[2020] UKUT 322 (TCC)

Appeal number: UT/2019/0095 (V)

VAT – Input tax recovery – whether Appellant making a supply of insurance services or of the services of an insurance intermediary – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

SAFESTORE LIMITED **Appellant**

-and-

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

TRIBUNAL: **MRS JUSTICE BACON**
JUDGE JONATHAN RICHARDS

Sitting in public by way of remote video hearing treated as taking place at The Royal Courts of Justice, Strand, London on 19 and 20 October 2020

Roderick Cordara QC instructed by Roly Pipe & Partners for the Appellant

Hui Ling McCarthy QC, instructed by the General Counsel and Solicitor for Her Majesty's Revenue & Customs, for the Respondents

DECISION

Introduction

1. The appellant company ("Safestore") appeals against a decision (the "Decision") of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 26 April 2019 that determined certain matters of principle. The hearing before us was a "fully remote" video hearing and neither party applied for the hearing to take a different form.

2. Safestore carries on a business that involves the provision of storage facilities to both business and non-business "domestic" customers. Safestore required its domestic customers to insure their goods under a policy that was provided by Assay Insurance Services Limited ("Assay"), an affiliated company incorporated in Guernsey. Accordingly, by means of a process that we will describe in more detail later in this decision, at the same time as a domestic customer entered into an agreement with Safestore for the storage of goods, it also obtained cover under an insurance policy written by Assay.

3. Safestore argues that the arrangements resulted in it making, for VAT purposes, exempt supplies of "insurance intermediary" services to Assay. Accordingly, because Assay belongs outside a Member State for VAT purposes, under the provisions of s26(2)(c) of the Value Added Tax Act 1994 ("VATA") when read together with Articles 3 and 4 of the Value Added Tax (Input Tax) (Specified Supplies) Order 1999 (the "1999 Order"), Safestore claims that it is entitled to recover input tax associated with the supplies it makes to Assay even though they are exempt in nature.

4. HMRC adopt a different analysis. They argue that Safestore is supplying insurance services to its domestic customers, and not insurance intermediary services to Assay. Alternatively, they argue that, to the extent that Safestore is supplying intermediary services to Assay, Assay receives those services in connection with a fixed establishment located in the UK so that Safestore is not entitled to the benefit of the 1999 Order. On either analysis, HMRC argue that Safestore is making exempt supplies which restrict its input tax recovery.

5. HMRC made decisions that (i) refused Safestore VAT repayments and (ii) assessed Safestore in respect of overclaimed input tax. Safestore appealed against both of those decisions to the FTT, both on the substance of its entitlement to input tax and on the basis that HMRC's assessment in respect of overclaimed input tax was out of time.

Relevant provisions of VATA and the Principal VAT Directive

Legislation relating to "insurance transactions" and "intermediary services"

6. Article 135 of Council Directive 2006/112 (the "Principal VAT Directive") provides that Member States are required to exempt the following transactions from VAT:

> (a) insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents…

7. That provision has been transposed into UK domestic law by a combination of s31 of VATA (which specifies, by reference to Schedule 9 of VATA, the supplies of goods or services that are to be exempt from VAT) and Group 2 of Schedule 9 which sets out the scope of the exemptions relating to insurance. Group 2 of Schedule 9 of VATA provides, so far as material, for the following services to be exempt from VAT:

> Item No.
>
> 1. Insurance and reinsurance transactions.
>
> 4. The provision by an insurance broker or insurance agent of any of the services of an insurance intermediary in a case in which those services-
>
> > (a) are related (whether or not a contract of insurance or reinsurance is finally concluded) to an insurance transaction or a reinsurance transaction; and
> >
> > (b) are provided by that broker or agent in the course of his acting in an intermediary capacity.
>
> Notes:
>
> (1) For the purposes of item 4 services are services of an insurance intermediary if they fall within any of the following paragraphs—
>
> > (a) the bringing together, with a view to the insurance or reinsurance of risks, of— (i) persons who are or may be seeking insurance or reinsurance, and (ii) persons who provide insurance or reinsurance;
> >
> > (b) the carrying out of work preparatory to the conclusion of contracts of insurance or reinsurance;
> >
> > (c) the provision of assistance in the administration and performance of such contracts, including the handling of claims;
> >
> > (d) the collection of premiums.
>
> (2) For the purposes of item 4 an insurance broker or insurance agent is acting 'in an intermediary capacity' wherever he is acting as an intermediary, or one of the intermediaries, between—
>
> > (a) a person who provides insurance or reinsurance, and
> >
> > (b) a person who is or may be seeking insurance or reinsurance or is an insured person.[1]

Legislation imposing time limits for the making of assessments

8. Section 73 of VATA permits HMRC to make assessments in respect of underpaid VAT. Sections 73 and 77 of VATA contain various time limits within which such

[1] Notes (3) to (5) contained additional requirements that must be satisfied for insurance intermediary services that are supplied in connection with taxable supplies of goods or services to qualify for exemption. Those requirements are relevant in the circumstances of this appeal. However the parties are agreed that the additional requirements are met and, accordingly, the full text of these provisions is not reproduced.

assessments must be made, but the only time limit relevant for the purposes of this appeal is that set out in the following provisions of s73(6) of VATA:

> (6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—
>
> …
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,
>
> but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.

The Decision of the FTT and the grounds of appeal against it

9. In the remainder of this decision, references to numbers in square brackets are, unless we specify otherwise, to paragraphs of the Decision, and references to Safestore's "customers" are to its domestic customers, with whom these proceedings are concerned.

Key background facts

10. We will not refer to all of the FTT's findings of primary fact, none of which is challenged in the appeal to this Tribunal. However, the following findings of the FTT will put into the context the discussion that appears later in this decision.

11. Safestore was incorporated in England and Wales on 19 July 2005. It was registered for VAT at all material times. It provides self-storage facilities at a number of locations in the United Kingdom and Paris, though only the UK facilities are relevant to this appeal. Safestore is a member of a corporate group headed by Safestore Holdings plc. Assay and Safestore are "sister" companies in the group structure ([18] to [20]).

12. Assay was incorporated in Guernsey in 2002 and has its registered office in Guernsey. It is regulated by the Guernsey Financial Services Commission. It acts as the Safestore group's "captive insurance company" ([22] to [23]). It is based at business premises in Guernsey owned by Marsh, which is part of a well-known and large global insurance-broking business. Both Assay and Safestore have obtained advice and assistance on insurance matters from Marsh and an affiliated company in the UK ("Marsh UK") ([37] and [72]).

13. During the relevant period customers were offered insurance cover by Safestore's staff at its depots as part of the process whereby they entered into an agreement to use Safestore's storage facilities. Safestore collected the premiums from the customers and remitted amounts due to Assay quarterly in arrears. The names of the customers who Assay insured were kept by Safestore, with Assay having a right to obtain that information if it required ([38]).

14. Safestore and Assay had an agreement, established by a course of dealing though not reduced to writing, that Safestore would retain 30% of the net premium paid by a customer for an insurance policy and would remit the 70% balance to Assay subject to an allowance for Insurance Premium Tax which Assay was liable to pay ([38] and [148]).

The issues that were before the FTT

15. At [3] of the Decision, the FTT recorded the parties' agreed position that it should determine four issues of principle:

> (1) Issue 1 – whether Safestore was, as HMRC argued, making exempt supplies of insurance to its domestic customers under Item 1 of Group 2 to Schedule 9 of VATA ("Item 1 supplies").
>
> (2) Issue 2 – whether Safestore was, as it argued, making supplies of insurance intermediary services under Item 4 of Group 2 to Schedule 9 of VAT ("Item 4 supplies") to Assay.
>
> (3) Issue 3 – if Safestore was making Item 4 supplies to Assay, whether those supplies were made in the UK (as HMRC argued) or in Guernsey (as Safestore argued).
>
> (4) Issue 4 – whether HMRC's assessment was made out of time (the "Time-bar Issue")

16. At [4], the FTT recorded, uncontroversially, that Issue 3 arose only if Safestore was correct on Issue 2. It also observed that Safestore could not be making *both* Item 1 supplies and Item 4 supplies. In his written skeleton argument Mr Cordara QC, for Safestore, suggested that this was incorrect. However, he said at the hearing that he was not pursuing that point. It follows that Issues 1 and 2 can be regarded as a single issue (which we will term the "Insurance Issue") namely whether Safestore was supplying insurance services to its customers, or insurance intermediary services to Assay, with those possibilities being mutually exclusive.

17. The FTT decided the Insurance Issue in favour of HMRC and, in consequence of the logic outlined at [16] above, concluded that it did not need to decide Issue 3. It also decided the Time-bar Issue in HMRC's favour. With the permission of the FTT, Safestore appeals against the FTT's determination of both the Insurance Issue and the Time-bar Issue.

THE APPEAL ON THE INSURANCE ISSUE

The FTT's reasoning on the Insurance Issue

18. The Decision contains an analysis of the following documents that were relevant to the provision of insurance to Safestore's customers:

> (1) A document entitled "Customer Goods Policy" issued each year by Assay and signed by Assay, but not by Safestore ([60]). The FTT concluded ([148]) that this represented an "open cover" or "master policy" between Assay and Safestore, although the Customer Goods Policy described itself

as an agreement between Assay and the "Insured" (defined as "any customer of the Intermediary to whom a Confirmation of Insurance Cover is provided") with the "Intermediary" being defined as Safestore Holdings plc and its subsidiaries. The Customer Goods Policy set out limits to Assay's total liability being, in the example that the FTT quoted, £80m in total and £2.5m in relation to any one of Safestore's premises with the exception of Battersea and Clift House Road, Bristol to which different limits applied: [61].

(2) A Licence Agreement, entered into between Safestore and each customer. Each Licence Agreement obliged a customer to take out a "Safestore Self Storage Insurance Policy" in respect of goods stored at Safestore.

(3) An "Application Form" by which a customer confirmed a wish to obtain insurance (as required by the Licence Agreement), gave information about the goods being stored with Safestore and gave certain confirmations. The Application Form made no reference to Assay although it cross-referred to the Confirmation of Insurance Cover (referred to below) which mentioned "Underwriters", without naming Assay, and to the Key Facts document which, as noted below, referred specifically to Assay.

(4) A "Key Facts" document which was used until August 2011 and set out the key terms of the insurance cover from which a customer benefited. After August 2011, the "Key Facts" document was no longer issued and, instead, details of the insurance cover were set out in the Licence Agreement: [57]. The Key Facts document stated:

> **Insurer**
>
> Our [i.e. Safestore's] customers are covered by an insurance policy arranged by Safestore Ltd with Assay Insurance Services Limited. All claims are handled on behalf of Safestore Limited by Royal and Sun Alliance plc.

(5) The Confirmation of Insurance Cover contained space for details to be filled in such as the name of Safestore's customer, the period of cover, the premium and the sum insured. It also largely repeated, albeit in a different order and with some minor variations the terms contained in the Customer Goods Policy: [59]. The FTT concluded that Safestore issued the Confirmation of Insurance Cover as agent for Assay: [143], [148] and [154].

(6) Reinsurance agreements were entered into between Assay and Royal & Sun Alliance pursuant to which Assay reinsured its obligations. The FTT found that, under those agreements, Assay reinsured liabilities arising under the Customer Goods Policy: [139].

19. The FTT heard evidence and submissions relating to the regulatory environment. It was common ground that Safestore's business involved it acting as an "insurance intermediary" for the purposes of the EU Insurance Mediation Directive. Accordingly, until 2009, Safestore was an "authorised person" under the Financial Services and Markets Act 2000 ("FSMA").

20. However, following a consultation in 2009, an exemption targeted at storage companies was introduced, by way of an amendment to the Financial Services and Markets Act 2000 (Exemption) Order 2001. That exemption (the "Storage Cover Exemption") provided for a "storage firm" such as Safestore to benefit from an exemption in the following circumstances:

> Where a storage firm ("S") –
>
> > (i) holds a policy of insurance which insures S in respect of loss or damage to goods which S stores or for which S arranges storage, and
> >
> > (ii) makes available to a customer rights under that policy to enable the customer to claim directly against the insurer in respect of loss or damage to those goods.

21. After some discussions with Marsh, Safestore decided that it would seek to rely on the Storage Cover Exemption and accordingly cancelled its FSMA authorisation with effect from 6 April 2009.

22. Before the FTT, HMRC did not accept that Safestore met the requirements of the Storage Cover Exemption. Mr Kendall, one of HMRC's witnesses, prepared a report concluding that the Customer Goods Policy did not set out a standalone policy of insurance as it did not contain any provisions concerning the premium to be paid (see the extract from Mr Kendall's report, set out at [141] of the Decision). If Mr Kendall's analysis was correct, then Safestore did not "hold" a policy of insurance for the purposes for the purposes of limb (i) of the Storage Cover Exemption. Instead, on Mr Kendall's analysis, Safestore's business involved it intermediating in the formation of multiple contracts of insurance between its customers and Assay that fell outside the terms of the Storage Cover Exemption.

23. The suggestion that the Storage Cover Exemption did not apply had potentially serious consequences. From 6 April 2009, Safestore was no longer an authorised person for the purposes of FSMA; accordingly, if the Storage Cover Exemption did not apply, Safestore would be conducting its business in breach of the requirements imposed by FSMA. Unsurprisingly, therefore, Safestore's case before the FTT was that the requirements of the Storage Cover Exemption were met. In support of that case, Mr Beavers, Safestore's Head of Retail Services, gave evidence that his commercial understanding was that Safestore and Assay had structured their arrangements in order to benefit from the Storage Cover Exemption. Through its counsel, Mr Purves, Safestore also made submissions that, as a matter of law, the requirements of the Storage Cover Exemption were met. The FTT accepted that case: [143] to [148].

24. The FTT's central conclusion on the effect of the above arrangements was set out in the following terms:

> 148. In my view, Mr Purves' analysis is correct. The Customer Goods Policy was a policy of insurance between Safestore and Assay in respect of which the policyholder was Safestore. Safestore was not, however, itself an insured party. The insured parties were Safestore's customers. The Customer Goods Policy was an open cover or master policy which

> contained the terms, agreed between Safestore and Assay, on which insurance cover would be extended to Safestore's customers, when they completed the Application Form, paid the premium and received the Confirmation. It is clear from the evidence that there was a collateral unwritten agreement between Assay and Safestore that Safestore should remit 70% of the premiums (which were determined by Assay but on the advice of Marsh, with input from Marsh UK and Safestore) collected from customers to Assay. Safestore kept a record of the names of the customers who became "insured" under the Customer Goods Policy. There is no requirement that the premium agreed between the insurer and the policyholder must be in writing. Indeed, most of the arrangements between Assay and Safestore were informal and were not reduced to writing.

25. At [150] and [151], the FTT decided that, even though the Customer Goods Policy described itself as an agreement made between Assay and Safestore's customer, it nevertheless took effect as an agreement between Assay and Safestore which set out the terms on which Assay would offer insurance to Safestore's customers:

> 151. This [i.e. the Customer Goods Policy], however, represents the agreement between Assay and Safestore as to the insurance terms which would be extended to Safestore's customers when those customers applied for insurance under the Customer Goods Policy. Moreover, I do not think that the fact that the Customer Goods Policy, rather self-consciously, labels Safestore Holdings Plc and its subsidiary companies (which would include Safestore) as "the Intermediary" affects the position. The VAT analysis must proceed on an objective view of the facts and labels, as *Wheels* demonstrates in relation to the description of the insurance policy, are not determinative.

26. Having made those findings as to the effect of the arrangements, the FTT concluded that they resulted in Safestore making a supply of an insurance transaction within Item 1 of Group 2 of Schedule 9, particularly having regard to the judgment of the Court of Justice of the European Union ("CJEU") in *Card Protection Plan v Customs and Excise Commissioners* (Case C-349/96) [1999] STC 270 ("*CPP*"). The FTT's overall conclusion on this point is contained in the following paragraph of the Decision:

> 160. In my judgment, therefore, Safestore arranged a master or open cover policy – the [Customer] Goods Policy – with Assay. Safestore has procured for its customers the insurance services specified in the Customer Goods Policy. That is a supply of insurance within Item 1 Group 2 Schedule 9 VATA under the extended meaning of insurance transactions explained in *CPP*. Therefore, the appeal against the First Decision and (as regards the Item 1 issue) against the Assessment, must, in principle, be dismissed ...

Insurance Issue – Discussion

27. The FTT based much of its analysis of the Insurance Issue on the decision of the CJEU in *CPP* and we will also start with a consideration of that authority.

28. The CJEU, in its judgment, summarised the facts before it as follows, and it is immediately clear that those facts have some similarity to those arising in this appeal:

> 7. CPP offers holders of credit cards, on payment of a certain sum, a plan intended to protect them against financial loss and inconvenience resulting from the loss or theft of their cards or of certain other items such as car keys, passports and insurance documents.
>
> 8. In so far as this card protection plan (the plan) provides for indemnification of the cardholder against financial loss in the event of loss or theft, CPP obtains block cover from an insurance company. The block policy was arranged by an insurance broker instructed by CPP. At the material time the insurer was Continental Assurance Co of London (Continental). It is CPP's customers who are mentioned in the policy as the assured. When a cardholder becomes a customer of CPP, his name is added to the schedule of the assured covered by that policy. CPP pays premiums to the insurance company in advance at the beginning of the policy year; any necessary adjustments are made at the end of the year, according to the number of customers who have joined or left the plan.

29. In that factual scenario, the House of Lords referred to the CJEU the question whether CPP was making exempt supplies of "insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents" for the purposes of what is now Article 135 of the Principal VAT Directive.

30. The core of the CJEU's reasoning is contained in the following passage of its judgment:

> 20… CPP acknowledges that it merely promised its customers to do what was necessary for insurance to be provided to them by a third party, and that it did not itself undertake to provide insurance cover. In this respect, the Commission has pointed out that CPP is the holder of a group policy for its customers.
>
> 21. In those circumstances, it must be noted that CPP is the holder of a block insurance policy under which its customers are the insured. It procures for those customers, **for payment, in its own name and on its own account**,[2] to the extent of the services mentioned in the Continental policy, insurance cover by having recourse to an insurer. Consequently, for the purposes of VAT, there is a supply of services between Continental and CPP on the one hand, and between CPP and its customers on the other, and the fact that Continental under the terms of its contract with CPP provides insurance cover directly to CPP's customers is not material in this respect.
>
> 22. Such a supply of services by CPP constitutes an insurance transaction within the meaning of art 13B(a). It is true that the exemptions provided for by art 13 of the Sixth Directive are to be construed strictly (see *Stichting Uitvoering Financiële Acties* [1989] ECR 1737 at 1753, para 13). However, the expression 'insurance transactions' is broad enough in principle to include the provision of

[2] Emphasis added; this phrase was at the heart of many of Safestore's submissions.

> insurance cover by a taxable person who is not himself an insurer but, in the context of a block policy, procures such cover for his customers by making use of the supplies of an insurer who assumes the risk insured.
>
> 23. That interpretation is supported by the purpose of the Sixth Directive, which exempts insurance transactions but gives member states, in art 33, the possibility of maintaining or introducing a tax on insurance contracts. Consequently, if 'insurance transactions' refers solely to transactions performed by insurers themselves, the final consumer might have to pay not only that tax but also VAT, in the case of block policies. Such a result would be contrary to the purpose of the exemption provided for by art 13B(a).
>
> 24. Having regard to the foregoing, there is no further need to consider whether CPP carried on the activity of an insurance agent referred to in art 13B(a) of the Sixth Directive.
>
> 25. The answer to Question 3 must therefore be that art 13B(a) of the Sixth Directive is to be interpreted as meaning that a taxable person, not being an insurer, who, in the context of a block policy of which he is the holder, procures for his customers, who are the insured, insurance cover from an insurer who assumes the risk covered performs an insurance transaction within the meaning of that provision. The term 'insurance' in that provision extends to the categories of assistance listed in the annex to EC Council Directive 73/239, as amended by EC Council Directive 84/641.

31. In his skeleton argument, Mr Cordara suggested that the correct resolution of the Insurance Issue did not depend entirely on an application of the decision in *CPP*. For example, he argued that the CJEU's conclusion at [22] of *CPP* that the concept of "insurance transaction" was "broad enough in principle" to embrace particular transactions did not necessarily mean that it actually *did* embrace those transactions in a specific case. Alternatively, he suggested that *CPP* left open the possibility that services could involve both the provision of insurance and the provision of intermediary services. He did not, however, pursue these arguments during the hearing. By the end of the hearing, the following principles were common ground:

> (1) If Safestore was making a supply of insurance to its customers, its appeal on the Insurance Issue would necessarily fail.
>
> (2) Conceptually, it is possible for Safestore to supply insurance to its customers for VAT purposes, even though it is not itself an insurance company and holds no regulatory authority to provide insurance.
>
> (3) Paragraph 21 of the judgment in *CPP* might, at first sight, appear simply to be a recitation of the factual background. However, it is more than this since the CJEU's conclusion at [22] is that "such a supply of services [i.e. the services described in [21]] … constitutes an insurance transaction". Therefore if, in the CJEU's words (i) Safestore was a holder of a block insurance policy under which its customers were the insured and (ii) Safestore procured cover for its customers "for payment, in its own name and on its own account" by having recourse to that insurer, Safestore would

be making a supply of insurance to its customers and would not be making a supply of intermediary services to Assay.[3]

32. Accordingly, the key battle ground between the parties on the Insurance Issue was whether the FTT was correct to conclude that Safestore's activities did fall within the CJEU's formulation set out in *CPP*. Mr Cordara advanced the following strands of argument in support of his submission that its activities fell outside the CJEU's formulation, which we will proceed to analyse in the sections that follow:

(1) The FTT's conclusions as to the nature of its arrangements were incomplete. The FTT should have "joined the dots" and made more detailed findings as to the nature of the undocumented arrangement between Safestore and Assay. Had it done so, the FTT would have realised that those arrangements involved Safestore acting as an "intermediary"; it did not obtain any "block insurance policy" and so did not have any insurance that it could "in its own name and on its own account" provide for the benefit of its customers.

(2) Properly understood, the principle in *CPP* could apply only if Safestore was itself the "insured" under a contract with Assay. Since the agreements provide for Safestore's customers, and not Safestore itself, to be the "insured", the principle set out in *CPP* was not engaged.

(3) The principle in *CPP* envisages two transactions. First, there has to be a supply of insurance to the intermediary in Safestore's position, which Mr Cordara characterised as the "mother transaction". Second there has to be a *subsequent* supply (the "daughter transaction") under which the intermediary provides cover to its own customers. Crucially, Mr Cordara argued that the "mother transaction" has to be "crystallised" before the "daughter transaction" takes place. He argued that the arrangements relating to the payment of premium, together with other relevant factors, demonstrate that there was no crystallised anterior supply of insurance to Safestore with the result that the principle in *CPP* could not apply.

"Joining the dots"

33. The FTT analysed the suite of contracts as follows:

(1) The Customer Goods Policy was an insurance contract between Safestore and Assay. Under that contract, Assay promised that it would provide insurance cover to any of Safestore's customers to whom Safestore issued a Confirmation of Insurance Cover. In return, Safestore agreed to pay Assay a premium equal to 70% of the premium Safestore charged its customer (plus an amount sufficient to enable Assay to pay insurance

[3] As will be seen, an aspect of Safestore's argument is that there is more to the CJEU's formulation than meets the eye. However, Safestore accepts that if its activities fall within the scope of the CJEU's formulation in *CPP*, once that formulation is properly understood, then it is supplying insurance and not the services of an insurance intermediary.

premium tax). Both Safestore and Assay entered into the Customer Goods Policy as principal.

(2) Safestore, acting as principal, entered into agreements with its customers under which, in return for a premium, Safestore promised to provide its customers with direct rights against Assay.

(3) Safestore honoured its obligations under its contracts with its customers by issuing a Confirmation of Insurance Cover as agent for Assay. That Confirmation of Insurance Cover established privity of contract between Safestore's customers and Assay so that those customers had the right to bring claims against Assay in their own names.

34. Safestore's detailed arguments under this heading involve a challenge to the first two of those findings. Safestore argues that these conclusions were either incorrect, or did not matter to the correct VAT analysis. In Safestore's submission all that mattered was the end result: namely that its customers acquired rights under an insurance contract that was directly enforceable against Assay. Alternatively, to the extent that the precise mechanism mattered, the only relevant contract was a single contract of insurance entered into by Safestore's customers with Assay (through the agency of Safestore). Whatever analysis was adopted, Safestore argues that it did not procure cover for its customers "in its own name and on its own account", but rather provided the services of an insurance intermediary in concluding a contract between its customers and Assay.

35. We reject Safestore's argument that the mechanism was irrelevant. *CPP* itself directed attention at matters of "mechanism". If the mechanism involved Safestore obtaining a block insurance policy from Assay and, for payment, in its own name and on its own account, procuring cover for its customers under that block insurance policy, *CPP* establishes that Safestore was making a supply of insurance. The FTT therefore cannot be criticised for considering the precise mechanism by which customers obtained insurance cover for their stored goods.

36. We also reject Safestore's related submission that the fact that customers obtained direct rights against Assay necessarily meant that Safestore was supplying intermediary services rather than insurance. The final sentence of paragraph 21 of the CJEU's judgment in *CPP* makes it clear that this factor is *not* determinative of the absence of a supply of insurance.

37. We turn, therefore, to the detailed conclusions that the FTT reached on the mechanism by which customers obtained insurance. Both parties agree that the FTT was correct to conclude, at [148], that Safestore and Assay did not reduce the entirety of their contractual arrangements to writing. Accordingly, the terms of the contract between Safestore and Assay had to be ascertained, at least in part, by reference to the parties' conduct. In those circumstances, we did not understand Safestore to disagree with the submission of Ms McCarthy QC, based on the judgment of the Court of Appeal in *Brunel Motor Company v Revenue & Customs Commissions* [2009] STC 1146, at [36] (which in turn cited *Carmichael v National Power* [1999] ICR 1226), that the FTT's findings as to the terms of the contract between Safestore and Assay were findings of fact. Accordingly, in order to establish that those findings were wrong in law, Safestore must establish that the familiar hurdle set out in *Edwards v Bairstow* is

met: the FTT's findings must either have ignored relevant considerations, have taken into account irrelevant considerations or be so plainly wrong that no reasonable tribunal could have reached them.

38. Safestore argues that there was ample indication, on the face of the contractual documents, that Safestore was not "acting in its own name and for its own account" in providing its customers with access to the benefit of a single overarching contract between Safestore and Assay but that instead, Safestore was to act as Assay's agent in concluding contracts between Safestore's customers and Assay. For example:

> (1) Pursuant to the Licence Agreement, customers were charged a separate identifiable sum for the provision of insurance.
>
> (2) Clause 19.1 of the Licence Agreement set out a statement to the effect that "Please note that we do not insure the Goods whilst they are on Site". That, Safestore argues, demonstrates that it did not have a "block insurance policy" whose benefits it could pass on to its customers.
>
> (3) The Confirmation of Insurance Cover contained features that could not be present in any overarching contract between Safestore and Assay. For example, Safestore's customer was expressed to have a right to cancel and an obligation to disclose all material information to the "Underwriters".
>
> (4) The Key Facts document referred to Safestore's customers being covered under a policy entered into with Assay.

Mr Cordara also set out in his skeleton argument a list of 14 factors that he submitted pointed in favour of Safestore performing an intermediary function.

39. We regard the fact that customers were charged a separate sum for insurance as being of little weight. The same can be said of the point made in connection with Clause 19.1 of the Licence Agreement. We prefer HMRC's reading of that clause as simply informing customers that their goods would not automatically be covered by insurance while on Safestore's premises and that customers would themselves need to take positive steps to ensure that they were covered.

40. We agree with Safestore that the features summarised in (3) and (4) above were *possible* indicators that Safestore was acting as Assay's agent in entering into separate contracts with customers rather than acting in its own name, and for its own account, in providing those customers with access to the benefits of a block insurance policy which Safestore had obtained from Assay. We do not consider we need ourselves to assess the weight that should be accorded to each of the 14 factors recorded in Mr Cordara's skeleton argument, and we simply acknowledge that some, at least, of these set out inferences in favour of Safestore's case. The FTT was clearly well aware of, and did not ignore, these factors, as it referred extensively to the various documents and to the commercial background in its Decision. Accordingly, it was a matter for the FTT to decide how strong were the inferences for which Safestore argued as part of its overall task of determining, as a matter of fact, the terms of the contract between Safestore and Assay.

41. In our judgment, the FTT was correct to have regard to the terms of the arrangement that Safestore and Assay *had* reduced to writing as set out in the Customer Goods Policy. The FTT acknowledged that that document was expressed to be a contract between Assay and Safestore's customers (rather than with Safestore itself). However, the FTT was correct to point out that some aspects of the Customer Goods Policy were inconsistent with this characterisation. For example, the limitations on liability which were expressed as a limit applicable to each of Safestore's premises, with a separate "sub limit" applicable to each customer unit, suggested that the Customer Goods Policy was setting out the terms of an overarching block insurance policy. Moreover, since its reinsurance arrangements were expressed to reinsure obligations under the Customer Goods Policy ([140]), that suggested that the Customer Goods Policy was *itself* an insurance policy rather than a document setting out terms that would apply to separate insurance policies with customers, as and when concluded. Accordingly, particularly given that the parties agreed that not all terms of the contract between Safestore and Assay were reduced to writing, the FTT was entitled to consider whether the Customer Goods Policy truly did set out the terms of a contract between Assay and Safestore's customers or rather whether it represented a "block policy" of insurance between Assay and Safestore. In a similar vein, it was entitled to look behind the description of Safestore as an "Intermediary" in the Customer Goods Policy.

42. In performing its evaluation, the FTT was also entitled to regard evidence of the regulatory background as being of central importance. Mr Beavers had confirmed in cross-examination that Safestore and Assay had structured their arrangements in order to obtain the benefit of the Storage Cover Exemption. Safestore had cancelled its authorisation under FSMA suggesting that it intended its arrangements to benefit from the Storage Cover Exemption so as to render the regulatory approval unnecessary. It was a matter for the FTT to decide what weight to give to this evidence in the light of the other inferences to which Mr Cordara referred us. There was nothing unreasonable or perverse in the FTT's conclusion that Safestore and Assay had succeeded in their aim of complying with the Storage Cover Exemption and so had created the kind of block insurance policy that is alluded to in the extract from the Storage Cover Exemption that we have quoted in [19] above.

43. Safestore argues that the FTT should not have concluded that the Customer Goods Policy was an insurance policy between Assay and Safestore. Instead, it should have concluded that the Customer Goods Policy set out the terms that would apply when Safestore (acting as Assay's agent) concluded contracts direct with its customers. Yet, quite apart from the fact that it was far from clear that such an arrangement would have satisfied the Storage Cover Exemption, which was central to an evaluation of the parties' intentions, there was no document setting out the scope of Safestore's authority to act as Assay's agent. Mr Cordara submitted that this could be explained by the fact that, having seen Safestore's documentation and, in particular, restrictions on the nature of goods that customers could deposit with Safestore, Assay was satisfied that it would not be taking on undue risk in insuring such goods and therefore saw no need to fetter Safestore's authority to enter into insurance contracts on its behalf. But that was a matter of pure submission. We do not consider that, in failing to accept that submission, the FTT was making perverse or irrational factual findings.

44. Finally, we note that the FTT found, at [154], that the contractual mechanism did involve some element of agency since Safestore issued a Confirmation of Insurance Cover as agent for Assay and we have reflected on Safestore's submissions in the light of that finding. We are quite prepared to accept that, if there had been no Customer Goods Policy, and no Storage Cover Exemption that had to be satisfied, Safestore's activities of receiving applications for insurance and issuing Confirmations of Insurance Cover on behalf of Assay might have amounted to supplies of insurance intermediary services. However, the FTT found, without making any error of law, that the parties' intention was that the Customer Goods Policy should be a contract of insurance between Safestore and Assay so as to meet the requirements of the Storage Cover Exemption. It follows, in our judgment, that Safestore obtained rights under the Customer Goods Policy on its own account and in its own name and was similarly acting on its own account and in its own name when it agreed with its customers to provide them with benefits under the Customer Goods Policy. The fact that, in order to meet obligations to its customers which it had incurred on its own account and in its own name, Safestore executed a document as agent for Assay does not alter the analysis we have set out above.

45. We therefore dismiss Safestore's arguments under this heading.

Safestore had to be the "insured" under an insurance contract with Assay

46. Mr Cordara showed us passages from the decision of the VAT Tribunal in the *CPP* case which, he submitted, demonstrated in that case CPP was included within the description of the parties insured under the "block insurance policy" with Continental. We do not, however, consider that this affects the scope of the principle set out in *CPP*. Nowhere in its decision does the CJEU indicate that the principle of interpretation of EU law that it is articulating depends on whether the person standing in CPP's position was an "insured" under the contract with the insurer. Indeed, [21] of the CJEU's judgment provides a strong indication that no such qualification should be inferred, since the CJEU states that it is dealing with a situation where CPP's *customers* were the insured under the contract with Continental.

47. Mr Cordara also referred to the judgment of the CJEU in *BGZ Leasing* (Case C-224/11) [2013] STC 2162 and the decision of the Upper Tribunal *Wheels Private Hire Limited v HMRC* [2017] UKUT 0051 (TCC), where in both cases the "intermediary" company in Safestore's position *was* named as the "insured" under the contract with the insurer. The reports of both cases suggest that there was no privity of contract between the underlying customers and the insurance companies, so that in both of these cases there was a true "back to back" arrangement under which customers had contractual rights only against the intermediary, with the intermediary in turn having contractual rights against the insurer.

48. We do not, however, consider that these judgments suggest that the *CPP* principle can *only* apply in a situation where the "intermediary" company is, one way or the other, named as the insured person. Rather, [59] of *BGZ*, which was relied upon by Ms McCarthy, for HMRC, emphasised that it followed from *CPP* that:

> … the expression 'insurance transaction' is broad enough in principle to include the provision of insurance cover by a taxable person who is not himself an insurer but, in the context of a block policy, procures such cover for his customers by making use of the supplies of an insurer who assumes the risk insured …

49. In this passage, the CJEU emphasises the inclusive nature of the concept of an insurance transaction as established in *CPP* without suggesting that the approach in *CPP* is limited to situations where the intermediary is named as the assured. Having noted that premise, the question in *BGZ* and *Wheels* was whether the company in the "intermediary" position was *also* making a supply of insurance where the insurance cover was provided other than by reason of a block insurance policy, which *BGZ* and *Wheels* answered in the affirmative.

50. Therefore, in our judgment, the principle in *CPP* can apply even though Safestore was not described as an "insured" under the contract with Assay and we reject Safestore's arguments under this heading.

"Mother transaction" and "daughter transaction"

51. In his oral reply, Mr Cordara developed a wide-ranging theory of the true effect of the CJEU's decision in *CPP*. He argued that, properly understood, the *CPP* principle could apply only if Safestore had received a "mother" supply of insurance from Safestore that was fully "crystallised" before the point in time at which Safestore made a "daughter" supply of insurance to its own customers.

52. In *CPP* itself, he submitted that these requirements were met. At the start of each year, CPP would approach Continental, explain how many customers CPP had on its books, and pay Continental a premium by reference to that number of customers. If, over the course of the year, CPP turned out to have a different number of customers from that notified to Continental, there would be a "truing up" with Continental receiving additional premium, or reimbursing premium as the case may be. That arrangement, Mr Cordara submitted, involved CPP receiving a crystallised "mother" supply of insurance which it then used to make the "daughter" supplies to its own customers.

53. Mr Cordara invited us to contrast that situation with that applicable to Safestore. Safestore did not make any payment of premium to Assay at or around the time each Customer Goods Policy was issued. Indeed it could not know how much premium would be due to Assay until a particular customer came to Safestore's premises to store goods. Once that customer revealed the nature and value of the goods to be stored, Safestore would charge a premium appropriate those goods and would come under an obligation to pay 70% of that premium to Assay. Until that point, however, the amount of premium that would be due to Assay, in respect of a particular customer's risks, could not be known and still less could the total premium be known. Moreover, Assay would not know, until customers had concluded their business with Safestore the identity of customers to be insured. In a similar vein, Mr Cordara observed that the Application Form, Licence Agreement, Confirmation of Insurance Cover and Key Facts document all contained statements the effect that the "Underwriters" would not be liable to settle a claim unless and until Safestore's customer paid the insurance

premium due. Therefore, he submitted that any "daughter" supply of insurance from Safestore to its customers could not be "enlivened" (to use his term) until the premium was paid. Accordingly, he argued that any "mother transaction" whose premium was expressed to be a percentage of the premium paid by Safestore's customer could similarly not be "enlivened" until that customer had paid the premium with the result, he argued, that the "mother transaction" could not be crystallised before the "daughter transaction".

54. This line of argument seems to us to be very similar to Mr Cordara's earlier argument that Safestore had to be an "insured person" under its contract with Assay. In any event, however, to the extent that it makes a different point, we reject it for the reasons set out below.

55. First, neither *CPP* nor any of the other authorities to which Mr Cordara referred us sets out in terms any requirement that there be a mother transaction that is "crystallised" before a daughter transaction. Still less do those authorities explain what it means for a supply to be "crystallised" in the manner that Mr Cordara said was essential. Mr Cordara's submissions, therefore, advance a gloss on the decision in *CPP* which is not supported by any authority. In any event, the CJEU's judgment is clear and straightforward and does not need any gloss to be workable and intelligible. If a person holds a "block insurance policy" and, in return for payment, in its own name and for its own account, procures cover for its customers under that block insurance policy, then it is making a supply of insurance. No architecture of "mother transactions" that are "crystallised" before "daughter transactions" is needed to apply that principle. Rather, in the case of a dispute such as this, the task is to ascertain whether the taxpayer holds the requisite kind of block insurance policy and whether, in return for payment, in its own name and for account, it procures cover for its customers under that policy. The FTT determined those issues in favour of HMRC and we have already explained why we see no error of law in those conclusions.

56. Second, and in any event, we do not see any material distinction between Safestore's position and that of CPP. The FTT's finding at [38] and [148] of the Decision was that Safestore and Assay agreed that the total premium payable under the Customer Goods Policy (which was the "block insurance policy" for the purposes of its CPP analysis) was 70% of the total premiums that Safestore charged to its customers with some allowance for insurance premium tax. That premium was to be paid quarterly in arrears. Certainly, the parties could not specify a precise premium figure at the time each Customer Goods Policy was issued (as the premium would depend on future events, including the number of customers and the premium they paid to Safestore). However, CPP could not have known either the total amount of premium that would be payable giving the "truing up" mechanism that was present in that case. Accordingly, both CPP and Safestore had agreed to pay a premium to their respective insurers that, while not ascertained at the time they obtained their respective block insurance policies, was ultimately ascertainable. Moreover, neither CPP nor Assay could have known, at the time they issued their respective block insurance policies, the precise identities of the individual customers they would be insuring.

57. We acknowledge that the mechanics by which Continental and Assay received payment were different. Continental received some "upfront" payment that was then adjusted by means of the truing up adjustments. By contrast, Assay received payments of instalments quarterly in arrears. However, we do not consider that these differences in payment profile have any bearing on the nature of the supplies that Safestore was making.

58. Nor do we consider that any conclusion can be drawn from the fact that Safestore's customers could only make claims against Assay once they had paid all premiums due to Safestore. That simply represented an aspect of the terms on which customers were entitled to make claims. It did not detract from the FTT's overall findings that (i) Safestore held a block insurance policy and (ii) Safestore procured cover for its customers (admittedly cover that was subject to conditions) under that policy, in return for payment, in its own name and for its own account.

59. For the reasons given above, Safestore's appeal on the Insurance Issue is dismissed.

THE APPEAL ON THE TIME-BAR ISSUE

The FTT's decision on the Time-bar Issue

60. At [163], the FTT set out a chronology of relevant communications and documents. Given the way in which the parties put their arguments on the Time-bar Issue, we will set out relevant aspects of the chronology in full.

> (1) On 30 July 2013, Safestore wrote to HMRC claiming a repayment of VAT on the basis that it had understated its entitlement to input tax credit in its VAT periods from, and including 07/09 to, and including 99/99[4] by failing to recognise that it was making supplies of insurance intermediary services to Assay that entitled it to recover associated input tax by virtue of the 1999 Order.
>
> (2) On 9 December 2013, HMRC refused Safestore's claim for repayment. They did so on the basis that, even if Safestore was providing intermediary services, the fact that Assay entered into contracts of insurance with individuals in the UK meant that Safestore could not recover input tax by virtue of the 1999 Order. HMRC now accept that that reasoning was incorrect and that Safestore could, in principle, establish an entitlement to input tax recovery by reference to the location of *Assay*. However, our decision on the Insurance Issue means that HMRC's decision of 9 December 2013 was correct, albeit for the wrong reasons, since Safestore was not supplying intermediary services to Assay and, accordingly, the provisions of the 1999 Order, on which the claim for repayment relied, were not engaged.

[4] With effect from 1 October 2012, Safestore had cancelled its individual VAT registration as it had been added to a group registration. "99/99" is HMRC's standard method of referring to a taxable person's final VAT period, in this case the period ended on 30 September 2012.

(3) The refusal of the claim for repayment was an appealable decision and Safestore appealed to the FTT against it. On 15 April 2014, HMRC served their Statement of Case in that appeal. In that original Statement of Case HMRC accepted that the reasons set out in their decision of 9 December 2013 were flawed. They also appeared to accept that Assay was receiving some insurance intermediary services from Safestore. However, they argued that Safestore was not entitled to input tax recovery associated with those intermediary services because Assay both received those services, and wrote its insurance with customers, in connection with a fixed establishment in the UK.

(4) HMRC continued to request, and obtain, information from Safestore. In In the course of HMRC's enquiries, Safestore explained to HMRC that "there is no formal documentary contract between Safestore and Assay". In a letter dated 3 July 2014, Peter Vines, the HMRC officer who ultimately made the assessment in dispute, requested copies of documents including Assay's reinsurance agreements.

(5) In response, under cover of a letter of 4 August 2014, Safestore's accountant provided, among other documents, copies of the reinsurance agreements and an internal business plan. As noted at [63] of the Decision, certain of Assay's reinsurance agreements were expressed to reinsure liabilities under a specific Customer Goods Policy. The business plan that Safestore had provided also referred to Safestore as being the "Original Insured" under a Customer Goods Policy. Those documents therefore (i) revealed the existence of the Customer Goods Policy (which Safestore had not hitherto provided to HMRC) and (ii) suggested that this was a policy of insurance entered into between Safestore and Assay.

(6) On 3 November 2014, Jennifer Pollock of HMRC wrote to Safestore to explain that HMRC might wish to amend their Statement of Case because it was not clear from documentation provided to date whether Assay was supplying insurance to Safestore's customers or whether Safestore was making an onward supply of insurance which was being supplied to it by Assay. It was clear from this letter that Ms Pollock's concerns in this regard had arisen because, having seen the reinsurance agreements and business plan, she thought it possible that Assay was supplying insurance to Safestore under a "block insurance policy" consisting of the Customer Goods Policy. She referred specifically to *CPP* in her letter and asked for copies of the Customer Goods Policy and information as to money flows relating to Safestore's 30% share of premiums.

(7) In response, Safestore sent Ms Pollock various versions of the Customer Goods Policy, for the first time, under cover of a letter dated 2 December 2014. Safestore also addressed her other queries relating to payment flows.

(8) On 16 October 2015, HMRC amended their Statement of Case to introduce the case now advanced, namely that either (i) Safestore was not supplying "intermediary services" to Assay at all and was instead making a supply of insurance to its customers or (ii) to the extent that Safestore was

supplying intermediary services, it was supplying them to a fixed establishment of Assay in the UK with the result that, in either case, the 1999 Order did not apply.

(9) On 30 October 2015, Mr Vines of HMRC made an assessment on Safestore in respects of its periods 10/11 to 99/99.

61. HMRC's case before the FTT was that their receipt of the Customer Goods Policy represented the "last piece in the puzzle" that justified the making of the assessment and that, since the assessment was made less than 12 months after they received the Customer Goods Policy, the assessment was in time under s73(6)(b) of VATA. HMRC did not call Mr Vines to give witness evidence as to what was in his mind when he made the assessment. Nevertheless, even without witness evidence from Mr Vines, the FTT accepted HMRC's case, after setting out conclusions to be drawn from *Pegasus Birds Ltd v HMRC* [2000] STC 91, the leading authority on s73(6) of VATA. The FTT's core reasoning s set out at [179] of the Decision as follows:

> 179. Applying this principle, it is clear to me that the "last piece of the puzzle" fell into place in December 2014 when Safestore, finally, provided the Customer Goods Policy to HMRC. Until that time, as the letter of 4 November 2014 evidences, HMRC were unclear whether the nature of the arrangements between Safestore and Assay fell within the extended concept of the supply of insurance in accordance with the decision in *CPP*. For the reasons explained above, I consider that the various versions of the Customer Goods Policy go to the heart of the issue in this appeal. Its provision therefore, in my view, constituted the "last piece of the puzzle". For this reason, I have concluded that the Assessment is not time-barred.

The Time-bar Issue – Discussion

62. The following matters were common ground between the parties:

(1) Safestore bore the burden before the FTT of establishing that HMRC's assessment was out of time.

(2) If the Customer Goods Policy was the "last piece in the puzzle" in the requisite sense, then HMRC's assessment was in time, as the Customer Goods Policy was not received until 2 December 2014 and Mr Vines made his assessment on 30 October 2015, less than 12 months later and so within the time limit set out in s73(6)(b) of VATA.

(3) To determine whether the Customer Goods Policy was the last piece in the puzzle, it is necessary to consider the subjective opinions of Mr Vines as the officer who made the assessment.

63. As its first challenge to the FTT's decision on the Time-bar Issue, Safestore argues that HMRC gave the FTT no evidential explanation as to why they did not make their assessment shortly after their decision of 9 December 2013, refusing Safestore's claim for a VAT repayment. Safestore goes on to argue that HMRC had everything they needed to make the assessment more than 12 months before Mr Vines made his assessment.

64. We reject that argument. First, it approaches s73(6)(b) of VATA from the wrong perspective: by asserting that HMRC had "everything they needed", Safestore's submissions apply an objective, rather than a subjective, standard to ascertaining whether the Customer Goods Policy was the "last piece of the puzzle". Whether the Upper Tribunal, or the FTT, thought that HMRC had "everything they needed" at an earlier point in time is not determinative of the time limit issue. What matters is what Mr Vines thought was necessary to justify the assessment.

65. In any event, Safestore's argument is wide of the mark since the assessment and the decision of 9 December 2013 to refuse the VAT repayment covered different ground. Safestore's claim for a VAT repayment involved it arguing that it had been unduly generous to HMRC in accepting that its input tax restriction should be computed by reference to an exempt supply for a consideration representing 30% of the premiums collected from customers. Rather, in its claim for VAT repayment, Safestore was arguing that, to the extent of 30% of the premiums it was entitled to input tax recovery because that 30% was consideration for an exempt supply of intermediary services made to Assay which was based in Guernsey. HMRC's assessment was based on a different proposition, namely that the consideration received for exempt supplies was not the 30% of premiums that Safestore had included in its VAT returns but rather was 100% of those premiums. HMRC justified that assessment by saying that Safestore was making exempt supplies of insurance for a consideration consisting of the entire premiums received. Even approaching the matter objectively, there is no reason why HMRC's conclusion that Safestore was not entitled to the VAT repayment claimed carried with it the conclusion that Safestore had underpaid VAT in the periods from 10/11 to 99/99.

66. Of more weight was Safestore's argument that the FTT could not properly have concluded that the Customer Goods Policy was the "last piece of the puzzle" without making findings as to Mr Vines's subjective opinions. Safestore argues that the FTT impermissibly based its conclusions at [179] of the Decision on its own, objective, evaluation of the material that justified the making of the assessment and in any event could not, without hearing witness evidence from Mr Vines, properly have formed any view as to his subjective opinions.

67. If [179] of the Decision is read in isolation, it can be read as containing the FTT's objective evaluation as to the material that, in its view, justified the making of the assessment. However, [179] needs to be read in connection with the quote from [15] of the judgment of the Court of Appeal in *Pegasus Birds v Customs and Excise Commissioners* [2000] STC 91 that precedes it. In that passage, the Court of Appeal was addressing a submission that s73(6)(b) of VATA could not be inviting an analysis of the subjective opinions of an HMRC assessing officer since those opinions would necessarily be outside the knowledge of a taxpayer seeking to argue that an HMRC assessment was out of time. The Court of Appeal rejected that argument and affirmed the decision of Dyson J at first instance to the effect that it was the subjective opinions of the assessing officer that mattered. Aldous LJ said, in the quoted passage:

> The true construction of s 73(6)(b) does not suffer from the difficulties suggested by Mr Ewart. An opinion as to what evidence justifies an

> assessment requires judgment and in that sense is subjective; but the existence of the opinion is a fact. From that it is possible to ascertain what was the evidence of facts which was thought to justify the making of the assessment. Once that evidence has been ascertained, then the date when the last piece of the puzzle fell into place can be ascertained. In most cases, the date will have been known to the taxpayer, as he will be the person who supplied the information.

68. Aldous LJ was therefore saying that the subjective opinions of the assessing officer can be inferred from the surrounding circumstances. It is this approach that the FTT was following at [179]; we therefore do not consider that paragraph [179] of the Decision shows any error of law consisting of the application of an objective, rather than a subjective standard. As Aldous LJ made clear, it was permissible for the FTT to infer Mr Vines' subjective opinions from relevant surrounding circumstances. When doing so, it obviously needed to take care to explain what the circumstances were and why they led to a particular inference as to Mr Vines' opinion. However, that is a very different matter from saying that an FTT can *never* make inferences as to an assessing officer's opinion without that officer attending a hearing to give live evidence.

69. That simply leaves the question of whether the FTT was entitled, on the evidence before it, to conclude that Mr Vines held the subjective view that the Customer Goods Policy was the last piece in the puzzle.

70. We acknowledge Safestore's point that the letter of 3 November 2014 in which HMRC first signalled an intention to plead a case based on *CPP* was written by Ms Pollock and not by Mr Vines, the assessing officer. We also acknowledge that Mr Vines did not himself refer expressly to the Customer Goods Policy when making his assessment on 30 October 2015. However, in his letter notifying Safestore of the assessment, Mr Vines made clear that the insurance policy in place between Assay and Safestore was material to his decision to assess, saying that:

> I believe that you have not declared or we have not assessed the correct amount of VAT due for the periods shown below.
>
> This is because HMRC contends that, for VAT purposes, Safestore Ltd (Safestore) provides insurance services to its customers for amounts it agrees with each customer. Assay Insurance Ltd (Assay) makes a supply of insurance services to Safestore valued at 70% of the amounts paid to Safestore by its customers. Accordingly, there is no supply from Safestore to Assay for VAT purposes.
>
> As Safestore is making the supply of insurance to its customers, the value of that supply is 100% of the premium. It is the full value of the premium, rather than the difference between the premium and the amount paid to Assay, that should be included in Box 6 of the VAT returns.

71. Mr Vines' letter therefore set out a more definitive version of the concerns that Ms Pollock had articulated at a point when HMRC had seen the reinsurance contracts and business plan that referred to the Customer Goods Policy, but had not seen the Customer Goods Policy itself. Whereas Ms Pollock had written, before seeing the Customer Goods Policy, that "it is not clear" whether Safestore was supplying insurance to its

customers, the Customer Goods Policy indicated (in HMRC's view) that the arrangements fell within the scope of the *CPP* case. That enabled Mr Vines to confirm HMRC's position as being that Safestore *did* supply insurance. In those circumstances, it was quite open to the FTT to draw the inference that Mr Vines considered that the Customer Goods Policy contained material relevant to the making of the assessment.

72. For the reasons above, we dismiss Safestore's appeal on the Time-bar Issue.

Disposition

73. Safestore's appeals on both the Insurance Issue and the Time-bar Issue are dismissed. That makes it unnecessary for us to consider Issue 3 and we will not do so.

74. Mr Cordara's skeleton argument also contained submissions to the effect that the FTT should have concluded that Safestore was making a single, standard-rated, composite supply of storage services at material times. At the hearing, however, he confirmed to us that he would not be pursuing that argument. Nevertheless, Ms McCarthy asked us to make a finding that Safestore was indeed making a single standard-rated composite supply. HMRC thought that such an outcome would be favourable to them on the basis that, although it would give Safestore greater input tax recovery, this would be outweighed by HMRC's ability to increase the amount of the assessment it had raised for under-declared output tax.

75. We will not make any finding on this issue. Neither party argued before the FTT that Safestore was making a single, standard-rated composite supply. HMRC did not, in their Response to Safestore's Notice of Appeal to this Tribunal suggest that the FTT had erred in failing to find a single composite supply and ultimately Safestore decided not to pursue such an argument either. In those circumstances, we do not consider that the FTT's Decision contains sufficient factual findings for us to decide whether there was a single composite supply, and, even if it did, we consider it would be procedurally inappropriate for us to make such a determination.

Signed on original

MRS JUSTICE BACON

JUDGE JONATHAN RICHARDS

RELEASE DATE: 18 November 2020