[2016] UKFTT 0479 (TC)

TC05231

Appeal number: TC/2012/05387

PROCEDURE – admissibility of expert evidence report which included law, opinion on legal issues and opinions on issues for tribunal – bulk of report ruled to be inadmissible

FIRST-TIER TRIBUNAL
TAX CHAMBER

DELOITTE LLP

Appellant

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN

Sitting in public at the Royal Courts of Justice, London on 17 June 2016

Valentina Sloane, counsel for the Appellant

Eleni Mitrophanous, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision concerns the appellant's application for permission to admit expert evidence on the insurance industry practice and regulation of Payment Protection Insurance ("PPI") mis-selling. The issue in the substantive appeal is whether services which the appellant provided to a loan provider in relation to PPI policies, which the loan provider had sold, fell within the exemption for relevant related services performed by insurance brokers and agents under Article 135.1(a) of VAT Directive 2006/112 (implemented into the UK's domestic legislation by Item 4 Schedule 9, Part II, Group 2 Value Added Tax Act 1994).

2. The services the appellant provided consisted of amongst other things gathering information in relation to PPI complaints from policyholders, reviewing information and assessing whether a PPI policyholder's complaint about PPI mis-selling should be upheld or rejected, contacting policyholders and calculating redress.

3. The expert evidence, which is the subject of the appellant's application, is a report by Ms Angela Darling FCII, a Chartered Intermediary and a Fellow of the Chartered Insurance Institute which, in the appellant's submission, explains the complex regulatory framework applicable to insurance contracts and uses Ms Darling's experience and expertise to give an opinion on how the framework applied to the services in issue in the context of the insurance industry. The appellant argues it is necessary for the report to be admitted as it is likely to assist the tribunal to reach its own informed view of the validity of various of HMRC's assertions about the nature of the services the appellant provided, (in particular that the mis-selling issues and services were not related to the insurance policy, the services did not relate to regulatory compliance by the insurer, and that they related to the lender's rather than the insurer's mis-selling).

4. HMRC object to the application. They maintain the evidence is irrelevant to the issue before the tribunal, that it gives views on the law and on interpretation of contract, which are contested issues and as matters of law are for submission, and that it seeks to answer the very questions of VAT law which it is for the tribunal to reach a conclusion on. They make many criticisms of the report and argue the decision on admissibility must be made now to avoid prejudice to HMRC in terms of time and cost, rather than leaving it to the tribunal to consider what weight to attribute to the report following the substantive hearing.

Law

5. Rule 15 of the Tribunal Procedure (First-tier Tribunal) Tax Chamber Rules 2009/273 ("the Tribunal Rules") deals with evidence and submissions and provides where relevant:

"(1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Tribunal may give directions as to—

(a) issues on which it requires evidence or submissions;

(b) the nature of the evidence or submissions it requires;

(c) whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence;

(d) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally;

…

(2) The Tribunal may—

(a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom; or

(b) exclude evidence that would otherwise be admissible where—

…

iii) it would otherwise be unfair to admit the evidence."

6. Rule 2 of the Tribunal Rules provides for the overriding objective and parties' obligation to co-operate with the Tribunal. Under Rule 2(3) the Tribunal must seek to give effect to the overriding objective when it- a) exercises any power under the Rules or b) interprets any rule or practice direction. Rule 2(1) provides that the overriding objective is to enable the Tribunal to deal with cases fairly and justly. Dealing with cases fairly and justly includes under Rule 2(2)(a) "dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and resources of the parties."

Case law

7. The parties were in agreement that, as set out by Lightman J in *Mobile Export 365 Ltd v Commrs for HMRC* [2007] EWHC 2664 (Admin), the key issue on applications for admissibility was relevance, and that there was a presumption that all relevant evidence should be admitted unless there were compelling reasons to the contrary. In *HMRC v Atlantic Electronics Ltd* the Court of Appeal in dealing with an appeal from the Upper Tribunal ("UT"), endorsed this approach noting at [31] that the UT in that case had also analysed the balance of prejudice to each party and at [30] and [71] that the tribunal had far more general powers to admit than under the Civil Procedure Rules ("CPR"). The FTT's decision in *Omagh Minerals Limited v Commrs for HMRC* [2015] UKFTT 0681 (TC), is a relatively recent example of the application of the above approach in relation to expert evidence.

8. I was also taken to various other cases on the subject of admissibility of matters of law, evidence on questions that are on the very issue before the tribunal, and on the question of whether courts and tribunals should undertake the task of excision where a report contains a mixture of admissible and inadmissible materials.

9. In *Kennedy (Appellant) v Concordia (Services) LLP (Respondent)(Scotland)* [2016] UKSC 6, which concerned an appeal from the Inner House of the Court of Session, the Supreme Court considered the issue of whether the skilled witness evidence of a chartered member of the Institute of Safety and Health was admissible in relation to an employer's potential liability for an employee, a home carer, who had slipped on snow and ice when on her way to visit her client. The witness (Mr Greasly) referred in his reports to legislation (the Personal Protective Equipment at Work Regulations 1992) and advice published by the Health and Safety Executive. He gave his opinion on what the employer could and should have done to reduce the risk of slips.

10. At [44] the Supreme Court identified four factors which governed the admissibility of skilled evidence (noting that a skilled person can give expert factual evidence either by itself or in combination with opinion evidence) :

> "i) whether the proposed skilled evidence will assist the court in its task

11. The other three factors ("(ii) whether the witness has the necessary knowledge and experience iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and iv) whether there is a reliable body of knowledge and experience to underpin the expert's evidence") were not put in issue in this application.

12. At [46] the court drew a distinction between skilled evidence of opinion which included under i) above a test of necessity rather than assistance and skilled evidence of fact which did not require necessity (explaining that otherwise the court would be deprived of the benefit of a skilled witness who collates and presents to the court in an efficient manner the knowledge of others in his or her field of expertise – that would not strictly be necessary if instead the parties called many factual witnesses).

13. The Supreme Court overturned the Court of Session's decision (Extra Division of the Inner House) that the evidence was inadmissible explaining why it disagreed with the Court of Session's criticisms of the evidence as follows:

> "[65] The Extra Division had two other major criticisms of Mr Greasly's evidence. One was that he was inadmissibly giving his opinion on matters of law. The other, which was based on the well-known dictum of Oliver J in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384, 402, a case of solicitor's negligence, was that an expert's opinion of what he would have done in the circumstances did not assist the court, and was therefore inadmissible.
>
> [66] …[Mr Greasly's statements] appear at first sight to be statements of opinion on Cordia's legal duty which would not be admissible before lay fact finders and should be avoided. An experienced judge could readily treat the statements as the opinions of a skilled witness as to health and safety practice, based on the Management Regulations and the PPE Regulations and on HSE guidance, and make up his own mind on the legal question."

14. The decision is not binding (Under s41(2) of the Constitutional Reform Act 2005 such a decision of the Supreme Court is to be regarded as the decision of a court of the relevant part of the United Kingdom and, as pointed out by the Upper Tribunal in *Commrs for HMRC v National Exhibition Centre Limited* [2015] UKUT 0023 (TCC) at [30], tribunals from the respective judicial systems of the relevant parts of the UK are not bound to follow the judicial decisions of the other). It is also notable that Supreme Court's analysis included case law on the Scots law of evidence in civil and criminal cases and that at [51] and [58] the Supreme Court recorded it was not normal practice to hold preliminary hearings on the admissibility of the evidence of skilled witnesses. Implicit from what was said it seems that the absence of prior case management means that issues of admissibility will fall to be resolved at or after the substantive hearing. There was no discussion of the equivalent of procedural rules on admissibility and expert evidence similar to either the CPR or the Tribunal Rules. It should not therefore be assumed the principles / tests set out here will readily map across to this tribunal. Nevertheless, in my view the underlying principle that can be extracted is that legal questions are not admissible before lay fact finders because of the risk their decision will be supplanted but that non lay fact finders can be relied on to treat the opinions as opinions on practice and make up their own mind on the question.

15. In *Hoyle v Rogers* [2014] EWCA Civ 257 the Court of Appeal had to consider whether the first instance judge was correct to hold that a report by the Air Accident Investigation Branch was admissible and to decline to exclude it as matter of discretion. The facts concerned a plane crash and a claim for damages against the pilot by the executors and dependants of a passenger killed in the crash. As identified at [60] the relevant rules included CPR 35.1 (described below at [21]). Explaining at [41] of the decision that expert evidence of opinion is admissible "because it is the product of a special expertise which the trial judge is unlikely to possess and which, even he did, it is not his function to apply" the Court of Appeal went on at [52] and [53] to comment on how to deal with reports containing opinion on facts which did not require expert knowledge to evaluate:

> "52. It is not, however, the function of an expert to express opinions on disputed issues of fact which do not require any expert knowledge to evaluate. However, as the judge observed, it is common to find in many expert's reports opinions of that character, which are not helpful and to which the court would not have regard. As to those he thought it preferable:
>
> "*…to treat this as a question of weight rather than admissibility, particularly since there is no clear point at which an expert's specialised knowledge and experience ceases to inform and give some added value to the expert's opinions. It is a matter of degree. The more the opinions of the expert are based on special knowledge, the greater (other things being equal) the weight to be accorded to those opinions*".
>
> 53. Insofar as an expert's report does no more than opine on facts which require no expertise of his to evaluate, it is inadmissible and should be given no weight on that account. But, as the judge also

observed, there is nothing to be gained, except in very clear cases, from excluding or excising opinions in this category. I agree with what he said in para 117 of his judgment:

> "*Such an exercise is unnecessary and disproportionate especially when such statements are intertwined with others which reflect genuine expertise and there is no clear dividing line between them. In such circumstances, the proper course is for the whole document to be before the court and for the judge at trial to take account of the report only to the extent that it reflects expertise and to disregard it in so far as it does not. As Thomas LJ trenchantly observed in Secretary of State for Business Enterprise and Regulatory Reform v Aaron [2008] EWCA Civ 1146 at para 39:*
>
> *"It is my experience that many experts report views on matters on which it is for the court to make its decision and not for an expert to express a view. No modern or sensible management of a case requires putting the parties to the expense of excision; a judge simply ignores that which is inadmissible.""*

16. *JP Morgan Chase Bank v Springwell* [2006] EWHC 2755 (Comm) was another case concerning the admissibility of expert evidence; the context was a complex commercial dispute relating to losses claimed to have been caused by negligent advice in relation to the purchase of emerging market linked debt instruments. From [15] to [18] it is apparent, as the appellant points out, there were a number of expert reports in contention such as "Russia and emerging markets", and "derivatives" and "portfolio analysis".

17. HMRC referred me to the three part test set out by Aikens J which in summary posed the following questions: 1) is the expert evidence necessary to resolve a particular issue, if so it must be admitted, 2) if not necessary, is it of assistance? 3) if so then in the context of the proceedings as a whole is expert evidence on the issue reasonable required to resolve proceedings? The judge also went onto comment on a practical matter relevant to large commercial disputes that there was tendency to think the judge would be assisted in any area of fact outside the "normal" experience of a Commercial Court Judge but that "the result is that, all too often, the judge is submerged in expert reports which are long, complicated and which stray far outside of the particular issue that may be relevant to the case".

18. The three stage test was referred to as helpful to bear in mind by Warren J at [23] in *British Airways Plc v Spencer* [2015] EWHC 2477 (Ch) whose judgement was in turn adopted by the judge in *Wattret v Thomas Sands Consulting Ltd* [2015] EWHC 3455 (TC).

19. The appellant highlighted what was said at [21] of *JP Morgan Chase Bank*:

> "Although in former years it was said that experts should not give opinions on the "the very issue which the court has to decide", that restriction is no longer in force, at least in civil actions: see *Barings plc (in liq) v Coopers & Lybrand* [2001] Lloyd's Rep (Bank) 85 at para 54 per Evans-Lombe J and the cases there cited. However it is not for experts to attempt to make findings of fact. Instead they should express

> their opinion on the area in which they have their expertise on the basis of assumed facts which should be clearly identified and stated in their expert report."

20. HMRC say *Barings* merely set out that even if an expert report purported to usurp the court's decision on a matter for it, then it did not – it confirms that evidence is not automatically excluded because it goes to the very question but HMRC say the point is unhelpful because the very issue in this case is VAT law and it is accepted that the appellant is not an expert in VAT law.

21. The particular context for these cases and the practical note of caution sounded by Aikens J is the CPR and the starting point in CPR 35.1 is that "Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings." There is no specific rule mirroring CPR 35.1 in the Tribunal Rules but in my view it is relevant to take account of the case law based on that rule in the CPR given the overlap between the policy underlying the CPR rule and the Tribunal's overriding objective. Given the extra time, cost and complexity involved in proceedings which involve expert evidence, the admission of expert evidence which is not reasonably required to resolve the proceedings is unlikely to be consistent with the tribunal's overriding objective.

22. Taking account of the above case law I note the following:

(1) Relevant evidence should be admitted unless there are compelling reasons not to. The prejudice to each party of respectively admitting / not admitting the evidence should be weighed. (*Mobile Export365* and *Atlantic Electronic*).

(2) An expert's evidence of opinion is admissible because it is the product of a special expertise which the tribunal does not possess, or even if it does, which is not its function to apply (*Hoyle*).

(3) Expert reports are not rendered inadmissible because they refer to legislation, matters of law or indeed the very issue before the court or tribunal. Tribunal panels (who are not lay finders of fact) can be credited with the ability to distinguish between inadmissible / admissible matters in a report and to know that they have to reach their own view on the legal question before them. (*JP Morgan Chase Bank*, and *Kennedy*)

(4) Even if reports contain inadmissible expert evidence of fact they can be admitted and should be admitted without requiring excision particularly if the admissible / inadmissible evidence of fact is intertwined (*Hoyle*).

23. Before considering the application of the case-law to the facts it is useful to outline in more detail the underlying legal issue, what HMRC have pleaded in their Statement of Case and what the expert report concerned.

24. Article 135.1(a) of Directive 2006/112 exempts "insurance and reinsurance transactions, including related services performed by insurances brokers and insurance agents". This provision is transposed into UK law by Schedule 9 Part II Group 2 of the VATA 1994.

"Item No.

…

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.

…"

25. The parties' positions and the instructions to the expert refer to various issues derived from the case-law on the interpretation of the above legislation. As to the meaning of "related to…", the Court of Appeal in *Customs and Excise v Century Life Plc* [2000] EWCA Civ 336 which concerned review services provided to a pension policy provider in relation to complaints of alleged mis-selling of pension policies stated at [15] that "if a service is only remotely or incidentally connected with an insurance transaction it is not "related to" it…". The court rejected arguments that services in the case were not in relation to the pension transactions because their nature was essentially that of compliance rather than commercial, and because the transactions were past transactions explaining:

> "…Seeing that a policy complies with regulations is intimately related to it- the very nature of the policy is under scrutiny. And the fact that the policy was already sold does not mean that they are not continuing obligations. There clearly are, an important one of which is compliance."

26. In *InsureWide.com Services Ltd v HMRC and HMRC v Trader Media Group Ltd* [2010] EWCA Civ 422 the Court of Appeal held that in order for a person's services to fall within the scope of the Item 4 exemption.

> "…it is necessary that the services which that person is rendering are in themselves characteristic of the services of an insurance agent or broker".

27. HMRC in their Statement of case put forward the following: the appellant is not acting as an intermediary or one of the intermediaries between an insurer and insured, the PPI problems relate to the loan provider, not the insurer, redress is sought against the entity selling the PPI, the redress is in the form of compensation, not the refund of premium. The relevant services are undertaken by the appellant as principal for the loan provider and not intermediary for the insurer. It is argued that the relevant services are remote from the PPI policies themselves – the appellant's services do not relate to any regulatory compliance by the insurer or the particular insurance, the services relate to a distinct issue regarding the lender's mis-selling in relation to which the insurer has no interest.

Ms Darling's report

28. Ms Darling's report is a 62 page document with two lever arch files of appendices. I am aware that there have been numerous rounds of correspondence between the parties in relation to possible amendments/ clarifications to the report but the application and accordingly this decision is in relation to the admissibility of the report as it stands. The general structure is familiar: a summary of the case, instructions and conclusions the report ending with an expert's declaration and statement of truth. Ms Darling's extensive qualifications and specialist experience in the insurance industry, policy, regulation and compliance are set out at Appendix 1. The remaining appendices set out the documents she has examined, a chronology, regulatory documentation including copies of the Insurance Mediation Directive (Directive 2002/92/EC), various FSA Handbooks (DISP, ICOB, PRIN, SYSC, TR and the glossary). I have found it necessary for the purposes of dealing with this application to set out the contents of the report in a fair amount of detail in order to put the parties' submissions into context and as the broad headings to the sections of the report do not necessarily give a full enough picture as to the detailed contents of the report. I highlight areas where I understand there is at present disagreement between the parties (in addition to HMRC's general point that the opinions on matters which they say are issues of VAT law dealt with in sections 4.5 and 4.6) but do not suggest that this is an exhaustive list.

29. The main body of the report starts at Section 2. In this section Ms Darling goes through: the witness statements, various agreements between the loan provider and the appellant, the loan provider policy, the loan protection third party administrator

agreement and provides details of the support and compliance training said to be required before persons working for the appellant could carry out the relevant services. The report mentions a fictitious case of PPI sale by the loan provider following the events from point of sale to the response being provided to the complainant and redress being instructed. It is noted that the loan provider's policies and procedures for the appellant were not disclosed for confidentiality reasons. A 2015 copy of the ICOB rules is appended. Ms Darling states that she indicates where her investigations have highlighted compliance or non-compliance with the relevant regulation.

30. Section 3 sets out a short background on market structure, regulation describing variously the role of GISC (the General Insurance Standards Council), FSA and FCA, and market practice – in this section Ms Darling describes "white labelling" of products by distributors, the rationale for this, the nature of competition in the market, the situations where insurers and intermediaries delegate responsibilities to others, and the possible reasons for that.

31. Section 4 of the Report sets out Ms Darling's opinion. Section 4.1 is prefaced with a summary of the regulations, standards and fiduciary duties that applied to the sale and administration of PPI products during the Relevant Period (defined as 2002 – 2013). The parties do not agree which FSA and FCA rules applied to the sale and administration of the PPI products during the relevant period –in particular [4.1.9] it is a matter of dispute that the appellant was subject to FSA and FCA requirements in relation to the activities it engaged in alongside and on behalf of the loan provider as it was acting in the capacity of an insurance intermediary for regulatory purposes. At 4.1.8 the report sets out Ms Darling's views on the FSA's / FCA's view on what would fall within the regulated activity of "assisting in the administration and performance of a contract of insurance". The section also contains views (4.1.13 and 14) on interpreting the scope of authority given and effect of the loan protection third party administration agreement and opines that the activities which were performed were in regulatory terms administering and assisting in the performance of a contract of insurance.

32. At 4.1.25 -4.1.46 summarises and paraphrases the content of various provisions in ICOBS, SYSC, TR and other regulatory requirements and at 4.1.47 it gives background on regulated firms' compliance functions.

33. Section 4.2 deals with the background to the sale of PPI products, suggesting the rationale for regulatory interest in the area and a brief chronology of regulatory actions taken.

34. Section 4.3 covers the implications of mis-selling PPI including the implications for the validity of the insurance product. At 4.3.1 the report puts forward the view that "complaints about the mis-selling of PPI are complex and go to the heart of the insurance contract". The report goes onto describe how insurers or their agent intermediaries would not be able to rely on exclusions where relevant information as to the terms had not been conveyed to the policyholder, and that if a claim had not

been made, that the policy would be cancelled from inception and premiums paid plus interest returned to the policyholder.

35. Section 4.4 describes the complaints resolution procedure(s) relevant to mis-sold PPI products for the Relevant Period. It is matter of dispute between the parties that when handling complaints the loan provider and the appellant, when acting on their behalf, were obliged to comply with FSA/FCA's DISP rules. The section on complaints procedures [4.4.3 – 4.4.11] seek to paraphrase the regulatory requirements on regulated firms. It is also a matter of dispute as to whether the appellant was obliged to consider whether any claim has been unreasonably rejected (4.4.12). The section goes to deal with the recording of complaints (4.4.15-4.4.17), the time limits for complaints (4.4.18) and additional protections for customers, a policy statement issued by the FSA and the industry reaction and unsuccessful legal challenge to that, and the controversy over whether the policy statement reflected the guidance.

36. At 4.4.42 Ms Darling offers the view that the loan provider and the appellant appeared to have appropriate processes in place to enable them to comply with complaint handling.

37. Section 4.5 responded to the instructions given to Ms Darling to consider 1) whether services of the type which the appellant was engaged to perform and did perform were akin to those in respect of which the Court of Appeal found in *Century Life* that the very nature of the individual PPI policy is under scrutiny, and 2) the fact that the policy was sold did not mean that there were not continuing obligations.

38. At 4.5.2 Ms Darling sets out her view on the distinction between administration and performance of contract and providing administrative services, what the appellant had authority to do, training requirements, compliance with loan provider policy, commentary on what the appellant did, and her view that on the basis of what she had seen complaints were handled "strictly in accordance with FSA/FCA requirements and in the same manner that any insurance intermediary would be required to do so." At 4.5.9 the report sets out a list of activities undertaken and the view that the appellant was carrying out activities which amounted to the administration and performance of an insurance contract and at 4.5.10 she also sets out her opinion that the activities were related to the insurance contract and that they were characteristic of a firm acting in the capacity of an insurance intermediary. Her view as expressed at 4.5.13 was that the appellant was not undertaking a compliance activity but a business function that had to be performed in a compliant manner.

39. In the section "How did Deloitte perform the Relevant Services" Ms Darling introduces this section at 4.5.15 by stating that her understanding is based on documents shown to her by the appellant. It includes commentary on the options open to complaints handlers at the appellant and comparison at 4.5.24 on division of labour / specialism within insurance firms. At 4.5.26 Ms Darling sets out her opinion that the appellant was not working remotely and also that it was not unusual for a distributor with delegated authority to handle the premiums and claims transaction payments on behalf of the insurer.

40. At 4.5.27-29 Ms Darling sets out her view that it was usual for an intermediary to maintain the database of customer records and process the transactions, that in the insurance market it is common practice to impose authority limits according to their level of skills, that the authority limit given to the appellant by the loan provider was not a token de minimis amount and that the appellant was not providing a back office function.

41. The report then sets out Ms Darling's professional opinion that the service provided by Deloitte "went to the very heart of the insurance contract" and her view that dealing with the complaint was an integral part of administration of insurance contract. At 4.5.36 she sets out her view that the handling of complaint about mis-selling is intrinsic to original insurance transaction.

42. Sections 4.5.37 to 4.5.51 of the report deals with complaints handling process – this is a combination of what Ms Darling understood the appellant did, and her view on the regulatory parameters they were working to, and sometimes their compliance with it. Sections 4.5.52- 4.5.59 cover the question of whether an intermediary's fiduciary and regulatory obligations continue after the policy has been sold and concludes with the opinion that the obligations do continue.

43. Section 4.6 responds to the instruction to consider whether, as set out by the Court of Appeal in *Trader Media* the services of the type the appellant was engaged to perform and did perform were characteristic of the services of an insurance agent or broker. The evidence for the reasons for the opinion is stated to be given elsewhere in the report and in particular the previous section. At 4.6.2 Ms Darling sets out that the fact that the appellant did not participate in all aspects of the arrangement, conclusion administration or performance of individual contracts of insurance was not an unusual feature of the market.

44. The appellant has, I understand provided HMRC, with witness statements of fact setting out the scope and nature of the services which were provided to the loan provider. I have not considered these witness statements but see from Ms Darling's report that these were among the documents she considered.

Parties' arguments:

45. Ms Sloane, for the appellant, emphasises that the presumption is that relevant evidence should be admitted unless there are compelling reasons not to. She argues the expert evidence is directly relevant to the issues HMRC has put in dispute. The tribunal must be able to reach an informed view on the regulatory framework which applies to insurance contracts. The appellant bears the burden of rebutting, needs to support its case with adequate evidence, and it is they who bear the risk if evidence is found wanting at trial.

46. Ms Mitrophanous' position, on behalf of HMRC, is that the report is irrelevant to the issues before the tribunal and offers views on legal matters which are properly matters for submission. The report seeks to paraphrase regulatory requirements which are a matter of law in a way where it is not clear what rule is being referred to and in

respect of what time period, it reaches legal conclusions on the controversial issue of whether the regulatory requirements apply, make interpretations of contract and expresses views on the matters of VAT law questions (e.g. on remoteness and whether what was done went to the heart of the contract).

47. Ms Sloane's response is that the expert has been careful not give an opinion on the ultimate issue before the tribunal of whether the exemption applies; the opinions given e.g. on remoteness, relationship to regulatory compliance of insurer are not directly questions of VAT law but "building blocks" to the VAT conclusion on which submissions can be made and upon which the judge can take his or her own view. One element of rebuttal, the appellant argues, is from the perspective of insurance and PPI compliance. How the insurance industry works, what is normal market practice and the effect of regulation in practice are not matters which can be addressed by legal submission. In any case there is no bar in the authorities (considered above) to matters of legal submission / regulation / legislative background being covered by the expert report or indeed the very issue which is before the court or tribunal for determination. In relation to the report before the court in *Kennedy* which covered the health and safety legislative context, the Supreme Court's rejected the restrictive approach taken by the Inner House to admissibility.

Discussion

48. In considering the report in the light of the parties' arguments on the application before me I have found it helpful to analyse the report according to the following categories of statement: 1) excerpts/ recitation of law 2) statements as to the applicability of the law, the content of a legal requirement on the person, the scope of authority given to them whether that arises under statute, regulation or other legal rules 3) opinions on the "building blocks", as Ms Sloane described them, to the VAT question for determination.

49. As regards 1), putting aside the question of foreign law, evidence does not need to be called for the tribunal to take notice of the law. This is clear in relation to Acts (s3 Interpretation Act 1978) and is clear from practice in relation to secondary legislation and rules such as the FSA or FCA Handbook rules made under statutory rule-making powers where courts and tribunals routinely get on with the job of identifying and resolving relevant questions of law by the parties' representatives putting the relevant law before them and without evidence from experts or other witnesses.

50. In my judgment the question of whether such materials should be admitted, and the presumption that relevant evidence must be admitted is not on point; issues of what the law is, are plainly not matters of evidence. The Tribunal Rules, which draw a distinction between evidence and submissions refer to expert *evidence* and the flexibility to admit or exclude under Rule 15(2) is in relation to admission or exclusion of *evidence*. The rules do not need to deal with the admission or exclusion of law because they do not envisage that evidence will be relevant to proving what the law is.

51. Category 2) includes any statement e.g. that a particular Handbook provision applies, or that a particular person is required or permitted to do something under the relevant regulatory provision, or that there is a legally valid contract or the effect of it. The same analysis - that such statements are not evidence – applies. These statements can be viewed as arguments or opinions as to the law which applies but those are matters for submission; they are not evidence (except where a person's subjective view or appreciation of the law is a relevant question which is not the case here.)

52. As regards (3) (and indeed 1) and 2)) as indicated by the approach of the High Court in *JP Morgan* referring to what was said by the High Court in *Barings* and the Supreme Court in *Kennedy,* there is nevertheless a discretion to allow a report which contains such matters to be admitted even if it expresses a view on whether and how certain legal tests are fulfilled on the basis that the court or tribunal can be trusted with the task of making its own mind up on the issue. But, in my view it is relevant to draw a distinction between opinions on the issue for the court or tribunal whose foundation is built on matters which are outside the tribunal's expertise (the value for which will be for the tribunal – having examined the underlying explanation of facts and reasoning to consider what it makes of the ultimate opinion) and opinions whose foundation itself rests on legal matters which are properly for the tribunal to reach a conclusion on with the benefit of evidence of the relevant facts and legal submissions.

53. The expert's opinions set out in this report on the issue of remoteness, whether regulation is at the heart of the contract, the issue of whether there are continuing obligations after the policy is sold, whether the services assisted the administration and performance of insurance contracts fall into this latter category. These opinions are based on views on regulatory law, contract, fiduciary and other legal obligations; underlying matters which a tribunal, assisted by the representatives' legal submissions, is readily able to engage with as matters of law and which are not outside of the realm of its expertise.

54. The position is potentially different as regards the opinion on the characteristics of insurance brokers and agents where the appellant maintains it is relevant to consider the industry's practice. HMRC disagree arguing the issue is, as with the others, one which will be resolved by considering the relevant UK and EU case law. Although this will ultimately be a question for fuller submission at the substantive hearing it is necessary to set out in a little more detail the relevant case-law in order to deal with the parties' arguments on this point.

55. The appellant refers to nine principles set out by the Court of Appeal in *Insurewide.com* v *R & C Comrs* [2010] EWCA Civ 422 in particular the fifth one where the court stated that the definitions of "insurance broker" and "insurance agent" in EC Council Directive 77/92 ("the Insurance Directive") :

> "…are relevant to the meaning of the same expressions in Article 13B(a) to the extent, but only to the extent, that they should be taken into consideration as reflecting <u>legal reality and practice</u> in the area of insurance law. It is not necessary, in order to invoke the exemption in art 13B(a), for the taxpayer to perform precisely the description of

> activities in art 2(1)(a) or (b) of the Insurance Directive." [emphasis added]

56. Further in relation principle 8), that it was sufficient:

> "…if a person is one of a chain of persons bringing together an insurance company and a potential insured and carrying out intermediary functions, provided that the services which that person is rendering are in themselves characteristic of the services of an insurance agent or broker."

57. Accordingly Ms Sloane argues that legal reality and practice, while not determinative, are things which should be taken into consideration and also that it will be a matter of dispute at trial as to what "characteristic of the services of an insurance agent or broker" means and whether, as the appellant argues, the perspective of the insurance industry is relevant and should be taken into account.

58. Ms Mitrophanous invites a careful reading of what the Court of Appeal said namely that the Insurance Directive provision may be relevant because what it describes is reflective of reality. The court was not suggesting that in order to answer the question of VAT law recourse had to be made to the practice of the insurance industry.

59. While in no way a final view on the point, I have difficulty with this argument; if the rationale underpinning the relevance of the Insurance Directive definition is that it is reflective of reality then that arguably carries with it the implication that the underlying reality is itself relevant. I should also record that at the hearing I raised the issue of whether expert evidence was necessary on the basis that the Court of Appeal in *Century Life* did not appear to be hampered in reaching a conclusion on the exemption by the apparent lack of expert evidence at first instance. Ms Sloane's response was that it was not clear what the evidential basis was for some of the assertions being made in the higher courts and the appellant did not want to take the risk of making an assertion without it being supported by evidence. While HMRC pointed out that in *Century Life* the issue of whether there might have had to have been an enquiry into whether what the appellant in that case did was "the sort of thing normally performed by insurance brokers or agents" as the Court of Appeal put it at [13] did not arise because it was accepted that Century Life were such agents, the implication is that the question of whether what the appellant does was characteristic of what was normally done by insurance agents / brokers was thought by the Court of Appeal to be at least potentially relevant.

60. Ms Mitrophanous also highlights the need to take account of the CJEU's recent decision in *Aspiro* (Case C-40/15). Resolution of the issue will be a matter of case law, and looking at the directive provision rather than looking at evidence of industry practice in the member state. Ms Sloane's reply was that it well established that the UK legislation is put in different terms to the EU legislation and that the taxpayer can take the benefit of whichever is the more generous interpretation. I was sent a copy of *Aspiro* by HMRC after the hearing which I have considered. The case will no doubt be the subject of detailed submissions at any substantive hearing but for present purposes I need only note that although I can see that the CJEU's decision, sets out

the view at [43] that it is not necessary to look at the Insurance Directive definition on the business activities of insurance brokers or agents definition when considering the VAT exemption (given the different rationales as between the Insurance Directive based on free movement rights and the VAT Directive), the CJEU's judgment does not necessarily undermine the appellant's argument that matters of practice or reality as referred to in *InsuranceWide* are nevertheless potentially something which is to be considered in determining the scope of what insurance agents and brokers do for the purposes of the VAT exemption.

61. Accordingly at this stage it cannot be ruled out at this point that industry practice on characteristics of insurance agents and brokers is irrelevant and that evidence on this point may in principle assist the court at the final hearing. There being no compelling reason to exclude such evidence having considered the prejudice to the parties I see no bar to the appellant, it if wishes, pursuing an argument that the practice is relevant and putting forward evidence on that issue.

Whether report should be admitted leaving it to tribunal at substantive hearing to decide its relevance weight? The prejudice to parties in admitting / not admitting the report and whether compelling reasons to exclude

62. As flagged above the appellant's position is that even if there are elements of legal background, opinions on matters for the tribunal then the proper and proportionate course, taking into account the amount at stake (millions of pounds), that costs will be borne by the appellant in relation to the expert irrespective of the outcome, and the minimal amount of time saving, is nevertheless to admit the report. Referring to *Hoyle* Ms Sloane argues that unless there was a very clear case for excluding or excising opinions on facts which did not require expertise to evaluate, then the report should be admitted leaving it to the trial judge to make use of the report as he or she sees fit. The Tribunal should not go through the report with a red pen – the sections are intertwined, there is no clear dividing line between regulatory/ legislative sections and expressions of opinion. The prejudice to appellant is significant:- it is draconian to deprive it of important element of how it wants to argue its case and the tribunal should be cautious about excluding evidence that assists in rebutting case. HMRC are not precluded from addressing the matters by submission if they wish. There is in summary no compelling reason to exclude the evidence.

63. HMRC are clear admissibility must be determined now. The approach of leaving it to the trial judge may be appropriate where the evidence is largely relevant (as could be seen on the facts of *Hoyle* where the AAIB report determined the causation of the accident) but that is not the case here. The appellant does not identify what is admissible and what is not and does not develop its argument that the provisions are intertwined. In Ms Mitrophanous' submission there is clear prejudice to HMRC. Controversial submissions are clothed in guise of objective expert evidence. It will have to cross-examine witness on points where they disagree with Ms Darling's assessment of the regulatory position when this could better be done by submission and HMRC's additional costs of dealing with this are irrecoverable. Issues of costs and wasting court time on irrelevant matters are all the more acute in relation to irrelevant expert evidence.

64. At the outset it is clear to me that certain of the criticisms HMRC make are, as the appellant points out, matters that could be left to the substantive hearing (for instance that the report purports to say what appellant did but is really based on assumed facts and that the report contains bare assertions of opinion which as pointed out by various authorities referred to in *Kennedy* are valueless). The mainstay of HMRC's objection is the extent to which the report comprises matters of law and the prejudice and propriety in having to put HMRC's legal position through cross-examination of a witness, and furthermore one who is not a legal expert.

65. Although there is no absolute prohibition on mentioning law in evidence, I agree with HMRC's point that where the law and its application is in dispute this puts a wholly different complexion on matters (there is no indication that in *Kennedy* the legal provisions described in Mr Greasly's report was in dispute). Having considered the totality of Ms Darling's report it is apparent that: it contains many matters of law albeit law from the regulatory sphere, that the precise statutory or other basis for the legal propositions put forward has in many cases not been clarified, and further that much of the legal propositions put forward are contested. The fact that the report contains so many disputed legal matters is significant. It raises the issue as to what is the most suitable way for the legal disputes to be made transparent in order that they can be dealt with fairly and justly by the tribunal hearing the matter.

66. Ms Sloane highlighted in her reply, the variety of case management directions a tribunal might choose to deploy in dealing with HMRC's concerns. The tribunal could for instance direct that it was not necessary for HMRC to cross-examine the witness on points of law and that HMRC were free to set out in their submissions their disagreement with the legal points. While I agree the prejudice might to some extent be mitigated by case management this applies just as much to a conclusion that the report is not to be admitted insofar as directions might be made to allow the appellant to adduce alternative or supplementary evidence of fact leaving matters of law to be addressed through submission.

67. The choice is between on the one hand having the legal issues addressed by submissions from both parties, or by a combination of the appellant's expert report and HMRC's submissions on the other. As the appellant points out if the legal issues on applicability of regulatory provisions are contested and this is dealt with in submissions then this will also take time, but it will in my view take significantly more time tackling such issues through the means of expert evidence. While I do not doubt a tribunal faced with submissions of law encoded in an expert report on the one hand and legal submissions from the other party would ultimately be capable of resolving the legal issues that is not my view an answer. Such an approach risks exhausting a far greater amount of the tribunal's hearing management and decision making time in deciphering what the parties' competing arguments on the law compared with the situation where these are clearly set out by the parties' legal submissions. Contested matters of law are more efficiently addressed through submission rather than expert evidence. Dealing with contested matters of law through the medium of evidence adds to the complexity by extending the potential dispute not just to the parties' representatives' submissions on the law, but the independent expert's views and each parties' submissions on the expert's views.

There is prejudice to both parties in the risk of arguments at cross-purposes with some submissions of law not being fully addressed or explored because they are cached in the statement, confusion over whether a legal position is being argued which does not need to cross-examined, or whether what is being put forward is Ms Darling's opinion of the legal position.

68. In my judgment a decision which allows the appeal to proceed on the basis that contentious legal issues are examined through the lens of an expert witness' view will more likely blur rather than focus the relevant issues for the tribunal. In that context, (and I should make it clear I mean no criticism of Ms Darling's credentials or the diligence with which she has followed her instructions) the report as it stands is more likely to hinder rather than assist the tribunal.

69. I also take into account that with the exception of the topic of whether the services rendered are characteristic of the services of an insurance agent or broker where it is at least arguable that evidence on industry practice is relevant, the reasoning underlying the various other opinions e.g. on remoteness, whether obligations continue after sale are matters of law are not areas where the court of tribunal can be assisted by expert evidence whether of fact or opinion. The prejudice to the appellant in not being able to put forward opinions on these points is therefore insignificant because the underlying reasoning would not assist the tribunal in any case. Any prejudice in collateral matters which are not matters of law being non-admissible can be mitigated by allowing the opportunity to serve amended or additional evidence of fact, or expert evidence of fact and opinion (where the foundation for those opinions are not matters of law).

70. As to the appellant's argument that the law is intertwined with other evidence and the guidance in *Hoyle* that where inadmissible statements appear in a report excision is not appropriate this concern does not appear to me be on point on the facts of this application. The guidance in *Hoyle* acknowledged the difficulty of making judgments as to the usefulness to the court of the expert's expertise to evidence of fact – in that context it could well be seen that such judgments would better be left to after the hearing having had the benefit of hearing from the witness and their answers in cross-examination. That is not the situation in relation to matters of law where there is no such ambiguity as to the level of assistance the statement will offer. Where opinion evidence has been supported by intertwined threads of regulation, and practice and both are contested the two will need to be disentangled in order that the legal issues may be resolved having considered the relevant submissions and in order that findings of fact can be made on practice having heard the evidence and had it tested in cross-examination.

71. If the report is admitted the task of disentangling what conclusions of the witness rest on contested legal matters which are not going to be of value but which will instead require focussed legal submissions and what rest on other matters falls to the tribunal panel at and after the hearing whereas it would in my view assist the tribunal far more if this work was done at the outset. Although this will involve some prejudice to the appellant in particular in terms of the additional time and cost that is

outweighed in my view by the resulting benefit of putting the tribunal in a far better position to deal with appeal fairly and justly at the substantive hearing.

72. Although neither party has invited me to dissect the report line by line I have considered whether that would be appropriate. In my view it would not; the difficulty with adopting an approach of the tribunal simply excising the matters appropriate for legal submission and leaving the remainder admissible is not so much identifying what to excise but with the coherence of explanation and usefulness to the tribunal of what then remains of the report. Rather than make such detailed excisions the better approach in my view, taking account that no hearing has yet been listed, is to reject admission of those sections of the report which contain to a significant degree of matters more appropriate for legal submission but at the same time permit the appellant to serve such further or amended evidence it wishes covering the matters of fact it wishes to rely on that would otherwise be lost.

Conclusion and directions

73. Taking account of the above discussion I therefore make the following rulings on admissibility in relation to the report and directions in relation to the further conduct of the case.

74. Section 3 which give a brief general background on the structure, regulation and practice of the market and Section 4.2 which gives general background to the sale of PPI products do not appear to me to be contentious. These sections appear to me to provide helpful background to a tribunal and should be admitted. (This does not of course preclude cross-examination of the witness or submissions on these passages being made at the hearing).

75. Section 4.1 (summary of the regulations, standards and fiduciary duties that applied to the sale and administration of PPI products during the relevant period) is inadmissible.

76. The following sections are also inadmissible: Sections 4.3 (implications of mis-selling PPI including the implications for the validity of the insurance product), 4.4 (which considers the legal provisions surrounding the complaints resolution procedure(s) relevant to PPI mis-sold PPI products), 4.5 (which considers whether the appellant's services fell within what the Court of Appeal described in *Century Life* as ones where the "very nature of the PPI policy is under scrutiny and whether there were continuing obligations despite the fact the policy was already sold), and 4.6 (which considers as set out in *Tradermedia* whether the appellant's services were characteristic of the services of an insurance agent or broker.)

77. Section 1 which reflects the instructions to Ms Darling, Section 2 which summarises and scope of review, and the various appendices will need to be amended accordingly to reflect the narrower scope of the report which has been admitted. Where FSA/FCA Handbook and other regulatory provisions are referred to these will need to be covered in submissions and the relevant extracts placed into the authorities bundles.

78. The appellant has leave to serve any amended or additional witness statements of fact arising from the exclusion of the above parts of the expert report and/or, if it wishes, to serve amended or further expert evidence of fact and opinion, covering insurance industry practice on the characteristics of insurance brokers and agents.

79. This appeal appears to me to be one where it would greatly assist the tribunal if the parties were able to draw up an agreed statement of issues (which should include a list of which regulatory rules, the application or interpretation of which are in dispute) and a statement of agreed facts.

80. The parties are directed to submit draft directions for the Tribunal's consideration within 28 days of the release of this decision, agreed if possible, dealing with and setting deadlines in relation to 1) the production of i) an agreed statement of facts, ii) an agreed statement of issues 2) service by the appellant of amended or further evidence of fact, and any amended or further expert evidence on industry practice within the scope set out above.

81. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 7 JULY 2016