Neutral Citation Number: [2014] EWCA Civ 1033

Case No: A3/2011/0251

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL TAX AND CHANCERY CHAMBER
JUDGE AVERY JONES AND JUDGE HELLIER
FTC462009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 24th July 2014

Before :

LORD JUSTICE MOORE-BICK
LADY JUSTICE GLOSTER
and
LORD JUSTICE VOS

- -

Between :

AIRTOURS HOLIDAYS TRANSPORT LTD	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Official Shorthand Writers to the Court)

- -

Mr Andrew Hitchmough QC and Mr Jonathan Bremner (instructed by **Pricewaterhouse Coopers Legal LLP**) for the **Appellant**
Mr Owain Thomas (instructed by the **General Counsel and Solicitor to the Commissioners for HM Revenue and Customs**) for the **Respondents**

Hearing dates : Tuesday 4th and Wednesday 5th March 2014

- -

Judgment

Lady Justice Gloster :

Introduction

1. The issue in these proceedings is whether the appellant, Airtours Holidays Transport Limited (formerly MyTravel Group plc) ("the appellant"), is entitled to recover (as input tax) value added tax ("VAT") charged by PricewaterhouseCoopers LLP ("PwC") in respect of certain services provided by PwC and for which the appellant paid. The resolution of the issue turns upon whether, for VAT purposes, PwC "supplied" services to the appellant. The services were provided in the context of a large-scale restructuring of the appellant, at a time when its business was in financial crisis.

Procedural background

2. The appellant's appeal is against the decision of the Upper Tribunal dated 8 November 2010 ("the UT Decision") (Judge Avery Jones and Judge Hellier) ("the Upper Tribunal"). Permission to appeal was granted by Rimer LJ on 12 April 2011. The substantive hearing of the appeal before this Court was originally listed for 27 February 2012. At that time, however, the issues on the appeal were considered to be affected by two other cases which were subject to pending appeals to the Supreme Court: *HMRC v Aimia Coalition Loyalty UK Ltd (formerly Loyalty Management UK Ltd)* [2013] UKSC 15, [2013] 2 All ER 719; [2013] UKSC 42, [2013] 4 All ER 94 ("*LMUK (SC)*") and *WHA Ltd v HMRC* [2013] UKSC 24; [2013] 2 All ER 907 ("*WHA (SC)*"). As a result, on 14 February 2012 the Court ordered that this appeal be adjourned to a date to be fixed following the handing down of judgment in those two cases. Both *LMUK (SC)* and *WHA (SC)* have now been decided by the Supreme Court. In these two cases the Supreme Court confirmed that a previous decision of the House of Lords, which is highly pertinent to the issue in the present case, namely *CCE v Redrow Group plc* [1999] STC 161 (HL), [1999] 1 WLR 408 ("*Redrow*") had been correctly decided, notwithstanding the subsequent judgment of the Court of Justice of the European Union ("CJEU") in *HMRC v Loyalty Management UK Ltd; Baxi Group Ltd v HMRC* (Joined Cases C-53/09 and C-55/09); [2010] STC 2651 ("*LMUK (CJEU)*"). However, in a limited respect, the Supreme Court qualified the reasoning of the House of Lords in *Redrow.*

3. The First-tier Tribunal (Mr Richard Barlow and Ms Rayna Dean) ("the FTT"), in its decision dated 2 October 2009 ("the FTT Decision"), accepted the appellant's argument (supported by PwC) that the services provided by PwC for which the appellant paid ("the Servives") had been supplied for VAT purposes by PwC to the appellant, thus giving rise to an entitlement to deduct input tax. On appeal by The Commissioners for Her Majesty's Revenue and Customs ("the respondents"), the Upper Tribunal concluded that the FTT was wrong in law in its construction of the relevant agreements (see paragraph 23 of the UT Decision) and that, looking at the substance of the transactions, the appellant did not receive a supply of services from PwC, but rather that the Services had been supplied to a number of banks, to which the appellant was, at the relevant time, indebted. The Upper Tribunal also decided that the appellant received nothing of value from PwC to use for the purpose of its business in return for payment (see paragraph 24 of the UT Decision).

Factual background

4. The following summary of the factual background was not in dispute. It is largely taken from the findings made by the FTT, the witness statement dated 4 July 2008 of Gregory McMahon, the appellant's Company Secretary and Head of Legal Services, and the witness statement dated 16 December 2008 of Zubin Randeria, the partner in the Business Recovery Services Team of PwC who was the lead partner on the work carried out by PwC. Their evidence, supplemented by what they said in cross-examination, was accepted by the FTT as truthful; see paragraph 6 of the FTT Decision.

5. In 2002 the appellant faced a financial crisis that threatened the continuation of its business and its own existence. It was indebted to over 80 banks and other financial institutions ("the Banks"), pursuant to the terms of various credit facilities, including a Revolving Credit Facility dated 21 March 2000 ("the Revolving Credit Facility"), a Bond Facility dated 8 March 2002 and a facility referred to as the Orlando Term Loan Agreement Facility dated 15 November 1999 (together "the Bank Facilities"). It also had liabilities to another group of financial creditors who were holders of unsubordinated[1] bonds issued by the appellant in late 1999 ("the Bondholders"). As at September 2002 the amounts owed by the appellant under the Bank Facilities, to Bondholders and generally to other creditors stood at between £2 billion and £2.5 billion. Following the announcement of accounting problems, which resulted in the collapse of the appellant's share price, the Banks, which had been involved with the discussions about the renewal of the Revolving Credit Facility, became concerned that the appellant would not have sufficient funds to operate its business beyond 31 December 2002. In addition certain Banks began to refuse to allow the appellant to draw down funds which were required by it to pay for the continued running of its business. The most critical period was October and November 2002, when it was not clear whether its business would survive.

6. It became apparent to the appellant that it would need to involve the Banks that had been providing the Bank Facilities in agreeing a refinancing package. However, given the pressing time constraints, it was not possible for the appellant to negotiate individually with the vast number of Banks involved. Accordingly, in order to facilitate the refinancing process, the Banks formed a Steering Committee led by the Royal Bank of Scotland and Barclays Bank ("the Joint Lead Co-ordinators"). The Steering Committee represented all the Banks which had lent money to the appellant pursuant to the Bank Facilities. The Bondholders were separately advised and represented.

7. At the time, the appellant was obtaining legal advice from Slaughter and May as to how to restructure in order to return itself to long-term financial stability. It had appointed Deutsche Bank as its investment bank adviser and Ernst & Young as insolvency advisers to its Board of Directors in relation to the consequences of its going into administration. However, according to Mr McMahon's evidence, the appellant was also

> "keen to have an adviser reviewing the refinancing and restructuring strategies. Essentially the Group required another party to consider the plans of the business and to provide confirmation to the Steering Committee that, based on the

[1] See paragraph 9 of the witness statement of Gregory McMahon dated 4 July 2008.

> information available at the time, the agreed actions were reasonable."

8. Whilst, according to Mr Randeria, PwC and KPMG were approached by the Banks to submit proposals for carrying out the advisory work required to provide an insight into the financial position of the appellant, nonetheless the appellant had a role in the decision-making process as to which firm of accountants was going to be appointed. According to Mr McMahon, PwC was ultimately selected because the appellant considered that KPMG had a conflict of interest as auditors to one of its principal competitors, First Choice Holidays & Flights Ltd, the proposed purchase of which by the appellant had been blocked by the European Competition Commission in 1999. Mr McMahon said:

> "However, the appointment of PwC was acceptable to the Steering Committee; it had the required reputation, expertise and resources to deal with a task of this nature; and had some familiarity with the situation. Accordingly, the Steering Committee advised that they were happy with the appointment of PwC and [the appellant] agreed."

Mr Randeria's evidence was to slightly different effect. He merely said that, as a result of the conflict, the appellant "had an influence on the appointment of advisors which is very unusual."

9. PwC was originally engaged in November 2002 pursuant to a contract contained in a letter of engagement dated 5 November 2002 ("the November 2002 Letter of Engagement") from PwC. The letter was addressed "To the Engaging Institutions" and headed "Silver Group plc [code for the appellant] and its subsidiaries ('the Group')". The November 2002 Letter of Engagement (in so far as material) was in the following terms:

> "Introduction
>
> 1. This letter ('the Letter of Engagement') confirms that we, PricewaterhouseCoopers ('PwC') have been retained by the institutions as defined in paragraph [this is blank but 4 is clearly intended] to provide the services ('the Services') set out below.
>
> 2. This Letter of Engagement outlines the Services to be provided, the fees to be paid in respect of the Services, and the terms applicable to the provision of the Services.
>
> 3. Three syndicates lend to the Group in respect of the following facilities: (1) the Revolving Credit Facility dated 21 March 2000 ("the "RCF Syndicate"), (2) the Bond Facility dated 8 March 2002 ("the Bond syndicate"), and (3) THE Orlando Term Loan Agreement facility dated 15 November 1999 ("the Orlando facility") (collectively "the Syndicates"). In addition there are a number of parties lending to the Group under bi-lateral arrangements ("the Bilateral Lenders"). The

Syndicates and the Bilateral Lenders are hereinafter jointly referred to as "the Institutions".

4. Our report and letters are for the sole use of the Institutions who have expressly agreed to this Letter of Engagement ('the Engaging Institutions') by countersigning below. They must not be distributed to any third parties without our written consent. We confirm that we are prepared to agree to provide copies of the information and advice produced under this engagement (save as detailed at paragraph 11 below) to each of the Engaging Institutions (as formed as at the date that this Letter of Engagement is signed) and are also prepared to assume a duty of care to each of them but only on the basis that they each individually agree to the terms of this Letter of Engagement as party to it.

5. The Group is presently in the process of preparing to announce its annual results for the year to 30 September 2002. In conjunction with this announcement the Group's auditors will be required to issue an unqualified audit opinion. To be in a position to issue such an opinion it is anticipated that the auditors will require confirmation that the providers of certain facilities to the Group extend their existing commitments. In particular it is possible that the Revolving Credit Facility dated 21 March 2002, certain bi-lateral letters of credit and other ancillary facilities be extended beyond their present terms.

6. To enable the institutions to develop views on the Group's current financial position and financing needs, you have requested that we assist in providing information to the institutions providing facilities to the Group.

7. Our work is to be conducted in a number of phases. The first phase of it is to assist the institutions providing banking, bonding and other facilities to the Group to gain a more detailed understanding of the present financial position of the Group. During this phase our role is to obtain and comment on this information to enable the institutions to better consider the Group's likely requests for facility extension. This phase is to be followed in due course by a detailed examination of the Group's business plan and strategic options. In the time available you have requested that we restrict our work at phase one and that the timing and scope of subsequent phases be developed prior to 26 November 2002.

8. Information and advice produced from this engagement is to be addressed to the Engaging Institutions with a copy to the directors of the Group, with the exception of any part of the report prepared exclusively or confidentially for the Engaging Institutions.

9. We have a duty of care to the Engaging Institutions as described in paragraph 4 relating to the contents of the Phase 1 report…

10. You accept that the aggregate limit referred to in paragraph 9 of our Terms and Conditions applies to our liability to the Group and the Engaging Institutions and any other party to whom we later agree to assume a duty of care taken together.

11. We do not accept any duty of care or liability to any other party, including any party that acquires from the Institutions financial exposure to the Group subsequent to the date of our report….

Scope of our Services

12. You have requested us to undertake a review of the Group as set out below. Our work is required by the Institutions in considering the level of facilities to the Group.

13. Our work is to be conducted in a number of phases. In respect of our phase 1 work, we are to carry out the work as described in more detail at Appendix A to this letter. The scope of our work for the subsequent phases will be determined during phase 1. It is intended this initial work will be followed by a more detailed review of the Group's 2003 budget, its business plan and the options available to the Group. Work for subsequent phases will be the subject of a separate engagement letter.

14. In the limited timescale, it is acknowledged that the scope of our Phase 1 work will be restricted. In particular, our phase 1 work will be undertaken exclusively in the UK - we will not visit any of the overseas operations.

15. Our work is to be based primarily on internal management information and representations made to us by management, which we will not verify or corroborate. We are not required to carry out an audit for the purposes of our work. In connection with this assignment we will not be required to undertake any responsibility for directing the affairs of the Group, the sole responsibility for which remains with the Group's management.

16. Our work is to include a review of the Group's short-term weekly cash flow forecasts and its medium term profits and cash flow projections. We point out that the Group's management is responsible for the preparation of the forecasts and projections and for the reasonableness of the underlying assumptions.

…

Timetable

19. It is proposed that we commence phase 1 of our work on 2 November 2002 and that a draft of our findings will be available for discussion with management on 15 November and with the Engaging Institutions on 18 November 2002. We would also propose to present our interim findings to the Engaging Institutions on 11 November 2002.

20. The timing for the other phases of our work will be agreed before each phase commences.

Staffing

21. Tony Lomas, Steven Pearson and Zubin Randeria will be responsible for this assignment. Craig Livesey will act as Director calling upon specialist staff as we deem appropriate. We reserve the right to change staff but will only change the named senior staff after discussion with you.

Fees

22. The Group will be responsible for our fees, expenses and disbursements incurred in carrying out our work…

23. Our rates for this project are detailed at Appendix B. We estimate our costs for Phase 1 will be in the range £350,000 to £400,000, plus VAT and out of pocket expenses.

24. We will provide an estimate of our fees in respect of subsequent phases prior to commencing our work on that phase.

25. Original invoices will be sent to the Group with a copy to the RCF Syndicate agent. Our terms are that a retainer of £200,000 be payable on the commencement of our work and that weekly invoices will be rendered to the Group. Our invoices are payable on submission.

Terms and Conditions

26. The attached terms and conditions ('the Terms and Conditions') have been agreed between the parties and set out the duties of each party in respect of the Services. The Terms and Conditions provide that among other matters:

(i) the Group will indemnify us against claims brought by any third party. For the avoidance of doubt, the reference to 'you' in clause 10 of the Terms and Conditions (and only in that clause) refers to the Group and not the Engaging Institutions; and

(ii) our aggregate liability to the Group, the Engaging Institutions and any other third party to whom we later agree to assume a duty of care taken together, whether in contract, negligence or any other tort, will be limited in accordance with clause 9.4 of the Terms and Conditions. For this purpose, our liability in respect of Phase 1 of the Services will in no circumstances exceed £10 million. In the event that you request and we agree to provide services beyond Phase 1, the financial limit of our aggregate liability will increase to £25 million in respect of the Services and any additional services we provide to you.

(iii) The Letter of Engagement and the Terms and Conditions are together referred to as the Contract, and evidence the entire agreement between the parties. For the avoidance of doubt, the Engaging Institutions and the Group both agree to all the terms contained in the Contract.

…

Acknowledgement and acceptance

28. Please acknowledge your acceptance of the terms of our engagement under the Contract by signing the confirmation below and returning one copy of this letter and a copy of the attached Terms and Conditions to us at the above address.

29. If you have any questions regarding this letter or the attached Terms and Conditions, please do not hesitate to contact us."

10. The signing pages for the Engaging Institutions were headed "Confirmation and terms of engagement— Engaging Institutions" and stated:

> "We confirm that the foregoing properly sets out the arrangements agreed between us, and we agree to the terms contained in this Letter of Engagement and the attached Terms and Conditions. We also understand that PwC will have unrestricted access to the Group's books and records and the full co-operation of its directors and senior management who will keep you informed of any matters arising which they consider are relevant to your work. If appropriate, you may instruct other professional parties to assist you and discuss with them the affairs of the Group. We confirm that the Group has authorised the Engaging Institutions to disclose to you all relevant matters concerning the Group's affairs and its bank accounts.
>
> Signed …..
>
> Position …..

Institution ……

Date…….”

11. The signing page for the appellant was headed “Confirmation and terms of engagement—the Group” and stated:

> “We confirm that the foregoing properly sets out the arrangements agreed between us, and we agree to the terms contained in this Letter of Engagement and the attached Terms and Conditions. We also confirm that PwC will have unrestricted access to the Group’s books and records and the full co-operation of its directors and senior management who will keep you informed of any matters arising which they consider are relevant to your work. If appropriate, you may instruct other professional parties to assist you and discuss with them the affairs of the Group. We authorise the Engaging Institutions to disclose to you all relevant matters concerning the Group’s affairs and its bank accounts. We also authorise the RCF Syndicate to debit your fees, expenses and disbursements to our current account on receipt by the agent to the RCF Syndicate of a copy of your invoice.
>
> Signed …..
>
> Position …..
>
> On behalf of Silver Plc for itself and on behalf of its subsidiaries
>
> Date…….”

This page was signed on behalf of the appellant.

12. Appendix A to the Letter of Engagement set out the scope of the Services in Phase 1 under the following headings each of which was then expanded upon:

> “1. Current trading position; …
>
> 2. Current Case position and outlook; ….
>
> 3. Existing Group financial exposure;….
>
> 4. Historical cash utilisation to September 2002; …
>
> 5. Review of accounting policies and accounting issues; …
>
> 6. Budget for year to 30 September 2003;
>
> 7. CAA [this was a reference to the Civil Aviation Authority];

a. Provide observations on the current discussions with the CAA, as reported by management.

b. Summarise financial conditions of CAA support and project compliance under the 2003 budget.

8. Any other matters which come to our attention during the course of our work insofar as it relates to any intention of the Group to dispose of any of the Group's activities.

9. Your outline of the activities to be conducted in subsequent phases."

13. The relevant PwC Terms and Conditions, to which the November 2002 Letter of Engagement was subject, were the 2002 Terms and Conditions, contained in a printed form which dealt with a whole host of matters including validity, regulation, confidentiality, PwC's liability and governing law ("the Terms and Conditions"). Material for present purposes were the following paragraphs:

"TERMS AND CONDITIONS

These terms and conditions ("the Terms and Conditions") apply to the services ("the Services") that we will provide to you pursuant to the attached letter of engagement ("Letter of Engagement"). The Letter of Engagement and the Terms and Conditions are together referred to as "the Contract". The Contract forms the entire agreement between us relating to the Services. It replaces and supersedes any previous proposals, correspondence, understandings or other communications whether written or oral.

For the avoidance of doubt "we" and "our" refers to PricewaterhouseCoopers, a United Kingdom partnership whose principal place of business is at 1 Embankment Place, London WC2N 6RH ("PwC"), and "you" and "your" refers to the entity or entities on whose behalf the attached Letter of Engagement was acknowledged and accepted.

…

2. Information and Assistance

2.1 Our performance of the services is dependent upon you providing us with such information and assistance as we may reasonably require from time to time.

2.2 You will use reasonable skill, care and attention to ensure that all information we may reasonably require is provided on a timely basis and is accurate and complete. You will also notify us immediately if you subsequently learn that the information provided is incorrect or inaccurate or otherwise should not be relied upon.

2.3 Any reports issued or conclusions reached by us may be based upon information provided by you and on your behalf, which we will not corroborate or verify unless specified in the Letter of Engagement. While the Services may involve an analysis of financial information and accounting records, it will not include an audit in accordance with generally accepted auditing standards. Accordingly, we assume no responsibility and make no representations with respect to the accuracy or completeness of any information provided by you and on your behalf.

2.5 For the avoidance of doubt, we will not be required to direct your affairs, the sole responsibility for which remains with your management.

3. Fees

3.1 Time for payment of fees and expenses will be of the essence, and you agree to pay our fees promptly in accordance with the Letter of Engagement or our invoice.

3.2 All sums due in connection with the Services will be subject to the payment of tax by you where applicable.

3.3 Any fee estimate given by us will be given in good faith but will not be contractually binding.

9. Liabilty

9.1 We will use reasonable skill and care in the provision of the Services.

9.2 We will accept liability without limit for

(i) death or personal injury caused by our negligence or the negligence of our employees acting in the course of their employment;

(ii) any fraudulent pre-contractual misrepresentations made by us on which you can be shown to have relied; and

(iii) any other liability which by law we cannot exclude or limit.

This clause 9.2 does not in any way confer greater rights than either of us would otherwise have at law

……

9.4 The parties have agreed that it is reasonable for PwC to limit its liability in connection with the provision of the Services. Accordingly, our liability to pay damages for loss or

damage, including consequential loss, suffered by you as a direct result of breach of contract, negligence, or any other tort by us in connection with the Services will be limited to that proportion only of your actual loss which was directly and solely caused by us.

9.5 In circumstances where the Letter of Engagement is counter-signed by more than one party (the "Counter-signatories"), the limit of liability specified in the Letter of Engagement will be allocated between Counter-signatories. It is agreed that such allocation will be entirely a matter for the Counter-signatories, who will be under no obligation to inform us of it. If (for whatever reason) such allocation is not agreed, no Counter-signatory will dispute the validity, enforceability or operation of the limit of liability on the grounds that no such allocation was agreed.

14. Paragraph 10 of the Terms and Conditions (referred to in paragraph 26(i) of the November 2002 Letter of Engagement) read:

> "You [which given the terms of paragraph 26(i) of the November 2002 Letter of Engagement meant exclusively the appellant] agree to indemnify us to the fullest extent permitted by law against all liabilities, losses, claims, demands and expenses arising out of or in connection with your [the Group's] breach of any of the terms of the Contract (regardless of whether such breach is later remedied). This indemnity will not apply to the extent that the third party claim is determined to have resulted from our fraud or dishonesty. You agree not to dispute the validity of this indemnity or to seek to recover any funds paid by you pursuant to it."

15. So far as relevant, Clause 12 provided:

> "12. Termination and Suspension
>
> 12.1 At any time during the term of the Contract, either of us may terminate the Contract for whatever reason upon the expiry of 30 days' notice to be given in writing to the other commencing on the date when that notice of termination is sent.
>
> 12.2 At any time during the term of the Contract either of us may give immediate notice to the other suspending the performance of its duties and obligations under the Contract in the event that:
>
> (i) circumstances exist or arise which, in the reasonable opinion of that party, materially and adversely affect the performance of, or the ability to perform, that party's duties and obligations under the contract; or

(ii) either of us becomes aware that the other has failed (whether before or after the date of the Letter of Engagement) to disclose to it information which in the reasonable opinion of that party is material to the performance of its duties and obligations under the Contract.

12.3 Either of us may terminate the Contract forthwith by notice in writing to the other if the period of suspension of the Contract referred to at clause 12.2 above exceeds 30 days.

12.4 If we suspend the performance of the Contract pursuant to clause 12.2 above, we will be entitled reasonably to vary our fees for the resumed performance of Contract.

12.5 We may terminate the Contract at any time if we do not receive payment from you of any invoice within 30 days of the due date stipulated in the Letter of Engagement or invoice.

12.6 Either party may terminate the Contract on written notice with immediate effect if the other party commits a material breach of the terms of the Contract which is irremediable, or if remediable, is not remedied within 30 days of a written request to remedy the same."

There were subsequent PwC Terms and Conditions but it was not suggested that any alteration in such terms was material for present purposes.

16. PwC carried out its work between November 2002 and January 2005 in five phases. Following the November 2002 Letter of Engagement, there were four further engagement letters, dated respectively 14 January 2003, 7 March 2003, 21 July 2003, 15 December 2003, which set out the scope for each subsequent phase of work (collectively "the Engagement Letters"). They were in similar terms to the November 2002 Letter of Engagement and were likewise subject to the Terms and Conditions. The Engagement Letter for each subsequent phase of work was likewise signed (a) by the appellant, (b) on behalf of the Engaging Institutions, and (c) by PwC. Additionally there were three "Variation of Scope Letters" dated respectively 25 March 2004, 21 September 2004 and 26 November 2004 likewise so signed. It was common ground that there was a tripartite contract between the appellant, PwC and the Engaging Institutions in relation to all five Engagement Letters (including the Terms and Conditions, and the "Variation of Scope Letters": see paragraph 10 of the FTT Decision). I shall refer to that contract as "the Contract ".

17. Phase 2 of the work undertaken by PwC comprised "monitoring the Group and reporting monthly to the Engaging Institutions until the Group completes its strategic plan, and a review of the Strategic Plan including analysis of the options facing the Engaging Institutions." Phase 3 involved reviewing the appellant's short-term cash flow forecast, its bonding facilities and providing an insolvency analysis and scenario planning. Phase 4 comprised, inter alia, monthly monitoring of the latest booking data, review of the appellant's management's operational plan for the integration of the UK businesses, and a review of the options for a potential capital restructuring of the appellant's financial indebtedness. Phase 5 was to similar effect. The Variation of

Scope Letters importantly amplified the work to be carried out under Phase 5 to include the building of an "Entity Priority Model" ("the EPM") to "illustrate the effects of hypothetical insolvency proceedings of certain Group companies on the Group's major creditors or groups of creditors." Paragraph 21 of the Variation of Scope Letter dated 25 March 2004 provided that:

> "**Except to the Group**, Joint Co-ordinators and the Engaging Institutions, and then solely for the purpose in accordance with the terms of the Contract, and regardless of the form of action, whether in contract, tort (including negligence) or otherwise, in no event will PwC be liable to any party for any loss or damage arising out of or in connection with the EPM .." [My emphasis.]

Mr McMahon explained that one of the purposes of the EPM was to determine the allocation of funds to particular creditors in the event of the appellant's insolvency. He described how the fact that the PwC EPM essentially validated the EPM previously constructed by the appellant's own insolvency advisers, Ernst & Young, provided significant benefit to the restructuring process.

18. The FTT described the work carried out by PwC at paragraph 2 of the FTT Decision as relating to:

> " professional services consisting, in summary, of liaising with and making representations to banks and other creditors or bondholders of the appellant, carrying out a strategic review of its business and restructuring proposals, liaising with the Civil Aviation Authority and creating what was termed an entity priority model. That work was wide ranging and highly technical work of a kind that only institutions such as PwC would be capable of carrying out, especially as there was a need for urgent action."

19. In due course PwC invoiced the appellant in respect of its fees for work carried out under the Engagement Letters and payment was duly made by the appellant to PwC, pursuant to the appellant's contractual obligation to pay PwC's fees in respect of the work undertaken contained in, for example, clause 22 of the November 2002 Engagement Letters and similar provisions in subsequent Letters of Engagement. Ultimately, the restructuring of the appellant's business was achieved successfully. The appellant contends that this was only achieved with the assistance of the work undertaken by PwC.

20. The appellant sought to deduct the VAT which it had been invoiced and had paid in respect of PwC's fees as input tax in its VAT returns for the relevant periods. It was common ground that the appellant had indeed paid for PwC's services.

21. The respondents did not dispute before the FTT that the arrangements were of commercial benefit to the appellant; still less did the respondents contend that the work done by PwC was unnecessary. They accepted that, if the financial restructuring was to go ahead, there was plainly a need for PwC to perform the services at issue. They maintained the position, however, that PwC's services were not supplied to the

appellant, with the result that the appellant was not entitled to deduct the VAT on PwC's fees as input tax.

The FTT Decision

22. As I have already said, the respondents accepted that the Contract was a tri-partite contract between the appellant, PwC and the Engaging Institutions. However the respondents submitted before the FTT that the appellant received nothing from PwC by way of a supply; although the appellant was obliged by the Contract to pay PwC and provide information and access to its books etc, PwC were not under any obligation to the appellant to render services to the Engaging Institutions and none of the work it carried out was a "supply" to the appellant.

23. The FTT rejected the respondents' approach. It construed the word "you" in clauses 6 and 12 of the Contractt to refer to the appellant, as well as to the Engaging Institutions, and, as a result, decided that the appellant had requested the work as well as having authorised it; see the FTT Decision, paragraphs 18 and 31. It summarized what it regarded as the relevant propositions of law at paragraph 26 as follows:

> "26. From those authorities we derive the following propositions which we hold to be relevant to this appeal:
>
> (i) If a service has been provided there is no need to define it. Indeed to do so might lead to error.
>
> (ii) If a supply is made for a consideration and it is not a supply of goods then it is a supply of services.
>
> (iii) A supply of a service may consist of a right to have the service supplied to a third party.
>
> (iv) The correct approach is to look at the question from the point of view of the paying party. The person claiming the right to deduct input tax must identify the payment he claims he made and by which he claims he obtained something for the purposes of his business, which he therefore claims gave rise to deduction.
>
> (v) Provided he obtained anything at all that was used for the purpose of his business the right to deduct input tax will arise.
>
> (vi) The fact that someone else also received a service as part of the same transaction as that received by the party making the deduction does not prevent deduction.
>
> (vii) Questions such as who pays, who receives the invoice and who authorises the work will be relevant.
>
> 27. We should add two comments to the above propositions. As to proposition (vi) it might be said that Lord Hope, by saying that the third party also received "a" service rather than "the service" (at the end of the passage quoted above), meant that

> the deduction by Redrow only arose because it received a different service to that of the householder. We have no reason to think he did mean that and Chadwick LJ in *Loyalty Management* and Neuberger LJ in *WHA* both accepted that the same service might be supplied to both the deducting party and the third party without that affecting the right to deduct.
>
> 28. Proposition (vii) refers to questions relating to the evidence relevant to the issue whether or not the supply was for the purpose of the business of the deducting party. The identity of the deducting party will always depend on whether he paid the supplier."

24. In paragraphs 33 - 36 of its decision the FTT said:

> "33. That the contract thereby established involved supplies of services to the appellant seems to us, and we hold it to be the case, to be quite clear. The contract amounts to an agreement for work involving a supply to the appellant in at least the following specific respects.
>
> 34. Clause 8 of the Engagement Letter promises that the appellant will receive a copy of a report which will first have been discussed with its management (clause 19).
>
> 35. Clause 12 shows that the appellant had requested the review. It might be said that the fact that the clause also refers to the review having been required by the Institutions means it was a supply to those Institutions rather than to the appellant but we do not agree. The appellant was under no legal obligation to provide such a review to the Institutions and the reference to the Institutions requiring it merely acknowledges that the appellant needed, for practical reasons, a review that it could place before the Institutions. Such a review could have been obtained by the appellant without the Institutions being a party to its preparation but such a review would have carried less (probably very little) weight with the Institutions. Practicalities therefore required that the Institutions should be involved in the process but nonetheless it was the appellant who needed the review and authorised the work that gave rise to the review. The fact that the appellant was under no legal obligation to provide the review or report to the Institutions does not mean that, even though it had been agreed the Institutions would be parties to the contract for its preparation, the supply ceased to be a supply to the appellant. The work of PwC was needed by the appellant and it is our holding that the appellant authorised it and secured it for its own purposes. It was not obtained purely for the purposes of the Institutions. That is clear from the terms of the contract itself.

> 36. That the appellant needed the work by PwC and its results is fully confirmed by the oral evidence of the witnesses for the appellant. We have already recorded that we accept that evidence was entirely truthful. In particular Mr McMahon in his witness statement (which stood as his evidence in chief and in respect of which he was not challenged on this point) said this "… My Travel were keen to have an adviser reviewing the plans for the business and to provide confirmation to the Steering Committee that, based on the information available at the time, the agreed actions were reasonable. When determining who to appoint to provide this assistance it was necessary to appoint an adviser that was acceptable to the Steering Committee and My Travel and I note that My Travel had a role in the decision making process as to who was going to be appointed."

25. Accordingly the FTT held that the appellant had received supplies from PwC that were used for the purposes of its business and the right to deduct input tax arose; see the FTT Decision, paragraph 30.

The UT Decision

26. On appeal, the Upper Tribunal disagreed with the FTT's approach. Having considered the nature of the arrangements, the Upper Tribunal concluded that the substance of the transactions was that there was a supply of services by PwC to the Engaging Institutions, that the Contract should be construed as one in which the Engaging Institutions contracted with PwC to supply services which the Engaging Institutions needed for the purposes of their own businesses, and that the appellant contracted with PwC to pay its fees, rather than one in which the appellant received something of value from PwC to be used for the purpose of its business in return for payment. The critical paragraphs of the UT Decision are as follows:

> "21. So far as concerns what is received and whether it was to be used for the purpose of its business, the issue is whether in accordance with the three rival interpretations of the Agreement (a) Airtours receives the benefit of PwC's services; (b) receives no substantial benefit from PwC (other than a copy of the report); or (c) receives the right to have PwC's services supplied to the Engaging Institutions which is something of value to be used for the purpose of its business. In support of interpretation (a) is that Airtours were entitled to have a copy of the report. In support of (b) is that only the Engaging Institutions received anything from PwC; if Airtours received anything it was from the Engaging Institutions in the form of continued finance. In support of (c) Mr Hitchmough contended that PwC's review of Airtours' strategic plan gave Airtours reassurance; that it assisted in maintaining its CAA licence; that the "entity priority model" (which is a computer simulation which determines the allocation of funds in the event of an insolvency) aided Airtours in its negotiations with the banks and in court proceeding in relation to the bondholders; that the

work was invaluable in achieving the successful completion of the restructuring; and that the revolving credit facility was continued until 31 December 2003. But these are all matters that can be identified with the benefit of hindsight. They are not benefits for which Airtours contracted under the Agreement. It was just as possible that PwC's advice might have been wholly contrary to Airtours' interests, depending on what their work discovered, as is foreseen by the exclusion in paragraph 8 of matters "exclusively or confidentially for the Engaging Institutions".

22. Having the work done did not discharge any business obligation of Airtours, or provide it with something to be used in its business. We do not consider that Airtours received any *Redrow*-type benefit in accordance with interpretation (c). Unlike Redrow (which used the estate agent's services supplied to X because that enabled Redrow to sell a new house to X simultaneously with the sale of X's house), and unlike WHA (which used the garage's services by obtaining "satisfaction of an obligation to Viscount and the ability to earn the £17.60"), there was no business use made by Airtours of having PwC's services supplied to the Engaging Institutions. It did not start by needing PwC's report to place before the Institutions; the Institutions started by wanting the report for themselves, as the Agreement states. The benefit to Airtours was that PwC's report might lead to continued finance from the Institutions for which Airtours was willing (or was forced) to pay. The choice between interpretations (a) and (b) is whether in reality Airtours received PwC's services to be used for the purpose of its business, or received nothing from PwC's services because they were supplied to the engaging Institutions to be used for the purpose of their business. In substance we decide it was (b) because, as the Agreement makes clear, the Engaging Institutions needed PwC's services for the purposes of their own businesses and the fact that Airtours received a copy of the report was more of a courtesy than the receipt of the supply of PwC's services. We consider that the substance is that the Engaging Institutions (and not Airtours) were contracting with PwC for the provision of services, and that PwC supplied those services to the Engaging Institutions (and not to Airtours) and that interpretation (b) is the correct one. In deciding otherwise the First-tier Tribunal made an error law.

23. The First-tier Tribunal was also wrong in law in its construction of the Agreement that Airtours "authorised PwC to do the work" by paying for it. It was the Engaging Institutions that first approached PwC, and contracted for the work and therefore authorised it. Nor do we agree with the Tribunal's conclusion that it is clear from the terms of the Agreement that "The work of PwC was needed by [Airtours] and it is our

> holding that [Airtours] authorised it and secured it for its own purposes." We consider that the terms of the Agreement, particularly the ones summarised in paragraph 20 above, all point in the opposite direction, that it was the Engaging Institutions that wanted PwC's report for the purpose of their own business. This is not affected by the fact that Airtours had an input into the Agreement by influencing the appointment of PwC, and by agreeing the scope of the work for which they were paying.
>
> 24. We therefore consider that the arrangement which encompasses the formal agreement should therefore be construed as one in which the Engaging Institutions contracted with PwC to supply services which they needed for the purposes of their own businesses, and Airtours contracted with PwC to pay its fees, rather than one in which Airtours received something of value *from PwC* to be used for the purpose of its business in return for its payment.

27. Accordingly the Upper Tribunal allowed the appeal.

The issues which arise on this appeal

28. The issues which arise on this appeal can be summarised as follows:

    i) whether the Upper Tribunal exceeded its appellate jurisdiction, and erred in law, in overturning the FTT's Decision on the grounds that (as the appellant argued before this court) the UT Decision was, on proper analysis no more than a disagreement with the FTT Decision on issues of fact or factual evaluation which were within the sole remit of the FTT; and

    ii) whether in any event the Upper Tribunal's analysis of the arrangements as between PwC, the Engaging Institutions and the appellant as not amounting to a supply of services by PwC, but merely the provision of third-party consideration by the appellant to PwC, was correct as a matter of law.

29. By their Notice of 13 April 2011 (expanded upon in their written skeleton argument dated 3 June 2011) the respondents advanced two additional bases upon which, in their submission, the Upper Tribunal's Decision should be upheld. The first (namely that the decision in *LMUK (CJEU)* supported the respondents' position in this appeal) was not presented at the hearing of the appeal as a separate argument from Mr Thomas's arguments in relation to the consideration of the economic realities of the case (as to which see below).

30. The second ground is only relied on by the respondents in the event that this court sets aside the UT Decision. Under this ground they contend that the case should be remitted to the FTT for it to consider whether an apportionment of the VAT should be made according to the extent to which PwC supplied services to the appellant (on the one hand) and the Engaging Institutions (on the other).

The relevant statutory provisions

31. The appellant is entitled to credit for so much of its input tax as is attributable to taxable supplies under section 26 of the Value Added Tax Act 1994 ("VATA") as amended. In so far as material that provides:

> "**26 Input tax allowance under section 25.**
>
> (1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.
>
> (2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business-
>
> (a) taxable supplies;
>
> (b) supplies outside the United Kingdom which would be taxable supplies if made in the United kingdom;
>
> (c) such other supplies outside the United Kingodm and such exempt supplies as the Treasury may by order specify for the purposes of this subsection."

32. The provisions of VATA s 26 substantially reflected the terms of article 17(2) of the Sixth Council Directive of 17 May 1977 (on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment) (OJ 1977 L145) (77/388/EEC) ("the Sixth Directive") as amended. The current EU provisions relating to VAT and the recovery of input tax are contained in Council Directive 2006/112/EC of 28 November 2006 (on the common system of value added tax) (OJ L347/1), referred to as the Principal VAT Directive ("the PVD"). Article 168 of the PVD provides for the right of a taxable person to deduct from the VAT which he is liable to pay, the VAT which he has paid or is liable to pay in respect of the supply of goods or services carried out or to be carried out by another taxable person.

33. For the purposes of this appeal "input tax" is defined in section 24(1)(a) of VATA as follows:

> "24(1) Subject to the following provisions of this section, "input tax" in relation to a taxable person, means the following tax, that is to say-
>
> (a) VAT on the supply to him of any goods or services;
>
> (b)……..
>
> (c)……

being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him. ”

34. Therefore, in order, in the present context, for the VAT charged by PWC to be “input tax”, it must be “VAT on the supply to [the appellant] of any goods or services”. The two fundamental features of this provision are therefore that (1) there must be a supply of (here) services and that (2) that supply must be to the appellant.

35. It was common ground that the concept of a “supply” is a fundamental concept of the VAT system; that “supply” is an autonomous concept of the EU-wide VAT system; and that it is on “supplies” of goods and services for consideration that VAT is charged: see Article 2 of the PVD which in so far as relevant provides:

> “1. The following transactions shall be subject to VAT:
>
> ……..
>
> (c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;”.

36. "Supply of services" is broadly defined in Article 24 of the PVD as meaning "any transaction which does not constitute a supply of goods.”

The relevant legal principles governing the approach to the question whether or not a service, paid for by the taxpayer, is supplied to the taxpayer

37. The following propositions as to the correct approach to apply to the determination of the question whether a service paid for by the taxpayer is supplied to the taxpayer can be derived from various cases decided in this area, including the recent Supreme Court decisions of *LMUK (SC)* and *WHA (SC)*; the judgment of the CJEU in *LMUK (CJEU)* and, in addition, the Court of Appeal's and House of Lords' judgments in *Redrow*:

i) "Consideration of economic realities is a fundamental criterion for the application of the common system of VAT" as regards the identification of the person to whom services are supplied: see e.g. per Lord Reed in *LMUK(SC)* at [56] and [66]; *LMUK (CJEU)* at [39]; and *HMRC v Newey (trading as Ocean Finance (Case C-653/11)* [2013] STC to 432 at [42] ("*Newey").*

ii) Decisions about the application of the VAT system are highly dependent upon the factual situations involved. Thus a small modification of the facts can render the legal solution in one case inapplicable to another: see e.g. per Lord Reed in *LMUK(SC)* at [68] and in *WHA (SC)* at [26].

iii) The case law of the CJEU indicates that, when determining the relevant supply in which a taxable person engages, regard must be had to all the circumstances in which the transaction or combination of transactions takes place: see per Lord Reed in *LMUK(SC)* at [38] and in *WHA (SC)* at [26]. In cases where a

scheme operates through a construct of contractual relationships, it is necessary to look at the matter as a whole in order to determine its economic reality: see per Lord Walker in *LMUK(SC)* at [114]-[115] and per Lord Reed in *WHA (SC)* at [26]. Thus the relevant contracts have to be understood in the wider context of the totality of the arrangements between the various participants.

iv) The terms of any contract between the parties, whilst an important factor to be taken into account in deciding whether a supply of services has been made, are not necessarily determinative of whether as a matter of "economic reality" taxable supplies are being made as between any particular participants in the arrangements. However, the contractual position is generally the most useful starting point for the VAT analysis: see per Lord Reed in *WHA (SC)* at [27]. That may be particularly so where certain contractual terms do not wholly reflect the economic and commercial reality of the transactions: see per the CJEU in *Newey* at [43]-[44].

v) There may, as a matter of analysis, be two or more distinct supplies within the same transaction: see per Lord Hope at 412F-413A and Lord Millett at 418B-419H in *Redrow;* per Lord Millett in *CCE v Plantiflor Ltd* [2002] UKHL 33; [2002] 1 WLR 2287 at [67]; per Chadwick LJ in the Court of Appeal in *LMUK* [2007] EWCA Civ 165 at [38] and [43]; and per Lord Hope in *LMUK(SC)* at [103]-[108]. Moreover, as Lord Millett said in *Plantiflor* [50]: "a single course of conduct by one party may constitute two or more supplies to different persons." It is useful to set out Lord Millett's analysis in *Redrow* at 418B-419H, notwithstanding that his approach, and that of Lord Hope in the same case, were to some extent qualified in the subsequent decisions of the Supreme Court in *LMUK(SC)* and *WHA (SC))*:

> "Once the taxpayer has identified the payment the question to be asked is: did he obtain anything - anything at all - used or to be used for the purposes of his business in return for that payment? This will normally consist of the supply of goods or services to the taxpayer. **But it may equally well consist of the right to have goods delivered or services rendered to a third party. The grant of such a right is itself a supply of services.**
>
> In the present case the taxpayer did not merely derive a benefit from the services which the agents supplied to the householders and for which it paid. It chose the agents and instructed them. **In return for the payment of their fees it obtained a contractual right to have the householders' homes valued and marketed, to monitor the agents' performance and maintain pressure for a quick sale, and to override any alteration in the agents' instructions which the householders might be minded to give**. Everything which the agents did was done at the taxpayer's request and in accordance with its instructions and, in the events which happened, at its expense. The doing of those acts constituted a supply of services to the taxpayer. ….

The services obtained by the taxpayer are different. They consist of the right to have the householder's home valued and marketed in accordance with the taxpayer's instructions. Unless the householder sells his home and completes the purchase of a Redrow home, however, the taxpayer is not liable for the agent's fees and pays no input tax, so there is nothing in respect of which a claim to deduction may be made. What must await events is not the identity of the party to whom the services are rendered, for different services are rendered to each; but which of the parties is liable to pay for the services rendered to him and so bear the burden of the tax in respect of which a claim to deduction may arise.

Conclusion

It is sufficient that the taxpayer obtained something of value in return for the payment of the agents' fees in those cases where it became liable to pay them, and that what it obtained was obtained for the purposes of the taxpayer's business. Both those conditions are satisfied in the present case. It is not necessary that there should be "a direct and immediate link" between the services supplied by the agent and the sale of a particular Redrow home, although if it were necessary then this condition too would be satisfied on the facts of the present case. From the taxpayer's standpoint, which is what matters, the agent's fees incurred in the sale of a prospective purchaser's own home are not part of the taxpayer's general overhead costs but a necessary cost of and exclusively attributable to the sale of a Redrow home to that same purchaser….” [Emphasis supplied.]

Lord Hope, who agreed with Lord Millett (as did Lords Steyn, Goff and Hutton) said:

“The word "services" is given such a wide meaning for the purposes of value added tax that it is capable of embracing everything which a taxable person does in the course or furtherance of a business carried on by him which is done for a consideration. The name or description which one might apply to the service is immaterial, because the concept does not call for that kind of analysis. The service is that which is done in return for the consideration. As one moves down the chain of supply, each taxable person receives a service when another taxable person does something for him in the course or furtherance of a business carried on by that other person for which he takes a consideration in return. Questions such as who benefits from the service or who is the consumer of it are not helpful. The answers are likely to differ according to the interest which various people may have in the transaction. The matter has to be looked at from the standpoint of the person who is claiming the deduction by way of input tax. Was

something being done for him for which, in the course or furtherance of a business carried on by him, he has had to pay a consideration which has attracted Value Added Tax? The fact that someone else--in this case, the prospective purchaser--also received a service as part of the same transaction does not deprive the person who instructed the service and who has had to pay for it of the benefit of the deduction."

vi) However, the mere fact that the taxpayer has paid for the service does not necessarily mean that it has been supplied to him. Lord Reed made that clear in *LMUK(SC)* at [66]-[67], when confirming, contrary to HMRC's submissions, that, notwithstanding the subsequent decision in *LMUK (CJEU), Redrow* had been correctly decided, albeit that the reasoning of Lord Millett and Lord Hope in that case required some qualification:

"66. I would at the same time stress that the speeches in *Redrow* should not be interpreted in a manner which would conflict with the principle, stated by the Court of Justice in the present case, that consideration of economic realities is a fundamental criterion for the application of VAT. Previous House of Lords authority had emphasised the importance of recognising the substance and reality of the matter (*Customs and Excise Commissioners v Professional Footballers' Association (Enterprises) Ltd* [1993] 1 WLR 153, 157; [1993] STC 86, 90), and the judgments in *Redrow* cannot have been intended to suggest otherwise. On the contrary, the emphasis placed upon the fact that the estate agents were instructed and paid by Redrow, and had no authority to go beyond Redrow's instructions, and upon the fact that the object of the scheme was to promote Redrow's sales, indicates that the House had the economic reality of the scheme clearly in mind. When, therefore, Lord Hope posed the question, "Was something being done for him for which, in the course or furtherance of a business carried on by him, he has had to pay a consideration …?", and Lord Millett asked, "Did he obtain anything – anything at all – used or to be used for the purposes of his business in return for that payment?", those questions should be understood as being concerned with a realistic appreciation of the transactions in question.

67. Reflecting the point just made, it is also necessary to bear in mind that consideration paid in respect of the provision of a supply of goods or services to a third party may sometimes constitute third party consideration for that supply, either in whole or in part. The speeches in *Redrow* should not be understood as excluding that possibility. Economic reality being what it is, commercial businesses do not usually pay suppliers unless they themselves are the recipient of the supply for which they are paying (even if it may involve the provision of goods or services to a third party), but that possibility cannot

be excluded *a priori*. A business may, for example, meet the cost of a supply of which it cannot realistically be regarded as the recipient in order to discharge an obligation owed to the recipient or to a third party. In such a situation, the correct analysis is likely to be that the payment constitutes third party consideration for the supply."

Lord Hope expressed a similar view at [110]:

"110. I acknowledge, however, that some of the reasoning in *Redrow* needs to be adjusted in the light of later authority. I would not wish to alter what I said at [1999] 1 WLR 408, 412H-413A: was something being done for the person claiming the deduction for which, in the course or furtherance of a business carried on by him, he has had to pay a consideration which has attracted value added tax? But I think that Lord Millett went too far at p 418 G when he said that the question to be asked is whether the taxpayer obtained "anything – anything at all" used or to be used for the purposes of his business in return for that payment. Payment for the mere discharge of an obligation owed to a third party will not, as he may be taken to have suggested, give rise to the right to claim a deduction. A case where the taxpayer pays for a service which consists of the supply of goods or services to a third party requires a more careful and sensitive analysis, having regard to the economic realities of the transaction when looked at as a whole. It may lead to the conclusion that it was solely third party consideration, or it may not."

Lord Walker agreed with both Lord Hope and Lord Reed. Lord Carnwath and Lord Wilson dissented on the grounds that the decision of the CJEU was determinative of the appeal.

Discussion

38. The real issue in this case is whether, on the primary facts as found by the FTT, and which in essence were not disputed, the arrangements as between the Engaging Institutions, PwC and the appellant as a matter of law involved the supply of services to the appellant or merely third-party consideration provided by the appellant for services rendered by PwC to the Engaging Institutions alone. Only once that issue has been decided can one determine whether either the FTT or the Upper Tribunal was entitled to reach the respective decisions which they did.

39. Mr Andrew Hitchmough QC and Mr Jonathan Bremner, respectively leading and junior counsel for the appellant, submitted that this was a case which was analogous with the facts in *Redrow*, the decision in which had been confirmed by the Supreme Court in *LMUK(SC)*. Mr Hitchmough relied in addition on the decisions of the CJEU in cases of: (i) *Fiscale eenheid PPG Holdings BV cs te Hoogezand v Inspecteur van de Belastingdienst/Noord/kantoor Groningen* (Case C-26/12); [2014] STC 175 ("*PPG Holdings*"); and (ii) *AES-3C Maritza East 1 EOOD v Direktor na Diretktskia* (Case 124/12) ("*Maritza")* to support his submission that what was relevant was to look

whether the expenditure had been incurred for the needs of an economic activity engaged in by the taxpayer.

40. On the other hand, Mr Owain Thomas, counsel for the respondents, submitted that the correct analysis was that this was clearly a case where the economic reality was that the services were being provided to the Engaging Institutions and not to the appellant, who was merely providing third-party consideration; the appellant received nothing of value from PwC; the arrangements were clearly distinguishable from *Redrow;* the appellant had no right to require PwC to provide the services; there was no contractual obligation on PwC to provide the services to the appellant, merely a tortious duty of care; it was not sufficient that the appellant might incidentally or consequentially have benefited from those services; the Contract should be construed as one under which the Engaging Institutions contracted with PwC to supply services needed for the purposes of their business, not one in which the appellant received something of value from PwC; the FTT had wrongly construed the Contract; there was no basis for saying that it was the appellant which had commissioned the work. In the alternative he submitted that if the First-Tier Tribunal had been correct that a supply was made both to the Engaging Institutions and to the appellant, it ought to have considered the extent to which the service was being provided to each of the Engaging Institutions and the appellant to determine the proportion of input tax recoverable by the appellant.

41. In my judgment, this case, on proper analysis, is, like *Redrow,* a case where two distinct supplies of services were being provided by PwC within the same overall transaction. In relying on Lord Millet's analysis, I bear in mind the caveats to his approach, as articulated by Lords Reed and Hope in *LMUK(SC)* which I have quoted above. I also bear in mind that every case has to be approached on its own particular facts and that it may be dangerous to draw analogies between the facts of two different cases which may appear superficially similar. But although there are obvious differences between the facts of *Redrow* and those of the present case, the principles identified in *Redrow,* and confirmed in *LMUK(SC,)* support the analysis that in the present case PwC was making two distinct supplies "in both directions" (see per Lord Hope in *LMUK(SC)* at [89]) - i.e. both to the Engaging Institutions and to the appellant.

42. I identify the two distinct supplies in the present case as follows:

    i) The supply by PwC to the appellant of the service of having PwC, after appropriate liaison with the appellant's directors and senior management, review, monitor, and validate (if appropriate) its financial statements, budgets, financial performance, EPM, arrangements with the CAA etc. and report on such matters to the Engaging Institutions. That supply of the service of liaison, review etc, and reporting to the Engaging Institutions was provided to the appellant pursuant to the Contract which conferred a contractual right on the appellant to have such work carried out for the purposes of PwC reporting to the Engaging Institutions. As Lord Millett pointed out in *Redrow* at 418G, the grant of such a right (i.e. the right to have services rendered to a third party) is itself a supply of services. The supply of that service, pursuant to the Contract, was for a consideration payable by the appellant.

ii) The supply by PwC to the Engaging Institutions of the service of reporting on, monitoring and advising in relation to, the appellant's financial statements, budgets, financial performance, EPM, arrangements with the CAA etc. - in other words the provision to them of "the Services" as defined in the Engagement Letters - in order to enable the Engaging Institutions to decide whether to continue their credit facilities to the appellant. This supply was also made pursuant to the Contract but it was made in circumstances in which the Engaging Institutions incurred no liability or contractual obligation to PwC to pay for the supply.

43. My reasons for this conclusion may be summarised as follows.

44. I start with an analysis of the Contract. It is necessary to construe the November 2002 Engagement Letters (and indeed the subsequent Letters of Engagement and amending letters) as a whole together with the Terms and Conditions. The first point to note is that, although paragraph 1 of the November 2002 Letter of Engagement clearly states that PwC had been retained by the Engaging Institutions to provide the Services, that is not the end of the matter. The introductory preamble to the Terms and Conditions clearly state that "you" and "your" "refers to the entity or entities on whose behalf the attached Letter of Engagement was acknowledged and accepted". That necessarily included the appellant as one of the parties which acknowledged and accepted the Letter of Engagement. Accordingly, except in paragraph 10 of the Terms and Conditions (in relation to which paragraph 26(i) of the November 2002 Letter of Engagement expressly provides that the reference to "you" is restricted to the appellant), the words "you" and "your" where they appear in other paragraphs of the November 2002 Letter of Engagement refer both to the Engaging Institutions and to the appellant. In this respect, in so far as it is necessary to do so, I agree with the construction adopted by the FTT in paragraph 16 of its judgment. If the words are given their natural meaning, there is no reason whatsoever as a matter of language, common sense or otherwise to construe the words "you" and "your" where they appear elsewhere in the November 2002 Letter of Engagement and the Terms and Conditions, as restricted to the Engaging Institutions. They clearly include the appellant.

45. Whilst I agree to a limited extent with the view expressed by the Upper Tribunal in paragraph 20 of its judgment that, in the context of determining whether there has been a supply of services for VAT purposes, it is not appropriate to construe the November 2002 Letter of Engagement "in a legalistic fashion" - since ultimately the question is whether or not as a matter of economic reality services have been provided to the taxpayer - nonetheless one has to start with the actual words used in the Contract itself.

46. In my judgment, contrary to the respondents' arguments, as a matter of construction of the Contract, and on analysis of the economic realities of the surrounding commercial arrangements, the appellant had *a contractual right to require* that the Services, which were described in the various Engagement Letters and which both the Engaging Institutions and the appellant had agreed, were indeed provided by PwC to the Engaging Institutions. The Upper Tribunal did not expressly address the question as to whether the appellant had such a contractual right, although it appears implicit in their conclusion that the Contract was one where the appellant merely contracted with PwC to pay its fees (see paragraph 24 of the UT Decision).

47. Mr Thomas submitted that there was no provision in the Contract to support the appellant's assertion that the appellant had any right to require PwC to provide services to the Engaging Institutions and that the appellant's role under the tripartite arrangement was simply to make payment to PwC for the provision of services to the Engaging Institutions. I disagree. This approach disregards the reciprocal obligations entered into on the part of, respectively, the appellant and PwC under the Contract and the commercial reality of the arrangements. The absence of an express term specifically stating that the appellant had a right to insist on PwC providing the Services to the Engaging Institutions is irrelevant. The clear and necessary implication from the express terms of the Contract is that the appellant had such a right. My reasons for this conclusion follow.

48. Although it may have been the case that PwC was originally approached by the Engaging Institutions (see paragraph 23 of the UT Decision), it is clear from the facts as found by the FTT that the appellant not only had positively to consent to the appointment of PwC but also that it had an input into the decision to choose PwC rather than another firm. The appellant also had to agree that PwC would have unrestricted access to its books and records and that the appellant's directors and senior management would positively co-operate with PwC in the provision of information; see for example the appellant's confirmation of the November 2002 Letter of Engagement and paragraph 2 of the Terms and Conditions. As reflected in both paragraph 6 and paragraph 12 of the November 2002 Letter of Engagement, the commercial reality was that one of the contracting parties requesting PwC to carry out the work was indeed the appellant itself. If the appellant had not joined in the request and agreed to PwC's appointment, and the scope of its work, the assignment would have taken a very different form since PwC would have had no contractual right to access to the appellant's books and records or to cooperation from its directors and senior management. It is also relevant in this context that the evidence showed that at each stage the scope of the work to be carried out by PwC was agreed by all three parties, namely the appellant, the Engaging Institutions and PwC. Thus although, as Mr Thomas submitted, a distinction can be drawn with the factual scenario in *Redrow* - where the taxpayer itself selected and gave instructions to the estate agents, which could not be countermanded by the house owners - those factors are not sufficient in my judgment to prevent their being two distinctive services in the present case.

49. In my judgment the Upper Tribunal's approach to, and characterisation of the Contract and the underlying arrangements, as set out in particular in paragraphs 21 to 24 of the UT Decision, were incorrect. The Upper Tribunal seems to have laboured under the misapprehension that the appellant was somehow not a contracting party to the November 2002 Letter of Engagement in relation to the provision of services; see for example paragraphs 22 and 24 of the UT Decision. This was clearly wrong. Whilst of course the Engaging Institutions required the provision of the Services (as defined) for the purposes of their business in order to inform their decision as to whether to continue financial facilities to the appellant, the appellant itself also clearly required PwC to provide the Services (as defined) to the Engaging Institutions for the purposes of the appellant's own business in order to persuade the Engaging Institutions and other financial institutions to continue the appellant's loan facilities and to ensure that its bonding arrangements with the CAA were maintained. The Upper Tribunal seems to have thought that the fact that conclusions reached in PwC's reports might have been adverse to the interests of the appellant pointed against any conclusion that any

services were being supplied to the appellant; see paragraph 21 of the UT Decision. But that possibility was irrelevant to the issue. Unless the Services were provided to the Engaging Institutions, the appellant had little hope of obtaining any extension of its facilities. The appellant necessarily had to take the risk that PwC's reports might be negative.

50. Under the November 2002 Letter of Engagement and the Terms and Conditions, PwC clearly accepted that it owed a contractual duty to exercise reasonable skill and care in the provision of the Services; see for example paragraph 9.1 of the Terms and Conditions. There is no reason whatsoever, whether derived from context or otherwise, to restrict PwC's contractual duty of care solely to the Engaging Institutions or to characterise PwC's duty of care obligations to the appellant as merely arising, outside the contract, in tort. Paragraph 9.4 of the Terms and Conditions expressly envisage the possibility that PwC would have a liability to pay damages as a result of breach of contract. It was not simply as a matter of "courtesy", as the Upper Tribunal suggested (see paragraph 22 of the UT Decision), that the appellant was provided with a copy of PwC's various reports. The appellant, for example, might well have wished, and would have been entitled, to check that PwC had correctly represented in its reports to the Engaging Institutions the information which the latter had received from the appellant's directors or senior management. Moreover the recognition of such a duty owed by PwC to the appellant can only be consistent with the appellant's contractual entitlement to require that PwC did indeed carry out, with reasonable care, the work, which the latter had contracted to undertake and for which the appellant had agreed to pay.

51. The reciprocity of the obligations respectively of PwC and the appellant is further emphasised by provisions such as paragraph 2 of the Terms and Conditions. For example, as quoted above, paragraph 2.1 provided that PwC's performance of the Services (as defined) was dependent upon "you" (i.e. in context, the appellant) providing PwC with such information and assistance as it might reasonably require from time to time. Under paragraph 10 of the Terms and Conditions the appellant agreed to indemnify PwC in respect of all liabilities which PwC might incur arising out of or in connection with the appellant's breach of any of the terms of the Contract. In such circumstances it seems to me inconceivable that the appellant did not have an implied correlative contractual right to insist upon due and proper performance by PwC of its obligations under the Contract.

52. That analysis is further reinforced by the termination and suspension provisions contained in paragraph 12 of the Terms and Conditions. For example, PwC had the right under paragraph 12.5 to terminate the Contract at any time if it did not receive payment from the appellant of any invoice within 30 days of the due date for payment. Under paragraph 12.6 either party had the right to terminate the contract on written notice with immediate effect, if the other party committed a material breach of the terms of the Contract. Once again, the fact that the appellant had a contractual right to terminate PwC's provision of the Services (as defined) in the event a breach by PwC of its obligations under the Contract, can only be consistent with a correlative right on the part of the appellant to require performance by PwC of the obligation to provide the Services (as defined) to the Engaging Institutions.

53. As has already been stated, it is only on "supplies" of goods and services "for consideration" that VAT is to be charged; see Article 2 of the PVD. The CJEU has

held that the requirement entails a relationship of reciprocal performance. Thus when considering what consideration has been obtained by a supplier for a supply of goods (or services) the determining factor is "the existence of an agreement for reciprocal performance, the payment received by the one being the real and effective counter-value for the goods or services furnished to the other"; see e.g. Case 34/99 *Primback Ltd v Customs and Excise Commissioners* [2001] 1 WLR 1693 at paragraph 25. On my analysis that requirement of reciprocal performance is satisfied in the present situation. The payment of PwC's fees by the appellant was the real and effective counter value for the service provided to the appellant, viz. the right which the appellant was conferred under the Contract to have PwC carry out the Services (as defined) and report to the Engaging Institutions.

54. I turn to consider the wider economic realities of the situation. Mr Thomas submitted that, even if the appellant did have a right to insist that PwC provided its report to the Engaging Institutions (or, as I would define it, the right to require PwC to render the Services (as defined) to the Engaging Institutions), the economic reality remained that this was a clear example of third party consideration; he submitted that the mere existence of such a right would not imply that the appellant received anything in return for its payment to PwC, the Supreme Court in *WHA(SC)* at [58] having made clear that the mere fact of footing the bill did not imply adding any value. I reject this submission.

55. Although, as Lord Hope said in *Redrow supra*, "Questions such as who benefits from the service or who is the consumer of it are not helpful", nonetheless, as part of the exercise of looking at the economic reality as to whether a supply was made to a taxpayer, it is relevant to see what, if any, value the taxpayer obtained from the alleged supply. In my judgment there can be no doubt, on the evidence as accepted by the FTT, that PwC's review, monitoring and (in the event) endorsement of the appellant's financial statements, projections and financial position, PwC's liaison with the appellant's directors and senior management and its assistance in securing the consequential continuing financial support of the Engaging Institutions, was intended to play, and did indeed play, a critical role in the maintenance of the appellant's licence with the CAA and therefore the survival of its business. I refer in this context to paragraphs 29 to 33 of Mr McMahon's witness statement. Put another way, the appellant's right to have PwC carry out this work provided real additional value to the appellant in its struggle for financial survival. The presentation to the Engaging Institutions of the appellant's own figures, without review or validation by an independent third party such as PwC, would have been highly unlikely in the circumstances to have satisfied the banks and other financial institutions, which were considering the possible continuation of credit facilities. To suggest, as the Upper Tribunal did, that the services provided by PwC were provided exclusively for the purposes of the business of the Engaging Institutions, and that the appellant received no value from PwC (see for example paragraph 24 of the UT Decision), in my judgment flies in the face of the economic and commercial reality of the situation. Contrary to the submissions of the respondents, the arrangements between the parties, affording as they did the undoubted consequential benefits to the appellant, clearly involved the supply of economically valuable services to the appellant by PwC as well as the provision of distinct services to the Engaging Institutions.

56. Mr Thomas also submitted that the same service could not be supplied to two different people and that the authorities referred to above were clear in stating that where a paying party has been held to be the recipient of supplies in a tripartite context, it has not been on the basis of receiving the same supply as someone else. He referred to the fact that in the UT Decision the question whether the same service could be supplied to two different people had assumed some importance, because the FTT had referred, at paragraph 26 of its judgment, as one of the legal propositions which it considered to be relevant to the appeal that:

> "vi. The fact that someone else also received a service as part of the same transaction as that received by the party making the deduction does not prevent deduction."

Moreover the FTT had gone on to say at paragraph 27:

> "As to proposition (vi) it might be said that Lord Hope, by saying that the third party also received 'a' service rather than 'the service' (at the end of the passage quoted above), meant that the deduction by Redrow only arose because it received a different service to that of the householder. We have no reason to think he did mean that and Chadwick LJ in *[LMUK (CA)*] [at para 38] and Neuberger LJ in *WHA [CA]* [at para 38] both accepted that the same service might be supplied to both the deducting party and the third party without that affecting the right to deduct."

Mr Thomas submitted that the Upper Tribunal had correctly held that, in so concluding, the FTT had erred in law. The Upper Tribunal stated at paragraphs 16 and 17:

> "Contrary to the First-tier Tribunal's interpretation recorded at paragraph 10 above [where the Upper Tribunal quoted the above passage from paragraph 27 of the FTT's Decision] we consider that Lord Hope was necessarily making a distinction between the service that Redrow received (the right) and the service that the householder received (estate agency services).
>
> We do not read *[WHA (CA)]* as supporting the First-tier Tribunal's interpretation recorded at paragraph 10 above that the same service can be supplied to two different people."

57. On my analysis of the Contract and the surrounding arrangements as set out above, this issue does not strictly arise for determination. I have concluded that, applying the analysis set out in *Redrow*, as confirmed in *LMUK (SC)*, there were two distinct supplies provided by PwC - and, so far as the appellant was concerned, the relevant supply of a service consisted of the right to have the Services (as defined) rendered by PwC to the Engaging Institutions. As Lord Millett stated in *Plantiflor* (at [50]): "a single course of conduct by one party may constitute two or more supplies to different

persons.” To similar effect is Lord Slynn’s statement in the same case at [32] "that one set of acts can constitute two different supplies of services." In other words I have concluded that there was indeed a distinctive supply and a distinctive service in the present case.

58. Mr Thomas also sought to argue that, insofar as factual analogies could be of any assistance in VAT cases, this case was analogous to that of the situation in *Telent plc v HMRC* (2007) VAT Decision 19967 as referred to by the Upper Tribunal at paragraph 18 of the UT Decision. Apart from not being binding authority on this court, in my view *Telent* provides no assistance in the determination of the present case. The facts in *Telent* were wholly different. The taxpayer in that case, a former Marconi company, had no contract with Clifford Chance, whose legal fees for advising certain creditor banks in connection with Marconi's financial restructuring Marconi was required to pay pursuant to its arrangements with those banks. Marconi had no contractual right as against Clifford Chance to have legal services rendered to the banks and Clifford Chance had no obligation to make supplies of any nature to Marconi. Clifford Chance had not rendered a VAT invoice to Marconi.

59. It follows that, irrespective of the issue as to whether the Upper Tribunal exceeded its appellate jurisdiction in overturning the FTT’s Decision, I conclude that the Upper Tribunal reached the wrong conclusion as a matter of law, in deciding that no separate supply of services had been made to the appellant; in so doing, the Upper Tribunal failed correctly to construe and analyse the Contract and the surrounding arrangements and to apply the law as set out in *Redrow, Plantiflor, LMUK(SC)* and *WHA (SC)* to the facts of the case.

Did the Upper Tribunal exceed its appellate jurisdiction?

60. In the circumstances, I regard it as something of a sterile exercise to explore as a separate question whether the UT Decision can be challenged on the mere ground that the Upper Tribunal exceeded the limits of its appellate jurisdiction. Accordingly I express my views very briefly on this issue.

61. Mr Hitchmough QC argued that the UT Decision was on proper analysis no more than a disagreement with the FTT Decision on issues of fact or factual evaluation which were within the sole remit of the FTT. He submitted that the Upper Tribunal:

    i) placed a meaning upon the Contract between the appellant, PwC and the Engaging Institutions which it could not bear;

    ii) having misconstrued the contract, in any event proceeded (erroneously) to ignore the Contract in determining whether the Services had been supplied to the appellant;

    iii) ignored key findings of fact which had been made by the FTT (notwithstanding the absence of any challenge by HMRC to those findings on *Edwards v Bairstow* principles);

    iv) overstepped the role of an appellate Tribunal by supplanting, without any adequate justification, the multi-factorial assessment of the FTT;

v) illegitimately made new findings of its own which were directly contradicted by the evidence;

vi) overstepped the role of an appellate tribunal by supplanting, without any adequate justification, the multi-factorial assessment of the evidence which had been made by the FTT with one of its own.

62. It was common ground that the Upper Tribunal was only entitled to reverse the decision of the FTT if the Upper Tribunal correctly identified an error of law in the decision of the FTT. As Mummery LJ noted in *Procter & Gamble UK v HMRC* [2009] EWCA Civ 407; [2009] STC 1990, at paragraph74:

> "the issue on an appeal from the tribunal is not whether the appellate body agrees with its conclusions. It is this: as a matter of law, was the tribunal entitled to reach its conclusions? **It is a misconception of the very nature of an appeal on a point of law to treat it, as too many appellants tend to do, as just another hearing of the self-same issue that was decided by the tribunal.**" (Emphasis added)

Further, as Jacob LJ also observed in *Procter & Gamble* at paragraph 9:

> "Often a statutory test will require a multi-factorial assessment based on a number of primary facts. Where that i[s] so, an appeal court (whether first or second) should be slow to interfere with that overall assessment – what is commonly called a value-judgment."

63. As the Court of Appeal recently held in *Pendragon PLC v HMRC* [2013] EWCA Civ 868 (in allowing an appeal against a Decision of the Upper Tribunal on the basis that the Upper Tribunal had exceeded its appellate jurisdiction), the fact that a differently constituted tribunal may have come to a different result on the same material is not sufficient to permit the Upper Tribunal to substitute its view. If the conclusion was open to the First-tier Tribunal on a proper understanding of the law, and was not reached as a result of any misdirection, the Upper Tribunal is not entitled to interfere; see per Lloyd LJ at paragraph 165.

64. However if the Upper Tribunal does correctly identify an error of law, then it is obliged to set aside the decision (unless the error is trivial or otherwise has no impact on the disposition of the case) and it is entitled to re-make the decision itself pursuant to section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 ("the TCEA 2007"). In exercising this power the Upper Tribunal is entitled to reach any decision which would have been open to the FTT and "may make such findings of fact as it considers appropriate" (section 12(4)(b) of the TCEA 2007). An appeal from a decision of the Upper Tribunal decision only lies on a point of law (see section 13(1) of the TCEA 2007).

65. The Upper Tribunal in the present case clearly took the view that the FTT had made a number of material errors of law in reaching its conclusion that services had been supplied to the appellant, including the following:

i) that the FTT had wrongly construed the Contract and therefore come to a wrong conclusion of law as to the effect of its provisions;

ii) that the FTT had wrongly analysed the contractual arrangements as amounting - as a matter of law - to the provision of services to the appellant; and

iii) that the FTT had incorrectly applied the principles set out in the relevant authorities to the determination of the question whether, as a matter of law, services had been supplied to the appellant.

In my view the Upper Tribunal was correct to regard the above matters as issues of law and certainly did not think that it was approaching the matter on a de novo basis as Mr Hitchmough suggested.

66. Speaking for myself I think that, with the benefit of hindsight and the subsequent decisions in *LMUK (CJEU), LMUK(SC), WHA (SC)* it is arguable that the propositions of law set out in paragraphs 26(i), (iv) and (v) of the FTT's judgment were not accurately, or comprehensively, stated and could have led the FTT to approach the relevant issue (viz. whether there had been a supply of services to the appellant) in too loose and generous a fashion to the taxpayer. The propositions also, perhaps not surprisingly, omit any reference to the necessity of looking at the economic reality of the situation. I also consider that paragraph 27 seems to miss the point that, as *Redrow* makes clear, the Court does have to find a distinctive supply to the taxpayer, even though the same conduct on the part of the service provider may give rise to the provision of two different or distinct services. I also take the view that the FTT Decision can be criticised for failing to analyse what, if any, rights the Contract gave to the appellant and what, if any, obligations PwC had to the appellant thereunder.

67. Accordingly I would not have set aside the UT Decision simply on the grounds that the Upper Tribunal exceeded its appellate jurisdiction. In the event I have concluded that the appellant's appeal should be allowed on the ground that the UT Decision is wrong as a matter of law.

Apportionment

68. The submission that there ought to be some apportionment of the VAT payable on the consideration to reflect the extent to which PwC supplied services to the appellant (on the one hand) and the Engaging Institutions (on the other) was only faintly argued by Mr Thomas. In circumstances where there was no question as to the sufficiency of the consideration paid by the appellant to PwC, and no contractual apportionment of the consideration as between the two services, it is difficult, if not impossible, to understand the basis upon which the respondents contend that such an apportionment should take place. Mr Thomas was not able to point to any statutory basis or to any relevant authority to support his argument that, in circumstances such as the present, where no monetary consideration has been paid by one party to a contract, and “a single course of conduct by one party" (i.e. the work carried out by PwC) constitutes "two or more supplies to different persons", as per Lord Millett in *Plantiflor supra*, there should nonetheless be some notional apportionment. Accordingly I reject the submission that the case should be sent back to the FTT for consideration of the question of apportionment.

Disposition

69. Accordingly, I would allow the appellant's appeal against the FTT Decision and declare that the appellant is entitled to deduct the input tax in question on the payments made to PwC. However since Moore-Bick and Vos LJJ take a different view, the appeal will be dismissed.

Lord Justice Vos:

70. I am grateful to both Gloster LJ for her careful exposition of the facts and the law, and to Moore-Bick LJ, whose judgment I have seen in draft. I have adopted many of Gloster LJ's abbreviations, but regret to say that I am unable to agree with her conclusions.

71. As the Upper Tribunal said in paragraph 16 of its decision, and as both the appellant, Airtours Holidays Transport ("Airtours") and the respondent Commissioners ("HMRC") submit, the appropriate test to determine whether there is a supply of services to a taxable person for the purposes of section 24(1) of VATA 1994 is to ask whether something was "being done for him [the taxable person] for which, in the course or furtherance of a business carried on by him, he has had to pay a consideration which has attracted value added tax" (see Lord Hope at page 412H in *Redrow (HL)* [1999] 1 W.L.R 408).

72. The FTT did not set out this test, as such, even though it listed 7 propositions taken from the *Redrow (HL)* decision in paragraph 26 of its decision (see paragraph 23 of Gloster LJ's judgment). This is not a matter of criticism since the decisions that are relied upon by HMRC in *LMUK (CJEU)*, *LMUK (SC)* and *WHA (SC)* had not been decided when the FTT reached its decision. But HMRC nonetheless criticise the accuracy of 4 of those 7 propositions in the light of these subsequent cases. I shall confine my comments to those that have, I think, been refined or subjected to a gloss by subsequent authority.

73. The first of the FTT's propositions suggested that there was no need to define the service that was supplied to the taxable person (see Lord Hope at page 412G in *Redrow (HL)*). Yet, *LMUK (CJEU)* has now made it clear at paragraphs 39-40 that it was a fundamental criterion as regards the identification of the person to whom services were supplied to look at the economic realities of the transaction, and for that purpose to determine the nature of the transaction carried out.

74. The fourth proposition adopted by the FTT was derived from Lord Hope's test that I have set out in paragraph 3 above, but omitted the necessary link of reciprocity that Lord Hope mentioned between the consideration paid and the service supplied.

75. The fifth proposition relied upon by the FTT was taken directly from Lord Millett's speech in *Redrow (HL)* at page 418F-G to the effect that one should ask whether the taxable person obtained "anything – anything at all – used or to be used for the purposes of his business in return for" the payment. Lord Hope (at paragraph 110) in *LMUK (SC)* thought that Lord Millett had gone too far in this statement, and Lord Walker thought his statement might be capable of being misunderstood (paragraph 117). For my part, I am not sure that Lord Millett was doing more than emphasising that, provided some service is received by the taxable person in exchange for the

consideration paid, that will suffice. As Lord Reed said at paragraph 66 in *LMUK (SC)*, that question should be understood as being concerned with a realistic appreciation of the transaction in question.

76. Finally, HMRC criticise the FTT's 7th legal proposition as including the question as to "who pays" as a relevant enquiry. The FTT cited (in paragraph 40) Neuberger LJ's dictum in *WHA (CA)* referring to the dichotomy of neither the person receiving the services nor the paying party being able to reclaim the VAT, because neither of them paid and received the services. HMRC pointed out that Lord Reed had doubted the dictum in *WHA (SC)*, because deductibility of the VAT depended on the proper analysis of the transaction.

77. I have no doubt that this debate demonstrates that the most important elements of the analysis are to ascertain, by reference to the economic realities, the nature of the transaction and what, if anything, the taxable person is receiving in exchange for the consideration he has paid.

78. Once that is clear, it seems to me to be important to ascertain how the FTT approached the problem before considering whether it made an error of law as the Upper Tribunal decided it had. The mere recitation of passages from the most recent authoritative decision at the time (*Redrow(HL)*) does not seem to me to have been a significant error of itself, even if the legal formulations have since changed, unless the FTT in practice applied the wrong test to the facts of the case.

79. The core of the FTT decision is in paragraphs 29-37. It said first that the issue was whether Airtours received a supply from PwC, and it thought it had. It then relied on the following factors to support that conclusion:-

    i) That Airtours authorised PwC to do the work;

    ii) That Airtours promised to pay PwC for the work, and paid a £200,000 retainer;

    iii) That Airtours was a party to the contract, which provided that Airtours would receive a copy of PwC's report;

    iv) That Airtours was under no legal obligation to provide such a review to the Banks;

    v) That Airtours needed for practical reasons a review that it could place before the Banks, and that those practicalities gave rise to Airtours' authorisation of the review with the Banks involved in the process;

    vi) That Airtours authorised and secured the review for its own (business) purposes;

    vii) That Airtours' need for PwC's work was confirmed by the evidence of Mr McMahon to the effect that Airtours was keen to have the review to confirm its actions were reasonable, and that Airtours had played a role in deciding who was to be appointed.

80. Before considering whether any of these factors were inappropriately taken into account, it is important, I think, to record that the applicable test has always been

regarded as an objective one. The CJEU said in *HMRC v. Newey (Case C-653/11)* [2013] STC 2432 at paragraph 41 that "the term supply of services is … objective in nature and applies without regard to the purpose or results of the transactions concerned and without [it] being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person". As Mr Thomas put the matter, the customers in *Redrow (HL)* 'needed' the estate agents to sell their houses, but they were still not the recipients of the supply of services. But, as he also pointed out, in *Redrow (HL)*, it was clear from Lord Hope's speech (page 410) and Lord Millett's speech (page 418) that what was relevant was not that the taxpayer benefited from the agents' services, but that it had chosen the agents and instructed them.

81. Against that background, it seems to me that the main features that governed the FTT's decision were its view that Airtours was genuinely involved in selecting PwC and authorising it to do the work, that Airtours was to receive the copy report, that Airtours was under no legal obligation to provide such a review to the banks, and that Airtours needed the review for its own purposes.

82. The Upper Tribunal disagreed that these features really existed as a matter of the construction of the contract, and that they were relevant to the correct legal test. Thus it is necessary first, as the correct starting point, to consider the contract. The UT did not wish to construe the contract in a "legalistic fashion", but it seems to me that to know what it means it is necessary first to construe it correctly. That does not mean that the correct test is answered solely by reference to the correct construction of the contract, but it is hard to know what the economic realities are without knowing what the parties agreed.

83. In my judgment, the contract provides quite clearly for the services of PwC to be supplied to the Banks (clause 1). It is true that some duty of care (whether in contract as well as tort does not seem to me to be central to the debate) is owed to Airtours who are paying the bill (clause 10), but condition 9(1) does, it seems to me, limit the express duty to use reasonable care to the provision of the defined "Services" that are to be supplied to the Banks. Clauses 4, 6, 7 and 12 make clear that the work to be undertaken by PwC is for the Banks, not primarily for Airtours. I agree with Moore-Bick LJ's analysis at paragraphs [93]-[98] of his judgment.

84. Once that is clear, it seems to me that the FTT was wrong to use the evidence of Airtours' "need" for the report to override the clear meaning of the contract. Of course, Airtours "needed" the report so that it could be funded, so that it could retain its CAA licence, and so that it could stay in business. But none of these, in my judgment, assist in answering the correct legal question here. Moreover, I agree with HMRC that the fact that Airtours was under no antecedent legal obligation to obtain PwC's services tends to point in favour of Airtours not having received the supply of PwC's services rather than the reverse as the FTT held.

85. For these reasons, it seems to me that the FTT did fall into legal error. It did not state the correct question clearly and unequivocally and it did not consider that question objectively as it should have done, free of considerations as to the results that Airtours aimed to achieve, its subjective intentions, what it "wanted" or "needed", and the benefit it received.

86. Thus I would conclude that the Upper Tribunal was at liberty to consider the correct question *de novo,* as it in fact did. This court can, therefore, only reverse the decision of the Upper Tribunal if we determine that it fell into legal error.

87. As it seems to me, the Upper Tribunal stated the correct legal question as I have described it above (see paragraph 19). The Upper Tribunal then construed the contract as, in substance, a contract for PwC to do something that the Banks wanted for the purposes of their businesses in order to decide whether to support Airtours in the future (paragraph 20 and clause 12). It decided that Airtours was a party not to obtain any service from PwC for use in its business, but to pay the bill; it only received a copy of the report as a courtesy. The Upper Tribunal decided that everything Airtours gained from the contract could only be ascertained with the benefit of hindsight. It was as likely that PwC might have advised the Banks to pull the rug. The Banks did not provide anything (even the copy report) to be used in Airtours' own business, so that the substance and economic reality was that PwC was supplying its services to the Banks in exchange for Airtours' payments. It was a case of PwC obtaining third party consideration as envisaged by article 73 of the Principal VAT Directive.

88. In my judgment, it is not necessary that this court agrees with every supposed error of law in the FTT's decision identified by the Upper Tribunal for the latter's decision to stand. If the Upper Tribunal were right to find that the FTT made a material error of law, it was for the Upper Tribunal to re-make the decision and it does not matter whether any of the other criticisms it made of the FTT were well-founded. What is clear, in my judgment, is that the Upper Tribunal applied the right test, and reached sustainable conclusions. I do not think that the Upper Tribunal fell into legal error. It is interesting to note that Mr Hitchmough did not really suggest that it did. His point was that the Upper Tribunal had been wrong to think that the FTT had fallen into such error. In that respect I think he was wrong for the reasons I have given.

89. In the light of my conclusion, there is no need to deal with the question of apportionment raised by HMRC in the event that they were unsuccessful on their main points. I would comment, however, that I find it hard to see how any apportionment can be appropriate once it is determined that the taxable person received the supplier's services in exchange for the consideration. It is common ground that the sufficiency of the consideration is irrelevant. An apportionment might be appropriate if it could be shown that some part of the services was not provided to the taxable person in exchange for the consideration, but insofar as the services were so provided, that seems to me to be an end of the exercise. For my part, I cannot see how this position can be affected by the fact that the same or different services arising from the same contract might also be provided at the same time to another person. That said, since the matter was not fully argued, I would prefer to leave it to be decided in a case where it arises on the facts.

90. For the reasons I have given, I would dismiss the appeal.

Lord Justice Moore-Bick :

91. This appeal raises a narrow point, but one of some difficulty on which it is possible to take different views. There is little or no dispute about the principles of law applicable to this case or about the primary facts. They have been fully set out by Gloster L.J.

and I need not repeat them. For convenience I shall refer to the appellant as "the Group", the various financial institutions from whom they were seeking renewed financial support as "the banks" and PriceWaterhouseCoopers as "PwC".

92. As is apparent from the decision of the Court of Justice of the European Union in *HMRC v Loyalty Management UK Ltd* (Joined Cases C-53/09 and C-55/09) [2010] STC 2651, the critical question is whether, as a matter of economic reality, "PwC" provided a service to the Group or to the banks alone and in order to answer that question it is necessary to start by considering the nature of the transaction under which the service was provided. The need for there to be some reciprocity between the payment of consideration and the supply of the service means that, put simply, the critical question in relation to the present transaction is whether PwC entered into an obligation to the Group to provide the banks with a report on its financial position. It is on this question that the Upper Tribunal differed from the First-tier Tribunal and on which I regret to find myself differing from Gloster L.J.

93. The terms on which PwC were engaged to produce a report on the Group's financial affairs are set out in the letter of engagement. The letter was addressed to "the Engaging Institutions" and opened with a paragraph which expressly confirmed that PwC had been retained by the institutions identified in what must have been intended as a reference to paragraph 4 to provide the services to which the letter referred. In paragraph 4 the "Engaging Institutions" were identified as those institutions which had expressly agreed to the letter of engagement and a proforma signature page was provided for that purpose. A separate signature page with a different form of wording was provided for the use of the Group.

94. Paragraph 4 of the letter of engagement provided that the reports and letters produced by PwC pursuant to their instructions were for the sole use of the banks, to whom PwC was content to assume a duty of care. However, the letter contains no corresponding assumption of liability to the Group. Paragraph 8 of the letter of engagement provided that information and advice produced by PwC was to be addressed to the banks with a copy to the directors of the Group, but even the latter requirement was qualified by the exclusion of any part of the report prepared exclusively or confidentially for the banks. The scope of the services that PwC was to provide is set out in paragraphs 12-18 of the letter, but those paragraphs contain nothing which suggests that PwC were undertaking any obligation to the Group. However, by paragraph 22 the Group undertook responsibility for PwC's fees, expenses and disbursements incurred in carrying out their work.

95. It was, of course, necessary for the Group to be a party to the contract contained in the letter of engagement in order for it to incur a liability to pay PwC's fees, but it does not follow that PwC incurred any liability to the Group as a result. Viewed in isolation the letter of engagement contains no very obvious indication that they did so. The nearest one gets to it is in paragraph 8, which could be taken as imposing an obligation on PwC in favour of the Group to provide it with a copy of the report. However, since that paragraph is concerned only with the manner in which the information is to be provided, I do not think that it was intended to create an obligation of that kind. Paragraph 10 contains an agreement that the aggregate limit of PwC's liability to the Group, the banks and third parties shall be as set out in its terms and conditions, but its purpose is simply to impose an overall limit on PwC's liability.

Since PwC could incur a liability in negligence to the Group, it does not of itself support the conclusion that they were intended to incur a contractual obligation to it.

96. The argument that the letter of engagement creates an obligation in favour of the Group rests almost entirely on paragraph 26 and PwC's terms and conditions which are thereby incorporated into the contract. The second introductory paragraph provides that the expression "you" refers to the entity on whose behalf the letter of engagement was acknowledged and accepted. The First-tier Tribunal considered that this provision could be used to construe the letter of engagement and on that basis held that paragraphs 6 (". . . you have requested that we [PwC] assist in providing information to the institutions . . .") and 12 ("You have requested us to undertake a review of the Group . . .") were to be construed as meaning that the Group, as well as the banks, had commissioned the report. From there it was but a short step to hold that PwC were providing services to the Group. In my view, however, the terms and conditions cannot be used in that way. They are a standard form document of an essentially self-contained nature and the introductory paragraph is intended to be read as part of them. It is not intended to define terms used in the letter of engagement, which have to be construed in the context of that letter. Where, as in this case, standard terms are incorporated into a bespoke document, the intention of the parties as collected from the latter must govern the effect of the former. Any other course fails to respect the parties' freedom of contract and give effect to their intentions. In other words the controlling instrument is the letter of engagement and the terms and conditions must be applied in a way which is consistent with it.

97. The First-tier Tribunal also drew support for its conclusion from paragraph 26(i) of the letter of engagement which provides that the word "you" in clause 10 of the terms and conditions referred to the Group rather than the banks. That, it considered, tended to point to the conclusion that wherever else the word "you" appeared it was intended to include the Group. In my view that is inconsistent with the whole tenor and thrust of the letter of engagement. The reason for including paragraph 26(i) was to avoid any inconsistency between the undertaking by the Group to indemnify PwC against third party claims and the provisions of clause 10 which covers much the same ground, but in which the party giving the indemnity is the client (i.e. "you, the banks"). It is not permissible, in my view, to draw from paragraph 26(i) any inference about the meaning of the word "you" in the letter of engagement. Nor, in my view, can any comfort be drawn from clause 9.1 of the terms and conditions by which PwC undertook to use reasonable skill and care in the provision of the services, since that begs the question about the identity of the persons to whom the services were to be provided. Given the circumstances in which PwC came to be instructed it is likely, to say the least, that they would owe a duty of care to the Group in accordance with ordinary principles of law, but even if they undertook a contractual obligation to exercise reasonable skill and care, it does not follow that the services were to be provided to them.

98. The Upper Tribunal deprecated a linguistic analysis of the letter of engagement and preferred to consider the substance of the matter. In my view that was the right approach, because, however described, it involved reading the document as a whole, together with the terms and conditions, in a businesslike manner and seeking to identify what legal relationships the parties intended to create. In my view when read in that way it is possible to see that it contained a contract under which PwC

undertook an obligation to the banks to provide certain services for which the Group agreed to pay. The language of the letter of engagement is not in my view consistent with the conclusion that PwC undertook an obligation to the Group to provide the services to the banks. The Group's participation in the contract was limited to incurring an obligation to pay for the services provided by PwC to the banks and to indemnify PwC against any liabilities they might incur in carrying out their task.

99. Once it is appreciated that this was the nature of the transaction, it is apparent that the First-tier Tribunal made an error of law and that the Upper Tribunal was entitled to re-make the decision. The question, as Vos L.J. has pointed out, is not whether the Group needed the report to be produced or whether it obtained a benefit as a result of its production, but whether in producing it PwC were providing a service to the Group for which the Group paid. In my view the Upper Tribunal correctly answered that question in the negative.

100. In those circumstances no question of apportionment arises. However, I respectfully agree with Vos L.J. that it is difficult to identify any principled basis on which an apportionment could be made. Once it is established that taxable services have been supplied and paid for, it is not open to the court to enquire into the adequacy of the consideration.

101. For the reasons I have given I too would dismiss the appeal.