

DECISION NUMBER: 17747

VALUE ADDED TAX – exemption – insurance – Lloyd’s members’ agents – whether the insurers are the underwriting members -yes – or the syndicates – no – whether members’ agents are insurance agents -yes – whether members’ agents supply services related to insurance transactions – yes – whether members’ agents supply insurance or reinsurance transactions – yes – whether members’ agents supply financial services – appeal allowed – Sixth Council Directive (77/388/EEC) Art 13B(a) and(d)(3)

LONDON TRIBUNAL CENTRE

SOC PRIVATE CAPITAL LIMITED

Appellant

-and-

THE COMMISSIONERS OF CUSTOMS AND EXCISE

Respondents

Tribunal: DR NUALA BRICE (Chairman)
MR R L JENNINGS

Sitting in London on 13, 14 and 15 May 2002

Roderick Cordara QC with David Mildon of Counsel, instructed by Messrs Ernst & Young, Chartered Accountants, for the Appellant

Hugh McKay of Counsel, instructed by the Solicitor for Customs & Excise, for the Respondents

DECISION

The appeal

1. SOC Private Capital Limited (the Appellant) (formerly called Sedgwick Oakwood Underwriting Agents Limited) appeals against a decision of Customs and Excise dated 6 July 2000. The decision was that supplies made by the Appellant as a members' agent at Lloyds were not exempt supplies because the Appellant was not involved with arranging individual contracts of insurance.

2. We were informed that the result of this appeal could affect the position of three other members' agents.

The legislation

3. The legislation about supplies of insurance is contained in the Sixth Council Directive of 17 May 1977 (77/388/EEC) (the Sixth Directive). Article 13 contains the exemptions and the relevant part of Article 13(1) provides:

"13B Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

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

4. These provisions have been implemented by section 31 and Schedule 9 of the Value Added Tax Act 1994 (the 1994 Act). However, the appeal was argued on the basis that the relevant legislation was that contained in the Sixth Directive.

5. The legislation relating to supplies of financial services is contained in Article 13B(d)(3) of the Sixth Directive which exempts:

- "(d) the following transactions ...
3. transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring ...".

The issues

6. The primary question for determination in the appeal was whether the supplies made by members' agents were exempt supplies (as argued by the Appellant) or standard-rated supplies (as argued by Customs and Excise). It was agreed that the members' agents whose services were at issue in the appeal were not insurance brokers within the meaning of Article 13B(a).

7. The Appellant argued that the supplies of insurance in the Lloyd's market were made by the underwriting members; that members' agents were insurance agents; that members' agents performed services related to insurance transactions; alternatively that members' agents supplied insurance and

reinsurance transactions; or, alternatively, that members' agents supplied financial services.

8. Customs and Excise argued that, for the purposes of value added tax, the supplies of insurance were not made by the underwriting members but by the syndicates; that members' agents were not insurance agents; that the services performed by members' agents were insufficiently related to insurance or reinsurance transactions; that members' agents did not carry out insurance or reinsurance transactions; and that such supplies of financial services as might, be made by members' agents were an ancillary part of their main supplies.

9. Thus the issues for determination in the appeal were:

- (1) whether the insurers were the underwriting members or the syndicates;
- (2) whether members' agents were insurance agents within the meaning of Article 13B(a); and, if so
- (3) whether members' agents supplied services related to insurance transactions within the meaning of that Article; if not
- (4) whether members' agents supplied insurance and reinsurance transactions within the meaning of Article 1313(a); or
- (5) whether members' agents supplied financial services within the meaning of Article 13B(d)(3) which were more than just ancillary to their main supplies.

The evidence

10. Three bundles of documents were produced by the parties (being a bundle of documents, a bundle of correspondence and a supplementary bundle of documents). Oral evidence was given on behalf of the Appellant by Mr Christopher Fairs, a Director and the Compliance Officer of the Appellant. Mr Fairs produced two written statements of his evidence and also a bundle of exhibits as referred to in his written statements. Oral evidence was given on behalf of Customs and Excise by Mr Graham John Sheppard, a Senior Policy Adviser with HM Customs and Excise; Mr Sheppard also produced a written statement of his evidence. Mr Sheppard made the decision which was the subject of the appeal. Where the evidence of Mr Fairs and Mr Sheppard conflicted we preferred the evidence of Mr Fairs who had up-to-date practical experience of the Lloyd's market and of the activities of a members' agent.

The facts

11. From the evidence before us we find the following facts. After a short reference to the Appellant we summarise the structure of the Lloyd's market; the way in which insurance business is written at Lloyd's; and the way in which funds are secured to pay claims. We then refer to the statutory framework which regulates the Lloyd's market, with specific reference to the functions and activities of members' agents. Finally we refer briefly to some

value added tax arrangements entered into between Customs and Excise and Lloyd's.

The Appellant

12. The Appellant carries on business as a members' agent from premises in the City of London and was registered for value added tax on 1 October 1998.

The structure of the Lloyd's market

13. Lloyd's of London does not itself write insurance business but provides and regulates a market in which others can write such business. The Lloyd's market is unique and almost anything can be insured at Lloyd's including ships, aircraft, civil engineering projects, factories, oil rigs, personal line risks and commercial liabilities. Lloyds now occupies a building in Lime Street in the City of London which contains an underwriting area of 19,000 square metres. 'Capacity in 1977 was £1,822M; in 1981, £3,372M; in 1988 £10,740M; in 2000 £10,045M; and in 2002 £12.2 billion.

14. Insurance business is written by the *underwriting members* of Lloyd's (known as Names). It is the personal obligations of the underwriting members which provide the capacity; it is the underwriting members who receive the premiums; and it is the underwriting members who are liable to pay claims on the policies they underwrite. There are both individual underwriting members and corporate underwriting members. If the underwriting member is an individual his liability is to the full extent of all his personal wealth. If the underwriting member is a company it is liable to the extent of all its assets. In 1946 there were 2,079 underwriting members; in 1962 there were 5,126; in 1977, 10,622; in 1981, 19,137; in 1988 there were 32,433 after which numbers reduced to 3,296 in 2000. Although it is the underwriting member who is the person who carries on the business of underwriting he must do this as a member of one or more syndicates.

15. Each *syndicate* consists of a number of underwriting members. Although a syndicate is an unincorporated association recognised by Lloyd's it does not have a separate legal identity. Lloyd's publishes a "Blue Book" which contains the number of each syndicate, the name of its managing agent (managing agents are described in paragraph 16 below), the names of the members' agents who have underwriting members in the syndicate (members' agents are described in paragraph 17 below) and the names of the underwriting members in the syndicate. For example, we were shown the details of syndicate 2121 of which the managing agent was Sackville Syndicate Management Limited. There were four members' agents of which the Appellant was one. The name of the Appellant was followed by the names of many underwriting members, both individual and corporate, for whom the Appellant acts as members' agent. Most underwriting members belong to more than one syndicate. In 1981 there were 427 syndicates; in 1988, 376; in 2000, 123; and in 2002, 86. The participation of an underwriting member in a syndicate is for a twelve month period (the annual venture) and is for a stated percentage participation in all the risks written by that syndicate. Thus, for each year of

account each underwriting member of a syndicate states the proportions which he is prepared to contribute to the syndicate's underwriting capacity and authorises the managing agent of the syndicate to underwrite business on his behalf in those proportions. Each member of a syndicate is only liable for his stated proportion of the risk and is not liable for the stated proportion of any other member of the syndicate. Thus, the liability of each member of a syndicate is several (and not joint) but is unlimited up to his percentage participation in the risk. A syndicate will auction available underwriting capacity.

16. Each syndicate is managed by a *managing agent*. The managing agent employs, pays and supervises the *leading underwriter* of the syndicate and provides administrative facilities for the syndicate. The managing agent also reinsures contracts of insurance and pays claims. The managing agent is obliged to estimate all current and future liabilities of the syndicate on an annual basis and to make financial provision for them.

17. Unless permitted otherwise, an underwriting member must also appoint a *members' agent* through whom he conducts his underwriting business. (In 2002, 73% of the capacity of the Lloyd's market consisted of "aligned capacity" where there was common ownership of a corporate member and a managing agent and where there was no requirement to appoint a members' agent.) The members' agent arranges for the underwriting member to join or leave the syndicates in which he conducts underwriting business; bids on behalf of the underwriting member at the auctions of syndicate underwriting capacity; on behalf of the underwriting member contracts with the managing agent of each syndicate in which the underwriting member participates; analyses syndicate trends; prepares and transmits information to Lloyd's and to managing agents on the underwriting activity of the underwriting member; ensures that the underwriting member complies with Lloyd's regulatory requirements; and assists with the reinsurance of the underwriting members' exposure at Lloyd's. For each underwriting member the members' agent collates a statement of assets, liabilities, and outstanding risk exposures required by the Council of Lloyd's and deals with any queries raised by Lloyd's. We saw the Appellant's business compliance timetable which listed the compliance obligations by reference to each month of the year; there were an average of about ten separate obligations each month. The members' agent also compiles each year for each underwriting member a syndicate list which confirms the underwriting member's underwriting for the forthcoming year. The syndicate list will contain the number of each syndicate in which the underwriting member will participate and also, in respect of each such syndicate, the name of the managing agent and the amount of the premium capacity in which the underwriting member will participate in the syndicate.

18. Some underwriting members delegate to their members' agent the choice of syndicates through what is known as a MAPA (members' agent pooling arrangement). (Such arrangements account for more than one third of the premium capacity of the underwriting members for whom the Appellant

acts as members' agent.) Participation in a MAPA allows an underwriting member a greater spread of syndicate participation as part or all of his premium capacity will be aggregated with that of the other underwriting members in the MAPA. If an underwriting member participates in a MAPA the choice of syndicate mix is in the discretion of the members' agent who exercises it on behalf of all the underwriting members of the MAPA. As the MAPA manager the members' agent participates in important syndicate decisions.

The writing of insurance at Lloyd's

19. A person who wishes to take out insurance at Lloyd's will first contact his own broker (called a retail broker) who in turn will contact a Lloyd's broker. All insurance is broked at Lloyd's by specialist brokers who are either registered with Lloyd's as Lloyds brokers or are accredited under special arrangements. The Lloyd's broker, who acts as the agent of the assured, will prepare a document known as a slip and will take the slip into the underwriting room at Lloyd's building in Lime Street. The broker will approach the leading underwriters of a number of syndicates known to write the business in question and will describe the risk and ask each leading underwriter how much he would charge by way of premium to subscribe to the risk. The broker will accept one of the quotes and that leading underwriter will stamp the slip with his syndicate number and note a percentage. That is the percentage of the total risk accepted on behalf of that syndicate. The broker will then consult the leading underwriters of other syndicates (or non-Lloyd's insurance companies) some of whom will stamp the slip and note a percentage until 100% of the risk is covered.

20. A contract of insurance at Lloyd's becomes binding as soon as the leading underwriters have subscribed to the slip. When the slip is complete it is sent to the Lloyd's Policy Signing Office which prepares a formal Lloyd's policy document incorporating all the terms agreed on the slip. Although the policy is issued by Lloyd's, Lloyd's is not the insurer. The contract is between the assured and the underwriting members of Lloyd's comprising the syndicates bearing the numbers in the schedule to the contract in the proportion set against each number. The contract is issued and signed on behalf of the assured and each syndicate participating in the risk. When a claim is made it is usually handled by the lead syndicate who will usually employ the services of Xchanging Claims Services Limited, the out-sourced claims handling service of the Lloyd's market. Neither the individual underwriter nor the members' agent has any role in the claims procedure. If there is a legal claim Lloyd's nominates a leading underwriter to accept legal proceedings on behalf of all who subscribed to the slip.

21. Because the primary liability under each contract of insurance is that of the underwriting member; and because there are many underwriting members in each syndicate with each underwriting member being liable only to the extent of his percentage participation in the syndicate; and because many syndicates may subscribe to each contract of insurance, there could be thousands of underwriting members subscribing to each contract of insurance.

It is for this reason that the interlocking obligations of underwriting members, members' agents and managing agents have been established and it is those interlocking relationships which ensure that there are always funds to meet any claims.

Securing funds to pay claims

22. The Lloyd's market treats security as of paramount importance as this underpins the ability to pay claims. Lloyd's sets solvency requirements that the underwriting members have to meet. The Lloyd's regulatory requirements include a solvency test; a risk-based capital adequacy requirement; and a deposit of sufficient funds to support the underwriting activities of each underwriting member. All premiums received are held in trust for policyholders in members' premium trust funds; these funds may only be used for paying claims and other permitted expenses. Profits are only distributed when a year of account is closed which is normally after three years. In addition, underwriting members are required to hold additional capital at Lloyd's in the form of cash, securities, letters of credit, or bank or other guarantees. If further resources are required to meet claims then underwriting members' other assets are available as individual underwriting members have unlimited liability and corporate members are liable to the extent of their assets. As a last resort, Lloyd's also operates a central fund of assets but this is only made available for claims if all the assets of all the underwriting members writing that business are insufficient.

23. The individual underwriting members take out reinsurance in respect of their risks and this is part of their compliance with the solvency requirements. The syndicate managing agents have a general authority to enter into reinsurance on behalf of the underwriting members of the syndicate. Because the individual underwriting members of the syndicate are liable for the risk on the contracts made by the syndicate the reinsurance contracts are with the individual members. Reinsurance is effected for the risks of each year of account (the annual venture). Also, at the end of the second year following the year of participation the syndicate prepares an assessment of potential future exposure for policies written in the year. "Reinsurance to close" is normally undertaken by closing the year of account into the succeeding year of account but, if there is material uncertainty as to the future liability, the managing agent of the syndicate will seek alternative forms of reinsurance and will obtain quotes for "reinsurance to close". The quotes are communicated to the members' agents who advise and represent their underwriting members in this process. In addition, an underwriting member may wish to enter into a personal stop loss policy and, although this need not be obtained through the members' agent, the members' agent does have authority to negotiate and place such insurance on behalf of the underwriting member. The members' agent also has authority to negotiate and place estate protection reinsurance which protects the estate of an underwriting member from losses arising after death up to a specified limit. Members' agents advise and assist their underwriting members on the subject of reinsurance generally.

24. Members' agents are also concerned in financial transactions on behalf of their underwriting members. Members' agents are involved when an underwriting member wishes to draw down surplus funds, or when an underwriting member is required to top up his funds at Lloyd's, or when a syndicate makes a cash call on an underwriting member for funds to meet the liabilities of the syndicate to policyholders. If an underwriting member wishes to draw down surplus funds from his premium trust fund he notifies his members' agent and it is for the members' agent to calculate whether there is a distributable surplus; if there is then the members' agent gives appropriate instructions to the trustees of the premium trust fund. The trustees are entitled to rely upon the calculations made by the members' agent. If there is syndicate cash call then it is the members' agent who receives the cash call and passes it on to the underwriting member and receives the payment from the underwriting member. In default of any other payment instructions, the members' agent has authority to effect a compulsory draw down of the funds of the underwriting member held at Lloyd's. The administration of these payments is conducted by the members' agent who has authority from the underwriting member to move funds when necessary.

How the market works – a summary

25. In summary, capital or underwriting capacity enters the market when provided by the individual or corporate underwriting member. Unless otherwise agreed by Lloyd's, each underwriting member is required to appoint a members' agent who introduces him to one or more syndicates each managed by a managing agent. The person seeking insurance enters the market through a retail broker who contacts a Lloyd's broker who obtains the cover desired by the assured by dealing with the lead underwriter of one or more syndicates. A lead underwriter has authority to commit his syndicate, which means all the individual underwriting members of that syndicate, to the risk in question. Thus, although the insurance contract is between the assured on the one hand and the underwriting members on the other hand, nevertheless the members' agent, the managing agent of each syndicate (who employs the lead underwriter of his syndicate), the Lloyd's broker and the retail broker, all constitute a chain which links the underwriting member with the assured. A contract of insurance is, in effect, the transfer of risk from the assured to the underwriting member, in consideration of a premium paid by the assured to the underwriting member; all the other links in the chain, including the members' agent, are there to bring together the risk of the assured and the capacity of the underwriting members and thus bring about the formation of the contract of insurance.

The statutory framework

26. Part I of the Insurance Companies Act 1982 contains restrictions about the carrying on of insurance business in the United Kingdom. Section 2(1) provides that no person shall carry on insurance business unless authorised under the Act. Section 2(2) provides that section 2(1) does not apply to insurance business carried on by a member of Lloyd's. Sections 83 to 86 contain provisions about requirements to be complied with by Lloyd's

underwriters, the financial resources of Lloyd's underwriters and other matters, including provisions about margins of solvency. Section 83(2) provides that every underwriter must carry to a trust fund all premiums received by him in respect of any insurance business in accordance with the provisions of a trust deed approved by the Secretary of State. (We saw a copy of a specimen of a Lloyd's Premium Trust Deed to be made between an underwriting member and Lloyd's.) Section 83(4) provides that the accounts of every underwriter should be audited annually by an accountant approved by the Committee of Lloyd's and the auditor must furnish a certificate to the Committee and to the Secretary of State.

27. The first Lloyd's Act was enacted in 1871; this incorporated Lloyd's which thus became a statutory corporation called "the Society". Later Acts followed and that currently in force is the Lloyd's Act 1982 (the 1982 Act) which establishes the Council of Lloyd's and vests in the Council the rule-making and disciplinary functions which were previously vested in the membership as a whole. The Council consists of members elected by the members of Lloyd's and nominated members. The Council elects the Chairman and Deputy Chairman of Lloyd's from among its members. The Council delegates some of its functions to the Committee and the members of Lloyd's may also meet in general meeting.

28. Section 8 of the 1982 Act provides that an underwriting member has several (and not joint) liability; may not act in partnership; may only underwrite contracts of insurance through an underwriting agent; and may only place business through a Lloyd's broker. There are two types of underwriting agents, the managing agent and the members' agent. Section 12 of the 1982 Act provides that a managing agent is an underwriting agent who is permitted by the Council to underwrite contracts at Lloyd's for an underwriting member. The 1982 Act also gives the Council power to make byelaws for regulating a number of matters.

The byelaws

29. The byelaws made by the Council under the provisions of the 1982 Act are numerous and complex. In these findings of fact we have simplified their provisions and have necessarily had to exclude many matters which are covered by the byelaws. We concentrate on matters which are relevant to this appeal.

30. The first relevant byelaw is the *Membership Byelaw* made on 8 September 1993. This contains provisions about the classes and conditions of membership and the continuing requirements of membership. Byelaw 13 provides that a corporate member shall appoint and retain a members' agent to act in respect of its underwriting business unless the Council otherwise agrees. The Council has agreed that some large and well known insurance companies do not need to appoint members' agents because they have the resources to perform the functions of members' agent themselves.

32. The next relevant byelaw is the *Underwriting Agents Byelaw* made on 14 May 1984. An underwriting agent is defined to include both a managing agent and a members' agent. The byelaw repeats the definition in section 12 of the 1982 Act that a managing agent is an underwriting agent which underwrites contracts of insurance at Lloyd's for an underwriting member. The byelaw defines a members' agent as an underwriting agent which acts on behalf of an underwriting member in accordance with a direct contractual relationship with that member in respect of that underwriting member's business at Lloyd's but does not perform any of the functions of a managing agent. The byelaw provides that the registration of underwriting agents is under the control of the Committee of Lloyd's which must be satisfied, in the case of a members' agent, that he is a person whose functions include advising underwriting members or who has authority to effect investment transactions on behalf of such members. The byelaw also defines a syndicate as a group of underwriting members underwriting insurance business through the agency of an underwriting agent to which group a particular syndicate number is assigned by the Council.

33. The third relevant byelaw is the *Agency Agreements Byelaw* made on 7 December 1988. This prescribes the contractual terms upon which underwriting members appoint their underwriting agents (both members' agents and managing agents). The terms of the agreements are set out in the schedules to the byelaw and may not be varied. Byelaw 1 defines "members' agent" as an underwriting agent which is listed as a members' agent in the register of underwriting agents. Byelaw 10 provides that a members' agent may arrange for an underwriting member to participate in syndicates through a members' agent pooling arrangement; the agreement takes effect on the date of signature of the syndicate list by the members' agent.

The Members' Agent's Agreement

34. Schedule 1 of the Agency Agreements Byelaw sets out the form of the *Members' Agent's Agreement* to be entered into between an underwriting member and a members' agent. It makes it clear that the business of underwriting is carried on by the underwriting member at Lloyd's as a member of syndicates. The members' agent's agreement provides that the services to be provided by the members' agent include: advising the underwriting member as to the syndicates in which he should participate; agreeing with the underwriting member, and informing Lloyds, of the allocation of the underwriting member's overall premium limit among the syndicates; reporting to the underwriting member on the performance of the syndicates; and preparing a syndicate list for the underwriting member in respect of each year of account. Specifically, it authorises the members' agent on behalf of the underwriting member to allocate the underwriting member's premium limit among those syndicates in which the underwriting member and members' agent agree that the underwriting member is to participate and provides that the members' agent may enter into an agreement with the managing agent of each such syndicate. It also provides that the member's agent has authority to sign on behalf of the

underwriting member a list of the syndicates (a syndicate list) in which the underwriting member is to participate in each year of account with such allocations of the underwriting member's premium limit as are specified in the syndicate list. The members' agent is also given power, without first obtaining the agreement of the underwriting member, to terminate the underwriting member's participation in a syndicate. The agreement also provides that where the underwriting member and the members' agent agree that part of the underwriting member's premium limit should be allocated through a members' agents' pooling arrangement then the agent has discretion to make the allocation among the syndicates.

35. The Members' Agent's Agreement also provides that the members' agent has certain duties in respect of the premium trust deed and the premium trust fund (into which all the underwriting member's premiums are paid) and that the members' agent may apply to the regulating trustee for the release to the underwriting member of assets in excess of the minimum amount which must be retained; that the members' agent is to advise the underwriting member about the requirements of the Council for reserve funds and other regulatory and compliance matters and, where appropriate, the agent must comply on behalf of the underwriting member with certain regulatory and compliance matters. The agreement also authorises the members' agent to enter into such transactions and arrangements with respect to investments as are necessary or expedient for the purposes of the business; it authorises the members' agent to take such legal proceedings, whether or not in the name of the underwriting member, as the agent considers necessary or expedient; and it contains a power of attorney authorising the members' agent to sign and execute, on behalf of the underwriting member, all deeds and documents as are required by the Council or which the members' agent considers it necessary or expedient for the underwriting member to sign. The power of attorney is used by the members' agent to sign syndicate lists for the underwriting member.

36. In the Members' Agent's Agreement the underwriting member contracts to pay to the members' agent an annual fee and a profits commission and also agrees, among other things, to ensure that there are at all times sufficient funds to meet all claims. If the appointment of the members' agent is terminated the members' agent is empowered and obliged to wind up the business of the underwriting member and those affairs of the underwriting member at Lloyd's in respect of which the members' agent acts for the underwriting member as members' agent.

The Agents' Agreement

37. Schedule 2 of the Agency Agreements byelaw sets out the *Agents' Agreement* which is made between the members' agent and the managing agent. It records that the members' agent has been appointed by certain underwriting members to act as their members' agent and that they wish to conduct underwriting business as members of a syndicate of which the managing agent is the managing agent. They record that they both wish to fulfil their obligations as members' agent and managing agent respectively for such

underwriting members. By signing a syndicate list for each year of account showing each underwriting member as participating in the syndicate list, the members' agent on behalf of each underwriting member appoints the managing agent as managing agent of that underwriting member with the allocation of the underwriting member's overall premium limit as specified in the syndicate list. The members' agent and the managing agent agree to provide information to one another and each agrees to perform certain functions, The members' agent promises the managing agent that the underwriting members will fulfil their obligations to ensure that there are sufficient funds for the purpose of paying all claims.

The Managing Agent's Agreement

38. Schedule 3 of the Agency Agreements Byelaw sets out *the Managing Agent's Agreement* which is made between a underwriting member and the managing agent. It recites that the underwriting member wishes to appoint the managing agent in respect of the underwriting business of a particular syndicate and also that the underwriting member has entered into an agreement with a members' agent who has entered into an agreement with the managing agent. Under the agreement the underwriting member appoints the managing agent to carry out underwriting on behalf of the underwriting member; to determine the underwriting policy of the syndicate; to appoint and supervise the active underwriter of the syndicate; to accept risks on behalf of the syndicate; to determine the policy of the syndicate and to effect and manage its reinsurance programme; to settle and pay claims on behalf of the syndicate; and to determine the premium for reinsurance to close in respect of each year of account. The managing agent also undertakes to manage the premium trust fund and investments. Under the agreement the underwriting member authorises the managing agent to conduct the underwriting as the managing agent sees fit and to enter into contracts of insurance on behalf of the underwriting member and the other members of the syndicate. The underwriting member undertakes to ensure that at all times there are sufficient funds subject to the premium fund trust deed to enable the payment of all claims. The underwriting member agrees to pay the managing agent an annual fee and a profit commission.

The Syndicate and Arbitration Agreement

39. Annexed to schedule 3 of the Agency Agreements Byelaw is "*The Syndicate and Arbitration Agreement*". This is made between the managing agent, each of the underwriting members who participate in a syndicate for the relevant year of account, and the members' agent. Under that agreement each of the underwriting members undertakes to comply with the provisions of the managing agent's agreement and to remain a member of the syndicate unless and until the appointment of the managing agent is terminated. The agreement also provides that any disputes between any or all of the underwriting members, the members' agent and the managing agent in relation to the syndicate shall be referred to arbitration.

The Solvency and Reporting Byelaw

40. The fourth and final byelaw to which we were referred is the *Solvency and Reporting Byelaw* made on 5 December 1990. This contains provisions for the conduct of an annual solvency test for underwriting members. Each managing agent must make a syndicate return in respect of each syndicate which it manages and each members' agent must make a return in respect of each of his underwriting members. This enables the Council to prepare a solvency statement in respect of each underwriting member and also certain statutory statements as required by the regulating statutes.

The value added tax arrangements with Lloyd's

41. We were shown two documents which recorded agreements between Customs and Excise on the one hand and Lloyd's on the other relating to value added tax. The first document was undated but applied before 1 January 2000; the second document recorded the arrangements effective from 1 January 2000.

42. The first document recorded that the arrangements in it were administrative arrangements for operating value added tax within Lloyd's. It stated that the arrangements were without prejudice to the provision of insurance or reinsurance at Lloyd's which was underwritten by each individual member of the Society. It provided that the taxable person who was providing insurance was to be deemed to be the managing agent who managed a syndicate. It also provided that where a members' agent who was not a managing agent made any supplies which he was authorised to make under his principal agency agreement with an underwriting member all such supplies were the "making of arrangements for the provision of insurance" for the purposes of value added tax and such supplies were, therefore, either exempt or zero-rated.

43. The second document, which contained the arrangements effective from 1 January 2000, recorded that the arrangements in it were subject to the prevailing law and were without prejudice to the right of any entity to take an appeal to the VAT and Duties Tribunal on a matter of law. It provided that a number of entities could register for value added tax in their own right and these entities included syndicates, managing agents, members' agents, and some others.

Reasons for decision

44. We consider separately each of the issue for determination in the appeal.

(1) Who is the insurer?

45. The first issue is whether the insurer is the underwriting member (as argued by the Appellant) or the syndicate (as argued by Customs and Excise).

46. For the Appellant Mr Cordara argued that the insurer was the underwriting member. He referred to section 8 of the 1982 Act and cited *General Accident Fire and Life Assurance Corporation and others v Peter William Tanter and others (The "Zephyr")* [1984] 1 QB 58. He argued that the

members' agent was the means by which the underwriting authority of the underwriting members was, passed to the managing agent.

47. For Customs and Excise Mr McKay accepted that, following *The "Zephyr"*, the underwriting members were the insurers but relied upon *Customs and Excise Commissioners v Reed Personnel Services Limited* [1995] STC 588 'as authority for the view that the contractual analysis was not necessarily coterminous with the analysis of the supply for value added tax purposes. He relied upon the evidence of Mr Sheppard that, for the purposes of value added tax, the supplier of insurance was the syndicate as it was from the syndicate that the promise of insurance emanated. He argued that, before January 2000, it was the managing agent of the syndicate who was registered for value added tax and it was the syndicate which signed the slip.

48. We start with the relevant statutory provisions. Section 2(1) of the Insurance Companies Act 1982 provides that it is the members of Lloyd's who carry on insurance business and sections 83 to 86 apply to the underwriting members of Lloyd's. The Insurance Companies Act 1982 thus proceeds on the basis that the underwriting members are the insurers. The 1982 Lloyd's Act proceeds on the same basis as do the various bye-laws made under the provision of the 1982 Act. Further, the primary liability under each contract of insurance is that of the underwriting member; the solvency and capital adequacy requirements apply to the underwriting members; the premiums are paid to the underwriting members; it is the underwriting members who are liable to pay claims and it is the underwriting members who take out stop loss, estate protection and other reinsurance. All these provisions lead to the conclusion that it is the underwriting member who is the insurer and not the syndicate. Such a conclusion is consistent with *The "Zephyr"* as Mr McKay accepted.

49. Mr McKay relied upon *Reed Personnel* where the issue was whether an agency, which provided temporary nursing staff to hospitals, supplied nursing services to the hospitals or whether the nursing services were supplied by the nurses. The contractual documents between the agency and the nurses, and the agency and the hospitals, led to the conclusion that the agency supplied staff and not nursing services. Laws J held that, where three or more parties were concerned, the contractual arrangements were not necessarily conclusive in defining value added tax issues. In that appeal he held that the resolution of the issue remained a matter of fact for the tribunal. In the present appeal we have approached this issue primarily by reference to the statutory framework and the authority cited to us. Accordingly, at this stage it is convenient to consider the evidence of Mr Sheppard.

50. The opinion evidence of Mr Sheppard was that it was the syndicate which wrote the insurance business and the contract of insurance was between the assured and the syndicate. He relied upon the fact that the assured would know the names of the syndicates which underwrote his risk but not the names of the underwriting members in the syndicates; also that the underwriting members would not know details of the individual contracts of insurance

written on their behalf by the syndicates. We accept that these are facts but we do not accept that they lead to the conclusion that it is the syndicates and not the underwriting members who are the insurers. The capacity to write the risk is provided by the underwriting members; it is the underwriting members who are liable on the contracts of insurance; and it is to the underwriting members that the premiums are paid. The involvement of the syndicate is through the managing agent to whom the underwriting member has delegated authority to write insurance.

51. We note that the value added tax arrangements agreed between Customs and Excise and Lloyd's before 1 January 2000 deemed the person providing insurance to be the managing agent of each syndicate. However, those were stated to be administrative arrangements only and also stated that insurance or reinsurance at Lloyd's was underwritten by each individual member of the Society.

56. Our decision on the first issue, therefore, is that it is the underwriting member who is the insurer, and not the syndicate.

(2) *Are members' agents insurance agents?*

57. The second issue is whether members' agents are insurance agents within the meaning of Article 1313(a).

58. For the Appellant Mr Cordara argued that members' agents were insurance agents as they were described as such in the Lloyd's statutory material and they acted for underwriting members who were insurers in connection with insurance matters. They were the channel by which the underwriting authority of the underwriting member came to be vested in the leading underwriter of the syndicate. A members' agent also acted as an insurance agent when he bound underwriting members when placing reinsurance business, when participating in the members' agents pooling arrangements, and when entering into the agreement between the underwriting member and the managing agent. Mr Cordara relied upon *Customs and Excise Commissioners v Johnson* [1980] STC 624 as authority for the view that agency was the relationship which existed where one person consented to another person representing him or acting on his behalf and that it was not necessary to effect legal relationships with third parties. He disputed the necessity for a relationship with the insured. First, he relied upon the words of the Sixth Directive and, in particular, Article 1313(a) and argued that, although that Article contained no requirement to be in a chain of relationships, members' agents were in the chain of insurance relationships between the underwriting member and the managing agent and without them no insurance would be written. Secondly, he relied upon Council Directive 77/92/EEC of 13 December 1976 (the insurance directive) and, in particular, on recital eight and Article 2 which described an insurance agent but contained no requirement for a legal relationship with the insured. Thirdly, he relied upon *Century Life plc v Customs and Excise Commissioners* [2001] STC 38 at 44g as authority for the view that the phrase "insurance agent" was not limited to someone who had

power to bind an insurance undertaking. He accepted that in each of *Card Protection Plan Ltd v Customs and Excise Commissioners* [1999] STC 270, and *Re Försäkringsaktiebolaget Skandia* [2001] STC 754 the Advocate General had mentioned the requirement for a relationship with the assured but the fact was that such a requirement did not appear in the Sixth Directive; also in *Skandia* the comments of the Advocate General were not taken up by the Court of Justice. Although in *Century Life* there was a relationship with the insured, it was not a legal relationship but a correspondence relationship. Finally, he relied upon *Winterthur Life UK Limited v The Commissioners of Customs and Excise* (2001) VAT Decision Number 17572 where the tribunal decided that an insurance agent, even when not acting in an intermediary capacity, was still an insurance agent.

59. For Customs and Excise Mr McKay argued that members' agents were not insurance agents within the meaning of Article 13B(a). He relied upon *Card Protection Plan* at 284a as authority for the view that an insurance agent brought together persons providing insurance and persons seeking insurance as provided by Article 2 of Directive 77/92. Mr McKay also relied upon *Skandia* at 759h as authority for the view that an insurance agent had to have a direct legal relationship with the insured. He referred to the insurance directive and argued that, as a general rule, the business of an agent involved putting insurance companies in touch with potential clients for the purpose of concluding insurance contracts where the business was characterised by a direct relationship with the insured. Mr McKay accepted that member's agents had a crucial role to play in the insurance market of Lloyd's. He argued that *Century Life* did not assist in deciding whether a person was an insurance agent because there it had been accepted that the appellant was an insurance agent.

60. In considering the arguments of the parties we start with the words of the Sixth Directive. The reference in Article 1313(a) is to "insurance agents". If there were no other authority or assistance we would conclude that members' agents were insurance agents; they are certainly agents of the underwriting members (the insurers); under the Lloyd's byelaws they are part of the chain of events which bring together the insurer and the assured; and their function is to bring about insurance transactions.

61. The insurance directive concerns measures to facilitate the exercise of freedom of establishment and the freedom to provide services in respect of the activities of insurance agents and brokers. Recital three states that, in view of the differences between member states as regards the scope of activities of insurance agent and broker it is desirable to define those activities. Recital eight states:

"Whereas, where the activity of agent includes the exercise of a permanent authority from one or more insurance undertakings empowering the beneficiary, in respect of certain or all transactions falling within the normal scope of the business of the undertaking or undertakings concerned, to enter in the name of such undertaking or undertakings into commitments binding on

them, the person concerned must be able to take up the activity of broker in the host member state."

62. Article 2 of the insurance directive provides:

"Article 2

1. This Directive shall apply to the following activities ...
 - (a) professional activities of persons who, acting with complete freedom as to their choice of undertaking, bring together, with a view to the insurance or reinsurance of risks, persons seeking insurance or reinsurance and insurance or reinsurance undertakings, carry out work preparatory to the conclusion of contracts of insurance or reinsurance and, where appropriate, assist in the administration and performance of such contracts, in particular in the event of a claim;
 - (b) professional activities of persons instructed under one or more contracts or empowered to act in the name and on behalf of, or solely on behalf of, one or more insurance undertakings in introducing, proposing and carrying out work preparatory to the conclusion of, or in concluding contracts of insurance, or in assisting in the administration and performance of such contracts, in particular in the event of a claim;
 - (c) activities of persons other than those referred to in (a) and (b) who, acting on behalf of such persons, among other things carry out introductory work, introduce insurance contracts or collect premiums, provided that no insurance commitments towards or on the part of the public are given as part of these operations.
2. This Directive shall apply in particular to activities customarily described in the Member States as follows:
 - (a) activities referred to in paragraph 1 (a): ...
 - in the United Kingdom – Insurance broker
 - (b) activities referred to in paragraph 1(b): ...
 - in the United Kingdom – Agent
 - (c) activities referred to in paragraph 1(c): ...
 - in the United Kingdom – Sub-agent

63. In our view the activities of members' agents fall within the definition of Article 2.1 (b) of the insurance directive. Members' agents are persons instructed by the underwriting members and empowered to act in the name and on behalf of the underwriting members (who are insurance undertakings within the meaning of the directive); members' agents introduce the underwriting members to the syndicates; they propose to the underwriting members the syndicates in which they should participate; and they carry out work preparatory to the conclusion of contracts of insurance. Thus, relying upon the words of the insurance directive, we would conclude that members' agents are insurance agents.

64. In *Card Protection Plan* (1999) one of the issues was whether the appellant, who offered to credit card holders a package of protection including insurance provided by an insurance company, performed related services as an insurance agent. In paragraph 32 of his Opinion the Advocate General referred to the insurance directive and expressed the view that the appellant did not fall within Article 2.1 (b) merely because it arranged through a broker a policy of

insurance for the benefit of its customers. At 284a, in the passage relied upon by Mr McKay, the Advocate General continued:

"The authors of the Sixth Directive chose to refer separately to "insurance agents" and "insurance brokers", rather than to use a more general term such as insurance "intermediaries". In my view, they thereby described persons whose named professional activity comprises the bringing together of insurance undertakings and persons seeking insurance as provided by art 2 of EC Council Directive 77/92. This view is supported by recital 8 in the preamble to EC Council Directive 77/92 which refers to the "activity of agent" as including "the exercise of a *permanent authority* from one or more insurance undertakings empowering the beneficiary, *in respect of certain or all transactions falling within the normal scope of the business of the undertaking or undertakings concerned*, to enter in the name of such undertaking or undertakings into commitments binding upon it or them [emphasis added]". Although those parts of the activities of CPP, in arranging insurance and in settling claims, are akin to the normal activities performed by an insurance agent or broker, an undertaking like CPP cannot, in my opinion, be regarded as such an agent or broker. On the basis of the information contained in the order for reference, I agree with the Commission that its usual business does not seem to be that of an insurance broker or agent in the strict sense."

65. The Advocate General concluded, in paragraph 33, that ultimately it was for the national court to determine whether CPP was an insurance broker or an insurance agent. The Advocate General also concluded that the services supplied by CPP were not insurance transactions. However, the Court of Justice, at paragraph 22, concluded that the services of CPP constituted an insurance transaction and did not need to consider whether CPP was an insurance agent.

66. The Advocate General placed reliance upon the "named professional activity" and "the normal scope of the business" of the person concerned. In this appeal the named professional activity of members' agents is to act as agents of insurers in bringing them together (through the chain of managing agents, Lloyd's brokers and retail brokers) with persons seeking insurance. Members' agents have a permanent authority from the underwriting members which empowers them to enter into commitments with the managing agents of the syndicates. The normal scope of the business of members' agents is to promote the formation of contracts of insurance. In our view, therefore, the conclusion that a member's agent is an insurance agent is not inconsistent with the opinion of the Advocate General.

67. In *Skandia* (2001) a parent insurance company supplied staff and infrastructure to enable its subsidiary to write insurance business. The issue was whether the parent was making an exempt supply of insurance and the Court of Justice held that it was not because the parent did not assume any liabilities and the subsidiary made the insurance contracts in its name. The mere fact that the parent was an insurance company did not mean that all the

transactions it carried out were exempt insurance transactions. In his Opinion the Advocate General at 759h, in the passage relied upon by Mr McKay said:

"Skandia cannot be regarded as a broker or agent, since it has no relationship with the insured, that is to say – to all intents and purposes – with [the subsidiary's] clients."

68. The Court of Justice stated, at paragraph 21, that it was asked to rule only on the interpretation of the term "insurance transactions" and so did not discuss the phrase "insurance agents".

69. In our view, the effect of the Opinion of the Advocate General is that it is essential for an insurance agent to be in the chain of events which leads from the insurer to the insured. In *Skandia* the parent company was not in that chain of events because the subsidiary contracted directly with the insured persons and the parent assumed no insurance liability. All that the parent provided was 'staff and infrastructure. That is not the case with members' agents. They are an integral part of the process by which insurance is provided by the insurer to the insured. We accept that members' agents do not assume any insurance liability (although by contracting with the managing agent of a syndicate they might be said to assume insurance liability as agent for, or on behalf of, the underwriting member). However, Article 2(1)(b) of the insurance directive makes it clear that work done preparatory to the conclusion of an insurance contract is an alternative to work done in concluding an insurance contract; members' agents may not actually conclude insurance contracts but their work is preparatory to the conclusion of such contracts and without their work the capacity of individual underwriting members would not be introduced to the Lloyd's insurance market.

70. Before leaving this issue we briefly consider the evidence of Mr Sheppard. In his view the supplies made by a members' agent were of an administrative and regulatory nature as they provided information to the underwriting members and to Lloyd's and they ensured that the underwriting members complied with Lloyd's regulatory requirements. In his view members' agents were not actively involved in the negotiation or the placing of insurance risks and did not act between the assured and the insurer (and he considered that it was the syndicate who was the insurer). We regret that we are unable to agree with these conclusions because in our view it is the underwriting member who is the insurer and not the syndicate. In evidence Mr Sheppard accepted that the supplies of any person in the chain of events linking the insured with the insurer would be exempt. That means that, as the members' agent is in the chain of events linking the insurer to the insured, the supplies of the members' agent should be exempt.

71. Our decision on the second issue is that members' agents are insurance agents within the meaning of Article 13B(a).

(3) *Do members' agents supply services relating to insurance transactions?*

72. The third issue is whether members' agents supply services related to insurance transactions within the meaning of Article 13B(a).

73. For the Appellant Mr Cordara argued that members' agents performed related services performed by insurance agents. Although related services did not need to be supplied in the character of an insurance agent they were in fact supplied by members' agents in that character. By assuming a contractual obligation in the agents' agreement to ensure that there would be sufficient funds to pay all claims they were performing a service related to insurance transactions. They committed the underwriting member to participate in all the transactions of one or more syndicates for a year of account and they had a high degree of discretion to allocate premium capacity in a members' agents' pooling arrangements. They assisted in the administration and performance of contracts of insurance and engaged in preparatory matters of the most fundamental kind. Even if an insurance transaction needed a direct relationship with the insured a related service did not. The whole process of regulation and compliance at Lloyd's was a holistic process the purpose of which was to ensure that there was security to meet claims written by individual underwriting members. It followed that the members' agents (and the managing agents) provided services related to insurance transactions. He cited *Century Life* where the Court of Appeal had held that assistance with regulatory compliance could be a related service and he relied upon 43f and 45b-e as authority for the view that the provider of a related service need not be acting as an insurance agent when providing those services; he relied upon 45j as authority for the view that compliance services were capable of being related services. Mr Cordara distinguished the decision in *Skandia* but relied upon the principle that "related services" was a wider phrase than "insurance transactions". He also relied upon the decisions of the tribunal in: *Barclays Bank Plc v The Commissioners of Customs and Excise* [1991] VATTR 466 as authority for the view that supplies which had a clear nexus with insurance broking activities were exempt; *Countrywide Insurance Marketing Limited v The Commissioners of Customs and Excise* [1993] VATTR 277 as authority for the view that an association which represented its members and who entered into discussions with insurance brokers had a nexus with the provision of insurance and its activities were a necessary part of the chain of the supply of insurance and not merely ancillary to such supply and so were services related to insurance transactions; and *Winterthur Life UK Limited v the Commissioners of Customs and Excise* (2001) VAT Decision Number 17572 where the issue was whether administrative services provided to the administrator of a pension scheme were related services supplied by an insurance agent and where the tribunal decided that related services could be services where the agent or broker did not have a direct insurance relationship with the insured person; the tribunal also decided that an insurance agent, even when not acting in an intermediary capacity was still an insurance agent.

74. For Customs and Excise Mr McKay argued that, even if a members' agent were an insurance agent, its activities could not be categorised as related services because the degree of relationship was insufficiently close because the members' agent had no relationship with the assured. He relied upon *Century Life* at 39a as authority for the view that a service was not a related service if it

was only remotely or incidentally connected with an insurance transaction; there had to be a close nexus between the service and the insurance transaction concerned. He argued that in *Century Life* the appellant had a relationship with the insured persons as it corresponded with them on behalf of the insurance company. In this appeal the work of the members' agent was directed to compliance, ensuring solvency and the introduction of capital; these were essentially administrative and advisory services but were not related to insurance transactions because the members' agent had no relationship with the insured persons. In *Winterthur* the taxpayer also was in a relationship with the insured person. He distinguished *Countrywide* on the basis that in that appeal there was a chain of relationships between the taxpayer and the insured person which chain did not exist in this appeal.

75. In *Century Life* (2001) the business of the appellant was to act as an insurance agent. An insurance company instructed the appellant to consider the pensions sold by the insurance company and advise in each case whether compensation for mis-selling should be paid to the purchasers of the pensions; if compensation was to be paid then the appellant was to calculate the loss and prepare a letter to be sent by the insurance company. Customs and Excise argued that, although the appellant was an insurance agent, it was not acting in that capacity; that the services it supplied were not "related services" as they concerned only past transactions; and that the appellant had not provided the services in the course of acting in an intermediary capacity. The Court of Appeal held that the appellant was an insurance agent; that "related services" were not those remotely or incidentally connected with insurance and there had to be a close nexus between the service and the insurance transaction but there was such a close nexus in that appeal; and that the services related to a continuing obligation of compliance and were therefore exempt.

76. In our view there is a very close nexus between the services of the members' agent and the insurance transactions entered into between the underwriting members and the insured persons. The services are intimately related to insurance transactions and without the members' agents the transactions would not take place. The services are more than merely ancillary to the contracts of insurance; they are a vital part of those contracts. The members' agents are in the chain of events between the insurer and the insured person. Thus following *Century Life* we conclude that the services supplied by the members' agents are related services.

77. Our decision on the third issue is that members' agents supply services related to insurance transactions within the meaning of Article 13B(a). That conclusion means that the services supplied by members' agents are exempt and so we do not need to consider the two other issues in the appeal. However, as arguments were put to us we briefly express our views.

(4) *Do members' agents supply insurance or reinsurance transactions?*

78. The fourth issue is whether members' agents supplied insurance or reinsurance transactions within the meaning of Article 13B(a).

79. For the Appellant Mr Cordara argued that members' agents performed insurance and reinsurance transactions in their own right. He relied upon paragraph 21 of the judgment of the Court of Justice in *Card Protection Plan* where it was held that, because CPP had a block policy with an insurer under which its customers were the insured, it procured insurance for its customers and there was a supply between the insurance company and CPP and between CPP and its customers and the fact that the insurer provided cover directly to the customer was not material. He also relied upon *Skandia* at 768 [39]. He argued that members' agents when they effected reinsurance for their underwriting members were performing insurance transactions. He also sought to extend the principle and argued that the members' agents brought the insurer (the underwriting member) into an insurance relationship with the managing agents and the syndicates when the members' agent sent the syndicate list to the underwriting member to sign. The members' agent had a legal relationship with the underwriting member and another legal relationship with the managing agent who was in touch with the assured and so the members' agent was in the chain of supply between the underwriting member and the assured.

80. Mr McKay argued that members' agents did not make supplies of insurance and did not carry out insurance or reinsurance transactions and he relied upon *Skandia* at 761h [25] as authority for the view that an insurance transaction necessarily implied the existence of a legal relationship between the person covering a risk (the insurer or the person who procures the cover) and the person whose risks were covered by the insurance (the insured). A person who did not assume any liability did not provide insurance. He relied upon 767g [35] as authority for the view that that it was necessary to have a legal relationship with the end customer, namely the insured. At [38] he accepted that the phrase insurance transactions also extended to the provision of cover by a person who was not the insurer but who procured such cover for his customers by making use of the supplies of an insurer who assumed the risk but argued that in the present appeal there was no legal relationship between the assured and the members' agent – there was no supply of insurance by the members' agent who at no time had any liability to the assured.

81. For the reasons mentioned earlier in this decision we are of the view that members' agents are part of the chain of events between the insurer and the insured person and so they do participate in insurance transactions.

82. In reaching this conclusion we have relied in particular on the facts found in paragraphs 17, 34 and 37 above. The members' agent arranges for the underwriting member to join or leave the syndicates in which he conducts underwriting business; bids on behalf of the underwriting member at the auctions of syndicate underwriting capacity; and, on behalf of the underwriting member contracts with the managing agent of each syndicate in which the underwriting member participates. The members' agent's agreement, which is made between the underwriting member on the one hand and the members' agent on the other, authorises the members' agent on behalf of the underwriting member to allocate the underwriting members' premium limit among those

syndicates in which the underwriting member and the members' agent agree that the underwriting member is to participate. The members' agent's agreement also provides that the members' agent may enter into an agreement with the managing agent of each such syndicate. Also, the members' agent has the authority of the underwriting member to sign a syndicate list allocating the underwriting members' premium limit to the syndicates specified in the list. Further, the agents' agreement provides that, by signing the syndicate list the members' agent, on behalf of each underwriting member, appoints the managing agent as the managing agent of that underwriting member.

83. We appreciate that the underwriting member also contracts directly with the managing agent of each syndicate but that is in addition to the contracts between the underwriting member and the members' agent and between the members' agent and the managing agent. All these agreements form part of an inter-locking whole and are part of the regulatory framework. Under the regulatory provisions it is only through the members' agent that the underwriting member's capacity can be utilised by the syndicate. The members' agent is therefore an essential part of the chain of events which brings together the underwriting members (the insurers) and persons seeking insurance.

84. *Skandia* can be distinguished on its facts as there the parent company was not part of the chain of events which linked the insurer with the insured – it was completely outside that chain.

85. We conclude that members' agents supply insurance or reinsurance transactions within the meaning of Article 1313(a).

(5) *Do members' agents supply financial services?*

86. The fifth issue is whether members' agents supply financial services within the meaning of Article 13B(d)(3).

87. For the Appellant Mr Cordara submitted that, to the extent that members' agents handled funds from the premium trust fund, and funds for cash calls, they supplied exempt transactions under article 13B(d)3.

88. For Customs and Excise Mr McKay cited *Customs and Excise Commissioners v FDR Limited* [2000] STC 672 at 692g 53 and argued that it was necessary to look for the true and substantial consideration given for the payment. In this appeal the thing which was given in return for the payment was not a supply of financial services. The services supplied by a members' agent which related to financial matters were ancillary to the main supply – they were not the whole point of what a members' agent did.

89. On this issue we favour the arguments of Mr McKay. In substance and reality what the members' agent gives in return for the payment made to him is not financial services but the ability to enter into insurance transactions.

Decision

90. Our decisions on the issue for determination in the appeal are:

- (1) that the insurer is the underwriting member and not the syndicate;
- (2) that members' agents are insurance agents within the meaning of Article 1313(a); and
- (3) that members' agents supply services related to insurance transactions within the meaning of that Article; that conclusion means that the services supplied by members' agents are exempt and that we do not need to consider the other two issues but as arguments were put to us we briefly express our views which are:
 - (4) that members' agents supply insurance and reinsurance transactions within the meaning of Article 1313(a); and
 - (5) that members' agents may supply financial services within the meaning of Article 13B(d)(3) but that these are ancillary to their main supplies of services related to insurance.

91. The appeal is, therefore, allowed.
92. The Appellant may make an application for costs.