VAT – Abuse of Law doctrine - Remittal of case by the Court of Appeal

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: LON/05/0950

BETWEEN

MR PAUL NEWEY (T/A OCEAN FINANCE) **Appellant**

-and-

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

TRIBUNAL: JUDGE PETER KEMPSTER
MRS JOANNA NEILL

Sitting in public at Taylor House, London on 1 to 3 July 2019 (with subsequent further written submission by the parties)

Julian Ghosh QC, Jonathan Bremner QC & Elizabeth Wilson of counsel (instructed by Ashurst LLP) for the Appellant

Owain Thomas QC & Isabel McArdle of counsel (instructed by the General Counsel and Solicitor to HM Revenue and Customs) for the Respondents

DECISION

INTRODUCTION

1. These proceedings were a hearing of a remittal of case to the First-tier Tax Tribunal by the Court of Appeal under s 14(2)(b)(i) Tribunals, Courts & Enforcement Act 2007: *HMRC v Paul Newey (t/a Ocean Finance)* [2018] STC 1054 ("**the CA Decision**").

2. The litigation history of the dispute is set out in the CA Decision at [5-9] and may be summarised as follows:

(1) Mr Newey's appeal against disputed VAT assessments was heard by the First-tier Tribunal at a five day hearing in early 2010, and his appeal was allowed: [2010] UKFTT 183 (TC) ("**the FTT Decision**").

(2) HMRC appealed to the Upper Tribunal. At the request of both parties the Upper Tribunal made a reference to the Court of Justice of the European Union. In summer 2013 the CJEU issued its judgment on the reference: Case C-653/11, [2013] STC 2432 ("**the CJEU Decision**"). The Upper Tribunal heard HMRC's appeal at a two day hearing in late 2014, and their appeal was dismissed: [2015] STC 2419 ("**the UT Decision**").

(3) HMRC appealed to the Court of Appeal. The appeal was heard at a two day hearing in early 2018, and HMRC's appeal was allowed. The outcome was that the UT Decision was set aside and (as already mentioned) the case was remitted to this Tribunal: CA Decision at [115].

3. The Court of Appeal set aside the UT Decision because that decision contained an error or errors of law in that it incorrectly interpreted findings by the FTT, and also adopted the wrong approach to the FTT Decision: CA Decision at [99-100]. Henderson LJ identified two errors of law in the FTT Decision:

> "[97] … I am satisfied that even on the narrower view there was clearly a material error of law in the FTT Decision. Furthermore, in respectful disagreement with the Upper Tribunal, I am unable to accept its benevolent reading of the FTT's repeated statements that the arrangements in Jersey did not involve the making of any exempt supplies in the UK. I cannot escape the impression that, at this critical point in their analysis of the abuse issue, the FTT momentarily lost sight of the agreed fact that Alabaster did make supplies of exempt services in the UK. If the FTT had in mind that there were indeed exempt supplies made by Alabaster, but the fact that they were made by a person who did not belong in the UK made all the difference, they would surely have said so. Furthermore, it would then have been necessary for the FTT to explain why, on that basis, the mischief which they had correctly identified (of artificial attempts to avoid or neutralise the burden of input tax attributable to exempt supplies) was no longer applicable, and why the Jersey arrangements were nevertheless not contrary to the purpose of the VAT legislation.
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> [98] For my part, I think the FTT must also be taken to have materially erred in law in not adopting the approach laid down in this very case by the CJEU. To say this is not to criticise them, because they could hardly have foreseen the way in which the CJEU would deal with the questions subsequently referred to it, and in particular its synoptic approach to the two main issues of characterisation of the supplies and abuse of law. But it would in my view be paradoxical to hold that there was no error of law in the FTT's overall approach, when the CJEU had the FTT Decision before it and nevertheless concluded that it was conceivable that the relevant transactions were abusive. It is thus not sufficient, in my judgment, to point to individual passages in the

> FTT Decision which touch on specific questions identified by the CJEU, including in particular those in the third question referred, and argue that the overall evaluation required by the CJEU has in substance already been carried out by the FTT. Mr Ghosh advanced this argument persuasively, but I cannot accept it. An error of law may lie in a failure to adopt an overall approach to the evaluation of the facts, as well as in an erroneous approach to any of the component considerations which have to be taken into account. It is this sort of high level error of approach, it seems to me, that Lord Sumption described in [*Pendragon plc v Revenue and Customs Comrs* [2015] UKSC 37, [2015] STC 1825] at [39], where he criticised the FTT in that case for having approached their task 'at too high a level of generality'."

4. As to disposition, Henderson LJ stated:

> "[100] **…** I am satisfied that the UT Decision cannot stand, and this court must either re-make the decision itself or remit the case, either to the Upper Tribunal or to the FTT, with directions for its reconsideration: see s 14 of TCEA 2007.
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> …
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> [102] Given the length of time which has elapsed since the FTT hearing in 2010, it would for obvious reasons be preferable if we were able to re-make the decision ourselves rather than remit it for yet further consideration. For the reasons which follow, however, I consider that we are not in a position to do so, and that the correct solution is to remit the case to the FTT."

5. The terms of the remittal were stated by Henderson LJ:

> "[110] … The fundamental difficulty may be simply stated. The decisions of both Tribunals are (as I have held) vitiated by material errors of law, with the consequence that the evaluation of the facts required by the CJEU has not yet been performed by a fact-finding body which has directed itself correctly in law. In those circumstances, I see no escape from the conclusion that the case must be remitted so that this task can for the first time be properly performed in all respects.
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> [111] The alternative would be for this court to embark on the task itself, but for a number of reasons that would be unsatisfactory. The principal role of this court is appellate and supervisory. Save in exceptional circumstances, it does not find facts itself, and we have not heard evidence from the witnesses. Nor have we been supplied with a transcript of the hearing before the FTT. I therefore consider that our power under s 14 of TCEA 2007 to re-make the decision, and for that purpose to make such findings of fact as we consider appropriate, is one which we should exercise sparingly, if at all. We should not do so if we feel any real doubt about how the FTT, as the primary fact-finding body, would have decided the case if it had the benefit of (a) the guidance given by the CJEU, (b) the relevant case law (both European and domestic) since April 2010 (including, in particular, the decision of the Supreme Court in *Pendragon* and the judgment of this court in [*University of Huddersfield Higher Education Corp v Revenue and Customs Comrs* [2016] EWCA Civ 440, [2016] STC 1741]), (c) the UT Decision, and (d) our judgment on this appeal.
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> [112] For my part, I do not feel confident enough about the conclusion to which the FTT would have come in those circumstances to dispense with the need for a remitter. If the submissions for Mr Newey are correct, it will not take the FTT long to confirm their original decision. But the contrary possibility envisaged by the CJEU seems to me a real one, when the facts come to be reviewed with a closer focus than before on the specific issues

> raised by the third question for reference in the manner explained by the CJEU. It cannot be a sufficient answer, in my judgment, to say that no new principles of law were laid down by the CJEU in its judgment. That is so, but there is no exact precedent of which I am aware in the earlier European case law, let alone as it stood before the FTT hearing in February 2010, for treating together the issues of characterisation of the supplies and the doctrine of abuse of law as the CJEU has done in the present case. Furthermore, there can realistically be no substitute for performing the task with the benefit of the guidance given by the CJEU in this very case, after and in the light of the original FTT Decision.
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> [113] It will be apparent from what I have already said that if, as I think, the case must be remitted, it is clearly preferable that it should be remitted to the FTT rather than the Upper Tribunal. One incidental reason for this is the fact that Warren J has now retired, but more importantly it is in my view far preferable that the task of re-examining and evaluating the evidence should be carried out by the body which conducted the oral hearing, and which heard and saw the witnesses give their evidence. Those advantages of a trial court or tribunal cannot normally be replicated by an appellate body, even with the benefit of a full transcript. A further advantage of remitting the case to the FTT is that it would be open to them, if they considered it necessary or helpful to do so having received submissions from the parties, to admit further written or oral evidence at a resumed hearing.
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> [114] As to the terms on which the case is remitted, I would not wish to be prescriptive and would leave it to the FTT to decide on the procedure which they adopt, the extent of any further written or oral submissions from the parties, and whether there should be an opportunity to adduce further evidence. In general, I envisage that there would be no need for the FTT to revisit their findings of primary fact, although they may wish in some respects to supplement them. They will, however, clearly need to reconsider their evaluative findings and conclusions in the light of the further guidance now available to them.
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> [115] For these reasons, therefore, if the other members of the court agree, I would allow HMRC's appeal, set aside the decision of the Upper Tribunal, and remit the case to the FTT for further consideration in the light of the guidance given by the CJEU and the judgment of this court."

THE REMITTAL HEARING

6. The panel of this Tribunal who heard the original appeal in 2010 was Judge Berner and Mrs Neill. Judge Berner has since retired and the current panel is Judge Kempster and Mrs Neill. Henderson LJ stated (at [113]) it was "far preferable that the task of re-examining and evaluating the evidence should be carried out by the body which conducted the oral hearing, and which heard and saw the witnesses give their evidence". The only person in that position (taking together the original and current panels of this Tribunal, the Upper Tribunal, the Court of Appeal, and the CJEU) is Mrs Neill.

7. We were assisted by the fact that the counsel representing the parties have been consistent throughout the stages of the litigation, and thus were familiar with all aspects of the proceedings. Mr Ghosh QC and Ms Wilson have represented Mr Newey at all stages, with Mr Bremner QC at most stages. Mr Thomas QC has represented HMRC at all stages (earlier led by Mr Christopher Vajda QC), with Ms McArdle at most stages.

8. We had an extensive hearing bundle including the documentation presented to this Tribunal in 2010, and the transcripts of the 2010 hearing. Neither party applied to admit further

evidence (ie beyond that presented in 2010) except that at the conclusion of the hearing Mr Thomas for HMRC asked that the Tribunal consider certain correspondence exchanged between the parties and the Court of Appeal before that Court made its Order for remittal; that additional material was given to the Tribunal and the Appellant in October 2019; comments from the Appellant were received on 15 November 2019; further comments were received from HMRC on 29 November 2019. We have considered that additional material in reaching our conclusions. We did not consider it would be necessary or helpful to request any further evidence or submissions.

APPROACH

9. Having considered carefully the submissions of both parties (both during and after the hearing) as to the approach which we should adopt in determining the remittal, we conclude there is no need to add any gloss to the clear words of Henderson LJ (at [114-115]):

> "In general, I envisage that there would be no need for the FTT to revisit their findings of primary fact, although they may wish in some respects to supplement them. They will, however, clearly need to reconsider their evaluative findings and conclusions in the light of the further guidance now available to them. … [We] remit the case to the FTT for further consideration in the light of the guidance given by the CJEU and the judgment of this court."

10. We will deal with matters in the following order:

(1) A recap of the FTT Decision, and the errors of law identified by the Court of Appeal.

(2) The guidance given by the CJEU and the domestic courts since 2010.

(3) The "findings of primary fact" from the 2010 hearing, and any supplementary findings.

(4) A reconsideration of the "evaluative findings and conclusions in the light of the further guidance now available".

(5) The error of law relating to Alabaster's exempt supplies.

(6) Conclusions and Decision.

A RECAP OF THE FTT DECISION

11. The disputed VAT assessment is for VAT assessed on the Appellant ("**Mr Newey**") in respect of advertising services provided by a Jersey-based advertising company (Wallace Barnaby & Associates Ltd) ("**Wallace Barnaby**") to the Jersey company which carried on the Ocean Finance business (Alabaster (CI) Ltd) ("**Alabaster**").

12. At the 2010 hearing HMRC defended their VAT assessment on two alternative grounds, as summarised by the Court of Appeal (at [4]):

> "First, they argued that the position as a matter of VAT law was that Mr Newey, not Alabaster, was the supplier of the loan-broking services, with the consequence that the advertising services had to be treated as supplied to him. On that footing, a reverse charge would arise on Mr Newey under s 8(1) of the Value Added Tax Act 1994. This charge would be attributable to exempt supplies of loan-broking services made by him in the UK, and thus not recoverable as input tax. Alternatively, if the supplies of advertising services were made to Alabaster and not to Mr Newey, the scheme viewed as a whole constituted an abuse of law under EU law, which should be countered by

> treating Mr Newey as receiving supplies of advertising services and using them to make exempt supplies of loan-broking services in the UK."

13. The FTT Decision held - as summarised by the Court of Appeal (at [5]):

> "… that on a proper consideration of all the facts it was Alabaster, not Mr Newey, which made the loan-broking supplies and was the recipient of the supplies of advertising services; and that the doctrine of abuse of law had no application, because although the essential aim of the scheme had been to obtain a tax advantage, the establishment of Alabaster in Jersey was not itself abusive unless its functions or activities were such as to be contrary to the purposes of the VAT legislation, and on the facts that test was not satisfied. In reaching this conclusion, the FTT applied the law on abuse of law in accordance with its understanding of the principles laid down by the the CJEU in *Halifax plc v Customs and Excise Comrs* (Case C-255/02), [2006] STC 919) and by the Court of Appeal in *WHA Ltd v Revenue and Customs Comrs* [2007] EWCA Civ 728, [2007] STC 1695."

14. The Court of Appeal described in more detail (at [69-71]) the FTT's conclusions on the characterisation of supplies issue (ie HMRC's first defence) and stated:

> "In all essential respects, it seems to me that the FTT directed themselves correctly on the relevant legal principles, including the need to examine the factual circumstances as a whole, the fact that the contractual position is not necessarily conclusive, although it must be the starting point, and the need to have regard to the economic purpose of the contracts. They observed correctly, at [71], that 'when all the facts and circumstances have been taken into account, it remains the case that the proper analysis of the supply might well be consistent with the contractual position'."

15. The Court of Appeal then described in more detail (at [72-76]) the FTT's conclusions on the abuse of law issue. The FTT had followed the approach in *Halifax* and *WHA* by seeking to identify the relevant purpose of the Sixth Directive, and what was required by the principle of fiscal neutrality. In this connection the Court of Appeal identified the first of the two errors of law in the FTT Decision; per Henderson LJ:

> "[74] It is important to note that in [90] the FTT appear to have proceeded on the express footing that the Alabaster arrangements did not involve the making of any exempt supplies in the UK, and that it was the absence of any such exempt supplies which made HMRC's arguments unsustainable. Had such exempt supplies existed, the FTT clearly considered it arguable that a scheme designed to prevent otherwise irrecoverable input VAT from being incurred might be contrary to the purposes of the VAT legislation. Unfortunately, however, it is common ground that the FTT were mistaken in their assumption, at any rate if it is read literally. It has always been an agreed fact that, under the new arrangements involving Lichfield and then Alabaster, exempt supplies of financial services continued to be made in the UK by the Jersey company. This apparent error of law was accordingly one of the grounds upon which HMRC appealed to the Upper Tribunal, and it is also the subject of the third ground of appeal to this court. Furthermore, the perceived absence of an exempt supply to which irrecoverable VAT might be attributable is a theme which runs through the FTT's remaining discussion of this issue: see [92] and [95]."

16. The second error of law identified by the Court of Appeal was simply that the FTT Decision in 2010 did not adopt the approach laid down by the CJEU in the CJEU Decision three years later. Henderson LJ explained (at [98]): "To say this is not to criticise them, because they could hardly have foreseen the way in which the CJEU would deal with the questions

subsequently referred to it, and in particular its synoptic approach to the two main issues of characterisation of the supplies and abuse of law. But it would in my view be paradoxical to hold that there was no error of law in the FTT's overall approach, when the CJEU had the FTT Decision before it and nevertheless concluded that it was conceivable that the relevant transactions were abusive."

THE FURTHER GUIDANCE NOW AVAILABLE TO THE TRIBUNAL

17. We understand (from the CA Decision at [111]) that the further guidance which we are to consider comprises:

(1) the UT Decision;

(2) the Supreme Court decision in *Pendragon* (cited above);

(3) the Court of Appeal decision in *University of Huddersfield* (cited above);

(4) the CJEU Decision; and

(5) the CA Decision.

The UT Decision

18. We consider that all the relevant points in the UT Decision, to the extent not overruled by the Court of Appeal, are incorporated in the CA Decision and, therefore, with no disrespect to the Upper Tribunal, we make here no further specific reference to the contents of the UT Decision.

Pendragon

19. Henderson LJ described this (at CA Decision [47]) as "The leading UK authority on the abuse of law doctrine". It is a unanimous Supreme Court decision (delivered after the UT Decision, and so not available to Warren J) concerning the now well-known "demonstrator car scheme" aimed to secure input tax relief on purchase of vehicles without having to charge output tax on their subsequent sale.

20. Lord Sumption gave this explanation of the abuse of law doctrine:

> "[5] Abuse of law is a concept derived from civil law jurisprudence, which is unknown to English common law but has been adopted by the law of the European Union. In its simplest form, it confines the exercise of legal rights to the purpose for which they exist, and precludes their use for a collateral purpose. For present purposes, the expression détournement de droit adopted by some French writers is probably a better description of its content. The application of the principle to tax avoidance schemes calls for a difficult balance to be drawn. It is traditional, at any rate in this jurisdiction, to distinguish between avoidance, which involves the lawful arrangement of a taxpayer's affairs so as to minimise his tax bill, and evasion, which is an unlawful failure to account for tax due, generally by suppressing or falsifying information. Sophisticated avoidance schemes do not so much undermine this distinction as challenge its usefulness. By artificially reclassifying transactions so as to produce a more favourable tax outcome than commercially comparable 'normal' transactions, they frustrate the objective of the taxing provision without necessarily falling foul of its language. The result is arbitrarily to depress tax receipts, producing inequity between taxpayers and potentially distorting competition between firms who are otherwise similarly placed. This gives rise to social costs which are significant and increasingly controversial. On the other hand, legal certainty is an important principle of both English and EU law, particularly when it comes to justifying the financial

demands of the state. Artificiality, if it is to be deployed as a workable legal concept, has to be tested against some standard of transactional normality, and the search for such a standard is far from straightforward. Taxpayers faced with a choice between alternative ways of achieving some commercial objective are in principle entitled to select the one with the more tax-efficient statutory outcome. In particular, they are entitled to choose between exempt and taxable transactions in their own financial interest. Like any other tax, VAT is due only in so far as its imposition is authorised by statute. It follows that although the courts may examine the commercial reality of transactions without being unduly hidebound by labels, they do not as a general rule enlarge the scope of a taxing provision by reference to considerations which affect neither the construction of its language nor the characterisation of transactions to which it is said to apply. These dilemmas are particularly acute in the United Kingdom, where the drafting of tax legislation has traditionally depended not on the formulation of general principles but on the definition of taxable occasions with a high degree of specificity.

[6] The main task of any court seeking to apply a principle of abuse of law is to reconcile these competing considerations. …"

21. After summarising the *Halifax* case, Lord Sumption continued:

"[10] Two main difficulties arise where the principle of abuse of law is applied to tax avoidance schemes.

[11] The first arises from the assumption made by the Court of Justice in *Halifax* that the principle will not apply to what it called 'normal commercial operations' (para 69). Subsequent case law has established that this means those that are normal in the context of the relevant line of business, not necessarily normal for the particular taxpayer: *Revenue and Customs Comrs v Weald Leasing Ltd* (Case C-103/09) [2011] STC 596, [2010] ECR I-13589. I do not think that the court can have intended to set up a third distinct test, in addition to the two which are set out in paras 74–75 and repeated in its order. The 'normality' of a transaction is relevant to the question posed in the court's first test, about the 'purpose' of the relevant provision of the VAT Directives. 'Normal commercial operations' will not as a general rule be regarded as contrary to the purpose of the Directives, since these must be assumed to have been designed to accommodate them. Thus in *Weald Leasing* the taxpayer's decision to take equipment on lease from an intermediate company rather than buy it outright was an ordinary commercial transaction. It was not abusive even though it was unusual for the taxpayer in question and was designed to obtain a tax advantage by spreading the liability to tax over a longer period. The choice between leasing and outright purchase was a choice accommodated by the scheme of the VAT legislation. The tax treatment of lease payments being a facility available under the legislation itself, resort to it could not be regarded as contrary to its purpose. For the same reason, a transaction is not abusive merely because it falls within an exception or derogation from ordinary principles of EU law governing the incidence of VAT, such as the right enshrined in the Sixth Directive to deduct input tax generated by transactions in another member state. It follows that the sourcing of goods or services from a country in which the VAT regime is more favourable is not in itself abusive, even though the object and effect is to allow the deduction of input tax without the payment of output tax (*Revenue and Customs Comrs v RBS Deutschland Holdings GmbH* (Case C-277/09) [2011] STC 345, [2010] ECR I-13805). The reason, as the court explained in that case at paras 51–52, is that this is a choice inherent in a scheme of taxation that is designed to be fiscally neutral as between different member states while

allowing for some differences between their implementing laws. Likewise, the conduct of a genuine business activity through a subsidiary incorporated in another member state is not abusive, although the sole reason for the choice is that it has a lower rate of corporation tax: *Cadbury Schweppes plc v IRC* (Case C-196/04) [2006] STC 1908, [2006] ECR I-7995. Precisely the same considerations must apply to a decision to source goods or services from outside the European Union, an option which is inherent in the territorial limits of the EU VAT regime and the assignment of economic relations with third countries to other policies of the Union.

[12] The second difficulty which arises from the application of the principle of abuse of law to tax avoidance is that of concurrent purposes. Tax avoidance schemes are rarely directed exclusively to tax avoidance. It is difficult to conceive of a scheme, other than a fraudulent one, which achieved absolutely nothing but a tax advantage. They are usually directed to achieving a commercial purpose, such as the provision of the call centres in *Halifax*, in a way which avoids a tax liability that would otherwise be associated with it. The potential for abuse consists in the method chosen to achieve the commercial purpose. In *Ministero dell'Economia e delle Finanze v Part Service Srl* (Case C-425/06) [2008] STC 3132, [2008] ECR I-897, the consideration payable by the lessee under a leasing transaction was artificially split between two contracts, one with the lessor and the other with an associated company of the lessor. The latter contract was structured so as to qualify as an exempt financial contract under Italian law, so as to reduce the amount chargeable to VAT. The transactions had a legitimate commercial purpose, namely the leasing of the cars, but the method of achieving that purpose was held to be open to challenge if 'the accrual of a tax advantage constitutes the principal aim of the transaction or transactions at issue' (para 45). This conclusion seems to me to do no more than make explicit something which is implicit in the *Halifax* tests. Identifying the 'essential aim' in a case of concurrent fiscal and commercial purposes depends on an objective analysis of the method used to achieve the commercial purpose. As Advocate General Maduro observed in a passage from (para 89) of his opinion which was in terms approved by the court (para 75), the taxpayer's choices must be 'at least to some extent, accounted for by ordinary business aims'. The question is therefore whether the commercial objective is enough to explain the particular features of the contractual arrangements which produce the tax advantage.

[13] These considerations effectively answer a question which is likely to arise in most cases involving prearranged sequences of transactions. Is the relevant 'aim' that of the scheme as a whole or of its component parts? The answer is that it may be either or both. Because the principle of abuse of law is, in this context, directed mainly to the method by which a commercial purpose is achieved, it is necessary to analyse each transaction by which it is achieved. Because the purpose of each step will generally be to contribute to the working of the whole scheme, the effect of the whole scheme has also to be considered. In *WHA Ltd v Revenue and Customs Comrs* [2007] EWCA Civ 728, [2007] STC 1695, [2008] 1 CMLR 522 (para [22]), Lord Neuberger, delivering the leading judgment in the Court of Appeal, rejected the submission that the court was confined to considering the artificiality or purpose of each individual step, since these will commonly be individually unassailable but designed to produce the tax advantage in combination. I agree with this observation."

22. Lord Sumption (at [39-40]) concluded that the scheme did constitute an abuse of law; that the First-tier Tribunal had erred in its application of *Halifax*; but he also disagreed with some conclusions of the Upper Tribunal; he stated:

> "To my mind, the objection to the reasoning of the First-tier Tribunal is more fundamental. They approached their task at too high a level of generality. They observed, quite correctly, that the secured financing of carrying costs through a bank was an ordinary commercial arrangement. They identified a number of commercial objectives which they regarded as explaining why Pendragon entered into the scheme. But they did not ask themselves whether Pendragon's commercial objectives explained the particular features of the transactions which produced the tax advantage. In particular, they did not ask themselves whether they explained the particular method by which the bank was involved at Steps 2, 3 and 4. This meant that they did not answer the critical question on which, in point of law, the identification of the 'essential aim' depended. If they had done, they would have been bound to conclude that the features which produced the tax advantage had no other rationale."

23. In relation to the redefinition of transactions necessitated by the need to counter the abuse of law, Lord Sumption explained (at [41]):

> "It follows that the transactions fall to be redefined 'so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice': *Halifax*, para 98. The redefinition is purely notional. Its effect is not to alter retrospectively the terms of the transactions, but simply to entitle the Commissioners, as between themselves and the taxpayer, to treat them for the purpose of assessing VAT as if their abusive features had not been present: see [the CJEU Decision] paras 50–51. The object of any redefinition in this case must be to deprive the taxpayer of the illegitimate advantage of paying VAT only on their profit margin on the resale of the cars to the consumer."

24. Henderson LJ commented on this case (at CA Decision [51]):

> "… I would single out two points:
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> (a) Lord Sumption's recognition, at the end of [11], that it is not abusive to conduct a genuine business activity through a subsidiary incorporated in another member state, or to source goods or services from outside the EU, that being 'an option which is inherent in the territorial limits of the EU VAT regime'; and
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> (b) his discussion of 'concurrent purposes' at [12], and the insight that '[t]he potential for abuse consists in the method chosen to achieve the commercial purpose'."

University of Huddersfield

25. This Court of Appeal case concerned a lease-and-leaseback scheme designed to enable an exempt educational body to reclaim input tax on property refurbishment costs. The Court concluded the scheme constituted an abuse of law. Lewison LJ stated (at [14]):

> "Whether the first test [ie the accrual of a tax advantage which would be contrary to the purpose of the legislative provisions] is satisfied entails identifying (a) the tax advantage that the scheme gave the University and (b) the purposes of that part of the VAT code with which we are concerned. It is then necessary to compare the purpose and objectives of the part of the VAT code allegedly being abused with the purpose and results achieved by the activity at issue. If the tax advantage results from a choice that the VAT code intended to give the taxable person, then there is no abuse: Advocate General Poiares Maduro in *Halifax* at para 88."

26. Henderson LJ commented on this case (at CA Decision [56]):

"In the course of considering the submissions for the University advanced by Paul Lasok QC, Lewison LJ referred to the post-*Halifax* decision of the CJEU in the *Weald Leasing* case (*Revenue and Customs Comrs v Weald Leasing Ltd* (Case C-103/09) EU:C:2010:804, [2011] STC 596, [2010] ECR I-13589) as authority for the proposition that consideration of the first test 'positively requires an examination of the object and effects of the impugned transactions, as well as their purpose': see [29]. He also rejected a submission that the question whether a transaction was artificial goes only to the second test, and is irrelevant in considering the first test. Lewison LJ said, at [33], that he found this submission 'very difficult to square' with the (pre-*Halifax*) case of *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas* (Case C-110/99) EU:C:2000:695, [2000] ECR I-11569) in which the CJEU had said (at para 59):

> '… a finding that there is an abuse presupposes an intention on the part of the Community exporter to benefit from an advantage as a result of the application of the Community rules by artificially creating the conditions for obtaining it.'

Lewison LJ then said:

> '[34] Clearly the artificial creation of conditions which formally comply with the requirements for obtaining a tax advantage is at the heart of the principle of abuse of rights. If Mr Lasok's submission were correct it would simply substitute one form of formalism for another.'"

The CJEU Decision

27. The judgment of the CJEU on the abuse of law doctrine was as follows:

> "41. It is also apparent from the case law of the court that the term supply of services is therefore objective in nature and applies without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person (see, to that effect, *Halifax*, paras 56 and 57 and the case law cited).
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> 42. As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case law of the court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, *Revenue and Customs Comrs v Loyalty Management UK Ltd, Baxi Group Ltd v Revenue and Customs Comrs* (Joined cases C-53/09 and C-55/09) [2010] STC 2651, [2010] ECR I-9187, paras 39 and 40 and the case law cited).
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> 43. Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction within the meaning of arts 2(1) and 6(1) of the Sixth Directive have to be identified.
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> 44. It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.

45. That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions.

46. The court has held on various occasions that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (see *Halifax*, para 71 and the case law cited) and that the effect of the principle that the abuse of rights is prohibited is to bar wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage (see *Ampliscientifica Srl v Ministero dell'Economia e delle Finanze* (Case C-162/07) [2011] STC 566, [2008] ECR I-4019, para 28; *Tanoarch sro v Tax Directorate of the Slovak Republic* (Case C-504/10) [2012] STC 410, para 51; and *JJ Komen en Zonen Beheer Heerhugowaard BV v Staatssecretaris van Financiën* (Case C-326/11) [2012] STC 2415, para 35).

47. In the main proceedings, it is not disputed that, formally, in accordance with the contractual terms, Alabaster provided the lenders with the supplies of loan broking services and that it was the recipient of the supplies of advertising services provided by Wallace Barnaby.

48. However, taking into account the economic reality of the business relationships between, on the one hand, Mr Newey, Alabaster and the lenders and, on the other hand, Mr Newey, Alabaster and Wallace Barnaby, as apparent from the order for reference and, in particular, the matters of fact mentioned by the Upper Tribunal (Tax and Chancery Chamber) in the third question, it is conceivable that the effective use and enjoyment of the services at issue in the main proceedings took place in the United Kingdom and that Mr Newey profited therefrom.

49. It is for the referring court, by means of an analysis of all the circumstances of the dispute in the main proceedings, to ascertain whether the contractual terms do not genuinely reflect economic reality and whether it is Mr Newey, and not Alabaster, who was actually the supplier of the loan broking services at issue and the recipient of the supplies of advertising services provided by Wallace Barnaby.

50. If that were the case, those contractual terms would have to be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice (see, to that effect, *Halifax*, para 98).

51. In the present case, the re-establishment of the situation that would have prevailed in the absence of the transactions at issue, if the referring court were to consider them to constitute an abusive practice, would, in particular, mean that the services agreement and the advertising arrangements concluded between Alabaster and Wallace Barnaby could not be relied upon against the Commissioners, who could legitimately regard Mr Newey as actually being the supplier of the loan broking services and the recipient of the supplies of advertising services at issue in the main proceedings.

52. In the light of the foregoing considerations, the answer to the first to fourth questions is that contractual terms, even though they constitute a factor to be taken into consideration, are not decisive for the purposes of identifying the supplier and the recipient of a 'supply of services' within the meaning of arts 2(1) and 6(1) of the Sixth Directive. They may in particular be disregarded if it becomes apparent that they do not reflect economic and commercial reality, but constitute a wholly artificial arrangement which does not reflect economic

reality and was set up with the sole aim of obtaining a tax advantage, which it is for the national court to determine."

28. Per Henderson LJ (at [64] of the CA Decision), the CJEU Decision does not lay down any new principles of law. His Lordship commented:

> "[62] As is apparent from this passage, the CJEU did not rule out the possibility that, in the light of its knowledge of the facts found by the FTT and reflected in the order for reference, the transactions in issue might constitute an abuse in the *Halifax* sense. The key paragraph for this purpose is para 48, which requires account to be taken of the economic reality of the relevant business relationships between each of Mr Newey, Alabaster, the lenders and Wallace Barnaby, as well as the matters of fact mentioned in the third question referred to the Court. The third question reads as follows:
>
> > '(3) In circumstances such as those in the present case, in particular, to what extent is it relevant:
> >
> > (a) Whether the person who makes the supply as a matter of contract is under the overall control of another person?
> >
> > (b) Whether the business knowledge, commercial relationship and experience rests with a person other than that which enters into the contract?
> >
> > (c) Whether all or most of the decisive elements in the supply are performed by a person other than that which enters onto the contract?
> >
> > (d) Whether the commercial risk of financial and reputational loss arising from the supply rests with someone other than that which enters into the contracts?
> >
> > (e) Whether the person making the supply, as a matter of contract, sub-contracts decisive elements necessary for such supply to a person controlling that first person and such sub-contracting arrangements lack certain commercial features?'
>
> [63] Since it is not the function of the CJEU to decide issues of fact, the question was remitted in the usual way to the Upper Tribunal as the referring court. A question which we raised at the hearing was what degree of probability the CJEU had in mind when it used the expression 'it is conceivable that' in para 48. Some light may be thrown on this by the original French text, with which we were supplied at our request after the hearing. The words 'it is conceivable that' are a translation of 'il ne peut être exclu que', which might be more literally rendered as 'it cannot be excluded that', or more colloquially as 'one cannot rule out the possibility that'. To my mind, the French phrase may imply a slightly higher degree of likelihood than the English phrase, but the important point is that the CJEU clearly considered the possibility to be a real one when all the relevant factors had been fully taken into account, although it presumably considered such an outcome to be relatively improbable on the information which it had available to it: otherwise a less tentative expression would have been used."

The CA Decision

29. We have quoted above several passages from Henderson LJ's lead decision (with which Peter Jackson and Patten LJJ agreed without further comment) and we do not repeat those here.

30. The Court of Appeal was clear as to the approach which we should adopt on this remittal; Henderson LJ (at [114]) drew a distinction between (a) "findings of primary fact" already found by this Tribunal in 2010, which need not be revisited; and (b) the "evaluative findings and conclusions", which needed to be reconsidered in the light of the further guidance now available.

FINDINGS OF PRIMARY FACT

31. Henderson LJ (at CA Decision [114]) emphasised that there is no need for this Tribunal to revisit the findings of primary fact in the FTT Decision. At several points during HMRC's submissions we formed the impression that this was what they were inviting us to do. The correct forum for HMRC to challenge the findings of fact in the FTT Decision was when making their appeal to the Upper Tribunal; we see nothing in the UT Decision clearly holding that any finding of fact in the FTT Decision was one that the FTT could not have properly come to,[1] nor that the Upper Tribunal was remaking any finding of fact.[2]

32. Mr Bremner for Mr Newey prepared a detailed schedule listing what he considered to be the Tribunal's findings of primary fact. On the basis that (per Henderson LJ) we have no need to revisit the findings of primary fact, we have decided there is no need to or purpose in restating them exhaustively here. They are clearly stated in the FTT Decision (and as we have noted above, are unaffected by the UT Decision) at [6-49], reflected in the CJEU Decision at [30-84], summarised in the UT Decision at [7-18], and again summarised in the CA Decision at [12-25]. To the extent that specific findings are relevant to our reconsideration then we restate them below at the appropriate point in our reconsideration.

EVALUATIVE FINDINGS

33. Henderson LJ (at CA Decision [114]) drew a distinction between the Tribunal's findings of primary fact, and the Tribunal's "evaluative findings and conclusions". That latter is a description he also used ("further important findings of fact, of an evaluative nature", at [26]) to describe paragraphs [50-53] of the FTT Decision; and again at [65], "the important evaluative findings they made at [50] – [53] of the FTT Decision."

34. The relevant section of the FTT Decision containing the evaluative findings as identified by Henderson LJ is:

> "50. Mr Vajda [HMRC's counsel] argued that there was no business advantage to the operation of Alabaster in Jersey, and that Alabaster was not run in a commercial manner. He said that the operations we have described of signing off forms such as OAFs were not normal commercial practice. We accept that, if compared with an arrangement that might have been entered into between independent parties operating at arm's length, the arrangements lack certain commercial features. It is true, and the Appellant [ie Mr Newey] accepted, that the loan broking business could have been carried out in the UK, and the loan broking business could have been pursued with an integrated, rather than sub-contracted, processing service. Nevertheless, we find that Alabaster carried on a commercial business. It was itself a commercial enterprise, carrying on economic activities of loan broking for which it equipped itself to a limited extent with its own staff and directors, and to a large extent through engaging the services of the Appellant under the

[1] Which would require satisfaction of the test set out by Lord Radcliffe in *Edwards v Bairstow* [1955] 3 All ER 48 at 57.
[2] On the basis described by Lord Carnwath in *Pendragon* at [50].

> Services Agreement. This was no brass plate company. Nor do we consider that it is in any way material to the question of commerciality that advice on the decision-making processes in Alabaster had been given by Moore Stephens.
>
> 51. Mr Vajda referred us to a submission made by the Appellant to the Office of Fair Trading that had been written by its recently-appointed compliance officer, who had previously worked as an underwriter in the business. That submission had been made in response to a fact-finding study by the OFT into the UK debt consolidation market. In it the Appellant described the way the Ocean Finance business operated, and did not distinguish between the Appellant and Alabaster. We do not find this to be indicative of the true relationship between the Appellant and Alabaster, or as being relevant to a consideration of the nature of the Appellant's business. In our view that is established by the contractual arrangements and the actual course of dealings, and not by a summary that, it seems to us, is directed at a completely different purpose, and for which the actual business structure would not be of any relevance.
>
> 52. It is common ground that the Appellant's operation in the UK was a substantial one. We were referred to the salaries of senior staff and underwriters in the UK, which were substantial when contrasted with those of the Alabaster directors and Lucy Woodworth. However, this merely emphasises the extent of the processing operation that Alabaster had contracted to equip itself to conduct its loan broking business. We do not infer from this that it must have been the Appellant that was carrying on the loan broking business. We are satisfied that the loan broking business was carried on by Alabaster, with the services of the Appellant provided through the Services Agreement.
>
> 53. There was much reference by Mr Vajda in cross-examination of both Mr Boylan and Mr Newey to Alabaster "rubber stamping" decisions of others. This was put to the witnesses in connection with all stages of the processes, including advertising approvals, the OAFs, valuation requests and Case to Bank Submissions. It was also described as "window dressing". Having considered all the evidence, we do not consider that the activities of Alabaster in these respects can properly be described as either "rubber stamping" or "window dressing". Those expressions might be apt in a case where documents are merely signed mindlessly, but we find that is not the case here. Alabaster obtained advice and recommendations, for example in relation to advertising, and it contracted underwriting and other administrative services to the Appellant. It relied on the Appellant to provide input into the advertising campaigns and the terms on which lenders were added to its panel. Having obtained such advice and assistance, it had its own staff to collate certain of the material. The fact that, having engaged all those services, it consistently chose to follow and adopt them does not in our view amount to rubber stamping or window dressing, and we so find."

35. We return to these specifically at [48 et seq] below.

RECONSIDERATION OF THE EVALUATIVE FINDINGS AND CONCLUSIONS

36. Henderson LJ (at CA Decision [114]) stated that this Tribunal should reconsider the evaluative findings and conclusions in the FTT Decision in the light of the further guidance now available to us. He noted (at CA Decision [112]) that it was possible that when we came to review the facts with a closer focus than before on the specific issues raised by the third

question referred to the CJEU in the manner explained by the CJEU, then we might not confirm the original decision.

37. The specific issues raised by the third question referred by the Upper Tribunal to the CJEU were as follows (at CJEU Decision [37]):

> (1) Whether the person who makes the supply as a matter of contract is under the overall control of another person?
>
> (2) Whether the business knowledge, commercial relationship and experience rests with a person other than that which enters into the contract?
>
> (3) Whether all or most of the decisive elements in the supply are performed by a person other than that which enters onto the contract?
>
> (4) Whether the commercial risk of financial and reputational loss arising from the supply rests with someone other than that which enters into the contracts?
>
> (5) Whether the person making the supply, as a matter of contract, sub-contracts decisive elements necessary for such supply to a person controlling that first person and such sub-contracting arrangements lack certain commercial features?

38. The CJEU decided not to address those individual questions (perhaps because the Court considered them factual matters for the national court to evaluate – see CA Decision at [63]), but instead rephrased a single question (at CJEU Decision [38]):

> "… whether contractual terms are decisive for the purposes of identifying the supplier and the recipient in a 'supply of services' transaction within the meaning of arts 2(1) and 6(1) of the Sixth Directive, and, if the answer is in the negative, under what circumstances those terms may be recharacterised [?]"

39. The CJEU then considered that self-posed question at CJEU Decision [38-52] – mostly quoted at [27] above. The CJEU stated:

> (1) The effect of the principle that the abuse of rights is prohibited, is to bar wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage (at CJEU Decision [46]).
>
> (2) Contractual terms, even though they constitute a factor to be taken into consideration, are not decisive for the purposes of identifying the supplier and the recipient of a supply of services; they may in particular be disregarded if it becomes apparent that they do not reflect economic and commercial reality, but constitute a wholly artificial arrangement which does not reflect economic reality and was set up with the sole aim of obtaining a tax advantage (at CJEU Decision [52]).
>
> (3) The task of the national court is, by means of an analysis of all the circumstances of the dispute, to ascertain whether the contractual terms do not genuinely reflect economic reality and whether it is Mr Newey, and not Alabaster, who was actually the supplier of the loan broking services at issue and the recipient of the supplies of advertising services provided by Wallace Barnaby (at CJEU Decision [49]).

40. We note that the approach followed by this Tribunal in 2010 was entirely concordant with the approach subsequently directed by the CJEU. From the FTT Decision:

> "56. It is clear from *Customs and Excise Commissioners v Reed Personnel Services Ltd* [1995] STC 588 that questions of the characterisation of a supply cannot be determined wholly by reference to the concept of contractual duty. Whilst the construction of a contract between two or more parties is relevant

> to the enquiry as to the proper analysis of the relevant supply for VAT purposes, it is not determinative. Nevertheless the contract is one of the factors on which an overall view must be taken.
>
> …
>
> 60. … There are a number of contracts between a number of parties: the contracts for the provision of loan broking services by Alabaster to the lenders, the contract between Wallace Barnaby and Alabaster for the advertising services and the Services Agreement between Alabaster and the Appellant. These contracts must all be considered as part of the overall factual circumstances. Whilst the Appellant was not party to Alabaster's contracts with the lenders or Wallace Barnaby, it was part of the overall factual circumstances and accordingly those circumstances and its involvement must be considered in determining the nature of the respective supplies and whether, in the case of the advertising services, those supplies were to the Appellant and not to Alabaster and, as regards the loan broking services, those supplies were made by the Appellant and not by Alabaster."

41. That concordant approach was acknowledged by the Court of Appeal (at CA Decision [69]):

> "In all essential respects, it seems to me that the FTT directed themselves correctly on the relevant legal principles, including the need to examine the factual circumstances as a whole, the fact that the contractual position is not necessarily conclusive, although it must be the starting point, and the need to have regard to the economic purpose of the contracts. They observed correctly, at [71], that 'when all the facts and circumstances have been taken into account, it remains the case that the proper analysis of the supply might well be consistent with the contractual position'."

42. However, Henderson LJ wished to ensure that the FTT's conclusions would be the same applying the CJEU's 2013 approach which he described (at [98]) as "its synoptic approach to the two main issues of characterisation of the supplies and abuse of law", and (at [112]) "treating together the issues of characterisation of the supplies and the doctrine of abuse of law as the CJEU has done in the present case." As the Court of Appeal noted (CA Decision at [112]), "If the submissions for Mr Newey are correct, it will not take the FTT long to confirm their original decision."

43. Further, Henderson LJ stated (at CA Decision [63]) that when the CJEU commented that "it is conceivable that the effective use and enjoyment of the services at issue in the main proceedings took place in the United Kingdom and that Mr Newey profited therefrom", the CJEU "presumably considered such an outcome to be relatively improbable on the information which it had available to it: otherwise a less tentative expression would have been used."

44. We will address matters in the following order:

(1) The specific issues raised by the third question referred by the Upper Tribunal to the CJEU.

(2) The questions proposed by the Court of Appeal at CA Decision [108].

(3) The evaluative findings at FTT Decision [50-53].

(4) Conclusions.

45. Mr Bremner and Mr Thomas assisted us by each giving detailed and extensive references back to the documentary evidence submitted in 2010, and the transcripts of the witness evidence (including cross-examinations) from 2010. We were thus able to remind and satisfy

ourselves satisfactorily as to the bases on which all the findings of primary fact and the evaluative findings were reached.

The specific issues raised by the third question referred by the Upper Tribunal to the CJEU

46. As we have noted at [38] above, the CJEU did not directly answer the third question in the terms referred by the Upper Tribunal, but as the Court of Appeal expressly directs us to the specific issues raised by the third question we address those issues as follows (we have substituted the names of the relevant persons to make the questions clearer, and the paragraph numbers are to the findings of primary fact in the FTT Decision). The Upper Tribunal asked the CJEU to what extent it was relevant:

(1) *Whether Alabaster was under the overall control of Mr Newey?* Mr Newey was the sole beneficial owner of the share capital of Alabaster ([13]). Presumably, from the context of the question, the Upper Tribunal was referring to what is usually termed central management and control, rather than shareholder voting control. Mr Newey was not a director of Alabaster, and he played no part in the management of Alabaster ([17]). Accordingly, we conclude that Alabaster was not under the overall control of Mr Newey.

(2) *Whether the business knowledge, commercial relationship and experience rested with Mr Newey?* Clearly Mr Newey had considerable relevant business knowledge and experience. Presumably, what the Upper Tribunal meant was whether Alabaster did not possess those attributes either at all or sufficiently to be able to conduct the loan broking business. Whilst Alabaster did not itself have the infrastructure in Jersey to conduct a loan broking business, it equipped itself to conduct such a business by outsourcing the processing operation to Mr Newey; the fact that there were only limited resources in Jersey itself did not have any impact on the carrying on by Alabaster of the loan broking business ([28]). Accordingly, we conclude that Alabaster did possess the business knowledge, commercial relationship and experience sufficient to be able to supply the loan broking services.

(3) *Whether all or most of the decisive elements in the supply were performed by Mr Newey?* The Upper Tribunal did not clarify what it regarded as "the decisive elements in the supply".

(a) In relation to the loan broking supplies, whilst Alabaster did not itself have the infrastructure in Jersey to conduct a loan broking business, it equipped itself to conduct such a business by outsourcing the processing operation to Mr Newey; the fact that there were only limited resources in Jersey itself did not have any impact on the carrying on by Alabaster of the loan broking business ([28]). The activities of Mr Newey in this respect were undertaken under the Services Agreement, and not as loan broker in his own right ([29]). All loan broking was done pursuant to the agreements (whether written or oral, or established by conduct) between Alabaster and the lenders, and all payments of commission for the loan broking services were made by the lenders to Alabaster; Mr Newey did not have any contracts with lenders with respect to loan broking ([31]).

(b) In relation to the advertising supplies, Mr Newey had a relationship with Mr Eddy Powell of Ekay, and Mr Powell would discuss with Mr Newey the content of the advertisements and the yields on particular adverts; Mr Newey monitored the advertising and would share his views with Mr Powell; he would also inform Mr Powell of the levels of processing capacity available, and on the basis of all this information, which as a commercial matter would necessarily have had to have been obtained from the processing operation, Mr Powell would make a

recommendation to Wallace Barnaby ([35]). Mr Newey's involvement in the advertising process was limited to this, and was consistent with the services performed under the Services Agreement, and Mr Newey's own interest (through having a right of approval of advertisements) in protecting his trade name and reputation; Mr Newey was not Mr Powell's (or Ekay's) client in terms of obtaining instructions (([35]).

(c) Accordingly, we conclude that all or most of the decisive elements in the supplies were performed by Alabaster, not Mr Newey.

(4) *Whether the commercial risk of financial and reputational loss arising from the supply rests with Mr Newey?* We are not clear what basis the Upper Tribunal had for speculating that the risk of any such losses might rest with Mr Newey. The CJEU records (at CJEU Decision [27]) that Mr Newey assumed no liability for the payment of the advertising services provided by Wallace Barnaby to Alabaster. In relation to the loan broking supplies, the Services Agreement contained an indemnity but that could not be construed as anything more than a normal cross-indemnity, which did not create potential liability for Mr Newey beyond his own breaches ([24]). Accordingly, we conclude that the commercial risk of financial and reputational loss arising from the supplies did not rest with Mr Newey.

(5) *Whether Alabaster sub-contracted decisive elements necessary for the supply to a person controlling Alabaster (eg Mr Newey) and such sub-contracting arrangements lack certain commercial features?* This seems to pose two questions: (a) Did Alabaster sub-contract "decisive elements necessary for the supplies" to Mr Newey? (b) If so, did such sub-contracting arrangements lack "certain commercial features"?

(a) We have commented above ([46(3)]) as to the phrase "decisive elements necessary for the supplies". This appears to be a rephrasing of the third question, and our conclusion is the same (for the same reasons): all or most of the decisive elements in the supplies were performed by Alabaster, not Mr Newey.

(b) Given our conclusion on (a) above, this does not arise. We note that if it did, then we would be unclear what "certain commercial features" the Upper Tribunal had in mind.

The questions proposed by the Court of Appeal

47. The Court of Appeal (at CA Decision [108]) noted that, "The CJEU must therefore have meant that the question of artificiality has to be assessed by reference to the business relationships actually entered into between Mr Newey, Alabaster, the lenders and Wallace Barnaby, with a view to testing whether they reflected underlying commercial reality. A central focus of this enquiry would naturally fall on the continued role of Mr Newey himself, and his relationship with Alabaster." The Court of Appeal then proposed some questions of its own, which we address as follows:

(1) Was the board of directors of Alabaster truly independent from Mr Newey, or was he a shadow director with whose instructions or wishes they invariably complied?

This was a matter that was tackled head-on by the Tribunal in 2010. Leading counsel for HMRC challenged in cross-examination of both Mr Newey and Mr Boylan that Alabaster was really just "rubber-stamping" decisions made by Mr Newey. That suggestion was rejected by the Tribunal, concluding on the evidence that it was not the case that documents were merely signed mindlessly; the Tribunal concluded that Alabaster obtained advice and recommendations from Mr Newey - for example in relation to

advertising, and the terms on which lenders were added to its panel – but Alabaster made its own decisions on such matters. The Tribunal noted that Alabaster consistently chose to follow and adopt the advice and assistance, but concluded that did not amount to rubber stamping or window dressing. The Tribunal found further that Mr Newey played no part in the management of Alabaster ([17]).

In the current hearing Mr Thomas submitted that there was no evidence that Alabaster made decisions in relation to advertising or loan broking independently of Mr Newey; indeed it would have been impossible for Alabaster to have done so; at each stage Mr Newey was involved in such a way as to be instrumental in the commissioning and approval of advertising content and in the founding and maintenance of relationships with loan providers. We disagree; the FTT Decision carefully records the evidence it considered in reaching its conclusion on this point – see, for example, the discussion of the procedures followed in relation to the Offer Authority Forms ([43]), and the advertising process ([35]) – and we find nothing to warrant changing the conclusions reached in 2010.

(2) Were the loan processing functions which Mr Newey and his staff continued to carry on in Staffordshire now genuinely provided to Alabaster pursuant to the Services Agreement, or was the commercial reality that Mr Newey was still carrying out the work on his own behalf?

Again, this was a matter that was tackled head-on by the Tribunal in 2010. Leading counsel for HMRC argued that the Services Agreement was a tax-driven document that did not fully or accurately describe the true nature of the legal relationship between the parties; also, he challenged in cross-examination of Mr Newey that Mr Newey's commissions share under the Services Agreement showed that Mr Newey's activities were those of a broker, not a processor. Those propositions were rejected by the Tribunal, concluding on the evidence that the Services Agreement represented and reflected the real activities of Mr Newey and Alabaster; there was nothing to indicate that Mr Newey's activities were anything other than those performed under and by virtue of the Services Agreement; Mr Newey's discussions with the lenders were undertaken under the Services Agreement and not as a loan broker in his own right; and Mr Newey's activities were those of a processor, not a broker. The Tribunal found that all loan broking was done pursuant to the agreements (whether written or oral, or established by conduct) between Alabaster and the lenders, and all payments of commission for the loan broking services were made by the lenders to Alabaster; Mr Newey did not have any contracts with lenders with respect to loan broking ([31]).

In the current hearing Mr Thomas submitted that Mr Newey himself continued to run the business in all but name; Alabaster had no knowledge or involvement in almost all aspects of the business; its purpose was artificial; it was inserted into the business so as to accrue a tax advantage; it did not in any real way operate the underlying business of broking. We disagree; the FTT Decision carefully records the evidence it considered in reaching its conclusions on this point – see, for example, the discussion of the possible significance of the commissions split ([23]); the discussion of the possible significance of the maintenance of a credit-broking licence ([24]); and the discussion of the possible significance of the wording and form of the provisional offer letter ([46]) - and we find nothing to warrant changing the conclusions reached in 2010.

(3) Were the advertising services provided by Wallace Barnaby to Alabaster genuinely the product of an independent commercial relationship between those two companies, or was this just elaborate machinery set up to enable Mr Newey's decisions on advertising

in the UK to be implemented via his meetings with Ekay Advertising, the recommendations made by Ekay Advertising to Wallace Barnaby, and the power which he retained to approve the content of advertisements?

Again, this was a matter that was tackled head-on by the Tribunal in 2010. Leading counsel for HMRC argued that Mr Newey was the client of Ekay, and that the contractual reciprocity for the advertising services was between Wallace Barnaby and Mr Newey. Those propositions were rejected by the Tribunal, concluding on the evidence that Mr Newey's discussions with Ekay were his only involvement in the advertising process and were consistent with the services performed under the Services Agreement. The Tribunal concluded that there was no relevant link between Mr Newey and Wallace Barnaby; certainly not one that could lead the Tribunal to conclude that there was a transaction between Wallace Barnaby and the Appellant for consideration; contrary to HMRC's submission, the advertising services were supplied to Alabaster for the purposes of its business, which it carried on with the benefit of the services of Mr Newey under the Services Agreement. The FTT Decision carefully records the evidence it considered in reaching its conclusions on this point – see, for example, the discussion of the interaction between Mr Newey and Mr Powell of Ekay ([35]); the discussion of the Yellow Pages advertisements ([38-39]); and the discussion of the possible significance of the ASA complaint ([40]) - and we find nothing to warrant changing the conclusions reached in 2010.

(4) And what is the true significance, in this context, of the fact that late advertising space offered to Alabaster was on occasion not taken up because an Alabaster director was unavailable to approve it?

This point was described thus by the FTT ([37]): "On occasion advertising space would become available at a late stage, and would be offered to Alabaster through Ekay and Wallace Barnaby, following discussion with [Mr Newey]. However, if there was insufficient time to obtain a decision from an Alabaster director, the advertisement would not be placed. We had evidence, which we accept, that this happened on a number of occasions. No advertising was commissioned without the approval of Alabaster."

In the current hearing Mr Thomas submitted that the significance of this was it pointed to Alabaster having no advertising expertise in-house; the structure set up by Mr Newey positively hindered commercial decision-making as to advertising opportunities. Having carefully considered this point, the conclusion we reach is that it merely demonstrated that it was Alabaster who was the customer of Wallace Barnaby (and thus the recipient of the advertising supplies); it was not open to Mr Newey to intervene and act to take up the late opportunity, no matter how attractive; if a director of Alabaster was not available to approve the proposal then it must just be foregone. Accordingly, we conclude the true significance of this fact is that it underlines the Tribunal's 2010 conclusion that there was no relevant link between Mr Newey and Wallace Barnaby.

The evaluative findings in the FTT Decision

48. We have set out at [34] above the relevant part of the FTT Decision which contains the evaluative findings which the Court of Appeal has directed us to reconsider. Given the consideration we have made in respect of the questions posed in the CJEU referral (see [46] above) and the questions posed by the Court of Appeal (see [47] above), and the extensive references provided by counsel for both parties to the documentary and witness evidence from 2010, we can deal with this aspect fairly briefly.

49. In paragraph [50] of the FTT Decision the Tribunal:

(1) considered stated submissions made by leading counsel for HMRC;

(2) noted that the arrangements lacked certain commercial features compared with an arrangement that might have been entered into between independent parties operating at arm's length – at FTT Decision [26] the FTT elaborated that "[Mr Newey] was the sole beneficial owner of Alabaster, and any element of non-arm's length dealing is, in our view, attributable to that fact, and does not indicate to us that the activities of [Mr Newey] were anything other than those performed under and by virtue of the Services Agreement.";

(3) noted that the loan broking business could have been carried out in the UK, and could have been pursued with an integrated, rather than sub-contracted, processing service – per the CA Decision at [107] a decision to have the business carried on by Alabaster in Jersey was in principle open to Mr Newey;

(4) and found:

(a) Alabaster carried on a commercial business.

(b) Alabaster was itself a commercial enterprise, carrying on economic activities of loan broking for which it equipped itself to a limited extent with its own staff and directors, and to a large extent through engaging the services of Mr Newey under the Services Agreement.

(c) Alabaster was no brass plate company.

(d) It was not in any way material to the question of commerciality that advice on the decision-making processes in Alabaster had been given by Moore Stephens.

50. Having reconsidered the evaluative findings in paragraph [50] of the FTT Decision we come to the same conclusions as stated in the FTT Decision.

51. In paragraph [51] of the FTT Decision the Tribunal:

(1) considered submissions made by leading counsel for HMRC concerning communications between Mr Newey and the Office of Fair Trading;

(2) noted that in those communications Mr Newey described the way the Ocean Finance business operated, and did not distinguish between Ocean Finance and Alabaster.

(3) and found:

(a) this was not indicative of the true relationship between Mr Newey and Alabaster, or relevant to a consideration of the nature of Mr Newey's business;

(b) that was established by the contractual arrangements and the actual course of dealings, and not by a summary that was directed at a completely different purpose, and for which the actual business structure would not be of any relevance.

52. Having reconsidered the evaluative findings in paragraph [51] of the FTT Decision we come to the same conclusions as stated in the FTT Decision.

53. In paragraph [52] of the FTT Decision the Tribunal:

(1) noted that the Ocean Finance operation in the UK was a substantial one;

(2) noted that the salaries of senior staff and underwriters in the UK were substantial when contrasted with those of the Alabaster directors and Lucy Woodworth;

(3) and found:

(a) this merely emphasised the extent of the processing operation that Alabaster had contracted to equip itself to conduct its loan broking business;

(b) it could not be inferred from this that it must have been Mr Newey that was carrying on the loan broking business;

(c) the loan broking business was carried on by Alabaster, with the services of Mr Newey provided through the Services Agreement.

54. Having reconsidered the evaluative findings in paragraph [52] of the FTT Decision we come to the same conclusions as stated in the FTT Decision.

55. In paragraph [53] of the FTT Decision the Tribunal:

(1) considered questions put in cross-examination by leading counsel for HMRC to both Mr Boylan and Mr Newey (in connection with all stages of the processes, including advertising approvals, the OAFs, valuation requests and Case to Bank Submissions), where counsel repeatedly referred to Alabaster "rubber stamping" decisions of others, and also described it as "window dressing";

(2) and found:

(a) the activities of Alabaster in these respects could not properly be described as either "rubber stamping" or "window dressing"; those expressions might be apt in a case where documents are merely signed mindlessly, but that is not the case here;

(b) Alabaster obtained advice and recommendations, for example in relation to advertising, and it contracted underwriting and other administrative services to Mr Newey; Alabaster relied on Mr Newey to provide input into the advertising campaigns and the terms on which lenders were added to its panel; having obtained such advice and assistance, Alabaster had its own staff to collate certain of the material;

(c) the fact that, having engaged all those services, Alabaster consistently chose to follow and adopt them does not amount to rubber stamping or window dressing.

56. Having reconsidered the evaluative findings in paragraph [53] of the FTT Decision we come to the same conclusions as stated in the FTT Decision.

57. In summary, having carefully reconsidered the evaluative findings in the FTT Decision at [50-53], and revisited the documentary and witness evidence provided in 2010, we come to the same conclusions as stated in the FTT Decision.

Conclusions.

58. Having addressed those specific issues (as directed by the Court of Appeal), we are mindful of the CJEU's statement that our conclusion must be by means of an analysis of all the circumstances of the dispute. We must determine whether the arrangements reflect economic and commercial reality, or instead constitute a wholly artificial arrangement which does not genuinely reflect economic reality and was set up with the sole aim of obtaining a tax advantage (per CJEU Decision at [52]).

59. We must be careful not to deconstruct what Henderson LJ described as the synoptic approach of the CJEU but focussing on the phrase "was set up with the sole aim of obtaining a tax advantage", we emphasise that one fact which has been accepted by Mr Newey from the

outset of the appeal proceedings is that his sole reason for implementing the arrangements was to avoid VAT (see FTT Decision at [11]). That is clearly a fact that weighs heavily in the mind of HMRC and they reminded us of it several times during their submissions, however it is just one aspect of the synoptic approach to be adopted. Focussing on the phrase "whether the arrangements reflect economic and commercial reality, or instead constitute a wholly artificial arrangement which does not genuinely reflect economic reality", we respectfully agree with Henderson LJ (at CA Decision [108]) that the question of artificiality has to be assessed by reference to the business relationships actually entered into between Mr Newey, Alabaster, the lenders and Wallace Barnaby, with a view to testing whether they reflected underlying commercial reality.

60. From our consideration of the questions posed in the CJEU referral (see [46] above) and the questions posed by the Court of Appeal (see [47] above), and our reconsideration of the evaluative findings in the FTT Decision (see [48-57] above) we have reached the firm conclusion that the business relationships actually entered into between Mr Newey, Alabaster, the lenders and Wallace Barnaby do reflect economic and commercial reality, and do not constitute a wholly artificial arrangement which does not genuinely reflect economic reality.

THE ERROR OF LAW RELATING TO ALABASTER'S EXEMPT SUPPLIES

61. As explained at [3] above, the Court of Appeal identified two errors of law in the FTT Decision. The first (not adopting the approach laid down by the CJEU) has been addressed above. The other is described by Henderson LJ as follows:

> "[74] It is important to note that in [90] the FTT appear to have proceeded on the express footing that the Alabaster arrangements did not involve the making of any exempt supplies in the UK, and that it was the absence of any such exempt supplies which made HMRC's arguments unsustainable. Had such exempt supplies existed, the FTT clearly considered it arguable that a scheme designed to prevent otherwise irrecoverable input VAT from being incurred might be contrary to the purposes of the VAT legislation. Unfortunately, however, it is common ground that the FTT were mistaken in their assumption, at any rate if it is read literally. It has always been an agreed fact that, under the new arrangements involving Lichfield and then Alabaster, exempt supplies of financial services continued to be made in the UK by the Jersey company. This apparent error of law was accordingly one of the grounds upon which HMRC appealed to the Upper Tribunal, and it is also the subject of the third ground of appeal to this court. Furthermore, the perceived absence of an exempt supply to which irrecoverable VAT might be attributable is a theme which runs through the FTT's remaining discussion of this issue: see [92] and [95].
>
> …
>
> [97] It is fortunately unnecessary for us to decide how far the Upper Tribunal's diagnosis of error was intended to go, because I am satisfied that even on the narrower view there was clearly a material error of law in the FTT Decision. Furthermore, in respectful disagreement with the Upper Tribunal, I am unable to accept its benevolent reading of the FTT's repeated statements that the arrangements in Jersey did not involve the making of any exempt supplies in the UK. I cannot escape the impression that, at this critical point in their analysis of the abuse issue, the FTT momentarily lost sight of the agreed fact that Alabaster did make supplies of exempt services in the UK. If the FTT had in mind that there were indeed exempt supplies made by Alabaster, but the fact that they were made by a person who did not belong in the UK made all

> the difference, they would surely have said so. Furthermore, it would then have been necessary for the FTT to explain why, on that basis, the mischief which they had correctly identified (of artificial attempts to avoid or neutralise the burden of input tax attributable to exempt supplies) was no longer applicable, and why the Jersey arrangements were nevertheless not contrary to the purpose of the VAT legislation."

62. On this point Mr Ghosh for Mr Newey submitted:

(1) Any misdescription in the relevant parts of the FTT Decision was at most a mistake in recording the FTT's view; the joint technical position of both parties was clearly that Alabaster's loan brokerage supplies were exempt and made in the UK.

(2) The error makes no difference whatsoever to the FTT's conclusion. The fact that Alabaster made exempt supplies in the UK could not determine whether the doctrine of abuse of law was engaged. As the Court of Appeal specifically held (at CA Decision at [107]), "it was in principle open to Mr Newey to decide that the business of Ocean Finance should henceforth be carried on by Alabaster in Jersey, with the benefit of advertising services provided by Wallace Barnaby". Thus, the fact that (as has been common ground throughout) Alabaster made exempt supplies in the UK could not of itself engage the abuse of law principle.

(3) Rather, the only ground upon which the abuse of law doctrine could be invoked was that the arrangements did not correspond with their economic and commercial substance (as per CA Decision at [107], reflecting CJEU Decision at [44-45]). The arrangements did accord with the economic and commercial reality, and that conclusion is not in any way called into question by the fact that Alabaster made exempt supplies in the UK.

63. Mr Thomas for HMRC submitted:

(1) The loan broking services were exempt.

(2) The Tribunal's analysis at FTT Decision [90-92 & 95] therefore identifies that there would be an abuse if there had been an exempt supply in the UK but finds no abuse because there is no such supply. On the basis of the same reasoning, the fact that there is an exempt supply ought to lead to the opposite conclusion, namely that where an exempt supplier "engineers a scheme to create a deduction [of input tax] or to prevent VAT which would be irrecoverable from being incurred, then we can see the argument (depending on the circumstances) that this could be regarded as contrary to the purpose of the VAT Directives" (FTT Decision at [90]).

64. We apologise to the parties (and the higher courts) for the error of law identified by the Court of Appeal. The loan broking supplies made by Alabaster to the lenders were made in the UK (art 16 VAT (Place of Supply of Services) Order 1992 SI 1992/3121), and were exempt supplies (s 31 and group 2 sch 9 VAT Act 1994).

65. We note that if the redefinition contended for by HMRC were to be made then the outcome would be that the loan broking supplies would be treated as being made by Mr Newey to the lenders and would be made in the UK (s 7(10) VAT Act)[3], and be exempt supplies (s 31 and group 2 sch 9 VAT Act 1994) – in other words, no different from the position of Alabaster making the loan broking supplies. We agree with Mr Ghosh that the fact that Alabaster made exempt supplies in the UK could not of itself engage the abuse of law principle. The correction of the earlier error of law in this respect makes no difference to the conclusions reached in 2010

[3] Now (since 2010) in s 7A VATA. The analysis by the Upper Tribunal (at UT Decision [29]) cites s 7(1) VATA (rather than s 7(10)) and is presumably a typographical mistake.

on this point. Any input VAT incurred by the supplier of the loan broking services would be attributable to exempt supplies (and thus irrecoverable, and a cost to the loan broker), irrespective of whether the supplier was Alabaster (Mr Newey's position) or Mr Newey (HMRC's position). Thus, this point, in itself, has no bearing on the application of the abuse of law doctrine to the facts of the case.

66. We conclude that the correction of the error of law identified by the Court of Appeal at CA Decision [74] does not change the conclusions reached by this Tribunal in the FTT Decision.

OVERALL CONCLUSIONS AND DECISION

67. On the error of law relating to the failure to apply the correct test as stated by the CJEU in the CJEU Decision: having applied the correct test we concluded that the business relationships actually entered into between Mr Newey, Alabaster, the lenders and Wallace Barnaby do reflect economic and commercial reality, and do not constitute a wholly artificial arrangement which does not genuinely reflect economic reality - see [60] above.

68. On the error of law relating to the exempt loan broking supplies made by Alabaster: having applied the correct law we concluded that this did not change the conclusions reached by this Tribunal in the FTT Decision - see [66] above.

69. Accordingly, the outcome of the remittal is that we ALLOW the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

70. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

Release date: 14 September 2020