[2016] UKFTT 0782 (TC)

TC05509

Appeal number: TC/2014/06538
TC/2015/00603

VAT — insurance intermediary services – whether supplied to insurer or to insured – to the insurer – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

UNICOM INSURANCE SERVICES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS
JANET WILKINS

Sitting in public at The Royal Courts of Justice, Strand, London on 22 and 23 September 2016 and having considered additional written submissions from the parties dated 15 November 2016

Peter Mantle, instructed by VAT Advice Line Limited for the Appellant

Brendan McGurk, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. This is an appeal by Unicom Insurance Services Limited ("Unicom") which carries on business as an insurance agent. On 29 July 2014, HMRC decided that certain services that Unicom supplied that fell within Item 4 of Group 2 to Schedule 9 of the Value Added Tax Act 1994 ("VATA 1994")[1] were supplied to consumers who belong in the UK for VAT purposes. Since those services were exempt supplies, HMRC concluded that Unicom could not recover input tax associated with making them. On 14 January 2015, HMRC issued Unicom with an assessment to VAT to recover what they considered to be input tax for which Unicom had wrongly claimed credit.

2. Unicom appeals against both the decision and the assessment. Its argument is that the intermediary services in question were supplied to Tradewise Insurance Company Limited ("TWIC") which belongs in Gibraltar (and so outside a member state of the EU) for VAT purposes. Accordingly, Unicom argues that, in consequence of Article 3 of the Value Added Tax (Input Tax) (Specified Supplies) Order 1999, it is entitled to claim input tax associated with the making of those supplies.

3. By the time of the hearing, it was common ground that Unicom was making supplies that fell within Item 4 of Group 2 to Schedule 9 of VATA 1994 and that TWIC belongs outside a member state of the EU for VAT purposes. It was also common ground that, although Unicom had made some exempt supplies to persons in the UK in the periods relevant to the appeal, these were sufficiently small to be ignored and so would not affect Unicom's entitlement to input tax recovery in those periods. Therefore, it was common ground that the only issue the Tribunal had to determine was whether Unicom was supplying its intermediary services to TWIC (in which case the appeal would succeed and the assessment should be set aside) or to consumers in the UK (in which case the appeal would fail and the assessment should be upheld).

Evidence

4. For Unicom, we had witness evidence from David Ratledge who was, at times relevant to this appeal, Unicom's Finance Director. Mr McGurk cross-examined him and we found him to be an honest and reliable witness. HMRC did not rely on witness evidence.

5. We also had documentary evidence in the form of a bundle of documents.

[1] Although this term is not used in the legislation, we will refer to this category of services as "intermediary services" since that was the terminology that both parties used at the hearing.

Facts

High-level overview of Unicom's business and its relationship with TWIC

6. Unicom was incorporated in the United Kingdom in 1992. At all times relevant to this appeal it has been registered for VAT purposes and, on 28 February 2013, it ceased to be separately VAT registered on joining a VAT group registration. It carries on business as an insurance agent dealing with the specialist needs of the motor trade industry such as garages and motor dealers and is not, therefore, concerned with the usual motor insurance policies taken out by private individuals. Unicom does not write insurance policies itself. Rather, it effects an introduction between consumers in the motor trade who want to take out an insurance policy (who we will refer to throughout this decision as "consumers") and insurance companies who are able to write such an insurance policy. It was common ground that all consumers belong in the UK for VAT purposes. The precise legal mechanism by which these introductions are effected was disputed and we will make findings on that issue later in the decision.

7. Unicom's commercial income consists of commission that it receives when it effects an introduction that leads to an insurance contract being concluded. In 95% of cases in which Unicom is successful in arranging an insurance contract, that insurance contract is written by Tradewise Insurance Company Limited ("TWIC"), a company incorporated in Gibraltar and which, it was agreed, belongs outside a member state for VAT purposes. TWIC and Unicom are associated companies. Until 2013, Unicom was a subsidiary of TWIC. From 2013, Unicom ceased to be a subsidiary of TWIC, but both Unicom and TWIC remained controlled by the same majority shareholder (Mr James Humphreys). More generally, the shares in Unicom are held by the same shareholders, and in the same proportions, as the shares in TWIC.

8. Unicom is registered with the Financial Conduct Authority (the "FCA") and prior to that was registered with the Financial Services Authority (the "FSA") in the UK. In accordance with that registration, it is able to undertake insurance mediation. It is also authorised, among other matters, to hold client money, to carry on a regulated activity and to provide advice and other services in relation to non-investment insurance contracts.

The decisions at issue in this appeal and the background to them

9. On 20 December 2010, Unicom applied to be registered for VAT and to backdate its registration to 1 January 2007. It made that application because, although it primarily made exempt supplies (and so was not obliged to account for any material output tax) it wished to reclaim input tax associated with supplies that it considered it was making to TWIC. HMRC accepted the application for VAT registration and backdated that registration to a date in 2007. (It was not immediately clear to us whether the effective date of registration was 1 January 2007 or 1 July 2007, but nothing much turns on this for the purposes of this appeal.)

10. Following registration, in around April 2011, Unicom made a successful claim for repayment of input tax associated with supplies that it considered it was making to TWIC. However, in December 2013, HMRC made a routine visit to Unicom,

evidently became concerned that Unicom might be supplying intermediary services to consumers rather than to TWIC and asked a number of questions about Unicom's relationship with TWIC. Following some correspondence, and an internal review within HMRC, on 25 November 2014, HMRC informed Unicom that, following their review, they considered that Unicom provided intermediary services to consumers and not to TWIC so that it was not entitled to input tax recovery. On 14 January 2015, HMRC issued Unicom with assessments totalling £162,965 to recover input tax which HMRC considered was not due. The assessment covered the VAT periods from, and including 03/11 to its de-registration as a separate company on 28 February 2013. Unicom appeals against both the decision and the assessment and it was common ground that Unicom has the burden of proving that it is entitled to the input tax it claimed.

Relevant terms of the Service Agreement between Unicom and TWIC and agency agreements with other insurers

11. On 2 July 2008, Unicom and TWIC entered into a service agreement (the "Service Agreement") in which TWIC was described as the "Insurer" and Unicom as the "Agent"[2]. That agreement was expressed to commence in January 2006 (before it was signed). We have concluded that, from January 2006 to 2 July 2008, TWIC and Unicom were party to an oral agreement in the same form as the Service Agreement and that, from 2 July 2008, this oral agreement was reduced to writing. It was not in dispute that the Service Agreement was in force at all times material to this appeal.

12. The recitals to the Service Agreement read, so far as material, as follows:

> (B) The Agent wishes to offer to its customers in the Territories a Motor Insurance Policy.
>
> (C) The Agent on behalf of the Insurer will issue the Policies whereby the Insurer will agree to provide the Policyholder an indemnity, subject to the terms of the Policies. The Parties have agreed that this Agreement records the terms of the procedures applicable to certain services (the "Services") to be provided by the Agent to the Insurer.

13. Clause 3 of the Service Agreement provided as follows:

> **3 DELEGATION OF POWERS**
>
> 3.1 The relationship between the Insurer and the Agent under this agreement is that of principal and agent but no relationship of employer and employee shall arise as between the Insurer and the Agent or between the Insurer and any of the Agent's employees or staff or sub-agents.
>
> 3.2 The Insurer shall specify all terms and conditions of the Policies to be underwritten, together with the criteria to be met by each

[2] The hearing bundle contained a number of versions of this document, not all of which appear to have been signed. We have concluded that the final version of the document was the signed version exhibited to Mr Ratledge's witness statement and references to clauses in this decision are, accordingly, to that version.

> Policyholder and the rates of premium to be applied by the Agent with which the Agent shall strictly comply and which it is not authorised to amend or vary in any way without the prior written consent of the Insurer (in respect of which the Insurer shall exercise its sole discretion).
>
> 3.3 The Insurer hereby delegates to the Agent the authority to transact Motor Insurance within the Period of this Agreement and within the Territories in accordance with the underwriting criteria and to issue Motor Insurance certificates to the Policyholder.
>
> 3.4 The Agent shall not act on behalf of or provide any advice in connection with the suitability of the Motor Insurance Policies to the Insured or any potential Insured or otherwise in the capacity of adviser to or agent of the Insured and shall make it clear to the Insured or potential Insured prior to the formation of any Insurance Policy that it is acting solely as the agent of the insurer.

14. Clause 3.2 of the Service Agreement was not, in practice, operated as strictly as the wording of that provision might suggest. In his oral evidence Mr Ratledge explained that TWIC gave Unicom a substantial delegated authority to match lower quotes that consumers received from other insurance companies. If Unicom started to find that a particular insurance company was quoting consumers lower premiums than TWIC it would notify TWIC of this fact. If the rival insurance company was one that TWIC considered to have sensible underwriting policies, and was offering a similar level of cover to TWIC, TWIC would typically give Unicom a general authority to match premiums offered by that insurance company. That authority was often communicated orally (rather than in writing). Moreover, it was a general authority (at least in relation to the particular rival insurer concerned). Unicom did not need to seek specific fresh authority each time it wished to match a quote offered by that rival. We have therefore concluded that, to the extent set out in this paragraph, Unicom and TWIC agreed a variation to the provisions of Clause 3.2.

15. The extent to which Unicom complied with Clause 3.4 of the Service Agreement was disputed and we will make findings on this issue (that take into account communications that take place between Unicom and consumers) later in this decision.

16. Clause 4 of the Service Agreement set out Unicom's duties and provided that Unicom had to discharge those duties "in good faith and in the Insurer's best interests". Those duties included:

> (1) An obligation, pursuant to Clause 4.1(a) to "offer Motor Insurance to its customers in accordance with the underwriting criteria". (We note that this provision describes the consumers as Unicom's "customers" and later in this decision will consider whether the extent to which phrasing such as this, which occurs in the Service Agreement, on Unicom's website and other communications with consumers sheds any light on whether Unicom was supplying its services to TWIC or to consumers.)

(2) A stipulation, in Clause 4.1(c) that, when acting on TWIC's behalf, monies that Unicom received from the insured client will be deemed as paid to TWIC when Unicom receives them, and monies due to the insured client by TWIC will be deemed paid when that client receives the money from Unicom.

(3) An obligation, pursuant to Clause 4.1(f) on Unicom to provide the Services in accordance with the professional standards of the insurance industry. The "Services" in question were defined in the Service Agreement as:

> The effecting of contracts of Motor Insurance under this Agreement and the notification of claims made by the Insureds pursuant to those Policies.

17. Clause 5 of the Service Agreement set out Unicom's additional duties. These included, among other matters, a duty to provide (at its own cost) administrative and other services in connection with the agreement, to keep proper records and to comply with applicable regulatory obligations. Clause 5.1(e) included a specific obligation on Unicom to take all available steps to ensure that it remains fully operational at all times and to have viable alternative methods of operation, or a recovery plan, in place in case Unicom became unable to function in whole or in part.

18. Clause 8.2 of the Service Agreement dealt with Unicom's remuneration in the following terms:

> 8.2 Subject to clause 8.3 the Agent shall be entitled, upon actual payment of the Net Premium and Insurance Premium Tax to the Insurer to retain the Agent's Commission as payment for its services in accordance with this agreement as agreed with the Insurer from time to time in respect of any Insurance Policy effected prior to the expiry or termination of this agreement (even though unpaid at the date of expiry or termination).
>
> 8.3 The Agent shall repay to the Insurer the Agent's Commission on a pro rata basis in respect of any Premiums which are returned to the Insureds.

19. Clause 8.2 of the Service Agreement needs to be understood in connection with the following terms defined elsewhere in the Service Agreement:

"Agent's Commission" which was defined as:

> the sum payable by the Insurer to the Agent as payment for the services provided by the Agent under this agreement which shall be 25% of the gross premium (net of Insurance Premium Tax) payable by the Insured in respect of each Motor Insurance or as agreed from time to time.

"Premium" which was defined as:

> the Premium set by the Insurer to be charged to and paid by the Insured. It is further understood and agreed that a proportion of the Premium charged, currently 7.5%, will be retained by Tradewise Insurance Services in relation to the Uninsured Loss Recovery Service provided within the Motor Insurance Policy.

"Net Premiums" which was defined as:

> the premiums received by the Insurer from Policyholders which shall be the gross Premiums payable by each Insured after taking into account any returns of premiums, taxes and levies and after deduction of the Uninsured Loss Recovery Service fee (as detailed below) and the Agent's Commission.

20. As well as the Service Agreement, Unicom entered into agency agreements with eight other insurance companies. By contrast with the Service Agreement, those agreements made it clear that Unicom was not the agent of the other insurers and, rather, was the agent of the consumers. For example, Clause 2.2 and Clause 2.3 of Unicom's agreement with Casualty & General Insurance Company (Europe) Ltd provided as follows:

> 2.2 We will authorise you to issue insurance documents on our behalf, but you shall only do so in accordance with current underwriting requirements ...
>
> 2.3 You undertake to pass us promptly any material information notified to you by the policyholder in accordance with the terms of the insurance contract. You remain, for this purpose, the agent of the policyholder and notification to you will not be deemed notification to us.

Unicom's website

21. Unicom maintains a website. A consumer cannot purchase an insurance policy over that website and, in order for Unicom to arrange an insurance policy for a consumer, the consumer would need to speak to Unicom over the telephone. However, the website does offer visitors the opportunity to obtain a "30 second quick quote" by providing certain information over the website.

22. A Google search for "motor trade insurance" would result in Unicom's website featuring several pages down the list of search results. In 2010, Unicom paid Tradewise Insurance Services Ltd ("TWISL"), an affiliated company, over £135,000 in return for efforts that TWISL undertook to improve Unicom's visibility in Google searches. However, those efforts were unsuccessful.

23. Mr Ratledge gave evidence that only around 8% of Unicom's new business is obtained as a result of consumers undertaking web searches and coming across the Unicom website and stated that this estimate was based on "tracking undertaken by our sales and marketing team". Little evidence was given as to how this estimate was produced and Mr McGurk put it to Mr Ratledge that the figure was incorrect. However, there was no challenge to Mr Ratledge's evidence as to the low ranking of Unicom in Google search results, nor to his evidence referred to below that the majority of new policyholders are referred to Unicom by consumers who have previously obtained policies through Unicom or from lead generation businesses. Moreover, Mr Ratledge is the finance director of Unicom and could be expected to have a good general idea of what Unicom regards as the most powerful media for generating new business. Therefore, while we will not make any findings as to

whether the 8% figure is absolutely arithmetically correct, as we could not do so without seeing some supporting evidence, we have accepted that Unicom does not regard its website as a powerful marketing tool, or as a significant source of new business.

24. Unicom's website displayed prominently the phrase "a Panel of 9 insurers" with a tick mark next to it together with other indicia of a desirable motor trade insurance policy (such as "cover at premises", "imports and American vehicle cover" and "demonstration cover") also with tick marks next to them. Although the website did not specifically state that the panel of 9 were all specialists in the provision of motor trade insurance (and Mr Ratledge confirmed that most were not specialists in this area), we have concluded that, on its website, Unicom was inviting consumers to attach significance to the fact that Unicom had a panel of 9 insurers available to it. Nothing on Unicom's website suggested that, in practice, 95% of insurance contracts that Unicom successfully arranged were with TWIC. Nor does Unicom's website describe TWIC as a "trading partner" of Unicom (the expression used in the new business letter referred to at [36]). However, we accepted Mr Ratledge's evidence that, in the period prior to 2013 in which Unicom was a subsidiary of TWIC, Unicom's website would have contained a statement that Unicom was such a subsidiary.

25. The website also contained a number of statements emphasising the care Unicom took with consumers and referring to consumers as "clients". For example, it said:

> Our experts evaluate your application as an individual case, before making sure every risk which applies to your business is covered under the single motor trade insurance policy. The quote is then based on this tailored policy, so you only pay for the exact policy features you need – no fluffy extras.
>
> …
>
> As a client, you are regarded as our number one concern. Part of the Unicom insurance "way" is to keep our clients in the loop on all things motor trade insurance. Any changes within our organisation – you will be the first to know.
>
> …
>
> As a Unicom Insurance client, you are the single most important thing to us. In a way you become a part of our organisation and because of that, we want to make sure you're fully up to date with everything that's going on. Any big changes in the insurance sector that may affect you – we'll let you know about straightaway. You'll be an official client of Unicom Insurance and you'll get the world class service we're recognised for, throughout your journey with us.

26. There were a number of other instances on Unicom's website of consumers being described as Unicom's "clients" or in similar terms.

27. Unicom's website offered consumers who had previously bought an insurance policy through Unicom the ability to report details of potential claims. Mr Ratledge in his evidence characterised this as "claims capture", a process by which Unicom sought to obtain early information on possible claims which it could pass on to the insurance company who issued the policy. He said that there was a benefit to the insurance company in obtaining this early notification as it increased the possibility of being able to deal with the claim itself before a third party claims management company could get involved and increase the size of the claim by, for example, suggesting that the consumer takes out expensive hire cars while his or her own car was out of action.

28. Mr McGurk, however, put it to Mr Ratledge that, at least prior to 2014, Unicom was engaged in "claims handling" rather than claims capture. He referred Mr Ratledge to the following passages on Unicom's website:

> It goes without saying that claims handling plays a vital role in an insurance agents [sic] business. It has to be quick, efficient and professional as insurance agents will be judged by this important service provided.
>
> It is for this reason that in 2014 Unicom took the decision to outsource its claims handling to Kingsway Claims Assistance Ltd. It was considered to be in our clients [sic] best interest that they received claims assistance from a company who solely specialises in claims handling.

He put it to Mr Ratledge that Unicom could scarcely have "outsourced" claims handling in 2014 if it was not itself performing "claims handling" prior to 2014. However, having considered Mr Ratledge's description of the services that Unicom performed and other evidence, we concluded that Unicom had only ever performed "claims capture" services which simply involved Unicom offering consumers an ability to report claims which would then be forwarded to TWIC with TWIC (and not Unicom) handling the claim. We considered that conclusion was consistent with both the terms of policy documents and "key features" documents that we saw that told consumers to report claims to TWISL and not to Unicom. It was also consistent with the definition of the "Services" in the Service Agreement referred to at [16(3)] which obliged Unicom to notify TWIC of claims but imposed no contractual obligation to manage claims. We therefore concluded that the website was wrong to suggest that Unicom had previously provided "claims management" services and then outsourced them.

29. Visitors to Unicom's website were told that, by using that website, they were agreeing to Unicom's privacy and cookie policy. However, no terms and conditions governing the terms of any contract between Unicom and consumers were published on that website and nor were consumers invited to accept any such terms and conditions.

Interaction between Unicom and consumers

30. Mr Ratledge's evidence, which we have accepted, is that the vast majority of Unicom's new business comes either by way of referrals from satisfied customers who have previously obtained an insurance policy through Unicom or from lead generation agencies. TWIC did not approach Unicom and ask Unicom to contact specified persons to see if they would be interested in motor trade insurance. On the contrary, persons interested in obtaining motor trade insurance either contacted Unicom themselves or were referred to Unicom by lead generation agencies.

31. The lead generation agencies deal with a number of insurance companies and rely on a strong IT offering. They invest heavily in ensuring that their websites come high on the list of Google results for consumers searching for motor trade insurance. A visitor to their website looking for insurance is then invited to fill in a web-based form that captures relevant information. Those "leads" are then sold to companies such as Unicom. Since the lead generation agencies capture information from consumers, it is possible for Unicom and others to specify, with a high degree of precision, the kind of leads in which they are interested. Unicom asks lead generation agencies to "filter out" consumers whose risks fall outside TWIC's underwriting criteria. For example, Unicom has told the lead generation agencies that it is not interested in receiving leads which would involve it insuring particular ages of drivers (as part of the motor business policy) or risks in certain postcodes.

32. Ultimately, a telephone conversation would take place between Unicom and an interested consumer. That telephone conversation would either be initiated by the consumer calling Unicom or by a lead generation agency that was itself having a telephone conversation with the consumer transferring that call to Unicom (a process known as "hotkeying"). In either case, the telephone conversation with Unicom would adopt the following structure:

(1) The Unicom agent answering the call would have access to computer systems (called Wisdom and Broker Online) that are extensions of TWIC's own systems. Unicom does not have exclusive access to these systems and TWIC allows other brokers and agents to use them.

(2) Those computer systems would prompt the Unicom agent to ask a series of questions, for example as to the level of cover that is needed and whether cover is needed for demonstration cars. The computer systems would generate the set of questions that need to be asked which would depend on the answers given to other questions in the set.

(3) The consumer might prompt further questions to be asked, for example by asking if an employee of the business could be named as an additional driver.

(4) The computer system would determine, from the answers given to the questions, whether the risks fell within TWIC's underwriting criteria. In the overwhelming majority of cases, the risks would fall within these criteria given that (i) 95% of the contracts that Unicom arranges are with TWIC and (ii) Unicom is able to "filter out" leads that would fall outside those criteria by giving targeted instructions to lead generation agencies. Assuming that TWIC's

underwriting criteria were met, the system would generate a quote for a premium that TWIC would be prepared to accept. In those cases, the Unicom agent would say that the system is "coming up with Tradewise" and would quote the premium offered.

(5) On some occasions, the risk might fall outside TWIC's underwriting criteria. That could result either in Unicom seeking specific authorisation from TWIC to depart from the criteria or in Unicom putting a specific proposal to one of the other insurers on its panel.

(6) The consumer would be asked if he or she wished to accept the quote offered. On occasions, the consumer might indicate that a rival insurer had offered a cheaper quote in which case Unicom might agree to match that quote in accordance with the authority from TWIC referred to at [14].

(7) If a consumer indicates that he or she would like to accept the quote, the telephone sales agent would read out a short script. Mr Ratledge did not say expressly what that "short script" was, though he referred in general terms to the New Business Letter referred to at [38] and specifically to the statement that the policy had been selected from those offered by a "limited panel of insurance undertakings". At [44], we make findings on what we consider this script involved.

(8) Having read out the short script, the telephone sales agent would take payment for the policy by means of credit card (which might result in the premium being paid in one lump sum by credit or debit card or by the consumer agreeing that a credit card could be debited with particular instalments in the future).

33. Mr Ratledge accepted in cross-examination that Unicom's telephone sales agents would not say anything over the telephone that was inconsistent with what was on Unicom's website. However, Mr Ratledge in his evidence made it clear that Unicom's sales agents only (i) asked a set of questions that the consumer system generated, (ii) informed consumers of insurance policies that would be available in the light of consumers' answers to those questions (which, in 95% of cases were Unicom policies), (iii) dealt with questions of price matching and (iv) read the short script referred to at [32(7)]. Mr Ratledge was confirming only that nothing Unicom's sale agents said in the course of those conversations was inconsistent with the website. That is not the same thing as saying that Unicom's sales agents would have repeated everything that Unicom said on its website (for example the statements that consumers were regarded as "clients") to consumers during the course of that telephone conversation. We have concluded that Unicom did not repeat those statements, not least since to do so would be inconsistent with the functional and reactive telephone conversation that Mr Ratledge outlined in his evidence.

34. Mr Ratledge was pressed in cross-examination as to whether the telephone conversation with consumers resulted in Unicom "recommending" policies to insured. We have concluded that Unicom only "recommended" policies in the narrow sense that it implicitly represented to consumers that the policies that it offered to consumers offered the cover that consumers had, by their responses to the questions

Unicom asked, indicated that they wanted. Unicom also expressly represented (as set out in the extracts from the New Business Letter referred to at [37]) that the policy covered the key risks associated with buying and selling vehicles as a motor trader. Based on the description of the telephone conversation that Mr Ratledge provided, we do not consider that Unicom gave any advice to consumers as to what kind of cover consumers should be purchasing. Rather, its role was reactive: Unicom told its customers about insurance contracts that would offer cover of the kind that those consumers thought that they needed. Our conclusions as to the extent of Unicom's recommendations and advice were consistent with what Unicom said in the New Business Letter referred to at [38]. If Unicom truly were offering "advice" or "recommendations" (in a wide sense) over the telephone, we do not consider it would have said in the New Business Letter that it was offering no advice and only a limited recommendation.

35. The effect of the system referred to at [32] was that TWIC had an effective "right of first refusal" since, in all cases, TWIC would be given the opportunity to enter into an insurance contract with the consumer. An insurer other than TWIC would only be offered the opportunity to transact with that consumer if, for some reason, TWIC was not interested in transacting itself (for example if the risk did not fall within TWIC's underwriting guidelines). We do not consider this was a contractual right of first refusal not least since the Service Agreement did not compel Unicom to offer TWIC the first opportunity to transact with consumers with whom Unicom was dealing. Rather, it was an effective right that arose primarily because Unicom used TWIC's Wisdom and Broker Online systems.

36. Any insurance contract with a consumer would be concluded over the telephone. Subsequent to the conclusion of that contract, Unicom would send a letter (the "New Business Letter") in a standard form to the consumer on its headed paper. The New Business Letter confirmed that insurance cover had been put in place, explained the information that the consumer needed to provide (for example copies of driving licences and proof of no claims bonus), gave key information about the policy and enclosed important documentation. One section of the New Business Letter informed consumers of their right to cancel and included the following notification:

> As your insurance intermediary we reserve the right to make a reasonable charge for the service we provide until cancellation.

37. There was also a section headed "Demands and needs assessment" which read as follows:

> This product ***will*** meet the demands and needs for anyone wishing to buy and sell vehicles as a motor trader.
>
> If you have an existing motor trade policy, ***we may not fully*** have taken into account your existing insurance cover.
>
> This product ***will not*** be suitable if you intend to use this product as a means to obtaining cheaper car insurance.

> This product ***may not*** be suitable if any material information given to us is incorrect or misleading or any material information has been withheld.

38. The New Business Letter also contained a section entitled "About Us" which, after informing consumers of Unicom's regulatory status, read as follows:

> Unicom Insurance Services is a trading partner of Tradewise Insurance Company Ltd. But operates independently from it and is free to offer products from a variety of insurance companies (including TIC Ltd) with which it has terms of business agreements in force.
>
> This policy has been selected from a limited number of insurance undertakings and companies. A list of the insurance undertakings and companies from which we've made this selection or deal with, in relation to this contract is available upon request.
>
> You will not receive advice or a recommendation from us for insurance. We may ask some questions to narrow down the selection of products that we will provide details on. You will then need to make your own choice on how to proceed.
>
> Our administration charges are published separately and are attached to this documentation.

The "administration charges" referred to related to charges for matters like producing duplicate certificates of insurance or duplicate proofs of no-claims bonus for which charges of £15 and £10 respectively were made.

39. At the same time as sending the New Business Letter, Unicom sent policyholders, also on its headed paper, details of the "Unicom Referral Scheme" which offered policyholders a discount of £20 on their next renewal premium for each new customer that they referred to Unicom. That letter began with the following paragraph:

> Due to popular demand from our customers, we are pleased to announce the launch of Unicom's new Referral Scheme.

40. Attached to the New Business Letter was a Key Features Document that explained the principal terms of the policy. In that document, policyholders were told to notify claims under the policy to TWISL and gave contact details for TWISL.

The regulatory regime applicable to Unicom

41. As we have noted, Unicom is regulated by the FCA and has previously been regulated by the Financial Services Authority ("FSA"). Under the terms of its authorisation with the FCA, Unicom is permitted, among other things to:

(1) hold and control client money;

(2) advise and arrange deals in "investments" (limited to non-investment insurance contracts);

(3) assist in the administration and performance of a contract of insurance (also confined to non-investment insurance contracts);

(4) make arrangements with a view to transactions in "investments" (limited to non-investment insurance contracts)

42. However, while Unicom had permission to undertake those activities it did not, in the periods relevant to this appeal, actually hold client money in accordance with the permission set out at [41(1)]. In particular, premiums that it received from consumers were treated, for applicable regulatory purposes, as having been received by the relevant insurer (TWIC in 95% of cases). Therefore, Unicom was not treated as holding client money when it received premiums from consumers.

43. Unicom was also subject to regulation in the form of "Insurance: Conduct of Business" rules and guidance contained in the FCA Handbook ("ICOBS"). The ICOBS treated the consumer as Unicom's "customer" for regulatory purposes and imposed a number of regulatory obligations on Unicom. In particular:

(1) Paragraph 4.1.6 of ICOBS set out a rule to the effect that, prior to the conclusion of a contract of insurance, Unicom had to tell the relevant consumer whether Unicom was under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance undertakings and whether it gives advice based on a "fair analysis of the market". Paragraph 4.1.8 of ICOBS set out guidance to the effect that an insurer could give advice based on a "fair analysis of the market" by using panels of insurers in certain circumstances.

(2) Paragraph 4.1.7 of ICOBS required Unicom to explain, prior to conclusion of a contract of insurance, whether it is making a "personal recommendation" which is defined as covering the situation where an investment:

> is presented as suitable for the person to whom it is made, or is based on a consideration of the circumstances of that person

(3) Paragraph 4.1.9 of ICOBS contained a rule explaining how information under, inter alia, paragraph 4.1.6 and paragraph 4.1.7 was to be conveyed. That paragraph permitted information to be given orally in certain circumstances. However, where information was given orally, it also had to be given in writing "immediately after conclusion of the contract of insurance". Thus, as we read paragraph 4.1.9, where information is given orally, it also has to be given in writing. Therefore, we have concluded that the information referred to in (1) and (2) above had, in all circumstances, to be given prior to conclusion of the contract of insurance and, if given orally before the contract of insurance was concluded also had to be set out in writing immediately afterwards. Merely giving notification in writing after the contract was concluded would not satisfy the requirements of paragraphs 4.1.6, paragraph 4.1.7 and paragraph 4.1.9 of ICOBS when read together.

(4) Paragraph 4.4.1 of ICOBS set out a rule that required Unicom to tell a "commercial customer" on request, the amount of commission that Unicom

earned in connection with an insurance policy. (Most of the consumers with whom Unicom dealt would be "commercial customers" for these purposes since they would be requesting insurance in connection with their trading activities, rather than in their private capacities.)

(5) Paragraph 4.4.3 of ICOBS (which contained guidance, rather than a rule) explained the rules on commission disclosure as being in addition to the general law on the fiduciary obligations of an agent and explained those obligations as follows:

> In relation to *contracts of insurance*[3], the essence of these fiduciary obligations is generally a duty to account to the agent's principal. But where a *customer* employs an *insurance intermediary* by way of business and does not remunerate him, and where it is usual for the *firm* to be remunerated by way of *commission* paid by the insurer out of premium payable by the *customer*, then there is no duty to account but, if the customer asks what the *firm's* remuneration is, it must tell him.

44. We consider that, in the extracts from the New Business Letter referred to at [38] Unicom was seeking to address the above requirements of ICOBS by explaining (i) that Unicom was not contractually tied to TWIC, (ii) that Unicom was not giving advice based on a "fair analysis of the market" and (iii) was not making a personal recommendation. In his evidence, Mr Ratledge said specifically that the "script" read out to consumers who were about to buy an insurance policy included the statement that the policy had been selected from those offered by a "limited number of insurance undertakings". He also indicated that the "script" covered other matters which the FCA required to be pointed out to consumers purchasing policies over the telephone.

45. We have accepted Mr Ratledge's evidence as to what the "script" involved. Given that the ICOBS imposed a regulatory requirement on Unicom to provide the information set out [44] prior to conclusion of the insurance contract, we consider that it is more likely than not that Unicom complied with that obligation and notified consumers of all the points referred to in the New Business Letter referred to at [38] over the telephone before the contract of insurance was concluded.

The law

UK and EU legislation

46. Section 26 of the Value Added Tax Act 1994 sets out the amount of input tax for which a taxpayer is entitled to credit as follows:

> **26 Input tax allowable under section 25**
>
> (1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in

[3] Italics indicate that the term in question is a defined term

the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—

(a) taxable supplies;

(b) supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom;

(c) such other supplies outside the United Kingdom and such exempt supplies as the Treasury may by order specify for the purposes of this subsection.

47. Article 2 of the Value Added Tax (Input Tax) (Specified Supplies) Order 1999 (the "Order") provides as follows:

The supplies described in articles 3 and 4 below are hereby specified for the purposes of section 26(2)(c) of the Value Added Tax Act 1994.

48. Article 3 specifies the following category of services which are, accordingly, supplies that are specified for the purposes of s26(2)(c) of VATA 1994:

Services—

(a) which are supplied to a person who belongs outside the member States;

(b) which are directly linked to the export of goods to a place outside the member States; or

(c) which consist of the provision of intermediary services within the meaning of item 4 of Group 2, or item 5 of Group 5, of Schedule 9 to the Value Added Tax Act 1994 in relation to any transaction specified in paragraph (a) or (b) above,

provided the supply is exempt, or would have been exempt if made in the United Kingdom, by virtue of any item of Group 2, or any of items 1 to 6 and item 8 of Group 5, of Schedule 9 to the Value Added Tax Act 1994.

49. Group 2 of Schedule 9 to VATA 1994 relates to insurance and provides an exemption from VAT in relation to:

1. Insurance transactions 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.

50. Notes 1 and 2 to Group 2 provide definitions of an "insurance intermediary" and of acting in an "intermediary capacity" as follows:

> (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.

51. It was common ground that, in order for a person's services to constitute intermediary services, it is necessary that the services which that person is performing are in themselves characteristic of an insurance agent or broker.

52. Mr McGurk also referred us to Directive 2002/92/E of the European Parliament and of the Council of 9 December 2002 on insurance mediation (the "Insurance Mediation Directive") which he said gave a further insight into the scope of the Item 4 exemption. However, since it was common ground that the services that Unicom provided were within the Item 4 exemption, and the only question was who those services were supplied to, we derived little assistance from the Insurance Mediation Directive and will not refer to it further in this decision.

Case law authorities on VAT

53. In *Airtours Holiday Transport Limited v Commissioners for Her Majesty's Revenue & Customs* [2016] UKSC 21, the Supreme Court considered whether PricewaterhouseCoopers ("PWC") made a supply of services to Airtours (which would result in Airtours being able to claim credit for input tax since it paid PWC for the services) or, alternatively, whether PWC supplied its services to a group of financial institutions. Thus, although *Airtours* was ultimately concerned with the question of whether *Airtours* could claim credit for input tax, Mr McGurk and Mr Mantle were agreed that it (and the other cases referred to below) were relevant authorities since they all involve an analysis of how to determine the person to whom services have been supplied.

54. We have concluded from *Airtours* that our starting point in determining whether Unicom supplied its services to TWIC or to consumers should be an analysis of the contractual arrangements between Unicom and TWIC and between Unicom and consumers. The focus of that exercise should be on ascertaining the nature of the parties' obligations under those contract. As Lewison J stated in *A1 Lofts Ltd v HMRC* [2009] EWHC 2694, the nature and classification of those obligations for VAT purposes needs to be performed by applying principles of VAT law (and it follows that the label attached to a particular service under a contract is not determinative of the nature of that service for VAT purposes).

55. Having also considered the judgments of the Supreme Court in *HMRC v Loyalty Management UK Ltd* [2013] STC 784 and *Secret Hotels2 Ltd v HMRC* [2014] STC 937, we will adopt the following approach:

(1) We will consider the whole of the relevant combinations of transactions and the whole of the relationships between the relevant persons (TWIC, Unicom and the consumers).

(2) We will take the contractual position as between the various participants in the arrangements as our starting point since we should, in normal circumstances, characterise the relationships by reference to those contracts.

(3) We will then consider whether the contractual position represents the "economic reality" of the arrangements. In performing this exercise, we will take into account that the contractual relationships will normally represent economic reality but that there will be circumstances where this is not the case, including but not limited to situations where the contractual terms constitute a purely artificial arrangement which does not correspond with economic and commercial reality.

Case law authorities relating to insurance contracts

56. Mr McGurk referred us to a number of authorities relating to insurance contracts which he relied on in support of his proposition that, when Unicom supplied intermediary services, it did so as agent of the consumers and not as agent of TWIC.

57. *Arif v Excess Insurance Group Ltd* 1987 SLT 473 is authority for the proposition that prima facie, an independent agent or broker is the agent of the insured and not of the insurer. However, *Winter v Irish Life Assurance plc & Anor* [1995] C.L.C 722 makes it clear that this presumption can be rebutted in the following terms:

> But the presumption can undoubtedly be rebutted and, in my respectful view, the determination of the particular relationship in any case depends more on the actual circumstances, including the circumstances underlying the initiation of the relationship, than on any presumption.

58. In the *Winter* case, the court considered that the most relevant factor was that the insurance contract in question was instigated by the insured (albeit following the recommendation of the broker) rather than the insurer. Accordingly, the court concluded that the broker in that case was acting as agent of the insured, and not of

the insurer. We do not, however, consider that *Winter* is authority for the proposition that, whenever a consumer initiates contact with an insurance company through a broker, it necessarily follows that in all cases the broker is acting as agent for the consumer not least since the court in *Winter* was at pains to point out that an examination of all circumstances was required.

59. In *Anglo-African Merchants Ltd and Anor v Bayley* [1970] 1 QB 311, Megaw J considered the relationships between an insured, a broker and an insurer in circumstances where a claim had been made and the broker had, on behalf of the insurer, commissioned and received an assessors' report which was expressed to be confidential to the insurer. It was submitted that there was nothing improper about this practice on the basis that the broker acted only as agent for the insured in placing the insurance and accordingly, the broker was entitled subsequently to accept instructions from the insurer for the purposes of dealing with claims under the policy.

60. Megaw J, however, rejected this submission. He concluded, based on his interpretation of comments made by Scrutton LJ in *Rozanes v Bowen* (1928) 32 LILR 98,101, that the broker was agent of the insured for all purposes. Having reached this conclusion he said:

> If an insurance broker, before he accepts instructions to place insurance, discloses to his client that he wishes to be free to act in the way suggested, and if the would-be assured, fully informed as to the broker's intention to accept such instructions from the insurers … is prepared to agree that the broker may so act, good and well. In the absence of such express and fully informed consent, in my opinion it would be a breach of duty on the part of the insurance broker so to act.

61. Mr McGurk appeared, at least in his skeleton argument, to submit that the absence of express consent from consumers necessarily meant that Unicom could not be acting as agent of TWIC for the purposes of providing intermediary services. We do not consider that to be a correct reading of the authorities. If Unicom was acting as agent of consumers when providing insurance services, it might be in breach of contract (with consumers) by acting as agent of TWIC for that purpose or for other purposes without consent (under the general law of agency). However, as *Winter* makes clear, the question of whether Unicom was acting as agent of consumers needs to be determined by ascertaining all relevant facts and circumstances. Moreover, the *Anglo-African Merchants Limited* authority does not suggest that a broker cannot act as agent for both insurer and insured but simply points out that, if it has been appointed as agent of the insured, it might be in breach of its contract with the insured when it accepts instructions from the insurer. That latter point was made clear in *Callaghan & Anor v Thompson* [2000] CLC 360 where David Steel J said as follows:

> Nor is it to the point that Mansons [the broker] were used by the defendants to instruct and obtain reports from the loss adjusters acting for the underwriters. This practice has been roundly criticised by the courts: see *Anglo-African Merchants Ltd v Bayley* [1970] 1 QB 311… The basis of the criticism is not to the effect that the brokers thereby have to be treated as agents of the insurers but in accepting such

instructions, the brokers are in breach of their retainer by the insured given the conflict of interest that thus arises.

Discussion

62. Our task is to consider whether Unicom supplied intermediary services to TWIC or to consumers. Since Unicom did not provide "claims handling" services, the relevant intermediary services consisted primarily of matters falling within Notes 1(a), 1(b) and 1(d) of Group 2 of Schedule 9 VATA 1994 (referred to at [50]).

63. Prior to the hearing, Unicom's position was that it was entitled to input tax recovery by virtue of Article 3(c) of the Order referred to at [48] and that was the position it pleaded in its Grounds of Appeal. In order to succeed with that argument, Unicom would need to establish that the services it supplied to TWIC were intermediary services. That was an agreed fact as noted at [3]. However, we ourselves raised the question of whether Article 3(c) was applicable since it seemed to us that the reference to the "transaction" in Article 3(c) was to the underlying insurance transaction between TWIC and consumers. Since TWIC wrote its insurance business with consumers based in the UK, it seemed to us that the "transaction" could not satisfy Article 3(a) or Article 3(b) with the result that Article 3(c) could not apply. However, it seemed to us that Unicom may still be entitled to input tax recovery by virtue of Article 3(a) of the Order and that, to obtain the benefit of that Article, it would need only to show that it was making supplies exempt under any item of Group 2 of Schedule 9 of VATA 1994. It would not need to show specifically that the services it was supplying were "intermediary services" falling within item 4 of Group 2.

64. We requested written submissions on the points raised at [63]. Having considered those, we have concluded that Unicom is not entitled to input tax recovery under Article 3(c) for the reasons we have given. However, we have given Unicom permission to amend its Grounds of Appeal so as to rely on Article 3(a), rather than Article 3(c), noting that Unicom formally submitted that no such application to amend was strictly necessary.

65. Given the VAT authorities referred to at [53] to [55], we will order our discussion as follows:

(1) We will ascertain the effect of the Service Agreement between Unicom and TWIC taking into account all relevant circumstances and the authorities relating to insurance contracts that we were referred to.

(2) We will then similarly ascertain the nature and effect of any relationship between Unicom and consumers in the light of those circumstances and authorities.

(3) We will then, having due regard to economic reality, conclude whether Unicom supplied intermediary services to TWIC or to consumers.

The effect of the Service Agreement

66. The Service Agreement clearly imposes a contractual obligation on Unicom to provide intermediary services. The parties chose to put their arguments as to who those services were supplied to by considering questions of agency with Mr Mantle arguing that, when it provided intermediary services, Unicom was acting as agent of TWIC (and so supplying its services to TWIC) and Mr McGurk arguing that Unicom was providing its services as agent of consumers.

67. Mr McGurk submitted that, in the absence of express consent by consumers, Unicom could not be appointed as TWIC's agent. We do not agree. Firstly, as we note at [61], absence of consent by consumers could be relevant only if consumers had appointed Unicom as their agent for the purposes of providing intermediary services. In the section that follows we explain why we do not consider that Unicom was the agent of consumers for those purposes. Secondly, even if consumers had appointed Unicom as their agent, although Unicom might be in breach of contract with consumers if it then accepted an appointment as TWIC's agent in relation to intermediary services, the agency relationship with TWIC would not necessarily be void. More fundamentally, Clause 3.4 of the Service Agreement contained an express provision preventing Unicom from acting as agent for consumers. Therefore, it was not the case that consent would be needed for Unicom to act as TWIC's agent. On the contrary, if Unicom acted as agent for consumers without TWIC's consent, Unicom would be in breach of its contract with TWIC.

68. Mr McGurk's next argument was that, properly construed, the Service Agreement did not appoint Unicom as TWIC's agent in relation to the supply of intermediary services. He accepted that, pursuant to the Service Agreement, Unicom was TWIC's agent for the purposes of the supply of insurance (or the purpose of "binding cover" on behalf of TWIC as he put it in his oral submissions). However, he submitted that that was the extent of Unicom's appointment as agent. We do not accept that submission for the following reasons:

(1) The effect of Clause 3.1 and Clause 3.4 of the Service Agreement is that the relationship between TWIC and Unicom under the agreement as a whole is that of principal and agent. The fact that, in Clause 3.3 of the Service Agreement, Unicom is given a specific delegated authority to transact motor insurance on TWIC's behalf does not detract from the generality of Clauses 3.1 and 3.4.

(2) As noted at [16], in performing duties under Clause 4 of the Service Agreement, Unicom was obliged to act in accordance with TWIC's best interests. That is consistent with a relationship of agency in relation to the duties under Clause 4. Unicom had a duty, under Clause 4.1(a) to "offer Motor Insurance to its customers". That service is clearly an "intermediary service" as it precedes the conclusion of the insurance contract and involves informing consumers of the terms on which TWIC was prepared to offer motor insurance, including dealing with any counter-offers that the consumer made. TWIC gave Unicom authority to handle those negotiations on TWIC's behalf as evidenced by the broad discretion that TWIC gave Unicom to "price match".

(3) As noted at [50], the collection of premiums is specifically stated to be an intermediary service. Clause 4.1(c) of the Service Agreement made it clear that when a consumer paid a premium to Unicom, it was to be treated as paid to TWIC. That is consistent only with Unicom acting as TWIC's agent in relation to the collection of insurance premiums. Moreover, that treatment was followed for regulatory purposes as well since, when it received premiums, Unicom was not regarded as holding "client money".

(4) We do not believe that the conclusions set out above are affected by the fact that, on occasions in the Service Agreement, consumers are described as "customers" of Unicom. Any inference that might have been raised by the use of that term is more than outweighed by the clear contractual provisions which Unicom and TWIC have used to describe the relationship between them. Nor do we consider that statements on Unicom's website, and in correspondence between Unicom and consumers, that describe consumers as "customers" or "clients" have any bearing on the construction of the Service Agreement between Unicom and TWIC.

69. Mr McGurk submitted that the true effect of the arrangements regarding Unicom's commission was that an amount equal to 75% of the gross premium represented consideration for the insurance contract that TWIC entered into with the consumer. The remaining 25% of the gross premium (which represented Unicom's commission) was predominantly consideration for services that Unicom provided to the consumers. We have not accepted that submission. We consider that the effect of the Service Agreement was that (i) TWIC owed Unicom a contractual obligation to pay it 25% of the gross premium on relevant insurance policies (ii) that contractual obligation was consideration for contractual obligations that Unicom assumed in favour of TWIC under the Service Agreement and (iii) in order to enable TWIC's contractual obligation in (i) to be satisfied, Unicom was entitled to deduct the Agent's Commission from premiums Unicom received from consumers before paying the amount of any balance due to TWIC. The effect of the Service Agreement was that TWIC (and not consumers) had the obligation to pay commission to Unicom and that conclusion is reinforced by Clause 8.3 of the Service Agreement (referred to at [18] above) requiring Unicom to "repay" commission to TWIC in certain circumstances. In the next section we will consider the nature of the arrangement between Unicom and TWIC and, for reasons noted in that section, we have concluded that consumers owed no contractual obligation to pay, or procure payment, of commission to Unicom.

70. It follows that we have concluded that, pursuant to the terms of the Service Agreement, properly construed, Unicom provided intermediary services as agent for TWIC. Also pursuant to the Service Agreement, Unicom acted as TWIC's agent for the purposes of concluding an insurance contract between TWIC and consumers. As consideration for Unicom performing its duties under the Service Agreement, TWIC agreed to pay Unicom commission and Unicom deducted that commission from premiums that it received from consumers.

The arrangement between Unicom and consumers

71. Mr McGurk argued that, when it was supplying intermediary services, it did so as agent for consumers and therefore supplied its services to those consumers. The essence of his argument was that, by means of its website and other documents, Unicom referred to consumers as its "clients" and represented to consumers that it was "batting for them". Accordingly, he argued, Unicom indicated that it was performing all the usual functions that an insurance broker would perform with the result that, when consumers called up Unicom and asked Unicom to approach insurance companies (including TWIC) for cover, the presumption referred to in *Winter* should be applied and Unicom regarded as acting as agent for consumers. He emphasised that it was consumers who, via Unicom, initiated contact with TWIC and that, as in *Winter*, this fact should lead to the conclusion that Unicom was the agent of the consumers.

72. We do not consider that the website contained contractual terms that applied for the purposes of any relationship between Unicom and consumers for the following reasons:

(1) As noted at [23], we have concluded that Unicom did not, at the material times, regard its website as a powerful marketing tool or as a significant source of new business. In those circumstances, viewed objectively, we do not consider that Unicom could have intended statements on the website to form part of a contract with consumers.

(2) The website did not publish any terms and conditions, or invite visitors to that website to accept any terms and conditions (except in relation to Unicom's cookie and privacy policy). In the absence of any such terms and conditions, viewed objectively, there was no intention that statements on the website should be regarded as setting out contractual promises.

(3) The statements on the website were largely in the nature of promotional statements. By referring to consumers as "clients", we do not consider that it was demonstrating a clear contractual intention to assume the obligations of an agent. By way of analogy, HMRC refer to taxpayers as its "customers" even though there is no relationship of principal and agent between HMRC and individual taxpayers.

(4) For reasons set out at [33], we do not consider that the statements on the website referring to the relationship between Unicom and consumers were repeated in the telephone conversation with consumers leading to the formation of the insurance contract.

73. Mr McGurk is correct to say that there were statements on the website that overstated the nature of the relationship between Unicom and consumers. The statements relating to "claims handling" referred to at [28] were, to put it simply, misleading. However, because of our conclusion at [72] we do not consider that the website has any significant bearing on the relationship in law between Unicom and consumers.

74. We agree with Mr McGurk that there is a presumption that Unicom was acting on behalf of consumers in negotiating, and arranging, insurance cover (and so was acting as their agent in relation to the provision of intermediary services). However, as *Winter* makes clear this presumption must be considered in the light of all relevant circumstances and we consider that having regard, in particular to the following circumstances, the presumption is rebutted:

(1) Unicom places 95% of its business with TWIC. While it is not contractually tied to TWIC, Unicom is nevertheless in a very different position from a truly independent insurance broker who surveys the whole market, or at very least a significant part of it.

(2) Unicom undertook a contractual obligation to TWIC in the Service Agreement that it would not act as agent for consumers (see Clause 3.4 of the Service Agreement set out at paragraph [13] above). Of course it would be possible for Unicom to breach that obligation. However, we think it highly unlikely that Unicom would engage in a course of dealing with consumers that amounted to a breach of the Service Agreement with TWIC, which represents such a significant source of revenue for Unicom.

(3) The relationship between Unicom and consumers must be understood by reference to communications between them which, unlike statements on the website, were intended to have contractual effect. Although the New Business Letter was sent to consumers after they had entered into the insurance policy (and so after Unicom had provided a number of intermediary services in relation to that policy), we believe it can be taken to reflect the agreement reached with consumers over the telephone. We do not consider that Unicom, which is regulated by the FCA and which conducts a business which relies on securing the confidence of consumers, would have said one thing over the phone about a material issue and something completely different in the New Business Letter[4]. Read as a whole, the New Business Letter makes it clear that Unicom is not offering any advice or any recommendation of the policy beyond that outlined at [34]. Mr McGurk is right to say that the New Business Letter does not fully describe the closeness of the relationship between Unicom and TWIC: it does not explain that Unicom has been appointed as TWIC's agent, misleadingly describes Unicom as the consumer's "insurance intermediary", does not explain that 95% of Unicom's business goes to TWIC and does not explain that TWIC enjoys the effective "right of first refusal" referred to at [35]. However, while the New Business Letter does not make it abundantly clear that Unicom <u>is</u> acting as TWIC's agent (with the result that Unicom has not complied with the provisions of Clause 3.4 of the Service Agreement which required Unicom to make this clear to consumers), we consider that it makes it sufficiently clear that Unicom is <u>not</u> acting as agent of the consumer.

[4] Although, as noted at [75], Unicom did purport, in the New Business Letter, to charge consumers if the underlying insurance policy was cancelled although we had no evidence before us that this was specifically mentioned in telephone discussions with consumers.

(4) In addition to the points made at (3) above, we have concluded that it is more likely than not that consumers were made aware of the aspects of the New Business Letter referred to at [38] during the course of their conversation with Unicom's sales agent and before any contract of insurance was entered into. That is a further reason why we consider consumers would have been aware that Unicom was not purporting to act as their agent.

75. There was no suggestion that consumers undertook any obligation to pay Unicom for its services in arranging the contract of insurance. (As noted at [36], Unicom did, in the New Business Letter, reserve the right to charge consumers if the insurance contract was terminated. However, we had no evidence that this was mentioned to consumers over the telephone and if it was not mentioned we doubt that such a term could form part of any contract with consumers.) Unicom also reserved the right to charge for certain specific administrative services such as the provision of additional certificates of insurance. However, it was clear that Unicom's only significant contractual right to compensation was contained in the Service Agreement with TWIC and only TWIC had any material contractual obligation to pay Unicom for the intermediary services it was providing.

76. In cross-examination, Mr Ratledge accepted that Unicom owed duties in both contract and tort to consumers. We do not regard that as determinative of Unicom's duties since Mr Ratledge has a background in chartered accountancy rather than the law and, in any event, the nature of Unicom's duties is a matter of law for the Tribunal to determine rather than a question of fact on which witness evidence is relevant. We consider that Unicom owed consumers some duty of care in general law – in particular a duty to record accurately answers that consumers gave to the questions that Unicom asked and to transmit those answers accurately to insurers for the purposes of obtaining quotes for insurance cover. We are prepared to accept that the duty was owed in contract and consumers gave consideration for Unicom's promise by permitting Unicom to use the information that they provided as the basis for making an offer of insurance (as agent for TWIC) which gave Unicom the prospect of earning commission.

77. Mr McGurk submitted that Unicom's contractual duty to consumers went further than that set out at [76] and referred us to common law authorities such as *Standard Life Assurance Ltd v Oak Dedicated Ltd* [2008] EWHC 222 (Comm), [2008] Lloyds Law Rep 552 on the scope of an insurance broker's duties. However, we consider that Unicom's duties to consumers need to be determined in the light of the fact that Unicom made it clear to consumers that it was not offering "advice" on the insurance policy and was offering only a limited recommendation as noted at [34]. Therefore, Unicom's duty to consumers was more limited than that of a conventional insurance broker. In any event, even if Unicom's duties to consumers were wider than those set out at [76], we do not consider that consumers had any contractual right to compel performance of the intermediary services that Unicom was performing. Only TWIC had, by virtue of the Service Agreement, the contractual right to compel performance of those services. Nor, for reasons set out at [74] was Unicom acting as the agent of consumers.

78. Clearly, Unicom also owed consumers certain duties given the terms of their regulatory authorisation with the FCA. However, we do not consider that the existence of those regulatory duties caused Unicom to be regarded as the agent of consumers. Indeed, it is clear from the extracts from ICOBS referred to at [43(4)] and [43(5)] that Unicom's regulatory obligations were not based on the law of agency.

Conclusion on direction of supply

79. Our analysis of the contractual arrangements points firmly to the conclusion that Unicom was supplying its intermediary services to TWIC since, under the Service Agreement, Unicom was the agent of TWIC. Moreover, only TWIC had the contractual right to compel Unicom to provide those intermediary services and consumers had only the limited contract with Unicom referred to at [76]. However, it remains to be considered whether that conclusion reflects the economic reality of the arrangements.

80. We consider that this conclusion does reflect economic reality. Unicom is different from a normal insurance broker. While it is not tied to TWIC, it places the overwhelming majority of its business with TWIC. There is nothing economically unreal about the proposition that, when Unicom supplies its intermediary services, it supplies them to its main commercial customer.

81. Moreover, the arrangement between TWIC and Unicom has real commercial consequences, and not just VAT consequences. By appointing Unicom as its agent for the purposes of negotiating and entering into a contract of insurance with consumers, TWIC is accepting that information communicated to Unicom in connection with a policy is to be treated as communicated to TWIC. That could be highly material to the question of whether TWIC is obliged to honour a claim under a policy in circumstances where a consumer provided information to Unicom prior to inception of the policy but Unicom did not pass that information to TWIC.

Conclusion

82. Our conclusion is that Unicom supplied the relevant intermediary services to TWIC and not to consumers. Neither party has sought to argue that Unicom was making supplies of intermediary services both to TWIC and to consumers and that the commission Unicom receives should be treated in part as consideration for services that Unicom supplied to TWIC and in part as third party consideration for services that Unicom was supplying to consumers. We would not have reached such a conclusion even if it had been argued given the findings we have made above and, in particular, our conclusion that TWIC was the only person with the contractual right to compel Unicom to provide the intermediary services at issue.

83. Given the parties' agreement as to how this appeal should be determined set out at [3], it follows that Unicom's appeal is allowed.

84. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 23 NOVEMBER 2016