Neutral citation: [2024] UKUT 00147 (TCC)

UT (Tax & Chancery) Case Number: UT/2022/000133

Upper Tribunal
(Tax and Chancery Chamber)

Rolls Building, London

VALUE ADDED TAX — whether charges raised by an agent arranging accommodation constituted consideration for a separate service falling within the exemption for financial intermediaries' services – Item 5, Group 5, Schedule 9, Value Added Tax Act 1994 – no – appeal dismissed.

Heard on: 14 February 2024
Judgment date: 23 May 2024

Before

JUDGE PHYLLIS RAMSHAW
JUDGE MARK BALDWIN

Between

SILVERDOOR LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: David Southern KC, of counsel, instructed by Cripps LLP

For the Respondent: Barbara Belgrano, of counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

DECISION

Introduction

1. This is an appeal by SilverDoor Limited ("*SilverDoor*") against the decision of the FTT in *SilverDoor Limited v HMRC*, [2022] UKFTT 233 (TC) ("the Decision"), in which the FTT dismissed an appeal by SilverDoor against two assessments for VAT amounting to £109,305.

2. In very broad outline, as found by the FTT, the arrangements under consideration work like this:

> (1) SilverDoor provides services to providers of short-term rentals of hotels, serviced apartments and similar properties (referred to as "Property Partners"). SilverDoor acts as disclosed agent for the Property Partners. The accommodation is booked by persons ("Clients"), which are generally businesses seeking short-term accommodation for employees on temporary assignments.
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> (2) SilverDoor charges commissions to Property Partners for the provision of services. Those services are advertising the accommodation and making reservations of accommodation on behalf of the Property Partner. When a Client reserves accommodation, SilverDoor collects payment from the Client on behalf of the Property Partner. This amount is paid by SilverDoor to the Property Partner after deduction of SilverDoor's commission.
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> (3) SilverDoor does not, itself, charge Clients a fee for making reservations of accommodation unless the Client chooses to pay for the reservation with a corporate credit card. In such a case, SilverDoor requires that the Client pay an additional fee ("the Fee/s"), being 2.95% of the accommodation charge.

3. The VAT assessments under appeal arise in respect of the Fees. HMRC concluded that the Fees were consideration for a supply of standard rated reservation services.

4. It is common ground that, where SilverDoor charges a Client a Fee, SilverDoor is making a supply of services to the Client and the Fee is consideration received from the Client for that supply.

5. The parties do not agree on (a) the proper characterisation of the supply (we refer to this as the "Characterisation Issue")) and (b) whether the supply is exempt pursuant to Item 5 of Group 5 of Schedule 9 to the Value Added Tax Act 1994 ("VATA") (we refer to this as the "Exemption Issue").

6. On the Characterisation Issue, SilverDoor contends that the Fees are charged in return for it providing Clients with a facility to pay by corporate card and that this is a separate and distinct supply from the supply of accommodation, which is made by the Property Partners.

7. On the Exemption Issue, SilverDoor initially had two arguments. Firstly (the "Principal Argument"), it said that its actions had the effect of transferring funds for the purposes of the financial services exemption. Alternatively ("the Intermediaries Argument"), it argued that it brought together Clients who wished to pay by credit card and the merchant acquirers, with a view to securing payment by this means, and this was a distinct act of mediation. SilverDoor has abandoned the Principal Argument, so its argument on the Exemption Issue now rests on the Intermediaries Argument alone.

8. It is common ground that, in order to be successful in this appeal, SilverDoor must "win" on both the Characterisation Issue and the Exemption Issue. In other words, SilverDoor must show that the Fees are consideration for a supply which is separate from any other supply made by SilverDoor (or the Property Partners) and that this separate supply is exempt from VAT.

The relevant VAT legislation

9. Article 135 of Council Directive 2006/112/EC (the "PVD") provides:

> "Member States shall exempt the following transactions:
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> …
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> (d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection;"

10. Article 135 PVD is implemented in UK law by Item 5, Group 5, Schedule 9 VATA 1994, which provides for the following services to be VAT exempt:

> "1 The issue, transfer or receipt of, or any dealing with, money, any security for money or any note or order for the payment of money…"
>
> "5 The provision of intermediary services in relation to any transaction comprised in item 1… (whether or not any such transaction is finally concluded) by a person acting in an intermediary capacity."

11. The Notes to Group 5 provide that:

> "(1) Item 1 does not include anything included in item 6.
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> (1A) Item 1 does not include a supply of services which is preparatory to the carrying out of a transaction falling within that item … "
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> "(5) For the purposes of item 5 "intermediary services" consist of bringing together, with a view to the provision of financial services—
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> (a) persons who are or may be seeking to receive financial services, and
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> (b) persons who provide financial services,
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> together with (in the case of financial services falling within item 1, 2, 3 or 4) the performance of work preparatory to the conclusion of contracts for the provision of those financial services, but do not include the supply of any market research, product design, advertising, promotional or similar services or the collection, collation and provision of information in connection with such activities
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> (5A) For the purposes of item 5 a person is "acting in an intermediary capacity" wherever he is acting as an intermediary, or one of the intermediaries, between—
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> (a) a person who provides financial services, and
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> (b) a person who is or may be seeking to receive financial services.
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> (5B) For the purposes of notes 5 and 5A "financial services" means the carrying out of any transaction falling within item 1, 2, 3, 4 or 6."

The FTT Decision

12. The FTT's findings of fact in relation to the contracts between SilverDoor and others involved in these arrangements are set out at paragraphs [11]-[20] of the Decision. So far as relevant to the appeal, the FTT found that:

> (1) SilverDoor enters into an agreement with each Property Partner, under which SilverDoor is appointed as the Property Partner's reservation agent to advertise and promote the accommodation and to make reservations on behalf of the Property Partner.
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> (2) SilverDoor also has terms and conditions which apply to Client reservations and, in some cases, enters into a global services agreement with a Client in respect of reservation services.
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> (3) Most Clients have accounts with SilverDoor and payment is dealt with through their account. Such transactions are not within the scope of this appeal. Where a Client either does not have an account with SilverDoor or chooses not to pay via their SilverDoor account, the accommodation charge may only be paid by corporate card or bank transfer. SilverDoor does not accept payment via any other means, such as personal card or cheque.
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> (4) Where a Client chooses to pay with a corporate card, SilverDoor issues the Client with a payment request which includes a "payment link" to a secure webpage on SilverDoor's website and also includes an additional "card fee amount" of 2.95% of the accommodation charge. The fee is charged because SilverDoor wants to be compensated for the cost charged to it by a merchant acquirer when a Client opts to pay by corporate card.
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> (5) A Client wishing to pay by corporate credit card is directed from SilverDoor's site to another site operated by one of the two merchant acquirers used by SilverDoor. The merchant acquirer site pages are set up to look as if they are part of the SilverDoor site but are in fact hosted on the merchant acquirer's own servers. The merchant acquirer obtains the necessary card details from the Client to obtain authorisation of the payment from their card issuer and then returns the Client to the SilverDoor website once the payment has been authorised. SilverDoor does not handle, hold, store or transmit any credit card data. All such data is obtained, processed, and stored by the merchant acquirer via their own payment platforms. The merchant acquirer will transfer aggregate card payments to SilverDoor's bank account each day.
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> (6) Once the merchant acquirer has confirmed to SilverDoor that the payment has been authorised, SilverDoor will then send confirmation to both the Client and the Property Partner.
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> (7) The agreement with Property Partners requires the Property Partner to invoice SilverDoor for the entire amount of the accommodation charge. SilverDoor deduct their commission from this amount and pay the balance to the Property Partner.

13. On the Characterisation Issue the FTT found that SilverDoor was providing a reservation service to Clients: it actively responds to requests from Clients for accommodation. Those requests specify parameters. SilverDoor selects a range of suitable properties from its database which fit those parameters and checks that the shortlisted properties are available. The shortlist is then presented to the Client. SilverDoor will incur costs in providing this service and, where it considers it appropriate, it charges a fee to Clients to recover a particular cost. The FTT considered that SilverDoor's choice to charge only the equivalent of this specific cost to those Clients and otherwise to fund the costs of providing reservation services from the commission charged to Property Partners, did not change the position.

14. Considering the evidence before it, the FTT found that SilverDoor did not provide "card payment facilities": it provided reservation services, which may be paid for by corporate card. There was no

evidence that the card payment service could be provided separately from the reservation services provided to Clients. There was no dispute that the reservation services would, if made for consideration, be a standard-rated supply. It followed, in the FTT's view, that the Fee was an amount charged for those reservation services, where a Client wished to pay by corporate card, and was a standard rated supply.

15. That was sufficient for the appeal to be dismissed, but the FTT went on to consider the arguments on the Exemption Issue.

16. So far as the Intermediaries Argument (which is all that remains of the Exemption Issue) was concerned, the FTT held that there was no evidence that SilverDoor did anything other than issue a payment request containing a website link which took the Client to the merchant acquirer's webpages in order to make payment for accommodation by corporate card. It found that SilverDoor did not "bring parties together" in any context required for the exemption to apply. There was no evidence that SilverDoor made any assessment of Client requirements or negotiated any terms of any contact between the Client and the merchant acquirer. SilverDoor did not even obtain the Client's card information to pass on to the merchant acquirer. Given that the merchant acquirer webpages were branded to look as they was part of SilverDoor's website, it was possible that a Client would not even be aware that they were dealing with a specific merchant acquirer. The FTT did not consider that SilverDoor's entering a contact with the merchant acquirer and later issuing a payment request to a Client could be regarded as "doing all that is necessary" for there to be a contract between a Client and a merchant acquirer. An intermediary within the scope of the exemption must, it considered, do more than issue a payment request to one party which directs that party to a webpage operated by the other party.

SilverDoor's grounds of appeal

17. SilverDoor was given permission to appeal on five grounds by this Tribunal. Subsequently, one ground of appeal (essentially, the Principal Argument on the Exemption Issue) was withdrawn following the decision of the Supreme Court in *Target Group Ltd v HMRC*, [2023] UKSC 35. The grounds on which SilverDoor now maintains its appeal are as follows:

> (1) The Tribunal failed to ask the relevant question, which was not whether SilverDoor provided a property reservation service to Clients (which was not disputed) but whether SilverDoor charged any consideration to the Client for the provision of that service. In consequence the Tribunal's characterisation of the supply was illogical and in contradiction of the facts.
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> (2) This error arose because the Tribunal failed to analyse correctly the legal effect and so the VAT consequences of the contractual structure used by SilverDoor. The contracts make it clear that SilverDoor made no charge to the Client in respect of the property reservation service. The only charge was the card handling fee for the use of the corporate credit card, in the case of those Clients who wished to use this mode of payment. This is a separate charge for a separate supply.
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> (3) For an intermediary to do all that is necessary to bring a provider of financial services and a customer for those services together, the intermediary is required to put the parties into a position to make a contract for the provision of that service. That was what SilverDoor did through its contractual arrangements with the merchant acquirers and Clients. There was no missing element in the service provided by SilverDoor, The Tribunal misapplied the law in holding that service provided by SilverDoor and for which it was paid did not constitute a 'distinct act of mediation'.

(4) These errors arose because the Tribunal failed to analyse the extensive case law concerning the correct VAT treatment of card handling fees.

18. Essentially, the issues we need to decide are:

(1) On the Characterisation Issue, did the FTT err in law in holding that the Fee was consideration for property reservation services, rather than a separate service? and

(2) On the Exemption Issue**,** if the Fees are consideration for a separate service, does the supply by SilverDoor to Clients for which the Fees are consideration fall within Item 5 of Group 5 of Schedule 9 VATA?

Issue 1 – the Characterisation Issue

SilverDoor's Submissions

19. Mr Southern submits that SilverDoor provides a reservation service to all Clients, however they pay, but it does not supply such services as there is no payment. For there to be a supply, there needs to be consideration and the FTT concluded (at paragraph [8] of the Decision) that SilverDoor does not charge a reservation fee to Clients. So, the FTT was wrong when it said (at paragraph [28] of the Decision) that SilverDoor provides reservation services which may be paid for by corporate card. SilverDoor provides property letting services to Property Partners. The services enjoyed by Clients are no more than a necessary consequence of the supply to Property Partners; that is how SilverDoor supplies its services to Property Partners. For there to be a supply, there must be a link between something done and the consideration for that. There is no link between the benefits Clients enjoy because of SilverDoor's activities and the payments made by those Clients who pay the Fees. The only benefit Clients obtain from the Fee is the ability to pay by credit card; that is all that is supplied, and it cannot sensibly be described as a reservation service – it is a fee for the facility of being allowed to pay by credit card.

20. At paragraph [28] of the Decision the FTT commented that there was no evidence that card payment services could be provided separately from reservation services supplied to Clients. In *Bookit Ltd v HMRC* (Case C-607/14) the CJEU decided that there was a single composite supply by Odeon and Bookit (its subsidiary) where Bookit charged a booking fee to customers who paid in a particular way. We discuss *Bookit* below, but for now we should note that Mr Southern distinguishes that case from the facts here as there was no supply by Bookit to Odeon (Bookit was not being paid for marketing services) and Odeon and Bookit were closely linked (they were members of the same corporate group).

HMRC's Submissions

21. For HMRC, Ms Belgrano's starting point is that the FTT has determined the Characterisation Issue and, on the authority of *HMRC v Gray and Farrar International LLP*, [2023] EWCA Civ 121, we should not interfere lightly with that characterisation. At [52] the Court commented:

> "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 Comrs* [2005] 1 WLR 86, paras 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"

22. The correct approach to characterisation of a transaction was set out at [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 Revenue and Customs Comrs* [2014] STC 937. At para 29 Lord Neuberger of Abbotsbury PSC (with whom the other members of the court agreed) quoted the CJEU in *Revenue and Customs Comrs v Newey* (trading as Ocean Finance) (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."

23. On analysis of the contracts here, it is clear that SilverDoor's argument that there is only one reservation service (supplied to Property Partners) is inconsistent with the terms of the agreements; it is readily apparent that SilverDoor provides Clients with specific services which are different from those supplied to Property Partners. In any event, the same transaction may yield two supplies. Accordingly, in circumstances where SilverDoor charges the Fee, it is consideration for the services provided by SilverDoor to the Client. These are the property reservation services set out in the Terms and Conditions/Global Agreement entered into with Clients. Silverdoor's pre-existing contract with a merchant acquirer and its redirecting the Client to a webpage managed by the merchant acquirer does not change the reservation service supplied by SilverDoor into a financial service.

24. As the FTT observed, there was "no evidence that the card payment service could be provided separately from the reservation services provided to Clients". Accordingly, contrary to SilverDoor's case, it is not possible to carve out a "facility to pay by credit card" service that is distinct from the reservation services. The alleged "facility to pay by credit card" service is simply a method of enabling a Client to pay, it is not a distinct service.

Discussion

25. The FTT's analysis of the Characterisation Issue is contained in paragraphs [23]-[29] of the Decision. It recorded (at paragraph [24] of the Decision) Mr Southern's submission that SilverDoor made no taxable supplies to Clients as they made no charge as a rule. The essence of Mr Southern's argument on the Characterisation Issue is that this can only be approached by looking at what SilverDoor did for a consideration. For there to be a supply, something must be provided and there must be a link between that provision and the consideration given for it. So, here, whilst SilverDoor may have provided reservation services to Clients, it did not supply them, because it did not charge for them. The Fee was only charged where Clients sought to pay by credit card, and so the only supply being made (the only thing done for a consideration) was allowing Clients to pay by credit. The FTT held, however, that SilverDoor was providing a reservation service to Clients. The Fee was charged to recover a cost incurred in providing this service.

26. The FTT summarised the booking process, but did not analyse the contractual underpinning of the arrangements in any great detail. It found (at paragraph [12] of the Decision) that SilverDoor enters into agreements with Property Partners and also that SilverDoor "has terms and conditions which apply to Client reservations and, in some cases, enters into a global services agreement with a Client in respect of reservation services". At paragraph [26] of the Decision it recorded its conclusion that:

> "[T]hose terms and conditions, and the evidence provided to us, make it clear that SilverDoor is providing a reservation service to Clients: it does not merely provide an online catalogue which Clients may pursue and then make a selection but, instead, actively responds to requests from Clients for accommodation. Those requests specify particular parameters. SilverDoor selects a range of suitable properties from its database which fit those parameters and checks that the shortlisted properties are available. The shortlist is then presented to the Client."

27. Both Mr Southern and Ms Belgrano took us through the relevant contracts in some detail. It is clear from the agreements we reviewed that SilverDoor enters into quite extensive and prescriptive agreements with Clients under which it agrees to provide a range of services. For example, in one agreement (described as a "Global Agreement") SilverDoor agreed to "provide the Services and meet any applicable Service Levels". The "Services" were defined in detail in the agreement.

28. The Client Reservation Terms and Conditions set out the terms on which Clients can make reservations for serviced apartments provided by Property Partners. Clients are told that, as well as using SilverDoor's website to initiate a particular reservation enquiry, they can make a general enquiry. In response to a general enquiry, SilverDoor "will endeavour to respond with a range of suitable Apartment suggestions that meet your requirements". If a Client makes a request for a particular reservation, SilverDoor will check availability and either confirm the booking or, if SilverDoor cannot make the reservation requested, "we will notify you and suggest suitable alternative Apartments". As far as problems are concerned, SilverDoor say that "We will provide you with reasonable assistance if you have an issue in respect of the Reservations, the Apartment, your use of it or any acts or omissions of the Apartment Provider (Apartment Issue). Please contact us immediately if you have an Apartment Issue. We will try to help, including taking the Apartment Issue up with the Apartment Provider."

29. The agreements between SilverDoor and Property Partners (and the obligations it undertook to them) are materially different. Despite this, Mr Southern submitted that there was only one service and that was supplied by SilverDoor to Property Partners. He said that there were no features of the services provided to Clients that could not be analysed as SilverDoor giving good value to Property Partners, keeping Clients happy so that they were prepared to rent from SilverDoor's stable of Property Partners. He likened the arrangements to someone selling their house via an estate agent. To discharge their obligation to the seller, the agent will market the property so a buyer is identified; that will confer a benefit on the buyer (they find a new home), but no one would suggest that the agent is supplying their services to the buyer.

30. We do not agree with Mr Southern. The relationship between a potential property buyer and an estate agent is not analogous to the instant case. As the FTT found, SilverDoor enters into separate arrangements with Clients (Terms and Conditions or contracts such as the Global Agreement) which specify what Clients can expect from SilverDoor – no such contracts/obligations are entered into by an estate agent. Whilst SilverDoor "doing a good job" for Clients will make them more likely to come back and rent from Property Partners, it cannot be said that all of the services can simply be analysed as giving good value to Property Partners, for example, managing problems, finding alternative accommodation.

31. Although the FTT did not set out any detailed analysis of sample contracts in the Decision, we agree with its summary at paragraph [26] of the Decision that SilverDoor is doing far more for Clients than just providing a list of accommodation Clients can select from and is providing a reservation service to Clients.

32. Ms Belgrano has an alternative argument, if we were minded to conclude that SilverDoor only makes supplies to Property Partners. She submits that, even if there was only one set of obligations on SilverDoor's part (those owed to Property Partners), performance of those obligations could still result in supplies being made both to Property Partners and Clients. She referred us to *CCE v Redrow Group plc* [1999] 1 WLR 161, and the discussion of that decision in *HMRC v Loyalty Management UK Ltd*, [2013] UKSC 15. In *LMUK* Lord Reed noted (at [67]) there can be third party consideration for a supply, albeit that (as a matter of commercial reality) businesses do not usually pay suppliers unless they are the recipient of the supply, even if that may involve provision being made to a third party. We asked Ms Belgrano whether it was any part of HMRC's case that SilverDoor supplied services to Property Partners and Clients with the commission paid by Property Partners being partly attributable to the services supplied to Clients and constituting third party consideration for those supplies, but she was very clear that this was no part of HMRC's case.

33. Mr Southern took issue with Ms Belgrano's reliance on cases such as *LMUK* and *Redrow*. This was on the basis that all the "one act: two supplies" cases were (he submitted) concerned with input tax recovery, asking whether when a business had paid input tax and whether it incurred it for its business. He says that those cases are not relevant where the question is whether VAT should be charged on consideration.

34. In the light of our (and the FTT's) conclusion that SilverDoor is providing specific services for Clients, we do not need to address this alternative argument.

35. Mr Southern's next contention is that, whilst SilverDoor might provide services to Clients, it did not (at least as a rule) supply them for VAT purposes as it charged no consideration, and therefore those services should be left out of account when determining the proper characterisation of what the Fee was consideration for.

36. It is clear that, for there to be a supply on which VAT is chargeable, there must be consideration. *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) concerned the taxation of the turnover of the operator of a barrel organ. The question for determination was whether the donations paid voluntarily to Mr Tolsma represented consideration paid for his services. The Court held that the basis of assessment of VAT on taxable supplies (in that case services) was everything that made up the consideration and for which there was a direct link between the services provided and the consideration received. At [14] it commented:

> "It follows that a supply of services is effected "for consideration" within the meaning of art 2(1) of the Sixth Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient."

37. The FTT was clearly well aware that (other than the Fee) Clients paid no consideration. In reaching its decision on the Characterisation Issue, the FTT observed (at paragraph [29] of the Decision) that the reservation services for Clients would be a standard rated supply if made for consideration. However, at paragraph [28] of the Decision the FTT had observed that there was no evidence that the card payment service could be provided separately from the reservation services provided to Clients, and that was an important factor in its decision. That reference to a card payment service not being capable of being supplied separately from the principal supply it relates to is a clear echo of the CJEU decision in *Bookit Ltd v HMRC* (Case C-607/14).

38. *Bookit* involved a company in the Odeon group. Bookit's business comprised processing debit and credit card payments ('card handling') for customers of the Odeon group of companies. Bookit also operated a call centre on Odeon's behalf. Bookit's income was entirely derived from transactions involving Odeon cinema customers. Counter sales were made by Odeon employees. With respect to those sales, as for those made at automatic ticket machines at cinemas, Bookit provided card handling services to Odeon, but charged neither Odeon nor customers any fee for those services. Telephone and Internet sales were made by Bookit, acting as agent for Odeon. With respect to those sales, the purchase of tickets by debit card or credit card involved the payment, by the customer, of the price of the ticket and also a card handling fee. The FTT analysed Bookit's role as involving, in part, a supply of a service as an agent of Odeon in selling tickets and, in part, the supply to the purchasers of those tickets of card handling services, consisting in obtaining card information from the customer, transmitting that information to the merchant acquirer, obtaining an authorisation code from the merchant acquirer and retransmitting the card information, including the authorisation code, to the merchant acquirer as part of the settlement process. Bookit argued that the card handling service that it provided to the purchasers of Odeon cinema tickets constituted a supply of services that was exempted under Group 5, Item 1, of Schedule 9 VATA and Article 135(1)(d) of the PVD, since the effect of the transmission to the merchant acquirer of the card data, including authorisation codes, was that funds were transferred to Bookit's account with the merchant acquirer. The question referred to the CJEU was whether this analysis was correct.

39. The CJEU in *Bookit* went on to consider the exemption question referred to it, but first delivered itself of some "preliminary observations", which might suggest that it considered the FTT had been asking the wrong (or an unnecessary) question. It observed:

> "22. The referring court bases its request for a preliminary ruling on the premise that the card handling service supplied by Bookit, when a person who wishes to visit an Odeon cinema purchases, via Bookit, a ticket which that person pays for using a debit card or a credit card, constitutes the supply of a service that is distinct from and independent of the sale of that ticket.
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> 23 The Court has however previously held that the additional charges invoiced by a provider of services to its customers, where the latter pay for those services by credit card, debit card, cheque or cash, over the counter at a bank or authorised payment agent acting on behalf of that service provider, do not constitute consideration for a supply of services that is distinct from and independent of the principal supply of services for which that payment is made (see, to that effect, the judgment of 2 December 2010, *Everything Everywhere*, C-276/09, EU:C:2010:730, paragraph 32).
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> 24 In that regard, the Court held, first, that the fact that the principal service provider makes available to customers an infrastructure that enables them to pay the price for that service, inter alia by bank card, does not constitute, for those customers, an end in itself, and that that supposed supply of services, which those customers are unable to access separately from the use of the principal service, can have no interest for such customers that is independent of that principal service (see, to that effect, judgment of 2 December 2010, *Everything Everywhere*, C-276/09, EU:C:2010:730, paragraph 27).
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> 25 The Court then added that the receipt of a payment and the handling of that payment are intrinsically linked to any supply of services provided for consideration, and that it is inherent in such a supply that the service provider should seek payment and make appropriate efforts to ensure that the customer can make effective payment in consideration for the service supplied, the Court holding that, in principle, any

> method of payment for a supply of services involves the provider taking certain steps for the handling of the payment, even if the extent of those steps may vary from one method of payment to another (see, to that effect, judgment of 2 December 2010, *Everything Everywhere*, C-276/09, EU:C:2010:730, paragraph 28).
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> 26.The Court stated, last, that the fact that a separate price for the alleged financial service is identified as such in the contract document and itemised separately in the invoices issued to customers is not of itself decisive, the Court holding that the fact that a single price is invoiced, or that separate prices were contractually stipulated, has no decisive significance for the purposes of determining whether it is necessary to find that there are two or more distinct transactions or only a single economic transaction (see, to that effect, judgment of 2 December 2010, *Everything Everywhere*, C-276/09, EU:C:2010:730, paragraph 29 and the case-law cited).
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> 27 In accordance with the Court's settled case-law, it is for the national court to assess whether the material put before it discloses, having regard to the economic and commercial reality of the transactions concerned, the characteristics of a single transaction, the contractual structure of that transaction notwithstanding (see, to that effect, judgments of 21 February 2008, *Part Service*, C-425/06, EU:C:2008:108, paragraph 54, and of 20 June 2013, *Newey*, C-653/11, EU:C:2013:409, paragraphs 42 to 45) and taking into consideration all the circumstances in which that transaction takes place (see, to that effect, judgment of 2 December 2010, *Everything Everywhere*, C-276/09, EU:C:2010:730, paragraph 26 and the case-law cited).
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> 28 In the light of the foregoing, it is for the referring court to determine whether, in the main proceedings, the card handling service provided by Bookit should be considered, for the purposes of the application of VAT, as a service that is ancillary to the sale of the cinema tickets concerned or as a service that is ancillary to another principal service that is supplied by Bookit to the purchasers of those tickets, which might be the remote reservation or purchase in advance of cinema tickets, and, consequently, as forming with that principal supply a single supply, with the result that that service should receive the same tax treatment as the principal supply (see, to that effect, judgments of 25 February 1999, CPP, C-349/96, EU:C:1999:93, paragraph 32, and of 16 April 2015, *Wojskowa Agencja Mieszkaniowa w Warszawie*, C-42/14, EU:C:2015:229, paragraph 31)."

40. The CJEU made similar (in fact, almost word for word identical) observations in *National Exhibition Centre Ltd v HMRC* (Case C-130/15). That case concerned the company which owned and operated the National Exhibition Centre and other venues in Birmingham which were used to stage exhibitions and events. It hired its venues to third party promoters and sold tickets for those events. When customers bought tickets for events and paid by debit card, in the case of remote payment, or by credit card, in all cases, the company invoiced them, in addition to the price of the tickets, for a booking fee. The company paid the event promoter the part of the amount paid by the customer which corresponded to the ticket price and kept the amount corresponding to the booking fee. The Upper Tribunal referred to the CJEU the question whether the 'card processing' service carried out by the company was VAT exempt. The CJEU answered this question (in the negative), having first delivered preliminary remarks to the same effect as those it delivered in *Bookit*.

41. As with the instant appeal, two questions were raised in *NEC*. The first (the "supply issue") was what the "booking fees" were consideration for. The FTT held that they were consideration for supplies of card processing services (rather than for the service of remote booking and delivery of tickets). HMRC submitted that "the starting point for identifying the supply that had been made was what the customers actually received in return for the consideration they provided in the form of the

booking fees" and the Upper Tribunal described this as the correct approach; [2015] UKUT 23 (TCC) at [43]-[44]. The second issue was the exemption issue, which was the question referred to (and answered by) the CJEU.

42. The Upper Tribunal in *NEC* referred to the decision of the Inner House of the Court of Session in *Scottish Exhibition Centre Ltd v HMRC*, [2006] CSIH 42. Here too the court was concerned with the question of the VAT liability of booking fees charged to customers buying tickets using a credit card or (when booking by 'phone) a debit card. As fees were only charged when a booking was made by credit card or debit card, the Court held that the only reasonable conclusion open to the tribunal was that the booking fee was charged by SEC in consideration of the facility of booking by credit card or debit card. The Upper Tribunal in *NEC* thought that the Court of Session's approach to the question of the nature of the supply was "instructive" and, whilst not formally bound by the decision of the Inner House, considered that, in the absence of conflicting authority, it should follow it. At [14] the Court of Session had noted its disagreement with the tribunal's conclusion that SEC's service was for a wider service, not just the facility of paying by debit or credit card, observing:

> "In our opinion the tribunal erred in reaching this conclusion. …. The tribunal gave no reason why it apparently rejected Mr Sharkey's evidence, that the booking fee was paid for the facility of booking by credit card or debit card. There is some indication that the tribunal confused the booking fee charged by the appellant to a customer with the booking fee the appellant was entitled to charge, but did not in practice charge, to the promoter in terms of para 4(b) of the ticket sale agreement. The tribunal took into account the evidence about the giving of certain information by telephone operators, without recognising that there was no evidence that the giving of any such information constituted any part of any supply made for a consideration by the appellant. It was held in *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats GA* (para 12) that there must be a direct link between the consideration and the supply (see also secs 4(1) and 5(2)(a) of the 1994 Act). The tribunal erroneously took into account the fact that the cost of the service exceeded the booking charge on the transaction. The use made by the appellant of the proceeds of the fee charged was irrelevant to its proper characterisation. The tribunal also erred by taking into account the role of the appellant as agent of the promoter. Supplies consisting of sales of tickets were made not by the appellant, but by the promoter through the appellant as agent. These supplies were therefore irrelevant in the characterisation of the nature of the supply made by the appellant in its own right. Most importantly, the tribunal erred by failing to take into account the undisputed evidence that a fee was charged whenever, and only whenever, a booking was made by credit card or debit card. The tribunal failed to take into account the fact that a booking fee would be incurred by a customer paying by credit card in person at the box office, and the fact that no fee would be incurred by a telephone booking in which the customer paid by cheque rather than by credit card. In these circumstances, in our opinion the tribunal based their decision upon matters which they ought not to have taken into account and disregarded matters which they ought to have taken into account. Having regard to the tribunal's findings in fact and to Mr Sharkey's uncontroversial evidence, the only conclusion reasonably open to the tribunal was that the booking fee charged by the appellant was charged in consideration of the facility of booking by credit card or debit card. In our opinion, no reasonable tribunal could have reached the conclusion which the tribunal reached. For these reasons the first question falls to be answered in the first alternative."

43. At [36] the Upper Tribunal in *NEC* went on to consider "the economic and commercial reality of the transaction", including the contractual relationship between the parties, describing its enquiry as "an objective one, the reference point being the typical consumer". It discussed *Everything*

Everywhere Ltd v HMRC (Case C-276/09), which was referred to by the CJEU in *Bookit* and *NEC*. In that case the ECJ considered the VAT liability of payment handling charges added to bills by a mobile phone company. The Upper Tribunal in *NEC* distinguished *Everything Everywhere* on the basis that the additional charges were levied by the principal supplier. At [39] it observed:

> "Although [counsel for HMRC] sought to place reliance on *Everything Everywhere*, there is an essential difference between that case and the circumstances of NEC's case. In *Everything Everywhere*, the critical finding was that there was no distinct and independent payment handling service, because that service was merely ancillary to the principal supply of telecommunication services. By contrast, as the FTT found, and which is not the subject of appeal, the service for which the booking fee is paid is distinct and independent from the supply of the tickets, as that supply is made by the promoter and not by NEC. There is thus no question of the supply made by NEC in return for the booking fee being regarded as ancillary to the supply of tickets. It is simply the nature of the supply for which the booking fee is the consideration that is in issue."

44. There are striking similarities between the fact pattern in *Bookit* and *NEC* and the facts here; in both cases there is an agent, which takes payment on behalf of its principal and (in certain circumstances) charges a card handling fee (but no other consideration) to the person to whom the principal supply is made. In *Bookit* and *NEC* the CJEU held that it was for the FTT to decide whether that fee "should be considered, for the purposes of the application of VAT, as a service that is ancillary to the sale of the cinema tickets concerned or as a service that is ancillary to another principal service that is supplied by Bookit to the purchasers of those tickets". We note that the CJEU did not regard the fact that the cinema tickets were being supplied by Odeon, or that Bookit's only activity was acting as a booking agent for which there was no other consideration beyond the handling fee (and therefore, on Mr Southern's analysis, no other service supplied by it), as being at all problematic. This is why we concluded that nothing turns on Mr Southern's submission that, absent the Fee, there may be a provision (but not a supply, at least in terms of the UK VAT legislation) of services to Clients.

45. The conclusion that it seemingly made no difference that Bookit and Odeon were separate companies might appear to be at odds with the decision of the Court of Appeal in *Telewest Communications plc v HMRC*, [2005] EWCA Civ 102. Mr Southern suggested that the CJEU had killed off the idea that two different, but related suppliers could not make a single overall supply. This was quite a surprising concession for him to make, but we agree with him that it would seem to be an inevitable consequence of the CJEU's comments (to the effect that the fee for being allowed to pay in a particular way, which was retained by the agent, could be analysed as ancillary to the principal supply made by the event organiser/cinema owner) that merely disaggregating activities between different suppliers will not of itself necessarily prevent those activities being analysed as one for VAT purposes. Fortunately, that is not an issue we need to explore.

46. We mentioned earlier that Mr Southern distinguished *Bookit* on the basis that Bookit was not being paid for marketing services and Odeon and Bookit were closely linked (they were members of the same corporate group). We do not consider that either of these grounds is a good basis on which to distinguish *Bookit*. Neither has any bearing on whether a card handling facility is ancillary to an agent's wider supplies, whether the card handling facility is being (or can be) supplied separately. The corporate group point is shown to be wrong by the CJEU's identical observations in *NEC*. The company there had no corporate relationship with the businesses putting on events in the NEC or other venues.

47. Pausing to take stock at this point, we agree with Mr Southern that the analysis of what SilverDoor supplies is to be answered by asking the question, from the point of view of a typical customer, "What did Clients actually receive in return for the consideration they provided in the form of the fees?" As Fees were only charged when a booking was made by credit card, the only reasonable conclusion is that the fee was charged by SilverDoor in return for enabling Clients to pay for bookings by credit card. That, however, is not the end of the analysis.

48. At [28] the CJEU in *Bookit* made it clear that it is for the national court to determine whether a service such as the card handling service provided in that case should be considered as a service that is ancillary to the principal supply (cinema tickets in that case, property letting here) or as a service that is ancillary to the service that is supplied by the agent arranging the principal supply. There is no conflict between this approach and the approach and conclusions of the Court of Session in *Scottish Exhibition Centre,* which were endorsed by the Upper Tribunal in *NEC*. In both of those cases the question being asked was what the payment was for. Looked at in isolation, the payment in those cases (and the payments we are concerned with, which the FTT was very clear about at paragraph [27] of the Decision) were clearly being made in return for being allowed to pay in a particular way. The issue raised by the CJEU is a different one: even if the payment is clearly consideration for being allowed to pay in a particular way and no more, should the supply for which that payment is consideration nevertheless be analysed on the basis that it is ancillary to a broader/different supply?

49. We have already noted our agreement with the FTT's conclusions on the facts, that SilverDoor was providing a range of services to Clients. It was entering into arrangements with Clients under which it agreed to do a number of things for them; it did much more than just let them look at a list of properties it had prepared for Property Partners. Among other things, SilverDoor facilitated payment by Clients for the services they received from Property Partners, and in that context it provided a facility under which Clients could (if they chose and against payment) pay for those services by credit card. The FTT held (at paragraph [28] of the Decision) that there was no evidence that the card payment service could be provided separately from the reservation services provided to Clients. Put another way, the ability to pay by credit card had no independent existence outside the wider spectrum of services being provided by SilverDoor. This conclusion was one which was perfectly open to the FTT based on the evidence; indeed, we find it hard to see how the FTT could have reached any other conclusion.

50. As the CJEU's comments in *Bookit* and *NEC* and its conclusions in *Everything Everywhere* make clear, allowing or facilitating a payment for something to be made in a particular way is (or, at the very least, is capable of being) inherently part of the wider arrangement of which the payment forms part, and in such cases the VAT liability on any payment (or additional payment) made by a person in return for being allowed to pay in a particular way will fall to be analysed on that basis.

51. We have already noted the FTT's conclusion (with which we agree) that the card payment service was bound up in the wider reservation services provided by SilverDoor and had no separate validity. On that basis, it was open to the FTT to conclude that the card payment service should be considered as a service that is ancillary to the principal service provided by SilverDoor for Clients. As the FTT recorded at paragraph [29] of the Decision, there was no dispute that those services, if made for a consideration, would be standard rated, and we have already observed that the CJEU in *Bookit* and *NEC* was not concerned by the fact that the agent only charged a fee where payment was made in a particular way and so, absent such payments, the agent only provided (but did not, at least in the language of VATA, supply) a service. The CJEU clearly regarded it as open to a national court to conclude, as the FTT did here, that a payment such as the Fee could be consideration for a service which falls to be analysed as ancillary to another activity even if the Fee constitutes the only consideration.

52. For these reasons, we have concluded that, in reaching its conclusion on the Characterisation Issue, that the Fee is properly to be analysed as consideration for the reservation services provided by SilverDoor, the FTT did not make any error of law.

53. The CJEU in *Bookit* and *NEC* considered that it was also possible that a payment such as the Fee could be regarded as payment for a service ancillary to one provided by the supplier of the principal service rather than the agent. Considering that issue would require us to engage with the effect of *Bookit/NEC* on *Telewest Communications.* Our conclusion at paragraph [52] above is why we do not need to do that.

54. Because we agree with the FTT on the Characterisation Issue, we do not need to consider Ms Belgrano's submissions on *Gray and Farrar International.*

Issue 2 - the Exemption Issue

55. Our conclusion on the Characterisation Issue is sufficient to dispose of this appeal. However, the Intermediaries Argument was fully explored before us and we record our conclusions on the Intermediaries Argument in the alternative.

SilverDoor's Submissions

56. Mr Southern cites the definition of what constitutes "negotiation" in *CSC Financial Services Ltd v CCE* (Case C-235/00):

> "39. It is not necessary to consider the precise meaning of the word "negotiation" …in order to hold that, in the context of Article 13B(d)(5), it refers to the activity of an intermediary who does not occupy the position of any party to a contract relating to a financial product, and whose activity amounts to something other than the provision of contractual services typically undertaken by the parties to such contracts. Negotiation is a service rendered to, and remunerated by a contractual party as a distinct act of mediation. It may consist, amongst other things, in pointing out suitable opportunities for the conclusion of such a contract, making contact with another party or negotiating, in the name of and on behalf of a client, the detail of payments to be made by either side. The purpose of negotiation is therefore to do all that is necessary in order for two parties to enter into a contract, without the negotiator having any interest of his own in the terms of the contract."

57. Etherton J in *CCE v BAA plc,* [2002] STC 327 at [45], provided a succinct summary:

> 'What is required in the bringing together of persons who are or may be seeking to receive a financial service and persons who provide the financial service, together with the performance of work preparatory to the conclusion of contracts for the provision of the financial service.'

58. Mr Southern says that, in cases where payment by credit card is required, SilverDoor enables the Client to communicate with the merchant acquirer and directs it to pay the accommodation charge to SilverDoor for onwards payment; SilverDoor brings together a party providing financial services (the merchant acquirer) and the party (the Client) wanting to make use of those services. The merchant acquirer extends credit and SilverDoor effects the introduction that brings that about. SilverDoor has a longstanding agreement with merchant acquirers to accept payment by credit card. It tells Clients that (at a cost) that facility is available and, if a Client chooses to do this, SilverDoor has set up arrangements to facilitate this.

HMRC's Submissions

59. HMRC say that SilverDoor's argument here appears to rely entirely on an alleged contract between Clients and merchant acquirers, but no such contract has been disclosed. Indeed, in evidence to the FTT, Mr Buckley (SilverDoor's CFO) said that it is not the Clients who have a contractual relationship with the merchant acquirer, it is SilverDoor. Mr Southern's reading of paragraphs [35] and [43] of the Decision is wrong; there is no such contract and the FTT was not purporting to find one.

60. SilverDoor does not in any sense act as an intermediary between the Client and the merchant acquirer, because:

(1) SilverDoor itself entered into contracts with merchant acquirers.

(2) SilverDoor provides Clients with a link to a SilverDoor branded website, operated by a merchant acquirer, which the Client used to make payment.

(3) Providing a link is in no sense an act of intermediation: SilverDoor provides the link pursuant to its (SilverDoor's) pre-existing agreement with the merchant acquirers to enable card payments to be made. That does not constitute a "service rendered to and remunerated by a contractual party as a distinct act of mediation". Moreover, on no sensible reading of the Terms and Conditions and/or the Global Agreement, does SilverDoor agree to act as a financial intermediary for the Clients, in return for consideration.

(4) There was no evidence that SilverDoor did anything other than issue a payment request containing a website link which took the Client to the merchant acquirer's webpages to make payment for accommodation by corporate card.

Discussion

61. The FTT's findings of fact relevant to the Intermediaries Argument were that:

(1) SilverDoor enters contracts with two merchant acquirers. It then tells Clients wishing to pay by card to click on a link which leads the Client to the webpages of one of those merchant acquirers in order to make payment for accommodation by corporate card. There was no evidence that SilverDoor did anything beyond this.

(2) There was no evidence that SilverDoor made any assessment of Client requirements or negotiated any terms of the contact between the Client and the merchant acquirer.

(3) SilverDoor did not even obtain the Client's card information to pass on to the merchant acquirer.

(4) Given that the merchant acquirer webpages were stated to be branded to look as they was part of SilverDoor's website, it was possible that a Client would not even be aware that they were dealing with a specific merchant acquirer.

62. At paragraph [70] of the Decision the FTT summarised its conclusion on the Intermediaries Issue as follows:

> "We do not consider that SilverDoor's entering into a contact with the Merchant Acquirer and later issuing a Payment Request to a Client can be regarded as "doing all that is necessary" for there to be any contract between Client and Merchant Acquirer. An intermediary within the scope of the exemption must, in our view, do

> more than issue a Payment Request to one party which directs that party to a webpage operated by the other party."

63. To succeed on the Intermediaries Argument, SilverDoor must show that there is a financial service being supplied, that it is not the supplier or recipient of that service (i.e., that it is independent of the contract for that principal service) and that it has negotiated the contract for the provision of that service. Mr Southern says that SilverDoor brings the merchant acquirer (a provider of financial services falling within Art 135(1)(b) – (f)) and the Client (the party seeking a financial service - the Client wants the merchant acquirer to pay their accommodation charge) together and a contract is concluded between them when the Client gives the merchant acquirer their card details via SilverDoor's website, so that – subject to authorisation by the card issuer – the merchant acquirer will pay the Client's accommodation charge to SilverDoor acting as disclosed agent for the Property Partner. Ms Belgrano stresses that there was no finding by the FTT that a Client/merchant acquirer contract came into being.

64. In argument Mr Southern at times characterised the service he says the merchant acquirer provides to Clients as one of credit. Ms Belgrano objected that it is not open to SilverDoor to argue that the merchant acquirer makes a grant of credit to the Client, because there was no evidence of this before the FTT and there is no finding to that effect by the FTT.

65. The existence (or not) of a contract between Clients and merchant acquirers is important because the essence of the concept of negotiation is "do[ing] all that is necessary in order for two parties to enter into a contract, without the negotiator having any interest of his own in the terms of the contract" (see the passage from *CSC* reproduced at paragraph [20]).

66. Mr Southern says that, at paragraphs [35] and [43] of the Decision, we can see that the FTT clearly found that there was a contract between the merchant acquirer and Clients. At Decision [35] the FTT commented:

> "We consider that SilverDoor's Payment Request has the effect of directing the Client to the Merchant Acquirer so that the Client can make payment. The Client then authorises the Merchant Acquirer to undertake actions which result in a payment of money from the Merchant Acquirer to SilverDoor."

67. At paragraph [43] of the Decision the FTT said that "SilverDoor receives payment from the Merchant Acquirer following the Client's request to the Merchant Acquirer". Mr Southern said that the merchant acquirer extends credit and SilverDoor effects the introduction that brings that about.

68. Ms Belgrano says that Mr Southern's reading of paragraphs [35] and [43] of the Decision is wrong; there is no such contract and the FTT was not purporting to find one. Indeed, in evidence to the FTT, Mr Buckley (SilverDoor's CFO) said that it is not the Clients who have a contractual relationship with the merchant acquirer, it is SilverDoor.

69. We agree with Ms Belgrano on this point. There is nothing in paragraphs [35] or [43] of the Decision to suggest that the FTT was finding that there was a contract between a Client and a merchant acquirer. The FTT found that payment is triggered by an authorisation by a Client (see paragraph 35 of the Decision), but it is reading too much into these words to say that the FTT was also finding the existence of a contract between Clients and merchant acquirers. The FTT found that the Client may not even be aware that they were dealing with a specific merchant acquirer. These payments and their consequences can just as easily be explained by the existing matrix of contracts discussed below.

70. What there is is a passing comment in paragraph [69] of the Decision that SilverDoor did not make any assessment of Client requirements or negotiate "any terms of the contact (sic) between the Client and the Merchant Acquirer". This is not a passage Mr Southern referred us to, but we should address what the FTT was saying here. In this passage the FTT was focusing on the role of SilverDoor and whether what it did amounted to negotiation. We consider that it is reading too much into these words to conclude that there was a definitive finding by the FTT that there was a contract between a Client and a merchant acquirer; it could just as easily be saying that SilverDoor was not doing all that is necessary "for there to be any contract between Client and Merchant Acquirer" (a phrase which is more agnostic on the question whether there is a contract), which is its turn of phrase in the next paragraph of the Decision.

71. It may be helpful at this point to pause and note how the arrangements involved in payment by credit card work in order to discover whether there is anything in those arrangements which might point towards the existence of a Client/merchant acquirer contract. Credit card arrangements were summarised by the Court of Appeal in *Office of Fair Trading v Lloyds TSB Bank plc and others,* [2006] EWCA Civ 268, as follows:

> "5. The agreements under which banks and other financial institutions issue credit cards represent a form of consumer credit agreement falling within the scope of the Act. Originally credit cards were issued within the framework of what we shall call for convenience a "three-party" structure. This involves (i) an agreement between the card issuer and the cardholder to extend credit by paying for goods or services purchased by the cardholder from suppliers who have agreed to honour the card; (ii) an agreement between the card issuer and the supplier under which the supplier agrees to accept the card in payment and the card issuer agrees to pay the supplier promptly; (iii) an agreement between the cardholder and the supplier for the purchase of goods or services. However, as the industry has grown there have been three significant developments which together have given rise to the present dispute.
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> 6. The first is the development of what may be called the "four-party" structure. This developed out of the use by card issuers of what are called "merchant acquirers" to recruit new suppliers willing to accept the issuer's card. In the classic four-party structure there is interposed between the card issuer and the supplier the merchant acquirer acting as an independent party. There is an agreement between the merchant acquirer and the supplier, under which the supplier undertakes to honour the card and the merchant acquirer undertakes to pay the supplier, and an agreement between the merchant acquirer and the card issuer, under which the merchant acquirer agrees to pay the supplier and the card issuer undertakes to reimburse the merchant acquirer. There is, however, no direct contractual link between the card issuer and the supplier.
>
> ...
>
> 8. The third development has been the creation of large international credit card operating networks. At least two of these, Visa and MasterCard, are established as independent organisations operating under what are in substance four-party structures with the addition of a sophisticated clearing house system. Under the rules of the network the card issuer enters into an agreement with its customer to extend credit in connection with the purchase of goods or services from any supplier who has agreed to honour the network card. The merchant acquirers recruit suppliers to the network rather than to any individual card issuer and the supplier undertakes to honour the network card regardless of the identity of the issuer and in most cases without having any clear idea who the issuer may be. The card issuer undertakes to reimburse the merchant acquirer, though he may previously have been unaware of

his identity or existence and is likely to have been wholly unaware of the existence or identity of the supplier. The arrangements are all underpinned by a complex agreement between the card issuers and the merchant acquirers, all of whom are members of the network."

72. Mr Southern referred us to "Goode: Consumer Credit Law and Practice" (Issue 73, November 2023), which contains the following helpful passages:

> "[2.64] A merchant acquirer is a bank or other financial institution which "acquires "merchants (traders) in the sense of bringing them into the network of traders willing to enter into an agreement with the merchant acquirer to accept the card. The functions of the merchant acquirer are to promote the card by extending the network, to pay traders for goods and services supplied against the card and to collect reimbursement from the card issuers, who in turn obtain reimbursement from the card holders. All four of the major clearing banks are merchant acquirers for both Visa and MasterCard.
>
> [2.65] The card issuer issues the card to its customer, the cardholder, who can use it to obtain goods and services from traders who have agreed to accept the card and, if it is a cash card, to draw cash for an automated teller machine. The merchant agreement regulating the terms on which the trader accepts the card may be concluded either with the card issuer direct or with the merchant acquirer. In the former case the trader is paid by the card issuer; in the latter by the merchant acquirer, who then obtains reimbursement from the card issuer.
>
> [343] *Re Charge Card Services Limited* involved a simplified card scheme with a single card-issuer. By contrast, numerous banks and other financial institutions issue Visa credit cards and MasterCards in the UK. Each scheme has its own agreement which operates as a binding contract between the participating banks and other financial institutions. The master agreement provides for such matters as the form of the card, card authorisation procedures and settlement between participating financial institutions. Under the master agreement, participating financial institutions generally become entitled to issue cards in their own name to their customers, and to admit suppliers to the scheme so as to entitle them to accept cards in payment for goods and services supplied to them. A supplier contracts with a 'merchant acquirer', a financial institution which gives the supplier admission to the scheme (the merchant acquirer is often the supplier's own bank, so long as it is a participant in the particular scheme). By this contract, the supplier is authorised and obliged to accept all cards issued under the scheme in payment for goods or services, and the merchant acquirer agrees to pay to the supplier the value of the goods or services supplied, less a handling charge, provided the supplier has complied with certain stipulated conditions (e.g. he has obtain specific transaction authorisation if the price is over a stated ceiling). For each transaction the supplier transmits both card and transaction details to the merchant acquirer and EFTPOS system (paper sales vouchers, signed by the cardholder are now rarely used). The merchant acquirer then pays the supplier as agreed. Under the terms of the master agreement, the merchant acquirer obtains reimbursement from the participating financial institution which issued the card used in the transaction (unless they happen to be one and the same). …"

73. The FTT's finding that SilverDoor has entered into contracts with two merchant acquirers is entirely consistent with the narrative in the *Lloyds TSB* case and the commentary in *Goode*. Under those contracts, HMRC submit, SilverDoor incurs a cost whenever Clients pay by credit card because the merchant acquirer is, in effect, providing a guarantee to SilverDoor; if there is a credit/financial service supplied by the merchant acquirers, it is supplied to SilverDoor.

74. In argument Mr Southern's position evolved. He still maintains that, as a matter of banking law, there is a Client/merchant acquirer contract, but he also says that the VAT analysis does not turn on this point at all. He referred us to the CJEU case of *Ludwig v Finanzamt Luckenwalde* (Case C-453/05) ("*Ludwig*"). In that case the CJEU held that negotiation is an act of mediation, the purpose of which is to do all that is necessary for the two parties to the principal contract to conclude that contract, and in that light the question whether there is an activity of mediation does not depend on the existence of a contractual link between the provider of the negotiation services and one of the parties to the credit agreement. On that basis, a commission paid to a sub-agent for services which amounted to negotiation would not be taken outside the exemption just because the sub-agent was not in a contractual relationship with one of the parties to the primary financial service contract.

75. Mr Southern also referred us to *CCE v Civil Service Motoring Association Ltd*, [1998] STC 111 ("*CSMA*"). The facts in *CSMA* were briefly as follows. CSMA was a non-profit-making association providing motoring, leisure, financial and related services to its members, including a credit card scheme on terms agreed between CSMA and a bank (FBS). FBS issued the credit card but worked in partnership with CSMA (regularly discussing the strategy for benefits and services to be offered). It was held that CSMA had done much more than just allow FBS to develop and market an affinity card. CSMA was not just an introducer; it was involved in customer handling, marketing, setting prices and policies and providing an arbitration service. The Tribunal described one of its actions as negotiating the global terms on which its members would be eligible for the credit card. FBS paid commissions to CSMA in connection with the scheme. The Commissioners contended that the supply by CSMA was taxable, arguing inter alia that the negotiation exemption was confined to cases where an intermediary arranges a transaction for a specific grant of credit. This argument was rejected. Giving his reasons for agreeing that CSMA's services fell within the negotiation exemption, Mummery LJ (with whom Pill and Hobhouse LJJ agreed) commented (at pp118-119):

> "(2) The critical question is whether the expressions 'negotiation of credit' and 'making of arrangements for any transaction for granting of any credit' are to be construed as *implicitly* restricted to activities in relation to particular transactions for the specific grant of credit. Neither the purpose nor the context of the exemption justify placing this restricted meaning on the wide general language of the directive and of the 1983 Act. Both the 'negotiation of credit' and 'the making of arrangements' for the granting of credit refer to the doing of things antecedent to, and directly leading to, the results sought to be achieved by the doing of those things. The result to be attained is of a general rather than a specific nature, namely the 'granting of any credit'. In some cases intermediaries between principals will be involved in achieving that result. In other cases they will not. It is neither expressly nor impliedly necessary that they should be involved as a condition of the application of the exemption to those who do not actually grant credit.
>
> (3) The activities of CSMA, in respect of which FBS paid commission, can reasonably and sensibly be described as negotiation of, or making arrangements for any transaction for, the grant of credit. I am unable to detect either in the purpose of the exemptions or in the language and context in which they are expressed any distinction between (a) the negotiation, or making arrangements for particular transactions for the specific grant of any credit, and (b) these negotiations or arrangements planned and designed by joint efforts for the specific purpose of leading directly to the grant of credit by FBS to members of CSMA."

76. Mr Southern submitted that *In re Charge Card Services Ltd*, [1989] Ch 497, stands as authority for the proposition that a merchant acquirer grants credit and makes a financial service. We have read the judgment of Sir Nicholas Browne-Wilkinson (who gave the only reasoned judgment in the Court

of Appeal) and that of Millett J at first instance (reported at [1987] Ch 150) and can find no trace anywhere of any analysis of the role of merchant acquirers in credit card transactions. The only parties to the transactions discussed in that case were the (by then insolvent) company which issued fuel credit cards, the garages which accepted those cards as payment for fuel supplied (and which charged the company the cost of fuel supplied and were paid that cost less the company's commission), the card users and a factoring company to which the issuer sold its receivables (amounts due from card holders) in order to finance the payments due from it to the garages. We are fortified in our conclusion that we have not missed a relevant point in this case by the comment in Goode (paragraph [343] reproduced at paragraph [47] above) that this case involved a simplified card scheme with a single card-issuer.

77. We agree with Ms Belgrano that there is no finding by the FTT that there is any contract between a Client and a merchant acquirer. When a Client authorises a merchant acquirer to make a payment which satisfies its obligations to make payment to SilverDoor, that (the passage from *Goode* suggests) is the modern-day equivalent of signing a paper sales voucher which confirms that a person has purchased goods or services for a price using their card, so that the merchant acquirer can release funds to the supplier and this will (in due course) result in the Client's account with the card issuer being debited. None of the materials we have been taken to point to the existence as a general matter of a Client/merchant acquirer contract in credit card transactions such as this, and there is no finding by the FTT that there was any such contract here. As the existence/identity of a merchant acquirer is not disclosed to a Client and we were not taken to any materials which explain the role of a merchant acquirer to Clients, it is difficult to see how the FTT could have concluded that there was a Client/merchant acquirer contract. To come to such a conclusion the FTT would have had to accept that Clients entered contracts, the existence of which was not revealed, with unidentified parties on undisclosed terms.

78. The materials we were taken to, including contracts in the hearing bundle SilverDoor was party to with merchant acquirers, suggest that merchant acquirers move funds to SilverDoor pursuant to their contract with SilverDoor. They do so in reliance on the undertaking they already have from the card issuers. We agree with Ms Belgrano that, if there is a financial service provided at this point in the arrangements (in the form of the transfer of funds to SilverDoor by the merchant acquirer or, which we consider an unlikely over-analysis of the arrangements, the grant of credit by merchant acquirers to SilverDoor), it takes place pursuant to a contract to which SilverDoor is a party and is a supply to SilverDoor itself. SilverDoor cannot provide negotiation services in relation to a contract/arrangement to which it is already a party.

79. We do not agree that merchant acquirers are providing credit to Clients when they move funds to SilverDoor. They are advancing funds to SilverDoor in reliance on the indemnity they have from card issuers. It is the card issuers who are advancing credit to Clients, pursuant to the arrangements already in place. The funds transfer by merchant acquirers is part of the mechanism by which that credit is delivered.

80. If we are wrong in our analysis that there is no contract for the provision of a financial service by merchant acquirers to Clients, we would agree with the FTT's conclusions, for the reason it gave, that there was no act of negotiation by SilverDoor. We do not consider that *Ludwig* or *CSMA* help Mr Southern. *Ludwig* indicates that a person whose acts amount to negotiation can benefit from the exemption, even if they do not have a direct contractual relationship with the provider of the principal financial service, but it does not suggest (nor could it) that the exemption is available to a person whose acts do not amount to negotiation in the first place. *CSMA* tells us that the negotiation exemption will benefit a person who negotiates a framework under which credit is advanced in the future. Fees/commission paid on each advance of credit is still being paid for the negotiation of the

credit arrangements. That feature (that commission was paid by reference to credit advanced sometime after the arrangements were negotiated) did not result in the negotiation exemption not applying, but it was still necessary for CSMA to have negotiated the credit arrangements in the first place.

81. The FTT held that SilverDoor had not brought the merchant acquirers and Clients together. The merchant acquirers were parties to the credit card arrangement put in place long before a particular Client engaged with SilverDoor. Pursuant to those pre-existing obligations, they had agreed to provide SilverDoor with funds where certain conditions were satisfied. SilverDoor gave Clients an electronic link that enabled them to use the facility SilverDoor had arranged for itself to pay for accommodation. As the FTT observed, SilverDoor was not pointing out suitable opportunities to Clients or doing anything else that would be expected of a person providing negotiation services. So, if (which we do not consider to be the case) there was a contract for the provision of a financial service by a merchant acquirer to a Client, it was not negotiated by SilverDoor.

Disposition

82. In conclusion, for the reasons set out above, we do not consider that the FTT made any error of law in reaching its conclusions on either the Characterisation Issue or the Intermediaries Argument. The Principal Argument has already been abandoned by SilverDoor.

83.There was no error of law in the Decision and this appeal is therefore dismissed.

JUDGE PHYLLIS RAMSHAW
JUDGE MARK BALDWIN

RELEASE DATE: 23 May 2024