done is, perhaps for obvious reasons, not linked to whether or not the insurance contract was terminated. This is firstly because, in our judgment, the customer would have little or no interest in terminating the insurance contract. This can easily be tested by asking oneself whether or not the customer would have engaged the Appellant for the sole purpose of terminating the

¹ In this context meaning the "essence".

insurance contract. The clear answer is “no”. Contrast this with the position where the question asked is would the customer have engaged the Appellant for the sole purpose of claiming compensation for mis-sold PPI. The answer, we suggest, is “yes”. The value of the service to the customer is the recovery of compensation – in pounds, pence and shillings.

55. The second reason why there appears to be no link between the fee and the termination of the insurance contract is because some of the relevant insurance contracts in question will have long run their course (either because they were terminated or because the term of the relevant loan had expired) and no part of the service provided by the Appellants in these cases went to terminating the insurance contract. Without the necessary evidence we cannot say what percentage of the Appellant’s customers this might relate to, but we are content to conclude that this would have applied to at least some customers. It should be noted that we are not saying, here, that an insurance transaction cannot exist long after the insurance policy was incepted. That is a separate point. We are only dealing, here, with the economic purpose or cause of the contract.

56. In light of our above findings we have little hesitation in concluding that the nature of the service provided was the making of compensation claims on behalf of customers and not the assessment and subsequent terminating of insurance contracts. That the insurance contracts were assessed in all cases and terminated in many instances was a consequence of the claim for compensation and not the service that was provided. Accordingly, we hold that the answer to the first issue before us is that the supplies provided by the Appellant were not insurance transactions.

Second issue: Are the Appellant’s services performed by an insurance broker or insurance agent and related to insurance transactions?

First limb

57. The first limb of the test is to examine whether or not the Appellant’s services are performed by an insurance broker or agent.

58. Article 2 of the EC Council Directive 77/92/EEC defines ‘insurance broker’ and ‘insurance agent’ as follows:

“Article 2

1. This Directive shall apply to the following activities...:

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

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

(c) activities of persons other than those referred to in (a) and (b) who, acting on behalf of such persons, among other things carry out introductory work,

introduce insurance contracts or collect premiums, provided that no insurance commitments towards or on the part of the public are given as part of these operations”

59. In *Re Forsakringsaktiebolaget Skandia (publ) (Case C – 240/99) [2001] STC 754 AG* Saggio in referring to the above directive said as follows:

“For a definition of 'insurance broker' and 'insurance agent', see EC Council Directive 77/92 of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers...and, in particular, transitional measures in respect of those activities..., and EC Commission Recommendation 92/48 of 18 December 1991 on insurance intermediaries... From these texts it can be seen that, as a general rule, the business engaged in by brokers and agents entails putting insurance companies in touch with potential clients for the purpose of concluding insurance contracts, or bringing insurance products to the attention of the general public or even the collection of premiums. In all cases, however, it is clear that such business is characterised by a direct relationship with the insured” (para 19, footnote b)

60. Then Etherton LJ considered EU and domestic legislation and the case (including the above) in *InsuranceWide.com Services Ltd v Revenue and Customs Comrs [2010] EWCA Civ 422, [2010] STC 1572*, and sets out the applicable principles at [85]:

(1) The insurance intermediary exemption should be interpreted so far as possible, consistently with its terms, in a way that reflects the jurisprudence of the ECJ and the United Kingdom's obligations under the Sixth Directive and the 2006 VAT Directive.

(2) The exemption in art 13B(a) must be interpreted strictly since it constitutes an exception to the general principle that VAT is to be levied on all services supplied by a taxable person. This does not mean, however, that the words and expression in art 13B(a) and the insurance intermediary exemption are to be given a particularly narrow or restricted interpretation. It is for the supplier to establish that it and its activities come within a fair interpretation of the words of the exemption.

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

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

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

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

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

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

(9) All the above principles are capable of being applied, and must be applied, to the insurance intermediary exemption in Sch 9 to VATA 1994.

61. The Appellant places further reliance upon VAT Notice 701/36/13. However, we do not think the interpretation which the Respondent places upon the relevant legislation and case law should influence our decision. We should make our decision in accordance with the applicable legislation and case law.

62. The crux of the Appellant's argument under this limb is that, once adjusted for the fact that the Appellant assesses the customer's needs for insurance with a view to terminating the transaction rather than commencing it then it can be demonstrated that the Appellant does the work of a broker or agent. The problem with this analysis, of course, is that the *Lubbock Fine* principle must apply in the manner that the Appellant contends. We have already held at paragraphs 42-47 above that it does not.

63. Even if we are wrong about that we have grave doubts as to whether or not the Appellant is an insurance agent or broker. Simply put, the Appellant does not, in our judgment, possess the "essential characteristics" of an insurance agent or broker. It is not in the business of putting insurance companies in touch with potential clients. There can be little doubt that the Appellant acts as an agent for its customers. However, even if it could be argued that its actions in instigating a claim against its customers' insurers (or former insurers) could be characterised as "putting in touch" it would still be the case that the customers are already or have already been clients of the insurance companies in question. They are not potential clients, but existing or former clients.

64. The Appellant also argues that it is providing the services of an intermediary between the client and the insurance company. It says it does this because it provides "*assistance in the administration of [contracts of insurance or reinsurance], including the handling of claims*" and "*the collection of premiums*" [Note 1 to Group 2 of Sch 9 of the VATA]. It says that it administers the PPI policy by assessing (we assume before the contract of insurance is entered into) whether the policies are suitable or reviewing (we assume at a point after the contract of insurance is entered into) whether they are suitable and then collects the premium (a negative amount). As we have already set out elsewhere in this decision we think that to describe what the Appellant does as assessing or reviewing the insurance needs of its customers is to mischaracterise the service that it provides. The focus of the Appellant's service is to make a claim for compensation on its customers' behalf. In order to do that it reviews the customers' circumstances that existed at the time that s/he entered into the insurance contract. The Appellant has no other interest in the insurance needs of its customers and does not, for example, search for or make alternative recommendations of insurance as one might expect when an assessment of insurance needs is carried out. Further we cannot agree that the collection of premiums includes the collection of a negative amount. To hold so would do violence to the clear meaning of the words used. Collection refers to the act of 'collecting in'.

Insurance premiums (in the context of a contract of insurance) must, in our view, be paid by the assured to the insurer. The premiums may be paid on behalf of the assured by an agent of the assured and collected in by an agent of the insurer. There is simply no part in the transaction for an agent of the assured to collect in a premium. The assured's agent may request the return of premia paid or may collect in and hold monies paid out to the assured pursuant to a claim – but that is not the same as collecting in the premium.

65. Our conclusion, therefore, is that the Appellant is unable to make out the first limb of the test and we are not satisfied that it is an insurance agent, broker or intermediary. Given this conclusion it is perhaps unnecessary for us to go on to consider the second limb of the test. However, we deal with it for the sake of completeness.

Second limb

66. The second limb of the test is to consider whether the services provided were related to insurance transactions. The main authority that we were referred to that might be of assistance to us in determining this issue was that of *Century Life [2001] STC 38*. The principles to be derived from the decision were enumerated by Jacob J and are as follows:

“15...one does have the ‘exceptions are narrow’ principle to help here. Applying that one can say that if a service is only remotely or incidentally connected with an insurance transaction it is not ‘related to it’: there must be a close nexus between the service and the insurance transaction concerned. So for example if an insurance agent supplies secretarial or general computer services to an insurance company, the exemption would not apply. Those services would be incidental to the insurance transactions.

16. This cannot be said of the services in the present case. Two points were taken to suggest otherwise. Firstly, it was suggested that the nature of the services was essentially that of compliance rather than commercial. Secondly, it was suggested that the service could not be in relation to the pension transactions because they were past transactions. Like Moses J I think there is no substance in either point, Seeing that a policy complies with regulations is intimately related to it- the very nature of the individual policy is under scrutiny. And the fact that he policy was already sold does not mean that there are not continuing obligations. There clearly are, an important one of which is compliance.”

67. The insurance transaction in question in this case can, in our judgment, be the entering by customers of the Appellant into the PPI contract. The Appellant argues that there is a close nexus between that original transaction and the services that the Appellant provides (which it describes as the assessment of insurance, a refund of premium and if appropriate the termination of the transaction). We do not agree with that contention for the following reasons.

68. First, there is the fact that in very many of the cases that the Appellant deals with there will be, at the time the claim is intimated, no continuing obligation on the part of either the assured or the insurer. This is because of the nature of the insurance provided. It is helpful to revisit this here. The assured will have taken on a loan and at the same time “purchased” payment protection insurance to provide cover in the event that the assured is unable to make repayment of the sums borrowed for specified reasons. The insurer's obligation is likely to have been extinguished with the repayment of the loan. We do not think that an obligation to return premia following a claim for rescission on the part of the assured which renders the contract *void ab initio* represents the sort the obligation that Jacob J had in mind in *Century Life*. This is not least because if the fiction created under English law in such situations, i.e. that the original insurance contract is treated as never having existed, was followed to its logical

conclusion then there would be no original insurance transaction in relation to which a nexus could be established. The fact that in the present case there are rarely continuing obligations relating to the original insurance contract by the time that the Appellant is involved, in our view, sufficiently distinguishes the present circumstances from those that existed in *Century Life*.

69. Secondly, whilst it can be argued that checking that the policy complies with regulation points to the that service being intimately related to the original insurance transaction; for the reasons that we have already set out, we think that to describe the services provided by the Appellant as the “assessment of insurance” is a mis-characterisation of the services provided by the Appellant. The Appellant is engaged in the making of claims for compensation on behalf of victims of the PPI scandal and to the extent that it checks if the policy complies with regulation (in other words checks the suitability) those checks are ancillary and incidental to the main service that it provides.

70. We are, therefore, of the view that the Appellant’s services are not related to the original insurance transaction.

CONCLUSION

71. We have answered both of the questions that we posed to ourselves at the beginning of this decision in the negative. For this and all the reasons set out above we dismiss this appeal.

72. We would like to take the opportunity to note the particular skill with which the challenging arguments in this case were pursued by the parties before us and to express our gratitude, publically, to Mr. Cordara, Mr. Edmund King and Mr. Sarabjit Singh for their invaluable assistance.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

73. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**ASIF MALEK
TRIBUNAL JUDGE**

Release date: 6 AUGUST 2019