



Neutral Citation Number: [2010] EWCA Civ 422

Case No: A3/2009/1300

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHANCERY DIVISION
SIR EDWARD EVANS- LOMBE
CH/2007/APP/0806
CH/2007/APP/0435

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/04/2010

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE EHERTON
and
LORD JUSTICE PITCHFORD

Between :

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

Appellant

- and -

**INSURANCEWIDE.COM SERVICES LIMITED (1)
TRADER MEDIA GROUP LIMITED (2)**

Respondent

Miss Alison Foster Q.C. and Mr Paul Key (instructed by HMRC) for the Appellant
Ms Valentina Sloane (instructed by Forbes Hall LLP) for the 2nd Respondent
The 1st Respondent was not represented

Hearing dates : 2, 3 and 4th March 2010

**Judgment Approved by the court
for handing down
(subject to editorial corrections)**

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LORD JUSTICE ETHERTON :

Introduction

1. The two appeals, to which this judgment relates, concern the exemption from Value Added Tax (“VAT”) contained in Schedule 9, Group 2, Item 4 to the Value Added Tax Act 1994 (“VATA 1994”) for the provision of services by an insurance broker or insurance agent of any of the services of an insurance intermediary (“the Insurance Intermediary Exemption”). The significant feature of both appeals is that each taxpayer claimed the exemption by virtue of the facility which they provided through their respective websites for a member of the public to have access to an insurer or an insurance broker or insurance agent, with or through whom an insurance contract could be made.
2. The appeals are by the Commissioners for Her Majesty’s Revenue & Customs (“HMRC”) from an order of Sir Edward Evans-Lombe made on 15 May 2009. By that order the Judge allowed an appeal by the first Respondent, InsuranceWide.Com Services Limited (“InsuranceWide”), from the decision of the VAT and Duties Tribunal (“the Tribunal”) released on 8 November 2007 (“the InsuranceWide Tribunal Decision”) that the supplies made by InsuranceWide fell outside the Insurance Intermediary Exemption. By the same order the Judge dismissed an appeal by HMRC from a decision of the Tribunal released on 8 May 2008 (“the Trader Media Tribunal Decision”) that the services provided by the second Respondent, Trader Media Group Limited (“Trader Media”), fell within the Insurance Intermediary Exemption. The InsuranceWide Tribunal Decision and the Trader Media Decision were themselves made on appeal from decisions of HMRC rejecting the claims of InsuranceWide and Trader Media respectively to the Insurance Intermediary Exemption. The precise details of that rejection in each case are not material for the purposes of this judgment.
3. InsuranceWide is not currently trading and is subject to a Company Voluntary Arrangement. It was not represented by counsel or solicitors at the hearing of the appeals. One of its directors, James Harrison, attended for part of the hearing, but did not make any submissions of law on its behalf.

The European context

4. The imposition of VAT was the result of the Sixth Council Directive 77/388 EEC of 17 May 1977 (“the Sixth Directive”). The Sixth Directive required member states to impose a tax on the supply of goods and services. Article 13 of the Sixth Directive provided that the supply of certain services should be exempt from VAT. The Insurance Intermediary Exemption was intended to implement the exemption in Article 13B(a) of the Sixth Directive (“Article 13B(a)”), which was as follows.

"B Other exemptions

Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

(a) insurance and re-insurance transactions including related services performed by insurance brokers and insurance agents;
..."

5. That exemption is now to be found in the same terms in Article 135(1)(a) of the recast Council Directive 2006/112/EC of 28 November 2006 on VAT ("the 2006 VAT Directive"). Both in the Court below and in this Court the parties presented their arguments by reference to the Sixth Directive since the decided cases on which they rely were decided under the pre-Article 135 law. I shall similarly appraise those arguments by reference to the Sixth Directive save where it is necessary to refer specifically to the 2006 VAT Directive.
6. The Sixth Directive did not contain, and the 2006 VAT Directive does not contain, any definition of the expressions "insurance brokers", "insurance agents" or "related services" for the purposes of Article 13B(a) and Article 135(1)(a) respectively.
7. The expressions "insurance brokers" and "insurance agents" do, however, appear in Council Directive 77/92/EEC of 13 December 1976 ("the Insurance Directive"), which was made for the purpose of regulating the freedom of establishment throughout the EEC, pursuant to Article 43 EC Treaty, of such professions as insurance brokers and insurance agents. It contained a recital that, in view of the differences between member states as regards the scope of activities of insurance agents and brokers, it was desirable to define as clearly as possible the activities to which the Insurance Directive applied. Article 2 of the Insurance Directive provided as follows:

"Article 2

1. This Directive shall apply to the following activities falling within ex ISIC Group 630 in Annex III to the General Programme for the abolition of restrictions on freedom of establishment:

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

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

(c) activities of persons other than those referred to in (a) and (b) who, acting on behalf of such persons, among other things carry out introductory work, introduce insurance contracts or collect premiums, provided that no insurance commitments towards or on the part of the public are given as part of these operations.

2. This Directive shall apply in particular to activities customarily described in the Member States as follows:

- (a) activities referred to in paragraph 1 (a)...
in the United Kingdom: insurance broker:...
- (b) activities referred to in paragraph 1(b):- ...
in the United Kingdom: agent:...
- (c) activities referred to in paragraph 1(c):-
in the United Kingdom: sub-agent."

8. Council Directive 2002/92/EEC of 9 December 2002 on insurance mediation ("the Insurance Mediation Directive") replaced the Insurance Directive. It contained recitals that: (6) insurance and reinsurance intermediaries should be able to avail themselves of the freedom of establishment and the freedom to provide services which are enshrined in the EC Treaty; (8) the co-ordination of national provisions on professional requirements and registration of persons taking up and pursuing the activity of insurance mediation can contribute both to the completion of the single market for financial services and to the enhancement of customer protection in that field; and (9) various types of persons or institutions, such as agents, brokers and "bancassurance" operators, can distribute insurance products, and equality of treatment between operators and customer protection requires that all these persons or institutions be covered by the Directive. The Insurance Mediation Directive introduced the compendious expressions "insurance mediation" and "insurance and reinsurance intermediaries", which included agents, brokers and others. The expressions "insurance mediation" and "insurance intermediary" were defined in Article 2(3) and (5) respectively as follows:

"(3) 'insurance mediation' means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts in particular in the event of a claim."

"(5) 'insurance intermediary' means any natural or legal person who, for remuneration, takes up or pursues insurance mediation."

The domestic legislation

9. The Insurance Intermediary Exemption contained in Schedule 9, Group 2, Item 4 to VATA 1994 was intended to implement Article 13B(a). It provides for the following exemption from VAT.

"Item number...

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

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

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

NOTES

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

(a) the bringing together, with a view to the insurance or re-insurance of risks of -

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

(ii) persons who provide insurance or re-insurance:

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

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

(d) the collection of premiums.

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

(a) a person who provides insurance or re-insurance, and

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

(7) Item 4 does not include –

(a) the supply of any market research, product design, advertising, promotional or similar services; or

(b) the collection, collation and provision of information for use in connection with market research, product design, advertising, promotional or similar activities."

The Preliminary Issue

10. At the Judge's suggestion the parties formulated a preliminary issue, and the hearing before him proceeded on the basis of that issue. It was as follows.

"Is the act of introduction sufficient:

(A) to render a trader, an insurance agent and/or insurance broker and/or intermediary within the meaning of either Article 13B of the Sixth VAT Directive and/or Schedule 9, Group 2, Item 4 of the Value Added Tax Act 1994?

(B) to constitute one or more of the services described in Schedule 9, Group 2, Note 1 of the Value Added Tax Act 1994?"

11. Following a three day hearing, the Judge answered both those questions in the affirmative. The Judge did not make a formal declaration by order giving the answer to the preliminary issue, but, on the basis of his answer, made his order of 15 May 2009 allowing InsuranceWide's appeal and dismissing HMRC's appeal. When Ms Alison Foster QC, for HMRC, opened the appeal we expressed concern that the matter had proceeded before the Judge, and the parties appeared to intend to argue the appeals, on the basis of a preliminary issue divorced from the actual facts, and so to be assessed against hypothetical factual scenarios, rather than as substantive appeals capable of disposing of both cases by applying the law to the established facts. It transpired that no findings of fact are challenged (save in respect of one error in the Trader Media Tribunal Decision, on which the parties were agreed). It was therefore agreed by all sides that the appeals should be conducted on the actual facts so as to dispose entirely of both sets of proceedings. For that reason, more detailed reference was made in the course of the appeals to the facts found by the Tribunal than appears from the summary in the judgment of the Judge.

The InsuranceWide Tribunal Decision

12. The Tribunal gave the following brief overview of InsuranceWide's business at the beginning of its Decision.

"3. InsuranceWide was formed in 1999 by David Harrison and his son James Harrison, both of whom had considerable experience in the insurance business, with the intention of being a conduit for the sale of insurance via the internet. In effect it provides a comparison service to individuals for insurance cover from various insurance companies. This is done via an on-line computer website. It receives commission from the insurers based on the number of contracts of insurance that eventuate from the introductions.

Since its inception the business has evolved from being linked to, and receiving commission from, only one insurance provider, namely Cox Insurance Holdings Plc ("Cox"), to the present situation where it now receives commission from all of the major direct insurance underwriters as well as the traditional UK insurance providers, and receives commission from approximately 98% of the entire UK online insurance market."

13. The Tribunal identified five phases to the scope of the relevant services provided by InsuranceWide. It said the following about the first phase.

"11. At the outset InsuranceWide reached an agreement with Freeserve (now Orange) to be appointed its sole designated provider of insurance products. At that time Freeserve offered users free access to the internet through dial-up modem connections. People looking for insurance on the homepage would be referred to InsuranceWide alone and would then be guided by InsuranceWide through the appropriate online forms to the relevant insurance product. InsuranceWide paid Freeserve 25% of all commissions earned on successful policy sales.

12. Freeserve wanted to offer its users an enhanced degree of choice, and as Cox had already developed an interactive website which was operational in 1999, InsuranceWide developed trading arrangements with Cox by means of a service agreement dated 17 September 1999. Cox was a publicly quoted company that owned Equity Red Star, a syndicate which underwrote motor and household business, and which operated a panel of insurers. This was described by Mr Cordara as 'the Cox phase' which commenced in late December 1999. (We bear in mind that the different phases described by Mr Cordara are not co-extensive or co-terminous with the periods of the different assessments.) At the initial stage of the Cox phase a person logging on to the InsuranceWide website would be put through to Equity Red Star for a quote, merely passing through the InsuranceWide website to Equity Red Star.

13. ... In the preamble to the agreement with Freeserve it is stated that "Whereas: ... [InsuranceWide] has agreed to operate a website offering the ability to arrange a number of competitive insurance products" There was a back to back agreement with Cox which remained in its original form for somewhat over a year, but endured in an altered form for some five years. In the initial phase, which lasted until early 2001, Cox provided the logistical support and an administrative infrastructure to InsuranceWide. In particular, telephone calls made to the number given on the InsuranceWide website would be answered by a member of Cox's staff but in the name of InsuranceWide and documents relating to insurance issued in

the name of InsuranceWide was signed by the managing director of Boncaster Limited ("Boncaster") a wholly-owned subsidiary of Cox. Boncaster acted on behalf of Equity Red Star, and administered both Cox's Helpline and InsuranceWide's Helpline. The relationship with Boncaster was revealed on InsuranceWide's notepaper which at its foot was endorsed:

"All InsuranceWide.com products and services are arranged and administered by Boncaster Limited ..."

It was accepted by Mr Harrison that InsuranceWide did not have authority to bind Cox. It was also acknowledged that InsuranceWide did not at any stage handle claims or collect premiums or prepare insurance policies. InsuranceWide did not employ staff to deal with such administrative matters.

14. ... Clause 9 of the initial agreement provides (in part):

"... the parties agree that InsuranceCity shall procure that Requests in respect of Exclusive Insurance Business are only referred to the relevant Panels of Insurers and Cox shall use reasonable endeavours to procure that such Panels of Insurers act in good faith with a view to maximising the value of the Exclusive Insurance Business. InsuranceCity is restricted during the term of this agreement from allowing any other person whomsoever to offer to provide such Exclusive Insurance Business utilising the InsuranceCity Website."

14. The second phase of InsuranceWide's business emerged in late 2000, and was described as follows by the Tribunal.

"17. The second phase of InsuranceWide's business was what Mr Harrison referred to as the "Decision-Tree" phase. This emerged in late 2000 when InsuranceWide recognised that certain categories of business were not being written because the companies on Cox's panel only dealt with a limited number of categories of risk. InsuranceWide therefore moved from acting purely for Cox's panel of insurers to acting on behalf of a number of potential insurers. InsuranceWide signed agreements with all those insurance companies whose products it was identifying on its website. We were shown a screenshot taken in October 2001 of the Freeserve 'money-insurance' website where below the heading "Insurance" was stated:

"Quote and buy from leading insurers via InsuranceWide.com".

The categories of insurance shown on the screen were motor insurance, travel insurance, building and contents insurance,

and lifestyle insurance. Under travel insurance were subheadings, including one for backpacker insurance. A user clicking on 'backpacker insurance' would be taken to a co-branded website of InsuranceWide.com and a company called Insureandgo. Insureandgo is itself an insurance intermediary not an ultimate insurer. At this time each sector of insurance was linked by InsuranceWide with only one broker, therefore the user was not given a choice of insurer. Throughout its existence the principal remuneration for InsuranceWide remained commissions based on the insurance contracts made as a result of its internet connections....

18. From September 2000 to May 2002 when the Decision-Tree came into operation, a business plan was drafted which described InsuranceWide's business as:

"InsuranceWide is unique in combining the benefits of instant low cost quotes and claim processing with comparative pricing and access to a wide range of specialised products."

"The InsuranceWide system employs a panel of insurers offering a standard policy wording where only the cost differs."

Additionally it provided:

"All additional insurance providers are being selected for their high level of customer service and innovative insurance policies. All will adopt the InsuranceWide look and feel for their sites providing a common standard of excellence."

The document describes its strategic aims as being inter alia "to develop new products and align with new distribution partners and insurance providers". With the introduction of other insurers, as agreed by Cox, the level of commission received by InsuranceWide varied according to its agreement with each particular insurance company. The range was from 5% to 20%. In addition, a signing-on fee was agreed with each new provider and there was a volume agreement for additional commission for any premiums generated above a pre-determined threshold. With the introduction of insurance providers other than Cox came the introduction of co-branding on the website, for example InsuranceWide's name would appear on the right hand side of the screen and on the left hand side would appear the name of the particular insurance provider, such as Insureandgo or Compucover. Mr Harrison described InsuranceWide's activities at this stage as moving from acting as an agent for just one group of insurers to being in a position comparable to an insurance broker acting on behalf of a number of potential insurers, with the possibility of recommending one or more of a number of insurers to potential insureds."

15. The third phase, which ran from about March 2002, was defined by the introduction of a system known as the InsuranceWide Wizard (“the Wizard”). It was also known as the “Motor Wizard” as it was at this stage only used in connection with motor insurance. It was later used more widely. InsuranceWide had developed technology to automate the selection process. It obtained and recorded the essential information required by underwriters and applied that information at high speed and in large volumes to guide each prospective customer through to the most appropriate insurer or insurers best suited to the customer’s individual circumstances. InsuranceWide established a series of rules with the insurer which set out what they could or could not quote for effectively. These criteria were put into the Wizard, and InsuranceWide would hold a series of monthly meetings with the insurers to ensure that these rules were kept up to date. InsuranceWide had established its own dedicated search department, which traded as “Every User Counts”, whose job it was constantly to monitor insurance websites, to ensure, amongst other things, that the insurers’ own stated rules were those they actually applied in practice. The Tribunal described how the process worked at this stage as follows.

“20. At this stage a person logging on to InsuranceWide’s website had the possibility of providing information to the Appellant by means of an on-line questionnaire. The answers to the questionnaire provided InsuranceWide with a profile of that person’s requirements. Based on this information Wizard identified a number of potentially suitable insurers. InsuranceWide then provided the person with the name of the insurer it considered to be the most suitable and a shortlist of three other potentially suitable insurers, together with a direct link to each insurer’s website. The list and the links were provided by email from InsuranceWide and/or directly via its website. The person seeking insurance had a free choice as to whether to proceed to each insurer’s website or not. If the person seeking insurance proceeded to an insurer’s website, then (on entering that website) the person seeking insurance had to complete a separate set of questions in order to receive a quotation from the insurer for the provision of insurance. Such quotation may (or may not) have resulted ultimately in an insurance contract being formed.

21. The Wizard was primarily used for motor insurance, where there were many options available, and it enabled InsuranceWide to direct a user more accurately to the relevant insurers. Where there were only a limited number of insurers dealing with a particular area it was unlikely that the Wizard would be used. However, even within motor insurance there were specific specialised areas where the Wizard was not used, for example: young drivers, student drivers and specialised car insurance. In this initial phase of the Wizard its use did not lead to a quote on the website, the customer had to go to the external website of the insurer or an intermediary to obtain a quote.

22. The Wizard provided the customer with the tools to compare a shortlist of selected insurers, knowing that all those selected would be able to quote and would be competitive. It was then up to the customer to decide whether he chose to have such additional benefits as a courtesy car, windscreen cover or any of the other additions to the policy that would alter the final price of the policy chosen. It was considered to be a more helpful approach than trying to quote the cheapest price on the minimum information input by the customer. Between 2002 and 2004 no quotes or indicative prices were available on InsuranceWide's website, these not being available until InsuranceWide introduced a system called "InsuranceWide Plus" in 2004-2005, the next phase which is dealt with below. InsuranceWide chose not to offer direct quotes, in part because the insurers did not like their prices to be exposed in direct competition, and in part because a customer might choose the cheapest price which would be based on standardised information, but when the insurer had the full information relating to the customer's specific circumstances, the actual offer might differ considerably from the initial quotation. InsuranceWide's technology gave it the ability to compare the market on price alone, and it could therefore establish in what fields the insurers were most competitive. It would be asked for advice by the underwriters on the sustainability of the prices they were demanding for their products."

16. The fourth phase was the introduction of InsuranceWide Plus, which was made available in 2004. This was described by the Tribunal as follows.

"23. The fourth phase was the introduction of InsuranceWidePlus which was made available in late 2004. The aim of this system was to enable the transfer of the data input by a customer into the InsuranceWide website directly to the insurers' systems. This simplified the system for the customer by requiring him only to enter his data once. This newer Wizard software generated a results page on-screen for the customer which set out his profile in brief and referred him to a short list of insurance companies, for each of whom InsuranceWide was authorised to act. Insurers were selected for their relevance to the customer's stated insurance profile and risk, and were set out in order of preference. An e-mail was simultaneously sent to the customer's e-mail address setting out the same information and containing direct links to the insurer's website. This e-mail to the customer also contained the necessary references and links to InsuranceWide's terms and conditions and its privacy policy which are published on its website. (We will refer to those later.) The customer was then able to click through from the e-mail directly to the chosen insurer's site and an insurance application form. Any customer choosing to link to an insurer's website by this method was

automatically identified to the insurer as an InsuranceWide customer.”

17. The final phase was the introduction of InsuranceWide Connect, and was described as follows by the Tribunal.

“24. The final phase was the introduction of InsuranceWideConnect. This was introduced in 2006, and by March 2007 almost all the insurers with whom InsuranceWide did business had integrated it into their systems. InsuranceWideConnect was essentially the same as InsuranceWidePlus, except that the technology involved in InsuranceWidePlus had not been completely successful. At the time of the hearing it was only available for motor insurance and life insurance. The aim throughout had been to produce a system which enabled a customer to complete only one application form which could then be transmitted to all the relevant insurers as necessary, and this InsuranceWideConnect was able to effect. This system is only used for motor and life insurance. As with the previous systems, no prices were displayed beyond the highest and the lowest in any given range.”

18. InsuranceWide’s terms and conditions made clear that, where there was co-branding, the co-branded website was operated by a different entity, as was the telephone.
19. The documentation included the following disclaimers and qualifications in InsuranceWide’s terms and conditions from October 2002:

“IMPORTANT: As explained below, our own terms and conditions do not constitute a contract between you and Insurancewide.com in connection with the purchase of insurance products or services and we accept no responsibility whatsoever (whether in contract, negligence or any other course of action) for the insurance providers websites including the sale of such products or services...”

“We do not represent, warrant or endorse the suitability of any insurance products or services, nor the accuracy or reliability of information concerning any insurance products or services.”

“IMPORTANT: WE RECOMMEND THAT BEFORE PURCHASING INSURANCE YOU SHOULD TAKE INSURANCE ADVICE APPROPRIATE TO YOUR NEEDS BY CONTACTING AN INDEPENDENT INSURANCE BROKER.”

20. There was no evidence as to whether there were similar terms and conditions prior to October 2002. New terms and conditions dated 7 October 2004 stated:

“We do not sell insurance or enter into insurance contracts. We are not an insurance company, broker or intermediary. We do not act as an agent for you or for the insurer. We simply provide a referral service.”

21. Different terms and conditions were introduced on 30 June 2005. They stated:

“We do not sell insurance or enter into insurance contracts. We are not an insurance company, provider or broker. In the case of the InsuranceWidePLUS (IWPLUS) section of our site we provide indications of the approximate insurance premium that may be payable in relation to insuring a risk as you have described in the forms you complete. We pass your information to the relevant Insurer and conclusion of any insurance contracts is a matter for you and the insurers. We do not guarantee that you can actually purchase insurance at the price indicated or at all.”

22. InsuranceWide’s website also had straightforward advertisements for insurance companies displayed on it and sponsored links where the sponsor’s name was displayed in a box, as well as a third form of advertising in the form of banner advertisements. A visitor to the site could click on any of the names displayed in any of the three forms and get taken directly to that advertiser’s website.
23. InsuranceWide had on 6 November 2004 been granted permission by the Financial Services Authority, under Part IV of the Financial Service and Markets Act 2000 (“the FSMA”), to act as an intermediary. The permission related to: “arranging (bringing about) deals in investments”, “making arrangements with a view to transactions in investments”, and “agreeing to carry on a regulated activity”.
24. It was accepted by Mr Roderick Cordara QC, for InsuranceWide, before the Tribunal that InsuranceWide never had the power to decide whether or not business would be accepted.
25. The Tribunal concluded that InsuranceWide was not at any stage an insurance agent, either for the purpose of the Sixth Directive or the Insurance Intermediary Exemption in VATA 1994, because it neither had power at any stage to bind the insurance company, nor did it have any role to play in negotiating the terms of any of the insurance contracts which resulted. The Tribunal considered that at all times InsuranceWide was acting on its own behalf and not on behalf of the insurers.
26. The Tribunal went on to consider the position if it was wrong in its analysis of what constitutes an insurance agent. It considered that, during the pre-Wizard phase, InsuranceWide was “nothing more than an introducer and its role at that time cannot properly be distinguished from that of an advertiser in that via its website it had no interaction with either party beyond making the one aware of the other and provided a means of the one contacting the other.” It concluded, however, that after the introduction of the Wizard the activities of InsuranceWide “went beyond that of being a mere promoter of, and introducer to, the insurance companies, which no longer all belonged to the Cox Group.” It found that, despite InsuranceWide’s disclaimer in its terms and conditions, it was as a matter of law acting as an insurance intermediary; its

services were related to an insurance transaction in the course of acting in an intermediary capacity; it was bringing together the relevant parties with a view to insurance within Note (1)(a) and (b) of Item 4 in the Insurance Intermediary Exemption; and also it was carrying out work preparatory to the conclusion of contracts of insurance within Note (1)(c). The Tribunal also concluded that, after the introduction of the Wizard, InsuranceWide was providing services related to insurance and reinsurance transactions within Article 13B(a).

The Trader Media Tribunal Decision

27. I gratefully adopt the following description by the Judge of the origins of the relevant service provided by Trader Media.

“9.Trader Media is a publishing company which specialises in classified display advertising which allows members of the public and businesses to sell and purchase a wide variety of motor vehicles. One of those publications is a magazine called Auto Trader. In addition to that magazine, Trader Media maintains an internet website devoted to this purpose. The online site comprises a number of products including the ability to advertise a car for sale, car valuation, details of new cars, financing, insurance and other products. In respect of insurance products, there is an *"insurance centre"* which customers using the website can use to obtain quotes for car insurance from a panel of selected insurers. In 2005 Trader Media undertook a tender process with the object of finding a partner with which it could enter into an arrangement under which such a partner could work with Trader Media to provide and sell insurance products to customers accessing the website who would probably have been readers of Auto Trader. As a result of this process Trader Media entered into an agreement with a company known as BISL. ”

28. The Tribunal gave a brief explanation of how the service to such customers worked.

“A user logs on to the Auto Trader website. There were a number of options in terms of the information available which were contained in links from the home page to other parts of the website or in a drop down menu. For example, a user could click on the *"Finance Centre"* to access information relating to loans or could click on the *"Motoring Centre"* to access information about car warranties or MOT tests. Similarly, if a user wished to access information in respect of insurance products, there were a number of routes available to access the Insurance Centre. The Insurance Centre contained information about choosing the best motor insurance policy. It did this by asking standard form questions of the proposer and provided in return information on insurance cover and premiums. There was no negotiation between the parties.

To get a customer to use the Insurance Centre they were invited to press the "get a quote" button. At that stage, they entered into the Auto Trader and Compare The Market branded insurance quotation page which opened up a separate "window" on their computer screen. Questions were asked and answers given in order to provide the information necessary for a quote. The URL or internet address for the quotation process was that of [BISL] and customers gained access to the questions through the Auto Trader website.

The questions in the proposal form or questionnaire were set by BISL. TMG [Trader Media] was not involved in the preparation of these questions but had the power to review and object to questions. The quotation process took about four minutes to complete providing all questions were answered. A number of insurance quotes were provided to the user in a price comparison table for review. At the top of the table was stated that TMG had "teamed up with a range of quality insurance companies to offer you online quotations".

The panel of insurers used at the start of the business was small. TMG made suggestions for the insurance panel based on an understanding of the consumer experience and demographics. The more TMG understood its audience, the more conscious it was to provide customers with the type of insurer who would be competitive in providing quotes (for example, with regard to male drivers under 25).

The user could click on one of the insurance offers in the comparison table if they wished to purchase that product. The purchase could be immediate. An e-mail confirmation of the policy was sent by BISL to the user. The insurance premium could be paid online by making an electronic payment. Insurance policy documentation would follow by post within five working days. The insurance process was done on the [BISL/TML] website. All communications between the users were done on Auto Trader branded e-mails sent by BISL. The website was easy to use in that the customer needed to input information once to obtain several quotations."

29. It is common ground that the Tribunal mistakenly referred to Auto Trader, when it should have referred to BISL, in two places in the second and last paragraphs just quoted. I have substituted a reference to BISL in those places.
30. As clarified in the course of exchanges with counsel in the hearing of the appeals before us, the internet address for quotations was that of BISL, but it had the logo of Trader Media on it; and it is to be regarded as a jointly owned and operated website. Trader Media provided a doorway through to the broker BISL. Both parties accepted that the following description by the Judge in paragraph 10 of his judgment was a correct summary.

“10. The Insurance Centre was run by BISL although Trader Media had initial and continuing input into such matters as the questions asked of customers and constitution of the panel of insurers to whom the answers of a customer could be referred for them to submit quotes. A customer who “clicks on” the indicator of the Insurance Centre on the Auto Trader web page is transferred automatically by electronic (“hypertext”) link to the Insurance Centre run by BISL where he is invited to answer questions relating to his insurance requirements. If an insurance contract between the customer and one of the panel of insurers results, Trader Media are paid a commission by the insurer.”

31. As I have said, the Tribunal concluded on those facts that Trader Media was entitled to the benefit of the Insurance Intermediary Exemption.

The Judgment appealed

32. The Judge’s full and careful analysis may be very briefly summarised as follows. He considered that the words “insurance broker” and “insurance intermediary” are interchangeable. He said that the business of a broker is to be an introducer, who, in the context of the present cases, he described in paragraph 25(i) of his judgment as:

“one who, by reason of his relationship with two or more individuals or groups of individuals, is able to put two or more of those individuals or groups in contact with each other with a view to their forming, in the future, a commercial relationship, in these cases a relationship of insurer and insured.”

33. In the Judge’s view sub-paragraph 1(a) of the Notes to Item 4 of Schedule 9 Group 2 of VATA 1994 describes the functions of an introducer. Those were functions performed by InsuranceWide and Trader Media. The Judge considered that the Notes differentiate between those falling within sub-paragraph (a), who are introducers, and those falling within sub-paragraph (b), who would include those concerned with the negotiation of the terms of contracts of insurance. He said that whether or not an individual seeking exemption is entitled to it depends upon what that individual is actually doing and not how he may describe himself or be described. Further, he considered that “related services” in Article 13B(a) do not have to be performed entirely by one individual to qualify for exemption but can be performed by one or more individuals in a chain. Both InsuranceWide and Trader Media were doing much more than merely advertising within the specific exclusion from exemption by Note (7)(a) to Item 4 of Schedule 9. He said that it was irrelevant that InsuranceWide and Trader Media were not regulated pursuant to the FSMA.

HMRC’s submissions

34. Ms Foster, in her skilful and forceful oral submissions, identified four pre-conditions for the application of the Insurance Intermediary Exemption: (1) the taxpayer must have been acting as an insurance broker or insurance agent; (2) they must have been providing the services of an intermediary; (3) those services must have been referable

- to an insurance transaction; and (4) they must have been provided by the broker or agent in the course of an intermediary activity.
35. HMRC's case is that both InsuranceWide and Trader Media fall at the first hurdle because neither can show that it acted as an insurance broker or insurance agent. The essence of HMRC's argument on this aspect can be stated very shortly. It is that InsuranceWide and Trader Media merely provided a "click through" facility to a broker, agent or insurer; and that, in the absence of any legal relationship with either the insurer or the insured or the prospective insured, and in the absence of any involvement in the negotiation of the terms of the insurance contract or its preparation or the collection of premiums or the handling of any claims, their activities were not such as to constitute them an insurance broker or insurance agent for the purposes of Article 13B(a) or the Insurance Intermediary Exemption.
 36. Ms Foster relied, for that analysis, not merely on the terms of the Sixth Directive and the Insurance Directive, but also on the opinions of the Advocate General and the Court of Justice of the European Union ("the ECJ") in Case C-349/96 *Card Protection Plan Ltd v Customs and Excise Commissioners* [1999] 2 AC 601, [1999] STC 270 ("*Card Protection*"), Case C-240/99 *Försäkringsaktiebolaget Skandia (Publ)* [2001] STC 754 ("*Skandia*"), Case C-8/01 *Assurandør-Societetet, acting on behalf of Taksatorringen v Skatteministeriet ("Taksatorringen")* [2006] STC 1842, and Case C-472/03 *Staatssecretaris van Financiën v Arthur Andersen & Co Accountants cs* [2005] STC 508 ("*Arthur Anderson*").
 37. HMRC's primary position is that the legislation and the jurisprudence are not so clear that the point is free from all doubt, and for that reason the Court should direct a reference to the ECJ. One of the reasons that doubt exists, Ms Foster observed, is that the framers of Article 13B(a) had in mind a face-to-face broker and not a "click through" broker. That is a possibility which only arose with the development of the internet. Furthermore, she submitted, the jurisprudence of the ECJ is not entirely clear or consistent on the importance or significance of the taxpayer being able to bind the insurer in order to be characterised as an insurance agent or broker for the purposes of Article 13B(a).
 38. Ms Foster submitted that, if the Court is not disposed to direct a reference to the ECJ, then the appeals should be allowed on the ground that neither InsuranceWide nor Trader Media carried on the relevant activities as an insurance broker or insurance agent. She submitted that the activities specified in the Insurance Directive as characteristic of a broker or agent, as well as the case law of the ECJ, show that, to come within Article 13B(a) and the Insurance Intermediary Exemption, the taxpayer has to have something in the nature of, or approaching, a legal link with the insured and with the insurance company, as contrasted with the concept of mere facilitation. The minimum requirement is the carrying on by the taxpayer of a business activity, the principle purpose of which is the putting together of the insured and the insurer; but the taxpayer also has to have an impact on the terms of the contract, and a negotiating role for one or other of the prospective insured and the prospective insurer as a "go-between" them.
 39. By contrast with the Insurance Directive, Ms Foster submitted that the Insurance Mediation Directive is of little assistance, in view of its compendious description of

“Insurance Intermediary”, which is a description wider than insurance brokers or agents.

40. In their written submissions in support of their appeal to this Court from the High Court, HMRC submitted that an act of introduction *per se* does not involve any of the following matters: (1) negotiation of the terms or potential terms of an insurance contract; (2) involvement in the making of an insurance contract; (3) assessment of the insurance required or the risk to be insured; (4) provision of (or even knowledge of) information about the policies which are offered by an insurance undertaking; (5) the taking of information (such as name, contact details and insurance requirements) of the person considering or seeking insurance; (6) knowledge of what takes place once the introduction has been effected; (7) involvement in handling claims, collecting premiums, preparing policies or dealing with the administration of an insurance contract; (8) the power to bind any party; (9) acting on behalf of any party; (10) any legal obligations or duties owed by the introducer to any party; (11) any recommendation or endorsement by the introducer of another entity; (12) any warranties or representations by the introducer; or (13) regulation of the introducer by the Financial Services Authority or any other entity.
41. HMRC submitted that it appears inappropriate to describe a person whose role does not have any of those features as an “insurance agent” or “insurance broker”. Ms Foster did acknowledge, however, that in the later stages InsuranceWide did undertake the activity in (5), and was providing intermediary services.
42. Turning to the judgment below, Ms Foster advanced several criticisms. She criticised the apparent width of the application of the Judge’s conclusion on the preliminary issue. This was, at least in part, due to his view, expressed in paragraph 8 of his judgment, that the issue that he had to decide was a pure question of statutory construction, as to which the background facts of the two appeals were strictly irrelevant. She criticised paragraph 20 of the judgment as an elision by the Judge of two separate matters: first, the question whether or not the taxpayers were acting in the capacity of “insurance brokers and insurance agents” within the legislation, and secondly whether they were acting in an intermediary capacity. Further, she criticised the view expressed by the Judge that the words “insurance broker” and “insurance intermediary” in Schedule 9 Item 4 are interchangeable; and that “agents” should be given “its broad popular commercial” meaning, which, he said, is really indistinguishable from “broker”. In the Judge’s view, in the context of Article 13B(a), there was effectively no difference between a professional described as an insurance broker and one described as an insurance agent. She submitted that there was no basis for those conclusions, and they were wrong in European law.
43. So far as concerns InsuranceWide, it appears that, before the Tribunal, InsuranceWide’s case was argued on the basis of agency rather than a broker; but, on appeal to the High Court, InsuranceWide wished to argue on both bases. Ms Foster said that she had no objection to that course.
44. Ms Foster supported and endorsed the analysis and conclusion in paragraphs 70 to 73 in the InsuranceWide Tribunal’s Decision, which were as follows.

“70. In the case of *Arthur Andersen* the court only tangentially considered the concept of an agent and its conclusions are

mainly negative. However it did (in reliance on the case of *Taksatorringen*) state that it was required by case law for recognition as an insurance agent to have a relationship with both the insurer and the insured parties. The court described the activities of the appellant in that case as being in part 'the setting and payment of commission for insurance agents, the maintenance of contact with them, the handling of aspects relating to reinsurance and the supply of information to insurance agents and to the tax authorities' which, the court said, were 'quite clearly not part of the activities of an insurance agent'.

71. The court in *Taksatorringen* endorsed the words of the Advocate General's opinion in that case at paragraph 91 where he said:

"As far as the activities described in art 2(1)(h) of Directive 77/92 are concerned, which by para 2 of that article correspond to those of an insurance agent, the wording itself of the Community legislation does not refer to assistance given in the administration and performance of insurance contracts, particularly in the event of a claim, as being an ancillary activity, as this form of assistance is prefaced by the conjunction 'or', and thus within the same category as the introduction, proposing and carrying out of insurance contracts. In order for this assistance to be provided by an insurance agent, however, it must be given within the context of a contract or an authority to act and 'in the name and on behalf of, or solely on behalf of, one or more insurance undertakings'. There must therefore be a power to bind the insurance company in relation to the insured person who has submitted a claim ..."

It is therefore the opinion of the European Court that, contrary to the decision of the Tribunal in *C&V*, Directive 77/92 does require that to be an agent there must be a power to bind the insurance company, however the court left open the question of whether or not it was necessary to construe 'insurance agent' in the VAT Directive in the same way. Whilst that Directive is not determinative or definitive in relation to interpreting the meaning 'an insurance agent' for VAT purposes, VAT concepts being separate and freestanding, we are nonetheless entitled to derive assistance from it, and, in particular, from the way the European court has viewed it, and we do so.

72. We have carefully considered all the different stages in the present case, and do not find that InsuranceWide was acting as an insurance agent at any stage either in the European or in the United Kingdom: at no stage did it have power to bind the insurance company, which is one of the indicia of an agent (see paragraph 45 of the case of *Taksatorringen* set out at paragraph 61 above). InsuranceWide at all times specifically disclaimed

being an agent and in a letter dated 4 March 2005 sent to HMRC, BDO Stoy Hayward stated that InsuranceWide was 'entirely independent' and that its recommendations were 'solely based on the best insurer for that particular risk', which is what the evidence before us showed to be the case. It might be expected that an agent would not be so detached. In addition InsuranceWide did not have any role to play in negotiating the terms of any of the insurance contracts which eventuated. InsuranceWide itself sends out reminders to the insured parties when their insurance is due for renewal. These reminders are sent out in its own name, and the insured parties are invited to visit InsuranceWide's own website again. We can only conclude that this is in order that the insured might view other options and possibly renew with a different insurance company which we consider to be evidence that InsuranceWide was acting on its own behalf and not on behalf of the insurers, as an agent would. It also was presumably in InsuranceWide's mind that, whilst making such a return visit, the insured might click on one of the other banners or other companies' names thereby generating further income for InsuranceWide. We accept that what happens after a person seeking insurance has been directed through to the insurer's website and taken out a contract of insurance is only tangentially relevant, but we consider it powerful evidence that InsuranceWide was not acting as an agent on behalf of any of the insurers.

73. We have looked with particular care at the 'Cox period', when InsuranceWide was bound to refer people seeking insurance to the Cox panel of insurers, and where the terms of the agreement with Cox superficially make it appear to be an agent, but at that stage all that InsuranceWide was doing when people clicked on to its own website was to pass them through to members of the Cox panel of insurers, and it was no more than a conduit for those seeking insurance to reach the insurers. At that stage InsuranceWide was not holding discussions on a regular basis with the insurers as it did later on, and had no role beyond that of an introducer. In our view it was not doing sufficient to bring it within the concept of an agent. At the Decision-Tree phase, Mr Harrison said InsuranceWide was moving from acting as an agent for just one group of insurers to acting on behalf of the number of potential insurers "with the possibility of recommending one or more of a number of insurers". We have underlined recommending because we do not in fact understand from the rest of the evidence that that is what InsuranceWide was doing. It was weeding out those companies which would not meet the requirements of the potential insured, and was doing no more than offering up the names of insurance companies which might be able to meet his needs. There was no suggestion that any particular insurance company was being 'recommended', albeit the name of one

company would be put forward above the names of three others. Indeed the companies' own terms and conditions, which are set out above, specifically state that InsuranceWide does not endorse the suitability of any insurance products or services as it might be expected an agent would. Whilst we acknowledge that a company's terms and conditions are not definitive of its tax status, nonetheless we consider it relevant in this case that InsuranceWide chose to describe its activities in the way that it did, and, in particular, that in October 2004 it specifically disclaimed acting as an agent for either the insurer or the person seeking insurance. We consider that to be an accurate description of its position."

45. So far as concerns Trader Media, Ms Foster submitted that the services which it provided were similar to the Cox period for InsuranceWide. It comprised nothing more than a "click through", with an input into questions. She emphasised that there was only one contract between Trader Media and BISL governing the relationship between them. It was signed in December 2005. The only relevant obligation of Auto Trader Digital under the contract was for Auto Trader Digital to provide a hyertext link in an agreed form to the Auto Trader website. She drew particular attention to the following terms of that contract.

46. The introduction to the agreement was as follows.

"Auto Trader Digital is the trading division of Trading Publishing Ltd specialising in the online marketing of used vehicles, primarily by means of the website with URL www.autotrader.co.uk ("Auto Trader website"). BISL is in the business of arranging insurance including the vehicle insurance to third parties. BISL and Auto Trader Digital have an existing separate arrangement for the distribution of insurance for commercial vehicles. By this Agreement, Auto Trader Digital and BISL make provision that Auto Trader Digital will provide a hypertext link ("Hypertext Link") in the agreed form on the Auto Trader website at the page for car insurance located at <http://www.autotrader.co.uk/CARS/motoring/ins/insurance-centre.jsp> ("CAR Insurance Page") that will link to the BISL website located at www.comparethemarket.com (the "BISL Quotation Website"). The Hypertext Link will constitute the route by which Auto Trader Digital will introduce Prospective Customers to BISL."

47. Clause 1.3 of the Agreement provided that BISL owns and controls the BISL Quotation Website.

48. Clause 3.2 was as follows:

"3.2 BISL may use the names, brand names, logos and trademarks of Autotrader Digital on the BISL Quotation Website (in the manner and format as previously agreed by Autotrader Digital) but shall not use any names, brand names,

logos and trademarks in any other way nor will BISL indicate to customers or Prospective Customers of the Products that Autotrader Digital is in any way responsible for the sale, arrangement or administration of the products other than as set out in this Agreement.”

49. Clauses 11.1 to 11.3 dealt with financial services compliance and were as follows:

“11.1 BISL are authorised and regulated by the Financial Services Authority ("FSA") and shall ensure that the marketing and provision of Products by them shall at all times be fully compliant with the Financial Services and Markets Act 2000, any regulations made thereunder and the FSA Handbook.

11.2 BISL shall at all times ensure that it has and maintains all licences, approvals, authorisations and permissions (including any necessary authorisation from the Financial Services Authority) required to enable it to exercise its rights or perform its obligations under this Agreement. BISL acknowledges that Autotrader Digital is not in the business of selling financial products and is not regulated pursuant to FSMA. Autotrader Digital is merely placing a Hypertext Link on its website in order to introduce Potential Customers to BISL.

11.3 BISL undertakes to promptly inform Autotrader Digital of any changes to the rules and regulations under FSMA or the FSA Handbook that BISL are aware of that could affect the regulatory status of Autotrader Digital or the arrangements pursuant to this Agreement.”

50. Ms Foster emphasised that Trader Media had no legal relationship of any kind with the customer. It did nothing which could render it liable whether in contract or otherwise to a customer. Nor, she emphasised, did Trader Media provide the insurers with anything. It was BISL which had a relationship with the insurers. She submitted that the Judge did not deal with this point, and he did not have to do so because his analysis was based on the concept of providing intermediary services, rather than on the status of a broker or an agent as distinct from the general category of intermediaries. Ms Foster’s submission was that Trader Media could not be either an agent or a broker within the Sixth Directive unless it had legal obligations of some kind, by way of contract or otherwise, to either the insurers or potential insureds. As a matter of fact, the Judge was wrong in so far as he thought that Trader Media was paid a commission by the insurer. Trader Media was paid only by BISL. Ms Foster speculated that he was misled, in that respect, by the fact that the Tribunal described BISL as the insurer. The Tribunal, like the Judge, approached the matter on the basis that it was only concerned with whether or not intermediary services were being provided, irrespective of any need for their to be a legal relationship with either the insured or the insurer. Ms Foster submitted that those facts did not disclose any particular category of input by Trader Media that had a sufficient quality of an activity of an insurance agent or broker. Trader Media was merely an intermediary. Its input into the questions asked did not take the matter further. They were insufficient to bring Trader Media within the exemption.

51. Ms Foster submitted that Article 2(1)(a) of the Insurance Directive could only be satisfied by a person who (1) was not restricted in the choice of insurer, (2) brought together those seeking insurance and those providing it, and (3) carried out work preparatory to the conclusion of the contract of insurance. So far as concerns Article 2(1)(b), she submitted that a person would only fall within its provisions if it was either instructed under one or more contracts to act in the name of and on behalf of, or solely on behalf of, one or more insurance undertakings in introducing, proposing and carrying out work preparatory to the conclusion of, or in concluding, contracts of insurance, or in assisting in the administration and performance of such contracts, in particular in the event of a claim, or was empowered so to act.
52. Finally Ms Foster emphasised that the intention was plainly to adhere to the requirement that the taxpayer had to be acting as a broker or agent, for the purposes of the VAT exemption, notwithstanding the Insurance Mediation Directive, because the replacement of the Sixth Directive had repeated the wording of Article 13B(a) and had not adopted the concept of an “intermediary” in Article 135 of the 2006 VAT Directive.

Discussion

53. *Card Protection* was the first case in which the ECJ was asked to interpret the scope of Article 13B(a). The question in that case was whether VAT was chargeable for the service supplied by Card Protection Plan Limited (“CPP”) to its customers, by which it offered holders of credit cards, on payment of a certain sum, a credit card protection plan, which was intended to protect them against financial loss and inconvenience resulting from the loss or theft of their cards or of certain other items such as car keys, passports and insurance documents. CPP contended that the service supplied should be wholly or largely exempt because there was a direct contractual relationship between CPP’s customers and the insurance company, from which CPP obtained insurance cover in respect of card holders who purchased the plan, CPP having instructed an insurance broker to arrange a block policy from an insurance company.
54. Ms Foster referred extensively to the opinion of the Advocate General (Fennelly). Some caution is required, however, with regard to his opinion since the ECJ did not agree with him on the answer to the reference, and, moreover, it resolved the reference in favour of CPP on the basis of the meaning of “insurance transactions” within Article 13B(a) rather than the “related services” part of the exemption.
55. The Advocate General referred to, among other legislation, the Insurance Directive for the purpose of interpreting the scope of Article 13B(a), and in particular the second part of the exemption regarding “related activities”. In paragraph 26 of his opinion the Advocate General acknowledged that it is necessary to apply a uniform Community law meaning to the notion of insurance for the purpose of applying the exemption in Article 13B(a), notwithstanding that the Community legislature had not chosen to provide any definition of the terms “insurance... transactions” or “related services performed by insurance ... agents”. In paragraph 31 of his opinion the Advocate General said that it is clear from the wording of Article 13B(a) that “related services” are exempt only if provided by insurance agents or brokers. In paragraph 32 of his opinion the Advocate General said that the limitation of the exemption of “related services” to “insurance brokers and insurance agents” would be deprived of any meaning if any intermediary whatever which is incidentally involved in arranging

insurance *ipso facto* came within the definition. He, therefore, advised, in paragraph 33 of his opinion, that the court should hold that the notion of “related services performed by insurance brokers and insurance agents” does not extend to the incidental activity of arranging insurance as part of the business of providing a credit card protection plan of the type in issue in the main proceedings. He said it was, of course, ultimately for the national court to determine the precise question whether CPP was an insurance broker or an insurance agent.

56. The ECJ held that the expression “insurance transactions” within Article 13B(a) is broad enough in principle to include the provision of insurance cover by a taxable person who is not himself an insurer, but, in the context of a block policy, procures such cover for his customers by making use of the supplies of an insurer who assumes the risk insured. It held, therefore, in paragraph 24 of its judgment, that there was no further need to consider whether CPP carried on the activity of an insurance agent within Article 13B(a).
57. Ms Foster then referred to *Skandia*. In that case the facts were Försäkringsaktiebolaget Skandia (“Skandia”), an insurance company, had a wholly-owned subsidiary, Livbolaget, which was engaged in the business of life assurance. Under a restructuring plan it was proposed that Livbolaget’s staff and operations be transferred to Skandia, which would in effect conduct all Livbolaget’s business, including the sale of insurance, the settlement of claims, the calculation of actuarial forecasts and capital management. In return Skandia would receive remuneration at market rates from Livbolaget. Skandia would assume no liability in respect of those insurance activities and all risks would devolve wholly on Livbolaget, which would preserve its status of insurer for the purposes of Swedish civil law. There was referred to the ECJ the question whether a commitment assumed by an insurance company to carry out, in return for remuneration at market rates, the activities of another insurance company, which was its wholly owned subsidiary and which would continue to conclude insurance contracts in its own name, would constitute an insurance transaction within Article 13B(a). The case was not, therefore, one about the “related services” part of the exemption in Article 13B(a), with which these appeals are concerned.
58. That was a point emphasised in paragraph 19 of the opinion of the Advocate General (Saggio). Ms Foster drew attention, however, to the observation of the Advocate General in the same paragraph that Skandia could not be regarded as a broker or agent “since it ha[d] no legal relationship with the insured, that is to say – to all intents and purposes – with Livbolaget’s clients”. A footnote to paragraph 19 of the Advocate General’s opinion stated that, from other EC texts, including the Insurance Directive:
- “it can be seen that, as a general rule, the business engaged in by brokers and agents entails putting insurance companies in touch with potential clients for the purpose of concluding insurance contracts, or bringing insurance products to the attention of the general public or even the collection of premiums. In all cases, however, it is clear that such business is characterised by a direct relationship with the insured.”
59. The Advocate General concluded that the Court should reply to the question referred by stating that a commitment assumed by an insurance company to its wholly owned

subsidiary to run the business of that subsidiary does not constitute an insurance transaction within the meaning of Article 13B(a). The ECJ, distinguishing *Card Protection Plan*, agreed with that view. In the course of its judgment, the Court made observations relevant to the present appeals.

60. The ECJ confirmed that the exemptions provided for by Article 13 of the Sixth Directive constitute independent concepts of Community Law. It said:

“23. It is settled law that the exemptions provided for by art 13 of the Sixth Directive constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system as between one member state and another (see *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financien* (Case 348/87) [1989] ECR 1737 at 1752, para 11 and *Card Protection Plan Ltd v Customs and Excise Comrs* (Case C-349/96) [1999] STC 270 at 291, [1999] 2 AC 601 at 625, para 15) and must be placed in the general context of the common system of VAT (see, to that effect, *EC Commission v Netherlands* (Case 235/85 [1987] ECR 1471 at 1489, para 18).”

61. In paragraph 30 of its judgment the ECJ referred to paragraph 18 of the ECJ’s judgment in *Card Protection*, and said that the Court there held that there is no reason for the interpretation of the term “insurance” to differ according to whether it appears in the directives on insurance or in the Sixth Directive.

62. The Court described in paragraph 32 the proper approach to the interpretation of the exemption in Article 13 of the Sixth Directive, as follows.

“32. Indeed, according to established case-law, the terms used to specify the exemptions provided for by art 13 of the Sixth Directive are to be interpreted strictly, since they constitute exceptions to the general principle that turnover tax is to be levied on all services supplied for consideration by a taxable person (see to that effect: *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financien* [1989] ECR 1737 at 1753, para 13; *Bulthuis-Griffioen v Inspector der Omzetbelasting* (Case C-453/93) [1995] STC 954 at 962, [1995] ECR I-2341 at 2359 para 19; *Blasi v Finanzamt München I* (Case C-346/95) [1995] STC 336 at 344-345 [1998] ECR I-481 at 499, para 18; and *Institute of the Motor Industry v Customs and Excise Comrs* (Case C-149/97) [1998] STC 1219 at 1235-1236, [1998] ECR I-7053 at 7079-7080, para 17).”

63. The next case is *Taksatorringen*. One of the questions referred to the ECJ by the Danish Court in that case was whether motor vehicle damage assessments carried out, on behalf of its members, by an association (“Taksatorringen”), whose members were insurance companies authorised to underwrite vehicle insurance policies in Denmark, were insurance transactions or related services performed by insurance brokers or insurance agents within Article 13B(a). The ECJ held that they were not.

64. The Advocate General (Mischo), having observed (para 73) that the Sixth Directive distinguished clearly between transactions involving the assessment of damage and insurance transactions, went on to consider whether, although it did not carry out insurance transactions, Taksatorringen should nevertheless be treated as coming within the category of insurance brokers or insurance agents, whose services are exempted by Article 13B(a) when they relate to insurance transactions. Taksatorringen relied upon the provisions of the Insurance Directive, and, in particular, the activities described in Article 2(1)(b) of that Directive. The Advocate General accepted the argument of the Danish Government and of the United Kingdom Government (para 84) that, even if Taksatorringen carried on certain of the activities of an insurance broker or agent, that did not mean that it was an insurance broker or agent for the purposes of the Insurance Directive or the Sixth Directive unless at the same time it carried on those activities which distinguish this type of undertaking from other categories, that is to say, the bringing together of insurance companies and persons seeking insurance, and unless it had a direct relationship with persons insured. The Advocate General said, in paragraph 86 of his opinion, that Article 13B(a) was not particularly well drafted in that it distinguished between insurance brokers and insurance agents, whereas a broker is truly an insurance agent in that his task is to act on behalf of a person seeking insurance in finding an insurance company that will offer cover exactly suited to his needs. He said that, notwithstanding that distinction in Article 13B(a), it “remains clear that this provision applies only to services provided by those professionals who have a relationship with both the insurance company and persons seeking insurance”. Taksatorringen, on the other hand, did not contend that it had any kind of relationship with insured persons. It did not claim to act as an intermediary.
65. The Advocate General was not prepared (para 89) to commit himself to the view that the Sixth Directive had to be interpreted by reference to the Insurance Directive, and said that it was not necessary to reach a view on that matter as the Insurance Directive provided no support for Taksatorringen’s submissions. He then said:
- “90. Admittedly, the activities set out in art 2(1)(a) of Directive 77/92, which under para 2 of that article correspond to those of an insurance broker, include those of assisting in the administration and performance of insurance contracts, particularly in the event of a claim, but it is stated clearly that this assistance is to be provided ‘where appropriate’ in conjunction with the activities which are distinctive of the carrying on of the business of an insurance broker, namely the bringing together of insurers and persons seeking insurance and the preparation of insurance contracts.
91. As far as the activities described in art 1(1)(b) of Directive 77/92 are concerned, which by para 2 of that article correspond to those of an insurance agent, the wording itself of the Community legislation does not refer to assistance given in the administration and performance of insurance contracts, particularly in the event of a claim, as being an ancillary activity, as this form of assistance is prefaced by the conjunction ‘or’ and thus within the same category as the

introduction, proposing and carrying out of insurance contracts. In order for this assistance to be provided by an insurance agent, however, it must be given within the context of a contract or an authority to act and ‘in the name and on behalf of, or solely on behalf of, one or more insurance undertakings’. There must therefore be a power to bind the insurance company in relation to an insured person who has submitted a claim. Once again, this requirement is not met by Taksatorringen.”

66. Accordingly, the Advocate General’s conclusion, on the question referred by the national court was that the assessments carried out by Taksatorringen on behalf of its members could not be exempted from VAT by virtue of Article 13B(a).
67. The ECJ reached the same conclusion. Having decided, particularly in the light of *Skandia*, that an association such as Taksatorringen was not carrying out an insurance transaction, the ECJ went on to consider whether the services provided by Taksatorringen fell within the “related services” part of the exemption in Article 13B(a). It said:

“44. As to whether such services are related services performed by insurance brokers and insurance agents, it must be stated, as the Advocate General has set out in para 86 of his opinion, that this expression refers only to services provided by professionals who have a relationship with both the insurer and the insured party, it being stressed that the broker is no more than an intermediary.

45. With regard to Directive 77/92, without its being necessary to rule on whether the terms ‘broker’ and ‘insurance agent’ must necessarily be construed in the same manner in Directive 77/92 as they are in the Sixth Directive, suffice it to note that, for the reasons stated by the Advocate General in paras 90 and 91 of his Opinion, the activity of an association such as Taksatorringen fails to satisfy the conditions of art 2(1)(a) or 2(1)(b) of Directive 77/92. The assistance in the administration and performance of contracts of insurance referred to in art 2(1)(a) of that directive is in addition to the activities involved in introducing persons seeking insurance and the insurance companies and in preparing and concluding insurance contracts and that referred to in art 2(1)(b) of that directive involves the power to render the insurer liable in respect of an insured person who has incurred a loss.”

68. Ms Foster then referred to *Arthur Andersen*. The facts of the case were that Royal Nederland Verzekeringsgroep NV, Universal Leven NV (“UL”), a company active, through intermediaries, on the life assurance market, and Andersen Consulting Management Consultants (“ACMC”), which was part of the Arthur Anderson & Co Accountants cs group (“Arthur Anderson”), concluded an agreement under which ACMC performed various back-office activities for UL. Those back-office activities included, in particular, the acceptance of new applications for insurance, the processing of contractual and tariff changes, the issue, administration and revision of

insurance policies, the processing of claims, the fixing and payment of commission to insurance agents, the development and administration of information technology, the provision of information to UL and to agents, and the preparation of reports for policy holders and third parties. APMC delegated responsibility for those activities to an internal division known as Accenture Insurance Services (“Accenture”). In cases where it was apparent from the answers given in an application form by an applicant for insurance that a medical examination was necessary, UL decided whether or not to accept the risk. Otherwise, Accenture took the decision to accept applications for life assurance, and that decision bound UL. Accenture was responsible for almost all of the daily contact with intermediaries necessary for the implementation of the various tasks involved. The question referred to the ECJ was whether, in the case of an agreement such as that between APMC and UL, under which a taxable person other than the insurance company undertakes most of the actual activities related to insurance - including, as a rule, taking decisions that bind the insurance company to enter into insurance contracts and maintaining contact with the agents and, as the occasion arises, with the insured - while the insurance contracts are concluded in the name of the insurance company and the insurance risk is borne by the latter, the activities undertaken by the taxable person in execution of the agreement are “related services performed by insurance brokers and insurance agents” within Article 13B(a).

69. The Advocate General (Poiares Maduro) referred to *Card Protection*, *Skandia* and *Taksatorringen*. He noted (para 20) that the Community legislator had expressly limited the scope of the exemption in Article 13B(a) to cover only those services which are performed by insurance brokers or insurance agents, and said that the classification of the person claiming the exemption as an insurance broker or an insurance agent therefore constitutes a vital element in the determination of those activities relating to insurance transactions which are exempted under Article 13B(a). He said, in paragraph 22 of his opinion, that the ECJ had preferred not to take an absolute position on the question whether the concepts of insurance broker and insurance agent should automatically be interpreted in the same way in the context of the Sixth Directive and in the context of the Insurance Directive and Insurance Mediation Directive but had “taken the essential elements set out in [the Insurance Directive] into consideration in defining the concepts of ‘insurance broker’ and ‘insurance agent’ in Article 13B(a)”. Taking those elements into consideration did not, he said, amount to an automatic cross-reference to the definition laid down in the Insurance Directive. He elaborated as follows:

“22. ... It is without doubt essential that the [Insurance Directive] is taken into consideration in order to avoid the development of a concept of “insurance agent” under Article 13B(a) which would risk losing all contact with legal reality and practice in the area of insurance law. However, as the Court has stated on several occasions, the exemptions from VAT constitute independent concepts of Community law which should be placed in the context of the common system of VAT of the Sixth Directive and whose purpose is to avoid divergences in the application of the VAT system as between one Member State and another.”

70. He said (para 23) that it was more worthwhile to turn to the definition given by the ECJ in *Taksatorringen*, and continued:

“24. In this judgment, the Court stated that the concept of ‘related services performed by insurance brokers and insurance agents’ within the meaning of Article 13B(a) of the Sixth Directive ‘refers only to services provided by professionals who have a relationship with both the insurer and the insured party, it being stressed that the broker is no more than an intermediary’. This definition places the emphasis – in the context of an area such as the distribution of insurance products which is characterised, in its *modus operandi*, by great complexity and diversity – on the external action of the insurance agent, that is his position as a mediator between the policyholder and the insurance company, necessarily implying the existence of relations with both of these parties.

25. The definition adopted by the Court has the merit of simplicity in an area such as exemptions from VAT which is, without doubt, complex and full of uncertainties. To determine whether or not a person is an insurance agent, the essential criterion is thus not simply the nature of the internal activities he performs but, first and foremost, his position with regard to the persons that he puts into contact.

26. Following along the same lines, Advocate General Saggio in his Opinion in *Skandia* points out that a company ‘cannot be regarded as a broker or an agent, since it has no legal relationship with the insured’. He adds that it clearly follows from the provisions of Directive 77/92 and other Community texts that ‘such business [as that of brokers and agents] is characterised by a *direct* relationship with the insured’.”

71. Rejecting the argument of Arthur Andersen that, for the purpose of qualifying as an ‘insurance agent’ within the meaning of Article 13B(a), it was sufficient that ACMC had indirect relations with the insured parties, the Advocate General said:

“28. Too much importance should not be attributed to the fact that the Court, in that judgment, did not explicitly specify that the professional relationship ‘with both the insurer and the insured party’ should be direct. The decisive aspect, in my view, lies in the fact that a relationship between an insurance agent and a policyholder necessarily implies the existence of an agent’s *own* declarations, adopted *as such* and addressed to the policyholder before whom he presents himself as an insurance agent acting on behalf of and possibly in the name of the insurer.

29. In the present case, it is evident that there is a network of insurance brokers and insurance agents who continue to

handle relations with UL's clients and with whom ACMC enters into contact in the performance of its 'back office' activities for UL. According to the order for reference, it is these agents who 'have a direct link to (potential) policyholders and insured persons, rather than ACMC'. Therefore, in my opinion, the latter cannot be considered to be in a legal relationship with both the insurer and the insured."

72. The Advocate General stated (para 30) that the conclusion at which he had arrived was not inconsistent with the fact that, in the particular circumstances envisaged in the agreement between UL and ACMC, the latter took part in the negotiation, the preparation and the conclusion of life assurance contracts and it even had the power to render the insurer liable in respect of an insured person by concluding insurance contracts in the name of UL. He said (para 31) that the power to render the insurer liable would not be sufficient, of itself, to make a taxable person an insurance agent within the meaning of Article 13B(a), and that other conditions would have to be fulfilled. Having stated (para 32) that the critical requirement was engaging actively in finding and introducing customers and insurers, which was not an activity with which ACMC was engaged, the Advocate General continued:

"33. The activity of insurance agent should therefore be viewed as a supply of services on a professional basis, which begins and ends in itself and which thus has an independent substance distinct from the business of the insurer. The activity of an insurance agent cannot be confused with that of the insurer on behalf of and possibly in the name of which the agent acts. In the main proceedings, ACMC simply cooperates in the economic activity of the insurer. It does not exercise activities distinct from those usually performed within UL.

34. In this respect, I share the view put forward by the Commission in its written submissions to the effect that the activities of ACMC correspond to a pure subcontracting of activities usually performed by an insurance company."

73. In a footnote to his opinion the Advocate General stated that the activities of ACMC clearly did not correspond with the activity in Article 2(1)(a) of the Insurance Directive concerning the profession of broker, which he said (quoting para 86 of the opinion of Advocate General Mischo in *Taksatorringen*) "is characterised by the fact that 'it ... falls [on this latter] to seek out, on behalf of a policy holder, the company that is likely to offer him cover that is best suited to his needs'".
74. In paragraph 32 of its judgment the ECJ endorsed the view of the Advocate General in paragraph 31 of his opinion that it cannot be inferred that the existence of a power to render the insurer liable is the determining criterion for recognition of an insurance agent within the meaning of Article 13B(a).
75. The ECJ concluded that services rendered by ACMC to UL were not those that typified an insurance agent. It analysed those services in the following way.

“35. The services in question have specific aspects, such as the setting and payment of commission for insurance agents, the maintenance of contact with them, the handling of aspects relating to reinsurance and the supply of information to insurance agents and to the tax authorities, which, quite clearly, are not part of the activities of an insurance agent.

36. Furthermore, as the Commission of the European Communities stated in its written observations and as the Advocate General pointed out in point 32 of his Opinion, essential aspects of the work of an insurance agent, such as the finding of prospects and their introduction to the insurer, are clearly lacking in the present case. It is apparent from the order for reference – and the defendant has not disputed – that the activity of ACMC starts only when it handles the applications for insurance sent to it by the insurance agents through whom UL seeks prospects in the Netherlands life assurance market.

37. As the Commission submitted in its written observations and at the hearing, the agreement between ACMC and UL must be regarded as a contract for subcontracted services under which ACMC provides UL with the human and administrative resources which it lacks, and supplies it with a series of services to assist it in the tasks inherent in its insurance activities...

38. Consequently, the services rendered by ACMC to UL must be regarded as a form of cooperation consisting in assisting UL, for payment, in the performance of activities which would normally be carried out by it, but without having a contractual relationship with the insured parties. Such activities constitute a division of UL’s activities and not the performance of services carried out by an insurance agent”

76. The ECJ therefore gave as the answer to the question referred to the court that Article 13B(a) must be interpreted as meaning that “back office” activities, consisting in rendering services, for payment, to an insurance company do not constitute the performance of services relating to insurance transactions carried out by an insurance broker or insurance agent within the meaning of that provision.
77. Ms Valentina Sloane, counsel for Trader Media, in her excellent submissions, referred to two cases, which concerned other heads of exemption from VAT involving consideration of the question of “negotiation”. They are relevant to subsequent development of the jurisprudence affecting Article 13B(a). They were Case C-235/00 *Commissioners of Customs & Excise v CSC Financial Services Limited* in relation to Article 13(B)(d)(5) of the Sixth Directive (“transactions, including negotiation... in shares, interests in companies or associations, debentures and other securities...”) and Case C-453/05 *Ludwig v Finanzamt Luckenwalde* [2008] STC 1640 (“*Ludwig*”) in relation to Article 13B(d)(1) (“... the negotiation of credit and the management of the credit by the person granting it...”). In both of those cases the ECJ made clear that the requirement of negotiation could be satisfied without a contractual link with either of

the parties. Ms Sloane referred, in particular, to the following paragraphs in the judgment of the ECJ in *Ludwig*.

“On the necessity of direct contact between the negotiator and both parties to the contract

34. It should be emphasised that the wording of art 13B(d)(1) of the Sixth directive does not, in principle, preclude the activity of negotiation from being broken down into separate services which may then fall under the concept of ‘negotiation of credit’ for the purposes of that provision and benefit from the exemption for which it provides (see, to that effect: with regard to art 13B(d)(3) of the Sixth Directive, *SDC*, para 64; with regard to art 13B(d)(5) of that directive, *CSC Financial Services*, para 23; and with regard to art 13B(d)(6) of that directive, *Abbey National*, para 67).

35. In those circumstances, it follows from the principle of fiscal neutrality that operators must be able to choose the form of organisation which, from the strictly commercial point of view, best suits them, without running the risk of having their operations excluded from the exemption provided for in art 13B(d)(1) of the Sixth Directive (see, to that effect, with regard to art 13B(d)(6) of the Sixth Directive, *Abbey National*, para 68).

36. Nevertheless, as pointed out in para 27 of the present judgment, in order to be classed as exempt transactions for the purposes of art 13B(d)(1) of the Sixth Directive, the service provided must, viewed broadly, form a distinct whole, fulfilling in effect the specific and essential functions of the service of negotiation.

37. It is not, therefore, inconsistent with art 13B(d)(1) of the Sixth Directive for the service of negotiation of credit to be divided, as in the case before the referring court, into two services, the first provided by the main agent DVAG, in the context of the negotiation with the lenders, and the second by its sub-agent, Mr Ludwig, in his capacity as financial adviser, in the context of the negotiation with the borrowers.

38. As stated in para 39 of *CSC Financial Services*, negotiation is an act of mediation which may consist, amongst other things, in pointing out to one party to the contract suitable opportunities for the conclusion of such a contract, the purpose of such an activity being 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 that contract. The concept of negotiation does not, therefore, necessarily presuppose that the negotiator, as sub-agent of the main agent, enters into direct contact with both parties to the contract, in

order to negotiate its terms, provided, however, that his activity is not limited to dealing with some of the clerical formalities related to the contract.

39. In addition, the very fact that the terms of the credit agreement have been fixed in advance by one of the parties to the contract cannot, as such, preclude the supply of a negotiation service for the purposes of art 13B(d)(1) of the Sixth Directive, given that, as stated in the previous paragraph, the activity of negotiation may be limited to pointing out to one party to the contract suitable opportunities for the conclusion of such a contract.

40. The answer to the second question must therefore be that the fact that the taxable person has no contractual link with any of the parties to a credit agreement to the conclusion of which he has contributed and that he does not establish direct contact with one of those parties does not preclude that taxable person from providing a service of negotiation of credit which is exempt under art 13B(d)(1) of the Sixth Directive.”

78. Finally, there is Case C-124/07 *JCM Beheer BV v Staatssecretaris van Financiën* [2008] STC 3360 (“Beheer”). It is to be observed that the constitution of the ECJ in *Beheer* was precisely the same as in *Ludwig*. The facts were that JCM Beheer BV (“Beheer”) acted as a sub-agent on behalf of VDL Polisassuradeuren BV (“VDL”), which was incorporated under Netherlands Law and which itself acted as an insurance broker and insurance agent. In the capacity of an “authorised agent” for certain insurance companies, VDL concluded insurance contracts independently in the name of those insurers. The activities which Beheer carried out in the name and on behalf of VDL concerned the conclusion of insurance contracts, the processing of transfers of insurance policies, the issue of such policies, the payment of commissions and the provision of information to the insurance company and policy holders. In addition, it offered and concluded new insurance policies independently and on its own initiative. Under the contract between VDL and Beheer, Beheer received from VDL, in return for the services provided, a commission equal to 80% of the commission paid to VDL for the conclusion of an insurance contract. The Dutch court referred to the ECJ, for a preliminary ruling, the question whether the provisions of Article 13B(a) extended to a person “which performs characteristic and essential activities of an insurance broker and insurance agent, whereby negotiations are carried out in the name of another insurance broker or insurance agent in connection with the bringing about of insurance transactions”.

79. In answering that question in a sense favourable to Beheer, the ECJ said as follows.

“26. Consequently, the appellant in the main proceedings cannot be refused the benefit of the exemption provided for in art 13B(a) of the Sixth Directive merely because it does not have a direct relationship with the insurers on whose behalf it acts indirectly, as a sub-agent of VDL, in regard to insurance policyholders.

27. Moreover, the wording of art 13(B) of the Sixth Directive does not, in principle, preclude the activity of insurance broker and agent from being broken down into separate services which may then fall within the definition of '[insurance and reinsurance transactions, including] related services performed by insurance brokers and insurance agents' (see, to that effect, with regard to art 13(B)(d)(3) of the Sixth Directive *Sparekassernes Datacenter (SDC) v Skatteministeriet* (Case C-2/95) [1997] STC 932, [1997] ECR I-3017, para 64; with regard to art 13(B)(d)(6) of the directive, see *Abbey National plc v Customs and Excise Commrs* (Case C-169/04) [2006] STC 1136, [2006] ECR I-4027, para 67; and with regard to art 13(B)(d)(1) of the directive, see *Ludwig* (para 34)).

28. In those circumstances, it follows from the principle of fiscal neutrality that traders must be able to choose the form of organisation which, from the strictly commercial point of view, best suits them, without running the risk of having their transactions excluded from the exemption provided for in art 13(B) of the Sixth Directive (see, to that effect, with regard to art 13(B)(d)(6) of the Sixth Directive, *Abbey National* (para 68 and with regard to art 13(B)(d)(1) of the directive, see *Ludwig* (para 35)).

29. In the light of the foregoing considerations, the answer to the question referred to the court should be that art 13(B)(a) of the Sixth Directive must be interpreted as meaning that the fact that an insurance broker or agent does not have a direct relationship with the parties to the insurance or reinsurance contract in the conclusion of which he has been instrumental, but merely an indirect relationship with them through the intermediary of another taxable person who is, himself, in a direct relationship with one of those parties, and to whom that insurance broker or agent is contractually bound does not prevent the service provided by the latter from being exempt from VAT under that provision."

80. I agree with Ms Sloane that *Beheer* marks an important shift in the jurisprudence of the ECJ. The earlier cases indicate that a vital characteristic of an insurance broker or an insurance agent within Article 13B(a) is a direct relationship with both the insurer and the insured or at any event with the insured. I agree with Ms Sloane that *Beheer* shows that, while there is a need to exercise the characteristic functions of an agent or broker, what is not required is a direct legal relationship with both or either of the ultimate parties, namely the insurers and those seeking insurance. It is sufficient that the insurance agent or insurance broker is carrying out a vital intermediary role in a chain of intermediaries.
81. In her submissions in reply Ms Foster sought to limit the significance of *Beheer* in the line of ECJ jurisprudence. She emphasised, as is plain, that *Beheer* carried out many more functions than InsuranceWide and Trader Media. Indeed, in paragraph 18 of its judgment, the ECJ said that *Beheer*'s activities were "unquestionably the

characteristic activities of an insurance broker or agent”, which is the very matter in issue in the present appeals. Ms Foster also emphasised that in both *Ludwig* and *Beheer* there was a person at the end of the chain doing the very thing that gave rise to an exemption. She said that *Beheer*, which had direct relations with clients, was carrying out, for all intents and purposes, all the work of an insurance agent and broker, which was reflected in the large proportion of the commission from the insurer that it received. Indeed, Ms Foster pointed out, on instructions, that the United Kingdom had supported the result in *Beheer*.

82. Ms Foster’s submissions do not, in my judgment, undermine the obvious significance of *Beheer* both generally and specifically in relation to the present appeals. The ECJ was for the first time applying, in the context of the exemption in Article 13B(a), the principle of fiscal neutrality, leading it to conclude that the activities characteristic of an agent or broker could be broken down among a chain of persons. That principle precludes economic operators, who effect the same transactions, being treated differently in respect of the levying of VAT: see Case C-253/07 *Canterbury Hockey Club v Revenue and Customs Commissioners* [2008] STC 351 especially at para 30.

83. Before leaving the case law, it is important to comment on the proper application of the numerous statements in the European cases, some of which are cited above, that the exemption in Article 13B(a), like the other exemptions in Article 13, should be interpreted strictly since it constitutes an exception to the general principle that turnover tax is levied on all services supplied for a consideration to a taxable person. As Advocate General Fennelly said, in paragraph 24 of his opinion in *Card Protection*, this does not mean that a particularly narrow interpretation will be given to the terms of an exemption. As Chadwick LJ said in *Expert Witness Institute v Customs and Excise Commissioners* [2001] EWCA Civ 1882, [2002] STC 42 at paragraph [17], the Court is not required to give the words in the exemption the most restricted, or most narrow, meaning that can be given to them. I agree with his observation, in paragraph [17] of his judgment, that:

“A ‘strict’ construction is not to be equated, in this context, with a restricted construction. The court must recognise that it is for a supplier, whose supplies would otherwise be taxable, to establish that it comes within the exemption, so that if the court is left in doubt whether a fair interpretation of the words of the exemption covers the supplies in question, the claim to the exemption must be rejected. But the court is not required to reject a claim which does come within a fair interpretation of the words of the exemption because there is another, more restricted, meaning of the words which would exclude the supplies in question.”

84. Neither Ms Foster nor Ms Sloane was able to suggest a clear and coherent policy objective underlying the “related services” exemption in Article 13B(a), which would assist in resolving uncertainties about its application on any particular set of facts.

85. In the light of that case law and the domestic and EU legislation, the following principles apply, in my judgment, to the interpretation and application of Article 13B(a) and the Insurance Intermediary Exemption in Schedule 9, Group 2, Item 4 to VATA 1994.

- (1) The Insurance Intermediary Exemption should be interpreted so far as possible, consistently with its terms, in a way that reflects the jurisprudence of the ECJ and the United Kingdom's obligations under the Sixth Directive and the 2006 VAT Directive. To do otherwise would, as Ms Foster pointed out, risk infringement of EU legislation by the United Kingdom.
- (2) The exemption in Article 13B(a) must be interpreted strictly since it constitutes an exception to the general principle that VAT is to be levied on all services supplied by a taxable person. This does not mean, however, that the words and expression in Article 13B(a) and the Insurance Intermediary Exemption are to be given a particularly narrow or restricted interpretation. It is for the supplier to establish that it and its activities come within a fair interpretation of the words of the exemption.
- (3) The exemption for "related services" under Article 13B(a) only applies to services performed by persons acting as an insurance broker or an insurance agent. Although those expressions are not defined by EU legislation, they are independent concepts of Community law which have to be placed in the general context of the common system of VAT.
- (4) Whether or not a person is an insurance broker or an insurance agent, within Article 13(B) depends on what they do. How they choose to describe themselves or their activities is not determinative.
- (5) The definitions of "insurance broker" and "insurance agent" in the Insurance Directive are relevant to the meaning of the same expressions in Article 13B(a) to the extent, but only to the extent, that they should be taken into consideration as reflecting legal reality and practice in the area of insurance law. It is not necessary, in order to invoke the exemption in Article 13B(a), for the taxpayer to perform precisely the description of activities in Article 2(1)(a) or (b) of the Insurance Directive.
- (6) On the other hand, the mere fact that a person is performing one of the activities described in Article 2(1)(a) or (b) of the Insurance Directive or the definition of "insurance mediation" in the Insurance Mediation Directive does not automatically characterise that person as an insurance agent or an insurance broker for the purposes of Article 13B(a).
- (7) It is an essential characteristic of an insurance broker or an insurance agent, within Article 13B(a), that they are engaged in the business of putting insurance companies in touch with potential clients or, more generally, acting as intermediaries between insurance companies and clients or potential clients.
- (8) It is not necessary, in order to claim the benefit of the exemption in Article 13B(a), for a person to be carrying out all the functions of a insurance agent or broker. It is sufficient if a person is one of a chain of persons bringing together an insurance company and a potential insured and carrying out intermediary functions, provided that the services which that person is rendering are in themselves characteristic of the services of an insurance agent or broker.

- (9) All the above principles are capable of being applied, and must be applied, to the Insurance Intermediary Exemption in Schedule 9 to VATA 1994.
86. In my judgment those principles, applied to the facts found by the Tribunal, inevitably lead to a dismissal of these appeals. Although HMRC's case is that the relevant functions performed by InsuranceWide and Trader Media were nothing more than the provision of a "click through" facility to a broker, agent or insurer, it is plain that both taxpayers were doing much more than that. They identified, and provided those looking for insurance with access to, insurers who provided a range of competitive insurance products. In both cases the evidence indicated that the insurers were appraised and selected bearing in mind the competitiveness of their pricing and products and their level of consumer service. In the post-Wizard phases, InsuranceWide provided those seeking insurance with a means of directing them most effectively and efficiently to the most appropriate insurers, whether directly or through another intermediary, to match their requirements. In the case of Trader Media the evidence was that it not only had an input into the questions to be answered by those seeking insurance, but, importantly, it made suggestions for the composition of the insurance panel based on its understanding of the experience and demographics of the consumers and with a view to providing customers with insurers who would quote competitive prices. Neither of them were, as Ms Sloane emphasised, a mere "conduit". Their relevant activities can fairly be described as the business of bringing together insurers and those seeking insurance, by contrast with the taxpayers in *Skandia*, *Taksatorringen* and *Arthur Anderson*, who were sub-contractors.
87. For the reasons I have given, I reject the proposition of law advanced by HMRC that neither InsuranceWide nor Trader Media can claim the benefit of the Insurance Intermediary Exemption because they did not have a legal relationship with either the insurer or the insured or the prospective insured. It is sufficient that they were providing services characteristic of an insurance broker or agent, and which were vital to the process of introducing those seeking insurance with insurers, even if they were only part of a chain of such persons. In any event, they did have direct relations with the customers who used their website, just as much as Beheer, and they did have collaborative arrangements with intermediaries who did have legal relations with insurers. It would therefore also be immaterial that neither InsuranceWide nor Trader Media had anything to do with the negotiation of the terms of the insurance contract or its preparation or the collection of premiums or the handling of claims.
88. Further, it is also immaterial, or at least inconclusive, as I have said, whether or not they were authorised to act as intermediaries by the Financial Services Authority. That is equally the position, in the case of InsuranceWide, with regard to the fact that its terms and conditions included disclaimers of responsibility for the purchase of insurance products or services and a denial that it was an insurance broker or intermediary. What matters is what InsuranceWide and Trader Media actually did, and whether that satisfied the requirements of the Insurance Intermediary Exemption in the light of the principles to be derived from the EU legislation and cases.
89. I do not accept Ms Foster's criticism that the Judge elided the separate requirements that the Insurance Intermediary Exemption, like the exemption in Article 13B(a), only applies to (1) an insurance broker or insurance agent, and (2) services related to insurance or re-insurance transactions. That is clear, in my judgment, from the following passage in paragraph 21 of his judgment:

“21. Secondly, it is suggested that Schedule 9 Item 4 and its notes may create a third group of individuals called “*insurance intermediaries*”, in addition to insurance brokers and insurance agents, capable of attracting exemption from VAT under Article 13B. In my view, Schedule 9 para. 4 is not to be construed as doing this. Paragraph 4 is plainly directed to restricting the exemption of insurance brokers and insurance agents to apply only to services supplied by them when acting as intermediaries performing the roles set out in Notes (1) and (2)...”

90. As I have said, HMRC urge that, rather than decide the appeals adversely to HMRC, the Court should direct a reference to the ECJ for a preliminary ruling. Ms Foster submitted that there are two points of general principle which should be referred, namely whether the exemption in Article 13B(a) can apply if there are no legal relations with the insurer and the insured, and also whether, for the exemption to apply, any other characteristic functions are required in addition to the bringing together of insurer and insured.
91. I do not consider that such a reference is necessary or desirable in the present cases. The application of the exemption in Article 13B(a) and the Insurance Intermediary Exemption are highly fact dependant. The principles of law to be applied to the established facts are, in my judgment, clear and inevitably lead to a dismissal of these appeals.

Conclusion

92. For all those reasons, I would dismiss these appeals.
93. As I have said earlier in this judgment, I do not consider that it was desirable to approach the appeals from the Tribunal on the basis of a preliminary issue divorced from the actual facts of the case; the hearing of the appeals and my judgment have not proceeded on that basis, and so it has not been necessary to express any view on the decision of the Judge on the preliminary issue. Accordingly, this Judgment and the dismissal of the appeals should not be taken to be an endorsement of the Judge’s decision on the preliminary issue.

Lord Justice Pitchford

94. I agree.

Lord Justice Longmore

95. There are two main issues to be decided in these appeals from the VAT Tribunal which deal with on-line offers of insurance. The first is whether the on-line provider of the services is an insurance broker or insurance agent for the purposes of the VAT Directive 77/388 EEC (as recast by Directive 2006/112/EC) and Item 4 of Group 2 in Schedule 9 of the Value Added Tax Act 1994. If so, the provider does not have to pay VAT on the cost of the services provided. The second main question is whether

such services, if they are provided by someone who is an insurance broker or insurance agent, can only be exempt if the services are provided pursuant to a contractual or other legal relationship with the end-user.

96. The terms “broker” and “agent” have an ascertainable meaning in English law and the terms “insurance broker” and “insurance agent” similarly have an ascertainable meaning. As terms of EU law they must, however, have an autonomous meaning, since the terms “broker” and “agent” may well not have the same meaning in each EU country. The terms have, moreover, been used in EU legislation for some considerable time. The EU Commission provided for freedom of establishment of “insurance agents and brokers” in Council Directive 77/92/EEC of 13th December 1976. That was followed by Commission Recommendation 92/48/EEC applicable to “insurance intermediaries” and then replaced by Directive 2002/92/EC of 9th December 2002 on “insurance mediation” which by recital 6 emphasised the desirability of “insurance intermediaries” being able to avail themselves of the freedom of establishment and the freedom to provide services which are enshrined in the EU Treaty. Article 2 of 2002/92/EC defined “insurance mediation” and “insurance intermediary” in terms which encompass but may be wider than the definitions of “insurance agents” and “brokers” in Directive 77/92.
97. 1977 was also the year of the sixth VAT Directive providing for the relevant exemptions in relation to insurance services namely Directive 77/388/EEC. Not surprisingly it used the same terms as those used in 77/92, providing exemption in Article 13 B for

“(a) insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents.”

These terms of the exemption were repeated word for word when the VAT Directive was recast in 2006 by 2006/112/EC and are now to be found in Article 135 (1)(a) of that Directive. The exemption contained in the sixth VAT Directive has been transposed into English law and is now contained in Para 4 of Group 2 of Schedule 9 of the Value Added Tax Act 1994 in the following terms:-

“The provision by an insurance broker or insurance agent of any of the services of an insurance intermediary in a case in which those services –

- a) are related (whether or not a contract of insurance or reinsurance is finally concluded) to an insurance transaction or a reinsurance transaction, and
- b) are provided by that broker or agent in the course of his acting in an intermediary capacity.”

98. It can thus be seen that while EU legislation has replaced the concepts of insurance broker and insurance agent with the concept of an intermediary for the purpose of freedom of establishment and while English legislation in relation to VAT has adopted the overarching concept of an intermediary, EU legislation, in continuing to provide VAT exemption, has retained the concept that the exempted services must be provided by insurance brokers and insurance agents and English law still contains the

specific requirement that the services of an insurance intermediary, if they are to be exempt, must be provided by an insurance broker or an insurance agent.

99. In these circumstances it is necessary to ascertain an autonomous European law meaning for the terms insurance broker and insurance agent. I agree with my Lord's analysis of the authorities and his conclusion (in para 86) that the activities of an insurance broker or agent can fairly be described as the business of bringing together insurers and those seeking insurance. This echoes the analysis of para 32 of the opinion of AG Fennelly in Card Protection Plan Ltd v Customs and Excise Commissioners [1999] 2 AC 601, 615:-

“The authors of the Sixth Directive chose to refer separately to “insurance agents” and “insurance brokers” rather than to use a more general term such as insurance “intermediaries”. In my view they thereby described persons whose named professional activity comprises the bringing together of insurance undertakings and person seeking insurance as provided by article 2 of 77/92”

100. With regard to the second question, it may be somewhat counter-intuitive to conclude that a broker or agent, who expressly disclaims any responsibility to his client for the information provided on insurers' websites or who asserts (as InsuranceWide did in phase 4 from October 2004 onwards) that it is not a broker, agent or intermediary, should as a matter of law be able to claim the benefit of the VAT exemption. But once one accepts (as one must) the shift in the ECJ jurisprudence marked by Beheer to the effect that, provided the relevant company carries out an intermediary role of broker or insurance agent in a chain of intermediaries, then the broker or insurance agent may have no legal relationship with an end-user at all, it must follow that the mere disclaimer of a relationship cannot be legally significant in considering the claim for exemption.
101. I therefore agree that ECJ jurisprudence must inevitably lead to a dismissal of these appeals and that a reference to the ECJ is neither necessary or desirable. As A G Fennelly said in Card Protection (at page 616D) it is ultimately for the national court to determine whether any particular entity is or is not an insurance broker or an insurance agent.

