Value Added Tax - written agreements to provide hotel accommodation to holidaymakers – identity of supplier – was it hotel operator or company operating a bookings website – principles as to construction of written agreements – no difference because question arising in VAT context – appeal allowed

Case No: FTC/56/2010
[2011] UKUT 308 (TCC)

BEFORE THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Between :

SECRET HOTELS2 LIMITED (FORMERLY MED HOTELS LIMITED)	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

TRIBUNAL: Mr Justice Morgan

Sitting in public in London on 29th and 30th June and 1st July 2011

Mr David Milne QC and Miss Nicola Shaw (instructed by **McGrigors LLP**) for **the Appellant**
Mr Sam Grodzinski QC and Ms Eleni Mitrophanous (instructed by **the Solicitors Office**) for **the Respondents**

DECISION

Mr Justice Morgan:

Introduction

1. This is an appeal by Secret Hotels2 Limited (formerly Med Hotels Limited). Although the appellant has changed its name, it remains convenient to refer to it as "Med". Med appeals to the Upper Tribunal against the decision of the First-Tier Tribunal (Tax Chamber) ("the FTT") dismissing its appeal against two assessments by the Commissioners for Her Majesty's Revenue and Customs ("the Commissioners"). The judges of the FTT were Miss J C Gort and Mr A McLoughlin. The decision of the FTT was released on 24th March 2010.

2. The assessments related to output tax which was calculated under the Tour Operators Margin Scheme ("TOMS") in respect of supplies of hotel accommodation. I will refer to TOMS in a little more detail later in this decision.

3. The essential point made by Med before the FTT, and on appeal to the Upper Tribunal, was that it was not the supplier of the hotel accommodation in question and accordingly it was not liable to account for output tax as assessed by the Commissioners. Med contended that the relevant accommodation was supplied to holidaymakers by the hotel operators and that Med's role was to act as agent for the hotel operators. The FTT rejected Med's contention, hence this appeal.

4. Mr David Milne QC and Miss Nicola Shaw appeared for Med both before the FTT and on this appeal. Mr Sam Grodzinski QC and Ms Eleni Mitrophanous appeared for the Commissioners both before the FTT and on this appeal.

Background matters

5. At all material times, Med operated a website (www.medhotels.com) through which it marketed hotel accommodation. The website featured approximately 2,500 resort hotels, villas and apartments in a variety of destinations throughout the Mediterranean and the Caribbean. Approximately 94% of all hotel sales which were made via Med's website were made to travel agents acting on behalf of individual holidaymakers. The remaining 6% of sales were made direct to holidaymakers.

6. The appeal is concerned with the supply of hotel accommodation, via Med's website, made directly or indirectly to holidaymakers in the period from 12/04 to 06/07. It is Med's case that for the majority of the period in question (from 12/04 to 31 May 2007), the supply of hotel accommodation was by the hotel operator, acting through the agency of Med to the holidaymaker. Med relies upon the express terms of the contracts entered into by the holidaymaker and on the express written agreements made by Med with the hotel operators and, so far as material, with the express written agreements made by Med with travel agents. The Commissioners' case is that those documents should be looked at against the background of other contractual documents and the entirety of Med's commercial arrangements.

7. It is not in dispute that for the remainder of the period of the assessment (1st – 30th June 2007) Med itself, acting as principal, supplied hotel accommodation to holidaymakers. In the period from 1st June 2007 to 21st July 2008, Med changed the basis on which it conducted its business and entered into contracts in terms different from those which it used in the earlier period. The reason given by Med for this change was that there was commercial pressure upon it from travel agents following the deaths of children on holiday from the United Kingdom in Corfu from carbon monoxide poisoning. The travel agents wanted to ensure that Med was acting as principal in relation to the supplies of hotel accommodation and was therefore in a position to indemnify them against claims from any holidaymaker or his family for any such incidents which might occur in the future. From 21st July 2008, Med revised its arrangements again and it contends that from that date its involvement in the supply of hotel accommodation is as agent for the hotel operator and not as principal. The legal position in relation to the period from 21st July 2008 onwards is not raised for decision in this appeal.

8. There were two issues before the FTT. The FTT decided both issues against Med. On this appeal to the Upper Tribunal, Med challenges the decision of the FTT on the first issue but not on the second issue. The FTT described the first issue which was before it in these terms:

> "Does Med act as a principal, as the Commissioners allege, or as an agent, as Med contends, when making the supplies of hotel accommodation? It is common ground that if the Commissioners are correct then Med is in principle required to account for output tax under the TOMS and if Med is correct then the supplies are treated as taking place in the jurisdiction in which the hotel belongs (and are, therefore, outside the scope of UK VAT)."

9. On this appeal to the Upper Tribunal, counsel for both parties were content to accept the FTT's description of the issue. However, it seemed to me that it was potentially misleading to describe Med as contending that it was supplying hotel accommodation as an agent. If Med's involvement was as an agent, then it was not making the supply of hotel accommodation; its principal was the person making the supply of hotel accommodation. In such a case, what Med was supplying was agency services to its principal. Counsel for the parties were prepared to accept this comment. Accordingly, the real issue is: in relation to the supplies of hotel accommodation, who is the supplier? Is it the hotel operator (as Med contends) or is it Med (as the Commissioners contend)?

The agreement between Med and the holidaymakers

10. There is no doubt that in the cases with which Med was concerned, there was a supply of hotel accommodation to a holidaymaker. When considering the role of Med in the transactions which involved the supply of hotel accommodation, the FTT regarded the most significant document as the contract between the hotel operator and Med. I am not persuaded that that is the best place to begin the inquiry. It seems to me that because the question to be answered relates to

the identity of the person making the supply to the holidaymaker, it is more relevant to see what contract the holidaymaker entered into for the supply of hotel accommodation and in that way to seek to identify the person who had contracted with the holidaymaker to supply the hotel accommodation.

11. There are two sources for the relevant terms as to the contract or contracts made with a holidaymaker. The first source is Med's website which is accessed by the holidaymaker, or by a travel agent dealing with the holidaymaker. I will refer to the terms which appear from this source as "the website terms". The second source is the set of booking conditions. Although they also appear on Med's website, in view of their importance, I will refer to them separately as "the Booking Conditions".

12. The FTT referred to paragraph 4 and part of paragraph 6 of the "Terms of use" in the website terms. I think it is relevant to refer to some further provisions from the website terms.

13. The first part of the website terms is headed: "About us". It refers to Med as being "Europe's number one online provider of travel and leisure solutions". This part also refers to Med's customers being either independent travel agents or individuals.

14. The second part of the website terms is headed: "Terms of use". Paragraph 1 of this part contained the following wording:

> "This agreement governs your use of this Website ("the Site"), please read it carefully. … Please note that medhotels.com acts as agent on behalf of each of the hotels for which it offers accommodation. Generally, by making a reservation on this site you enter into a contract with the hotel company itself rather than with medhotels.com. Please note that medhotels.com acts as agent only for each of the hotels to provide you with information on the hotels and an on-line reservation service. medhotels.com's sole responsibility to you in providing the on-line reservation service is to pass your reservation details entered on [to] the hotel. medhotels.com shall not accept any liability for any loss or damage you may suffer or incur as a result of the incorrect processing of your reservation details by the hotel, or the accommodation service provided to you by the hotel."

15. Paragraph 4 of the website terms was headed: "The Services of medhotels.com" and stated:

> "medhotels.com provides information concerning the price and availability of hotels, together with a range of other information to assist in making a hotel reservation. Prices, restrictions and availability of goods and services may change without notice and reservations are subject to applicable taxes and fees. By completing the information boxes and clicking 'confirm' on the reservation page you are entering into a contract with

> medhotels.com for the provision of all the services of the Site, including the publication of pricing, availability and other information concerning available hotel rooms (the "Services"), on the terms set out herein. Unless otherwise agreed or specified, medhotels.com does not charge Users any fee for the provision of its Services. You may withdraw from your contract with medhotels.com for the Services at any time without any cost to you by notifying us at info@medhotels.com."

16. Paragraph 6 of the website terms was headed: "Contract to purchase hotel services" and stated:

> "Any reservations you make on this site will be directly with the company whose hotel services you are booking. At the time of making any such reservation you are entering into a contract with that company and not with medhotels.com. … Each hotel has certain rules relating to the occupancy of its rooms. Any special needs must be notified to the hotel in advance. Some hotels may have additional terms and conditions. Please note that medhotels.com acts as agent only for each of the hotels to provide you with information on the hotels and an on-line reservation service. medhotels.com's sole responsibility to you in providing the on-line reservation service is to pass your reservation details entered on the Site to the hotel. medhotels.com shall not accept any liability for any loss or damage you may suffer or incur as a result of the incorrect processing of your reservation details by the hotel, or the accommodation service provided to you by the hotel."

17. The website terms include other provisions, which I need not set out, which make it clear that there was a contract between Med and the user of the website, which contract governed that use.

18. Med's website displayed the prices of each hotel room for each hotel. These prices were available to be viewed by potential holidaymakers but also by the operators of the hotels in question.

19. A further part of the website contains the Booking Conditions which govern the contract made by the holidaymaker for the supply of hotel accommodation. Paragraph 1 of the Booking Conditions stated:

> "medhotels.com act as booking agents on behalf of all the hotels, apartments and villas featured on this website and your contract will be made with these accommodation providers. Please read the booking terms and conditions carefully. They apply to all bookings made with medhotels.com and to all members of your party."

20. Paragraph 2 of the Booking Conditions stated that an e-mail confirmation of the booking would be sent and at that time a binding contract would come into

existence and that the contract would be subject to the Booking Conditions which included cancellation charges. Paragraph 2 further provided:

> "Once the contract is made, the accommodation provider is responsible to you to provide you with what you have booked and you are responsible to pay for it, in each case subject to these booking conditions, and any other terms and conditions specific to the relevant accommodation."

21. Paragraph 3 of the Booking Conditions dealt with holiday insurance and paragraph 4 was headed: Payments. This paragraph dealt with the time for making the agreed payment and, in particular, required a deposit of 25% if the booking were made more than five weeks before the intended arrival date, and so that the balance would be payable five weeks before departure. It then provided:

> "Please note: Your booking may be cancelled, if you fail to make payment on time and you would then be liable to pay the accommodation provider the cancellation charges set out below. Payment for incidental extras (e.g. mini bars, telephone charges etc) has to be made directly to the accommodation provider, when you check out."

22. Paragraph 5 of the Booking Conditions was headed: "Special Requests" and provided that such requests were to be made at the time of booking and would be passed on to the relevant accommodation provider.

23. Paragraph 6 of the Booking Conditions dealt with any changes which a holidaymaker might wish to make. It stated that the accommodation provider had no obligation to make any change. If the accommodation provider was able to make the change, then an administration charge of £15 would be payable to medhotels.com.

24. Paragraph 7 of the Booking Conditions contained detailed provisions as to cancellation. It referred to the accommodation provider starting to incur costs from the time the booking was confirmed. It referred to the accommodation provider re-selling the accommodation. The paragraph included a table setting out variable charges for cancellation. The table also set out a scale of charges for amendments to a booking. The paragraph then referred to the accommodation provider changing the booking. The concluding part of paragraph 7, in relation to cancellations and amendments, provided:

> "If in the unlikely event that we are informed by the accommodation owner that they are unable to provide the accommodation which you have booked, we will try to provide you with similar accommodation of equal standard. If we are unable to do this or you prefer not to accept our alternative, you may cancel free of charge."

25. Paragraph 8 of the Booking Conditions was headed: "Our responsibility to you for your Booking". It stated:

> "Because we are acting only as a booking agent we have no liability for any of the accommodation arrangements and in particular no liability for any illness, personal injury, death or loss of any kind, unless caused by our negligence. Any claim for damages or injury, illness or death arising from your stay in the accommodation, must be brought against the owner of the accommodation and will be under the jurisdiction of the law of the country in which the accommodation is based."

26. Paragraph 9 of the Booking Conditions was headed: "Complaints Procedure" It provided that the holidaymaker must inform the accommodation management immediately of any complaint. If the issue was not resolved to the holidaymaker's satisfaction, he should contact Med's representative in the resort. It then provided:

> "We will act as an intermediary to try and rectify the problem. In the event that we are unable to do so, and you wish to take matters further, you must do so directly with the accommodation provider concerned."

27. Paragraph 10 of the Booking Conditions was headed: "Indemnity". It referred to the right of the accommodation provider to terminate the holiday arrangements in certain circumstances. The paragraph also referred to "us" terminating the booking.

28. On successful completion of a booking via Med's website, the holidaymaker would receive an email confirmation of the booking. In due course, the holidaymaker would receive from Med a voucher for presentation to the hotel which had been booked to establish the holidaymaker's entitlement to the hotel accommodation.

The agreement between Med and the travel agents

29. As already explained, some 6% of the sales handled by Med were made direct to holidaymakers. The other 94% involved a travel agent as an intermediary between Med and the holidaymaker. The travel agents included those with high street outlets and those who sold via the internet. Some of the travel agents were wholly independent of Med and others were associated with Med, for example, lastminute.com which was in the same group of companies as Med. The evidence before the FTT included a number of specimens of the agreements entered into by Med with travel agents. The agreements were broadly of two types: "gross rate" contracts, where the travel agent's commission was set in the agreement with the Med and, from around the start of 2007, "net rate" contracts in which the travel agent could decide its own commission above the price agreed with Med.

30. In its decision, the FTT referred in detail to the provisions of one of these agreements as typical of the arrangements which were made. The FTT referred to these provisions for the purpose of contrasting the obligations undertaken by the travel agents to Med with the obligations undertaken by Med to hotel operators. It is therefore appropriate for me to refer in detail to the provisions

of one of the agreements between Med and the travel agents. In this agreement, Med is referred to as "MHL" and the travel agent is referred to as "the Agent".

31. In this agreement with the travel agents, the Commission Terms were:

> "14% commission plus value added tax [of] invoice on all commissionable items arranged through or by the Agent. A VAT invoice in respect of commission earned will be required before commission is credited." (It is Med who required the VAT invoice.)

32. Credit Terms were defined as:

> "Payment for bookings made with MHL will be due and payable as follows: Where date of travel is more than 35 days after date of booking, a 25% deposit is payable on booking. Balance payable 35 days before date of travel. Where date of travel is less than 35 days after date of booking, full payment on booking date."

33. Clause 1 included the following definitions:

> "Booking Conditions means MHL's booking conditions as published from time to time;
>
> Accommodation Arrangements means accommodation supplied by MHL."

34. The Agreement then contained the following provisions:

> "2. Appointment
>
> 2.1 By this Agreement MHL appoints the Agent as a non-exclusive Agent … for the retail sale of the Accommodation Arrangements on the terms and subject to the conditions in this Agreement.
>
> …
>
> 4. Commission
>
> In consideration of the support and marketing agreed within the provisions of Clause 5 below, MHL shall share with the Agent the commission it receives from the hotel. MHL shall pay the Agent an agreed share of the commission as set out in the specific terms of this Agreement on all commissionable items arranged through or by the Agent.
>
> 5. Duties of the Agent

The Agent agrees, at all times during the continuance of this Agreement to act in the best interests of MHL, and not allow its interests to conflict with the duties that it owes to MHL and to act towards MHL dutifully and in good faith to:

5.1 Sales promotion

promote and use its best endeavours to increase sales of the Accommodation Arrangements to existing and potential customers through all means, including but not limited to teletext, the internet and direct marketing activity;

5.2 Monies Held

(i) hold all monies paid to the Agent by clients for bookings made with MHL, on trust as agents for MHL at all times;

(ii) hold all monies paid to the Agent by clients for bookings not including air transportation on behalf of those clients until MHL issues a confirmation invoice; thereafter to hold the monies on behalf of MHL;

5.3 Booking Procedures

ensure that a deposit is taken in accordance with the applicable current Booking Conditions and in the case of late booking within the balance due date, ensure that the full cost of the Accommodation Arrangements in cleared funds is taken, before confirming the booking with MHL.

5.4 Booking Conditions

ensure that the lead-named client is referred to the Booking Conditions in respect of the client's booking and any other applicable information before any booking is confirmed by the Agent;

5.5 Insurance

(i) ensure that the lead-named client is specifically advised that the insurance available … which the client shall be required to purchase at or before the time of entering into a contract with MHL.

(ii) indemnify MHL if the Agent fails to comply with the provision of Clause 5.6(i) and MHL incurs costs on behalf of the client such as medical and repatriation expenses.

…

5.9 Cancellation and amendment charges

Cancellation and amendment charges will be charged by MHL to the Agent on the basis shown in Appendix A to this Agreement.

5.10 Cancellation and amendment procedure

(i) inform the lead-named client of any obligations to pay cancellation amendment charges where a client requests the cancellation or amendment of a booking and pass on MHL's cancellation invoice or amendment invoice, as appropriate, to the client on receipt;

…

5.11 Collection and refund of moneys due

(i) collect from clients all deposits, balances, cancellation charges, amendment fees and all other moneys payable by clients in accordance with the Booking Conditions and to remit those moneys as shown on MHL's confirmation invoice, cancellation invoice or amendment invoice, as appropriate to MHL in accordance with the Credit Terms expressed in the Principle (*sic*) Terms and Conditions of this Agreement no later than the day after receipt by the Agent of such moneys.

…

9. VALUE ADDED TAX

For the avoidance of doubt, MHL and the Agent are, in accordance with this Agreement, acting in the capacity of selling agents and shall not be responsible for accounting for Value Added Taxation on the value of products sold."

35. The FTT held that there were two ways in which travel agents could access the hotels marketed by Med and make a booking. The first was through Med's website, and the second was through an "eXtensible Markup Language" or "XML" feed. A travel agent wishing to make bookings through the website was provided with an individual identity code to access a dedicated 'travel agents only' section. Neither the holidaymakers nor the operators of the hotels had access to this part of the website. The XML feed was introduced in about 2005, it enabled Med to transfer the hotel details and prices directly into the travel agent's own system, allowing the travel agent to market and sell the hotel rooms from its own system. The XML licence which was in evidence before the FTT was entered into on 23 January 2007 and provided at paragraph 3.1 as follows:

> "Customer shall at all times keep the individual Net Rate prices for the Med Hotels Content and the Customer Content hidden and confidential from any and all Visitors and all third parties, but will Package the Med Hotels Content with the Customer Content to create holiday packages for sale to Visitors at an inclusive price."

The agreement between Med and the hotel operators

36. Having considered the documents which are relevant to the contract made by a holidaymaker for the supply of hotel accommodation, whether as a result of the holidaymaker's direct contact with Med, or as a result of the holidaymaker's indirect contact with Med through a travel agent, it is now appropriate to consider the arrangements made between Med and the operators of the hotels.

37. The FTT held that Med, or connected persons acting on its behalf, would negotiate terms with the operators of hotels who were willing for Med to place information about their hotels on Med's website. Med would agree with the hotel operators the availability of rooms and the appropriate rates, depending upon the season. The rates were typically reviewed twice a year. The evidence before the FTT included various examples of schedules as to room availability and rates. The rates were "net rates" identifying the sum which would be payable to the hotel operator. Med throughout intended to charge more than this net rate to the holiday maker to secure for itself a profit for its involvement in the transaction.

38. The agreements made by Med with hotel operators incorporated Med's standard terms and conditions which were headed: "Terms and conditions for allotment contracts". Med was referred to as "the Agent" and the hotel operator was referred to as "the Principal". The opening words of this document were:

> "The terms and conditions of this Agreement will govern any reservation made by the Agent with the supplier of accommodation overleaf herein after referred to as 'the Principal' ".

39. The agreement then provided:

> "In accordance with this Agreement, the Principal hereby appoints the Agent as its selling agent and the Agent agrees to act as such. The Agent undertakes to deal accurately with the requests for accommodation bookings and relay all monies, which it receives from the Principal's client(s) ("Client(s)"), which are due to the Principal, but shall have no further commitment to the Principal under this Agreement. "

40. The terms and conditions then provided, so far as material:

> "1. Principal's Obligations
>
> 1.1 The Principal shall supply to the Agent, its subsidiaries and any authorised third party all advertising material including website address, CDs, slides, brochures and marketing video tapes ("Media"). The Principal shall ensure the Agent and its subsidiaries and any authorised third parties have unlimited rights to use the media at all times during the Agreement and that the content of the Media shall be accurate and shall not be misleading in any way.

1.2 The Principal shall provide all accommodation, property, resort or surroundings (“Property”) and services, amenities and/or facilities (“Services”) to the Client strictly pursuant to the Media.

1.3 The Principal shall notify the Agent in writing immediately of any withdrawal of or alteration to the Property and/or the Services or any other matter, which may alter any Media previously given to the Agent. …

…

1.5 The Principal shall honour all Client accommodation requests, options and reservations taken by the Agent. However, if any request, option or reservation cannot be honoured, the Principal will (a) notify the Agent immediately by fax/email; (b) comply with the Agent's requests and instructions concerning alternative arrangements, and (c) unless otherwise advised by the Agent, locate replacement accommodation for each Client at accommodation of least (*sic*) equal standard with similar Services and location ensuring all additional costs, including transportation expenses are borne by the Principal.

1.6 The Principal shall ensure the replacement accommodation complies with the provisions of this Agreement. The Principal shall remain bound by this Agreement if no replacement accommodation is provided to the Client.

1.7 If the replacement accommodation is not deemed acceptable by the Client and the Client wishes to cancel his/her booking, the Principal shall pay to the Agent compensation for loss of profit, all costs including without limitation committed airline seats, administration fees, Client compensation and the Agent's commission where applicable.

1.8 The Principal shall not, at any time, do anything which is intended deliberately to harm the reputation of the Agent or cause a derogation of the Agent's trading brands.

1.9 The Principal shall fully comply with all applicable national and local laws, rules, legislation and trade regulations relating to accommodation and the operation of the property or resort and shall ensure the Principal shall ensure all staff are properly trained for the evacuation of Clients in the event of an emergency.

…

2. Liability and Indemnity

2.1 The Principal on behalf or (*sic*) itself, its employees, agents and sub-contractors accepts liability and agrees fully to indemnify the Agent in respect of all losses, damages, liabilities, expenses and demands of whatever nature (including without limitation any professional fees incurred by the Agent and any compensation payments, refunds or credits to any Client subject only to condition 1.5(c) above) which the Agent may suffer or incur directly or indirectly as a result of (a) any breach by the Principal of any term or condition of this Agreement; and/or (b) the death, injury or illness (including fatality) of any person for whom the Agent may be responsible or for which the Agent may have any liability and which is caused by or arises out of any wrongful or negligent act or omission of, or any breach of this Agreement by, the Principal, its employees, agents or sub-contractors; provided that the Principal shall not be liable in respect of anything arising directly as a result of the sole fault of the Agent.

2.2 In the event of a claim or complaint being made by the Client to the Agent or the Agent's representatives in relation to the inadequacy or non-provision of the accommodation or any other Service provided or agreed to be provided by the Principal, the Agent shall notify the Principal of any such claim or complaint, and the Principal shall resolve the claim or complaint directly with the Client.

2.3 If the Principal receives a claim or complaint from a Client it shall (a) immediately take all responsible steps to resolve such claim or complaint; and (b) if it is serious, or if it involves a personal injury, immediately notify the Agent in writing by fax/email and provide details of the Principal's response to the claim or complaint; and (c) if requested to do so by the Agent, keep the Agent informed of developments concerning the claim or complaint as they arise.

2.4 If the Agent receives a claim or complaint concerning the Client's accommodation booking, the Principal will, at the Agent's request, promptly and at the Principal's own expense, give all assistance requested by the Agent including but not limited to, providing documents, providing detailed written statements from relevant employees and/or agents and ensuring such employees and/or agents remain available to give evidence.

2.5 The Agent is entitled to receive a commission from the Principal. Such commission may be calculated as any sum charged to a Client by the Agent which is over and above the prices set out in the rate sheet attached to this Agreement.

…

4. Insurance

The Principal shall maintain insurance cover with a reputable company or institution in respect of (a) the property (including the accommodation) against fire and such other risks as are usually covered by a hotel owner's or leaseholders comprehensive policy. Such cover being to the full reinstatement value of the property to include professional fees, site clearance and debris removal; and (b) all third party risks including (but not limited to) any liability for damages for the death, injury or illness of the Clients, employees, agents, sub-contractors of the Principal or any liability under clause 2.1(b) hereof. The Principal shall on demand provide a copy of insurance policies to the Agent or the Agent's representatives together with a copy of the receipt for the payment of the current insurance policy premium.

5. Health and Safety

5.1 The Principal hereby certifies that the Property, Services and accommodation comply and will at all times during the validity of this Agreement comply fully with EEC, national and trade laws, regulations and codes of practice, relating to hygiene, fire, general safety and security of those on the property or in any way affecting the operation of the Property.

…

8.2 The Agent reserves the right at any time to transfer or sub-contract any of its rights and/or obligations under this Agreement to any susbsidiary or other associated company of the Agent or to any authorised third party.

…

8.4 This Agreement shall not operate so as to create a partnership or joint venture of any kind between the parties."

The agreement between Med and the travel representatives

41. In various resorts where there were hotels advertised on Med's website, Med engaged handling agents or travel representatives. These arrangements were pursuant to a standard form Handling Agency Agreement used by Med. In this agreement Med was referred to as Medhotels or the Company. The agreement stated:

> "This Contract defines the services, which must be delivered by the Agent to support Medhotels in the provision of holidays and excursions to its Customers."

42. In clause 1.1 of the agreement, "the Customer" was defined as "a customer of the Company" i.e. Med and "Products" were defined as "the holiday and other travel arrangements provided by Medhotels to Customers …".

43. Clause 2 of the agreement provided:

> "The company hereby appoints AGENT as its agent to look after the needs of it's (*sic*) customers and to provide the Services in the Territory in accordance with and subject to the terms of this Agreement and the Agent hereby accepts such appointment on the terms set out in this Agreement."

44. Clause 4.1(h) of the agreement provided that one of the services to be supplied by the Agent was to:

> "assist the Company with any disputes between its Customers and Hoteliers."

45. By clause 5.3 of the agreement, the Agent's duty was to ensure that the representative's first priority was to provide Customer Service assistance to the customers. Clause 6.6 provided that "the Agent shall ensure that all staff remains courteous and helpful in all dealings and communications with the Company's Customers". Clause 6.12 provided that "all coach transfers will be branded with the Medhotels logo."

The relevant VAT provisions

46. The question which arises on this appeal is as to the identity of the supplier of hotel accommodation to a holidaymaker. Med submits that the answer to this question is to be arrived at by construing the written agreements in accordance with established principle and no separate point of VAT law arises. Conversely, the Commissioners submit that the question has to be considered in the context of the relevant law as to VAT and I must understand the VAT provisions which potentially apply in this case. I will later choose between these submissions but at this point, I will refer in summary to those provisions.

47. For most of the period that is covered by the decisions and assessments, the Sixth Directive (77/388/EEC) ("the Sixth Directive") was in force, replaced from 1 January 2007 by Directive 2006/112/EC ("the VAT Directive"). I will refer primarily to the provisions of the Sixth Directive but I will also give the references to the corresponding articles in the VAT Directive.

48. Pursuant to Article 13B(b)(1) of the Sixth Directive (Articles 135(1)(l) and 135(2)(a) VAT Directive), the leasing or letting of immovable property is generally to be exempted from VAT, but this excludes: "the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function…". This is reflected in item 1(e) of Group 1, Schedule 9 of the Value Added Tax Act 1994 ("VATA") which excludes from exemption "the grant of any interest in, right over or licence to occupy holiday accommodation". Thus the supply of hotel accommodation is standard rated.

49. Under Article 9(2)(a) of the Sixth Directive (Art 45 of VAT Directive): "the place of the supply of services connected with immovable property… shall be the place where the property is situated…". This is implemented by Article 5 of the VAT (Place of Supply of Services) Order 1992.

50. Thus, the supply of hotel accommodation is treated as being made where the hotel in question is located. Under the normal rule therefore, a UK company providing holiday accommodation in another Member State would be liable to pay VAT in that other Member State and would therefore need to be registered there for VAT.

51. Obvious practical difficulties would arise for travel operators supplying accommodation in a number of Member States if they had to account for VAT to the relevant tax authorities in each of those Member States. The normal rule is therefore in some circumstances displaced by the application of a special scheme for travel operators which provides for them to account for VAT on their margin within their own state of establishment.

52. Article 26 of the Sixth Directive (Articles 306-310 of the VAT Directive) is headed "Special scheme for travel agents". One needs to be a little careful with the reference to "travel agents". Article 26 makes clear that whilst the reference to "travel agents" includes tour operators, Article 26 does not apply to travel agents who are acting only as intermediaries and accounting for tax in accordance with Article 11A(3)(c).

53. Article 26 provides:

> "(1) Member States shall apply value added tax to the operations of travel agents in accordance with the provisions of this Article where the travel agents deal with customers in their own name and use the supplies and services of other taxable persons in the provision of travel facilities. This article shall not apply to travel agents who are acting only as intermediaries and accounting for tax in accordance with Article 11(A)(3)(c). In this Article travel agents include tour operators.
>
> (2) All transactions performed by the travel agent in respect of a journey shall be treated as a single service supplied by the travel agent to the traveller. It shall be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which the travel agent has supplied the services. The taxable amount and the price exclusive of tax, within the meaning of Article 22(3)(b), in respect of this service shall be the travel agent's margin, that is to say, the difference between the total amount to be paid by the traveller, exclusive of value added tax, and the actual cost to the travel agent of supplies and services provided by other taxable persons where those transactions are for the direct benefit of the traveller.
>
> (3) …

> (4) Tax charged to the travel agent by the other taxable persons on the transactions described in paragraph 2 which are for the direct benefit of the traveller, shall not be eligible for deduction or refund in any Member State."

54. Article 11(A)(3)(c) of the Sixth Directive (referred to in Article 26(1)) provides:

> "The taxable amount shall not include: (c) the amounts received by a taxable person from his purchaser or customer as repayment for expenses paid out in the name and for the account of the latter which are entered in his books in a suspense account. The taxable person must furnish proof of the actual amount of this expenditure and may not deduct any tax which may have been charged on these transactions."

55. Article 6(4) of the Sixth Directive (Article 28 of the VAT Directive) provides as follows:

> "Where a taxable person acting in his own name but on behalf of another takes part in a supply of services, he shall be considered to have received and supplied those services himself."

56. These EU legislative provisions are reflected in domestic law by section 53 of VATA and the Value Added Tax (Tour Operators) Order 1987.

57. Section 53 of VATA provides:

> "(1) The Treasury may by order modify the application of this Act in relation to supplies of goods or services by tour operators …
>
> (2) Without prejudice to the generality of subsection (1) above, an order under this section may make provision –
>
> (a) for two or more supplies of goods or services by a tour operator to be treated as a single supply of services;
>
> (b) for the value of that supply to be ascertained, in such manner as may be determined by or under the order, by reference to the difference between sums paid or payable to and sums paid or payable by the tour operator;
>
> (c) …
>
> (3) In this section "tour operator" includes a travel agent acting as principal and any other person providing for the benefit of travellers services of any kind commonly provided by tour operators or travel agents."

58. The Value Added Tax (Tour Operators) Order 1987 provides for the Tour Operators Margin Scheme ("TOMS"):

> *"Supplies to which this Order applies*
>
> 1 This Order shall apply to any supply of goods or services by a tour operator where the supply is for the benefit of travellers.
>
> …
>
> *Meaning of "designated travel service"*
>
> 3(1) Subject to paragraphs (2), (3) and (4) of this article, a "designated travel service" is a supply of goods or services—
>
> (a) acquired for the purposes of his business; and
>
> (b) supplied for the benefit of a traveller without material alteration or further processing;
>
> by a tour operator in a member State of the European Community in which he has established his business or has a fixed establishment.
>
> (2) The supply of one or more designated travel services, as part of a single transaction, shall be treated as a single supply of services.
>
> (3) The Commissioners of Customs and Excise may on being given notice by a tour operator that he is a person who to the order of a taxable person—
>
> (a) acquires goods or services from another taxable person; and
>
> (b) supplies those goods or services, without material alteration or further processing, to the taxable person who ordered the supply for use in the United Kingdom by that person for the purpose of that person's business other than by way of re-supply—
>
> treat supplies within sub-paragraph (b) as not being designated travel services.
>
> (4) The supply of goods and services of such description as the Commissioners of Customs and Excise may specify shall be deemed not to be a designated travel service.
>
> …
>
> *Place of Supply*

> …
>
> 5(2) A designated travel service shall be treated as supplied in the member State in which the tour operator has established his business or, if the supply was made from a fixed establishment, in the member State in which the fixed establishment is situated.
>
> …
>
> 7 Subject to articles 8 and 9 of this Order, the value of a designated travel service shall be determined by reference to the difference between sums paid or payable to and sums paid or payable by the tour operator in respect of that service, calculated in such manner as the Commissioners of Customs and Excise shall specify.
>
> …
>
> 12 Input tax on goods or services acquired by a tour operator for re-supply as a designated travel service shall be excluded from credit under sections 14 and 15 of the Value Added Tax Act 1983 *[now sections 24-26 Value Added Tax Act 1994]*."

59. Paragraph 2.6 of the HMRC Notice 709/5 explains that a supplier of services who comes within TOMS cannot reclaim any UK or EU VAT charged on the travel services and goods he buys in and re-supplies, but only accounts for VAT on his margin (i.e. difference between the amount received from his customer and that paid to his suppliers).

60. I can now summarise the effect of the VAT provisions as they potentially apply in this case. If the hotel accommodation is supplied by the hotel operator, and not by Med, to the holidaymaker, then Med is not liable to account for VAT on that supply. In such a case, Med will have supplied agency services to the hotel operator and will be liable to account for VAT on that supply or to arrange for that VAT to be paid by its principal, the hotel operator. The parties are agreed that such liability will be in the Member State where the relevant hotel is situated and not in the UK.

61. If the hotel accommodation is supplied by Med to the holidaymaker, then Med is liable to account for VAT on that supply to the Commissioners in accordance with TOMS.

The decision of the FTT

62. The FTT considered the contractual arrangements to which I referred above and, in particular, the agreement between Med and the hotel operators and the agreement between Med and the holidaymakers. The FTT then considered the evidence given for Med by Mr McLintock, a Senior Tax Director with Sabre Europe Management Services Ltd (a wholly owned subsidiary of Sabre Holdings Corporation which itself was the parent of lastminute.com Ltd).

63. At the hearing before me, the Commissioners emphasised the following findings made by the FTT on the basis of Mr McLintock's evidence:

i) When a holidaymaker made a booking on Med's website, he/she made a payment to Med. A deposit of 25% was made at the time of booking unless it was fewer than five weeks prior to the travel date, in which case the full price was paid. The payment was made into Med's bank account, not the hotel's, so that interest on direct sales was earned by Med (paragraph 38).

ii) The holidaymaker did not know the rate which the hotel charged Med and the hotel did not know the rate Med charged the holidaymaker (paragraph 39).

iii) It was accepted by Mr McLintock that Med ought on all occasions to have issued a VAT invoice for its commission but this had not been done (paragraph 39).

iv) It was accepted by Mr McLintock that where a hotel would make an error in Med's favour, Med would not account to the hotel for the difference, but that where a hotel made an error in its own favour, Med would look to the hotel to correct it (paragraph 39).

v) It was accepted by Mr McLintock that Med retained the 25% deposit it received when the holidaymaker did not in fact go on the holiday in question, i.e. that the holidaymaker forfeited that amount to Med, not to the hotel. There was no contractual obligation on Med to pay the sum to the hotel (paragraph 39).

vi) Med had corresponded with complainants and offered payment without first clearing the matter with the hotel in question, although the hotel would then be charged by Med for any monies it paid to the complainant (paragraph 40). It was accepted that Med had told HMRC that it could agree compensation without prior approval from the hotel in question (paragraph 40). There was evidence of a complaint that was rejected by the hotel but nonetheless Med paid compensation and charged the hotel in question without the hotel's agreement (paragraph 40).

vii) Where Med issued a holiday voucher in lieu of payment, that voucher would be in respect of a future holiday with Med and not with the hotel in question so that it was Med and not the travel agent or the hotel that was offering the compensation (paragraph 40).

viii) If a hotel became insolvent, Med would attempt to accommodate the holidaymaker elsewhere as set out in the Booking Conditions but Mr McLintock claimed this was a matter of goodwill (paragraph 41).

ix) Med had made pre-payments to certain hotels. It was accepted that there was a risk that the hotel in question might become insolvent (i.e. that the payments would be lost) (paragraph 43).

64. I have set out those parts of the findings of the FTT, in relation to Mr McLintock's evidence, which were particularly relied upon by the Commissioners. I have not set out the full text of the relevant findings although I have noted that the relevant findings do also record qualifications of some of these findings, based on Mr McLintock's explanation of the relevant circumstances. Mr McLintock's description of what occurred in practice showed that many of these matters were dealt with in accordance with the terms of the relevant written agreements. Where the practice in some cases did not accord with the terms of the agreements, Mr McLintock explained that Med acted in a way which was considered to be in Med's best interests having regard to the need to maintain customer relations and to recognise commercial reality.

65. After summarising the submissions made to it by counsel for the parties, the FTT set out its reasons for its decision at paragraphs 59 – 70. It started its discussion of the matter by referring to Customs & Excise Commissioners v Reed Personnel Services Ltd [1995] STC 588 and A1 Lofts Ltd v Revenue and Customs Commissioners [2010] STC 214. It then directed itself that it should look not only at the various contractual documents but also at "the behaviour of Med" (paragraphs 59-60).

66. The FTT considered (in paragraph 61) the agreement between Med and the hotel operators. It held that there were terms in that agreement which were unusual in an agency contract. The descriptions of Med as "the Agent" and the hotel operator as "the Principal" were not determinative. The FTT referred to a number of the terms of the agreement. It noted that Med had drafted the agreement, that the majority of the terms imposed obligations on the hotel and that Med's only obligation was to deal accurately with the request for accommodation and relay to the hotel all monies due to it. The FTT noted that there was no clause obliging Med to market the accommodation. As the holidaymaker was bound by Med's Booking Conditions, whether they booked direct with Med or indirectly through a travel agent, the FTT considered that it was not appropriate to consider the agreement with the hotel operators without also considering Med's Booking Conditions.

67. In relation to Med's Booking Conditions, the FTT found that these did not support Med's claim. At the hearing before me, the Commissioners stressed the following statements by the FTT:

    i) The Booking Conditions "attempted" to make clear that the holidaymaker had a contract with the hotel. However, the conditions did not specifically state that the holidaymaker was responsible for paying the hotel (paragraph 62).

    ii) There was an obligation on Med to accommodate changes to bookings but these would incur a £15 administration charge payable to Med not to the hotel (paragraph 62).

    iii) The Booking Conditions also stated that the holidaymaker would be liable to pay the hotel the cancellation charges set out in the Booking Conditions. However, the agreement between Med and the hotels did

not provide for the cancellation charges in the Booking Conditions to be paid to the hotels. There was no evidence that they were passed on to the hotel, despite the fact that Med was entitled to charge the holidaymaker up to 100% of the price payable (paragraph 62).

iv) Pursuant to the Booking Conditions, if the hotel were unable to provide the accommodation booked, Med would try to provide similar accommodation of equal standard or allow cancellation free of charge. The FTT found this was an unusual undertaking by an agent and one on the basis of which the holidaymaker could look to Med to provide accommodation rather than the hotel (paragraph 63).

v) The FTT also noted that although Med stated in its Booking Conditions that it had no liability unless caused by its negligence, it was not certain that Med would succeed in defending any action by an injured holidaymaker who would have no contract with the hotel (paragraph 63).

vi) Further, this clause contradicted the earlier clause which imposed a burden on Med to provide alternative accommodation in certain circumstances.

68. The FTT held that Med could not rely on the Booking Conditions to support its claim that it was an agent (paragraph 63). It found that there was no contract between the hotel and the holidaymaker and no possibility that the hotel could have gone to the holidaymaker and demanded the price of a room (paragraphs 62 and 68). Med did not put in evidence any terms and conditions between any hotel and holidaymakers and no evidence of Med being bound by any particular hotel's own terms and conditions (paragraph 62).

69. The FTT referred to the agreement between Med and the travel agents pursuant to which the travel agents were obliged to promote the accommodation. The FTT contrasted this with the absence of any such obligation on Med in its agreement with the hotel operators (paragraph 64).

70. The FTT also noted indicia that the hotels were treating the supply of accommodation as being made by it to Med, e.g. a sales invoice from a hotel showed the price it expected to receive from Med and which included local VAT on that value only (paragraph 64). Further, Med retained handling agents at the hotel locations while no condition in the Terms and Conditions required or allowed Med to provide in-resort services (paragraph 64).

71. The FTT found that it was relevant and contrary to Med's case that Med set its own commission and did not disclose it to the hotel. *International Life Leisure* (VAT Tribunal V19649, MAN/02/0524) and *Spearmint Rhino Ventures* [2007] STC 1252 showed this was 'strongly indicative' of the fact that Med was indeed acting as principal. The FTT's decision contains the following passage:

> "Whilst in a situation of agency not involving VAT the fact that the party may not know the commission charged by its agent

> may not be relevant to the question of agency, in the present situation it is important that the hotel knows the amount of commission of its true agent because it is only if the hotel knows the price its agent will charge that it can properly account for VAT. In the present case Med did not invoice the hotel with its commission or even inform it of what it was, which assumes that the hotel will not be accounting for VAT based on the full price paid for by the holidaymaker. The hotel only accounted for local VAT on the net amount payable by Med to it." (paragraph 66).

72. The FTT found that the matter referred to in the last paragraph supported the conclusion that the hotel was treating the supply as a supply of accommodation made by it to Med, not a supply of intermediary services made by Med to it (paragraph 66).

73. The FTT also noted that Med would deposit payments from customers into its own account and thus keep any interest and not account for this to the hotel; that it carried the benefit and risk of currency fluctuations; that it retained overpayments; that it made compensation payments to the holidaymakers and charged the hotel without there being a basis in the agreement for this; and would provide vouchers for accommodation with other hotels; and that it did not maintain a suspense account. It held that these were all matters more indicative of Med acting as principal than as agent (paragraphs 66-67).

74. In conclusion, the FTT held that the principal document was the agreement between Med and the hotel operators but found that as a whole the position was inconsistent with the "clear statement" in that document that Med was agent, when that "declaration" was taken together with the way the agreement was implemented by Med (paragraph 68). Med's failure to account to the hotels (i.e. the alleged principals) for all funds received by it and its failure to account for VAT, or to put the hotel in a position to pay the relevant VAT, were found to render its actions those of a principal not an agent (paragraph 68).

Med's submissions on appeal

75. Med submitted that the sole question was whether it acted as principal or agent in relation to the supply of hotel accommodation to a holidaymaker. The answer to that question turned wholly upon the true construction of the agreements between the relevant parties.

76. Med analysed the decisions in Customs & Excise Commissioners v Reed Personnel Services Ltd [1995] STC 588 and A1 Lofts Ltd v Revenue and Customs Commissioners [2010] STC 214. I was invited to follow the clear statements of principle in the latter case. In the present case, the only issue was as to the nature of the relationship between Med, the hotels and the holidaymakers. There was no issue as to the nature of the supply.

77. The FTT failed properly to construe the relevant agreements. There was no allegation that the agreements were a sham. The FTT relied on a number of

irrelevant or erroneous factors. None of those factors in any way justified the conclusion arrived at by the FTT.

78. Med then analysed the terms of the agreement between Med and the hotel operators. It was submitted that the only possible construction of that agreement was that the hotel operator was a principal and Med was an agent in relation to the supply of hotel accommodation to a holidaymaker. The terms as to commission were consistent with an agency relationship and were to be found in other VAT cases where the relationship in question was held to be one of agency: J K Hill v Customs & Excise Commissioners [1988] STC 424 and Customs & Excise Commissioners v Music and Video Exchange [1992] STC 220; see also the earlier case of Potter v Customs & Excise Commissioners [1985] STC 45. Med also relied on Mercantile International Group plc v Chuan Soon Huat Industrial Group Ltd [2002] 1 All ER (Comm) 788.

79. Med next analysed the terms of the agreement between Med and the holidaymaker. Again, the only possible construction of the agreement was that Med contracted as agent for the hotel operator and not as principal.

80. If the agreements, properly construed, resulted in the hotel operator (through the agency of Med) entering into a contract to supply hotel accommodation to the holidaymaker, there was no basis for finding that such a contract had been replaced by two different contracts under which (1) the hotel operator contracted to supply hotel accommodation to Med and (2) Med contracted to supply hotel accommodation to the holidaymaker.

81. Med addressed each of the matters relied upon by the FTT in support of its conclusion and submitted that these factors, whether taken individually or collectively, did not justify the conclusion arrived at.

The Commissioners' submissions on appeal

82. The Commissioners submitted that the FTT was right for the reasons which it gave. The Commissioners analysed the decision in detail. They relied on the decision in Reed Personnel Services. The FTT had to consider the obligations imposed by the various agreements and then determine whether those obligations were consistent with an agency relationship.

83. The references in the agreement between Med and the hotel operators were "labels" and were not accurate. The references in the Booking Conditions to a contract between the hotel operator and the holidaymaker were not supported by any "contractual reality". Some of the matters referred to by Mr McLintock amounted to a departure from the terms of the agreements and the FTT was entitled to take those matters into account.

84. In the course of their oral submissions, counsel for the Commissioners argued:

    i) To identify the obligations which the parties have undertaken to each other, one must construe the written agreements, unless the agreements are said to be shams;

ii) The agreements in the present case are not said to be shams;

iii) In general, and subject to one minor respect, it is not said that the agreements in the present case were varied by a subsequent course of dealing;

iv) The incidence of VAT is not regulated by private agreements and the proper classification of the nature of a supply is to be ascertained from the whole facts of the case.

v) Revenue and Customs Commissioners v Loyalty Management UK Ltd [2010] STC 2651 establishes that "economic reality" is critical to ascertaining the proper VAT treatment of a supply;

vi) The fact that the parties have used the label of agency in a contract cannot be determinative of the economic reality as to a supply; one must look to the substance of the agreement and not to the labels used;

vii) A fundamental feature of an agency relationship is that the agent acts as a fiduciary bringing into force a direct contract between the principal and his customer; the agent does not undertake reciprocal contractual obligations with that customer himself;

viii) Various indicia may show whether the relationship is a fiduciary one of principal and agent or a commercially adverse relationship between principals; the economic reality of these matters must be assessed;

ix) Even if I held, as a matter of contract, that the contract to supply hotel accommodation was made by the hotel operator (through the agency of Med) with the holidaymaker, nonetheless for the purpose of considering the correct VAT analysis of the position, I should have regard to the approach in Reed Personnel Services and Loyalty Management and conclude that there was a supply of hotel accommodation by Med to the holidaymaker.

85. At one time counsel for the Commissioners was prepared to argue that even if the supply of hotel accommodation was by the hotel operator to the holidaymaker, nonetheless Med was obliged to account for VAT pursuant to article 26 of the Sixth Directive or article 306 of the VAT directive because Med was not "acting only as intermediaries" (the wording of article 26(1)) or did not "act solely as intermediaries" (the language of article 306(1)). The suggestion was that because of Med's economic interest in the supply by the hotel operator to the holidaymaker, Med was something more than "an intermediary". However, having taken instructions overnight, counsel for the Commissioners did not seek to develop that argument.

The relevant legal principles

86. The issue in the present case is as to the identity of the supplier of holiday accommodation to the holidaymakers. In order to determine that issue, it is necessary to apply basic principles as to the construction of written

agreements, some further principles in the law of agency and to consider whether there are any special principles which apply by reason of the fact that the issue arises in a VAT context.

Construction of written agreements

87. I will begin by referring in summary form to some basic principles which govern the way in which a court (or a tribunal) construes a written agreement. I do not think that what follows is open to dispute but I will in due course have to consider whether the FTT applied these basic principles in this case.

88. When construing a written agreement, the court has regard to all of the provisions of the contract. The court construes the agreement against the relevant background. The material which is admissible in relation to that background is everything which a reasonable man would regard as relevant and which would have affected the way in which a reasonable man would have understood the language used in the document: Investors Compensation Scheme Ltd v West Bromwich B.S. [1998] 1 WLR 896 at 912-913. The relevant material is restricted to the material which would have been available to the parties. At the risk of stating the obvious, this last proposition means that the court cannot be influenced, when construing a written agreement, by material which would not have been available to the parties when they entered into that agreement.

89. The court may also be assisted by considering the commercial purpose of the agreement. In some cases, the ordinary literal meaning of the language used will be in accordance with the apparent commercial purpose of the agreement. If the ordinary meaning of the language appears to convey a meaning which does not make reasonable commercial sense, then a court will look more critically at the wording to see if the ordinary meaning is really what the parties must be taken to have intended. In a case where the ordinary meaning of the language is in serious conflict with commercial sense, then the court may conclude that the language has not been well chosen and may choose a possible meaning (even though it would not be the most likely meaning of the language in other circumstances) which fits better with commercial sense.

90. In some cases, the parties purport to state the legal effect of their agreement. They may, for example, state that the agreement is a licence in relation to land and not a tenancy. They may do this even where there is no question of the agreement being a sham. They may act in this way through a misunderstanding of what is involved in the legal concept to which they refer or for other reasons. Notwithstanding this, the court will examine the substance of the agreement to determine its legal effect: see, for example, Street v Mountford [1985] AC 809. This will often produce the result that the court finds the parties have correctly described the legal effect of the agreement but in other cases the court will determine that the description used by the parties is incorrect and is overridden by the substance of what they have otherwise agreed.

91. In the present case, the FTT stated that it would not only look at the written contractual documents but also at "the behaviour" of Med. This raises an

important question as to the purposes for which the FTT, and the Upper Tribunal on this appeal, is entitled to look at behaviour in this case where the contractual arrangements between the parties are the subject of detailed written agreements.

92. I have already referred to the principle that when the court construes a written agreement, it does so against all relevant background. In principle, a course of dealing prior to the entry into a written agreement may be part of the relevant background. In the case of an oral agreement, evidence of conduct may be relevant to determine the terms of the oral agreement; such evidence is not confined to conduct before the oral agreement was reached: Maggs v Smith [2006] BLR 395. In the case of an agreement to be inferred from conduct, then (plainly) evidence of that conduct is relevant. If the contract is partly in writing and partly oral or partly to be derived from conduct, then evidence as to conduct (including subsequent conduct) is relevant to the part of the contract which is not in writing. Further, if the contract was originally expressed in writing but it is contended that the written agreement was later varied or superseded, whether orally or by a course of dealing, then evidence as to conduct subsequent to the written agreement is relevant. Yet further, if it is alleged that the written document is a sham or a pretence, then evidence as to conduct before and after the written document is executed may be relevant: Antoniades v Villiers [1990] 1 AC 417 at 475. If it is contended that a party is bound by an estoppel by convention as to the meaning or effect of a written agreement, then again evidence of conduct subsequent to the written agreement may be relevant: Amalgamated Property Co v Texas Bank [1982] QB 84 at 119-120.

93. Subject to the above matters, it remains the law that the court may not have regard to the subsequent conduct of the parties to a written agreement as a suggested aid to the interpretation of that agreement: Schuler AG v Wickman Machine Tools Sales Ltd [1974] AC 235. This general proposition is qualified in some cases involving disputes about a land boundary: see Ali v Lane [2007] 1 P&CR 26.

Agency

94. In the course of its decision, the FTT discussed whether a particular term or terms were compatible with the relationship of principal and agent. When considering that question, it must be remembered that the parties to an agency relationship may expressly agree terms which would not otherwise apply to such a relationship. Thus the fiduciary obligations of the agent may be modified by express agreement. In particular, an agency agreement may contain express terms which provide for matters which would otherwise not be appropriate as involving an impermissible conflict of interest. These express terms which are at variance with what would otherwise be the obligations of parties to a relationship of agency do not necessarily mean that the relationship has ceased to be one of agency. There may, however, come a point where the parties have created a contractual relationship which is so far removed from that of agency, that it is not appropriate to analyse the case as one of principal and agent.

95. In principle, it is open to the parties to an agency relationship to agree between themselves on how the agent is to be remunerated and what liability the agent has to account to the principal for monies received by the agent from the other party to a transaction which the principal has entered into through the agency of the agent.

96. Contractual terms as to the remuneration of an agent can no doubt take many forms. Not all agency relationships involve a principal paying to an agent a commission by reference to a percentage of the gross consideration passing under the relevant transaction between the principal and a third party. One way in which an agent may be remunerated is by way of a "mark up". It is possible in an agency relationship for the principal and the agent to agree that the agent can contract on behalf of the principal with a third party on terms that (1) the third party will pay the agent £X plus a mark up and (2) the agent will remit £X to the principal. Of course, there is an entirely different set of legal relationships involving three parties which can lead to one party receiving a mark up. I refer to the relationships created by a sale and a sub-sale, for example, where A sells goods to B for £X and then B sub-sells the same goods to C for £X plus a mark up. In any particular case, it may be relevant to determine whether the parties have contracted for an agency relationship or the relationships of sale and sub-sale. If there is no written agreement between the parties, then the court will have to look carefully at the course of dealing to see which relationship exists. Conversely, if the matter is governed by a written document, then the legal answer is to be arrived at by construing the written document applying conventional principles as to the interpretation of written documents.

97. The possibility of an agent being remunerated by way of a mark up was considered by the Court of Appeal in Mercantile International Group plc v Chuan Soon Huat Industrial Group Ltd [2002] 1 All ER (Comm) 788. The court discussed earlier cases which had to distinguish between a relationship of agency on the one hand and the relationships of sale and sub-sale on the other: see Re Nevill, ex p White (1871) LR 6 Ch App 397 and Re Smith, ex p Bright (1879) 10 Ch D 566. The courts in those two earlier cases reached different answers. The different answers were essentially attributable to the fact that in the first case, there was no written agreement recording the terms of the relationship and the court had to determine that relationship from the parties' conduct, whereas in the second case the relationship was governed by a written agreement which fell to be construed. In the Mercantile International Group case, the matter was governed by a written agreement and the court held that unless that agreement was said to be a sham, it was not possible to ignore its effect: paragraph [31]. The Court of Appeal held that remuneration of an agent by way of a mark up was not inconsistent with an agency relationship: paragraph [36]. It also recognised that the agent had an interest in protecting its mark up and its conduct in dealing with disappointed customers should be considered in that light: paragraph [36]. Finally, it said that it is open to the parties to agree express terms which alter the fiduciary obligations which would exist in the absence of those express terms: paragraph [40].

98. I also note that in the VAT cases of Hill v Customs and Excise Commissioners [1988] STC 424 and Customs and Excise Commissioners v Music and Video Exchange Ltd [1992] STC 220, the persons who were held to be acting as agents for the sellers, and not as principals, received a mark up on the net sum payable to the sellers. The possibility of an agent receiving his remuneration in the form of a mark up was also recognised in the earlier VAT case of Potter v Customes and Excise Commissioners [1985] STC 45 at 51h.

99. I referred earlier to the possibility that a court when interpreting a written agreement might reach the conclusion that the parties have used terminology which misdescribes the legal effect of the agreement. This can happen with the use of the word "agent" or "agency". This point was forcefully made by Lord Herschell in Kennedy v De Trafford [1897] AC 180 at 188:

> "No word is more commonly and constantly abused than the word "agent". A person may be spoken of as an "agent" and no doubt in the popular sense of the word may properly be said to be an "agent", although when it is attempted to suggest that he is an "agent" under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading."

Any special principles relating to VAT?

100. I next need to consider questions which were said to arise as to whether the identity of the supplier of hotel accommodation under the contractual documents was necessarily the same as the identity of the supplier for the purposes of VAT.

101. In setting out its reasons, the FTT began by referring to the decision in Reed Personnel Services Ltd where Laws J said at page 591 that the *nature* of a supply for VAT purposes was not always answered by simply construing the contract in question. At page 595, Laws J stated:

> "In principle, the nature of a VAT supply is to be ascertained from the whole facts of the case. It may be a consequence, but it is not a function, of the contracts entered into by the relevant parties."

102. Having cited this and other passages from the decision in Reed Personnel Services Ltd, the FTT said:

> "We therefore will look not only at all the various contractual documents but also at the behaviour of the Appellant."

103. The FTT then referred, as I have already described, to certain matters of conduct by some of those involved in some of the transactions in question. In particular, the FTT referred to the way in which Med did not invoice the hotel operator in relation to its commission and the fact that some hotel operators accounted for local VAT on the net amount payable by Med to it. The FTT referred to the fact that Med deposited the payments from holidaymakers into

Med's account, received and kept interest on such deposits and ran (or benefited from) the currency risks involved. Further, the FTT referred to occasions when Med paid compensation to holidaymakers and re-charged the hotel operators. The FTT then held that the description of the parties as Principal and Agent in the agreement between Med and the hotel operators was not consistent with the way in which the agreement was implemented by Med.

104. However one describes the approach adopted by the FTT, it is clear that the FTT thought it was appropriate to adopt that approach on the authority of Reed Personnel Services Ltd. It is necessary, therefore, to consider the meaning of what was said in that case. Happily, that decision has been analysed in detail, together with a large number of other VAT cases before and after it, by Lewison J in A1 Lofts Ltd where it was explained at [40]:

> "What I understand Laws J to be saying is that the *identification* of the parties' obligations is a matter of contract. But once their obligations have been identified, the *nature* or *classification* of those obligations, and in particular whether they answer a particular statutory description, is not necessarily concluded by the contract. It may well be, even in a tripartite situation, that they do; but it is not inevitable. Read in this way, it seems to me that *Reed* exemplifies a common method of reasoning. The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in *Street v Mountford* [1985] 2 All ER 289, [1985] AC 809); or as a fixed or floating charge (as in *Agnew v IRC* [2001] UKPC 28, [2001] 2 AC 710), or as a consumer hire agreement (as in *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd* [2009] UKHL 35, [2009] 4 All ER 33, [2009] 1 WLR 1375). In all these cases the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them."

105. The part which the contractual analysis ought to play in the present case is also revealed by a further passage from the judgment in A1 Lofts at [47] (for simplicity I have removed the references to earlier cases):

> "I would summarise my conclusions as follows:
>
> i) Where two or more persons (call them A and B) are involved in the supply of goods or services to an ultimate consumer (call him C) different contractual structures may entail different VAT consequences … ;

ii) Those consequences will follow whether C knows about the contractual arrangements between A and B or not … ;

iii) The starting point for determining the true relationship between A, B and C is an analysis of the contractual arrangements between them … ;

iv) Where the contractual arrangements are contained wholly in written agreements, this will be a question of construction of the agreements. But a contract may be partly written and partly oral, in which case what the parties said and did may throw light on the extent of their contractual obligations … ;

v) The apparent contractual arrangements will not represent the true relationship between A, B and C if the contractual arrangements are a sham; or if the parties have failed to operate the contractual arrangements; or if the evidence is wholly inconsistent with the apparent contract … ;

vi) The identification of the true rights and obligations of the parties will be the same, whether the question arises in the context of VAT or in the context of an action for breach of contract; and is the same whether the question arises in a domestic or a European context … ;

vii) Having identified the true rights and obligations of the parties, it will then be necessary to decide how those rights and obligations should be classified for the purposes of VAT … ;

viii) Sometimes this will be concluded by the terms of the contract themselves; but it may not be … . If it is not then the classification of the parties' rights and obligations for the purposes of VAT may involve the application of particular deeming provisions of the VATA … ; or deciding whether the nature of the supply falls within a particular description … ; whether there is one contract or more than one … ; or in some cases deciding whether on the true construction of a single contract there is one supply or more than one … ;

ix) Depending on the true relationship between A, B and C the conclusion might be that A makes a supply to B, who makes an overall supply to C; or A and B may make separate and concurrent supplies to C … ."

106. The explanation in A1 Lofts of the earlier decision in Reed Personnel Services is clear and wholly convincing. This explanation, together with the above summary of the legal principles in A1 Lofts, supports an approach in the present case whereby the question as to the identity of the supplier of holiday accommodation is to be answered by considering the contracts entered into between the relevant parties and determining their effect as a matter of contract. Once the supplier under the contract is identified in that way, that

party will be the supplier for the purpose of the VAT provisions. In the present case, it would appear to be unnecessary to engage in any further classification or assessment of the nature of the relevant supply.

107. In any event, I do not think that anything said in Reed Personnel Services Ltd could justify the course taken by the FTT in this case. What the FTT appears to have done in this case was to consider the terms of the written agreements, then to consider some evidence as to how they were implemented in some cases and then to hold that the written agreements were not consistent with the way that they were implemented and, finally, to conclude that the terms of the written agreements could not be relied upon as setting out the governing terms of the relevant arrangements.

108. In seeking to support the conclusion arrived at by the FTT, counsel for the Commissioners submitted that to identify the supplier of hotel accommodation for contractual purposes did not necessarily identify the supplier for VAT purposes. He submitted that the principles of English law governing the construction of written contracts are not applied in other Member States where the Sixth Directive previously applied and where the VAT Directive now applies. He also submitted that there was an independent principle of law relating to VAT that transactions are to be analysed in accordance with their economic reality.

109. I will deal first with the submission as to the different principles of construction which apply in other Member States where VAT is chargeable. In Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101 at [39], Lord Hoffmann pointed out that the restrictive rule of English law, as to the admissibility of pre-contractual negotiations as an aid to the construction of a written contract, was not adopted in continental legal systems. Further, the difference in the approaches of English law and other legal systems in relation to the admissibility of conduct subsequent to the written agreement is explained in The Interpretation of Contracts, Lewison, 4th ed., at paragraph 3.15. Counsel for the Commissioners referred to the possibility that transactions similar to those in the present case might be analysed differently in other Member States applying different governing laws.

110. Whether counsel's speculation as to how similar transactions might be analysed differently if one applied the law of other Member States is right or wrong, it does not seem to me to be helpful. The transactions in the present case are governed by English law. (There is an exception in the case of one contract between Med and a travel agent where the contract was governed by Irish law. No one submitted, much less led any evidence, that the Irish law of contract was materially different and I was not asked to treat that contract in any way different from the other contracts.) Accordingly, I must apply English law principles to the construction of the written contracts. When I have construed the written contracts in that way, I will be able to identify the supplier of hotel accommodation under those contracts. I will then apply the provisions as to VAT which refer to the concept of a supply of goods and services. I do not see how a finding that the relevant contracts might be construed differently if, say, they were governed by Greek or Portuguese law, can begin to help me to apply the provisions as to VAT to the transactions

which are in fact to be analysed in accordance with English law. I also record that there was no material before the FTT, nor before me, which would allow me to hold that the identity of the supplier under the transactions would be considered to be different if one applied some system of law other than English law. This point was not argued before the FTT.

111. Counsel for the Commissioners also submitted that the VAT treatment of the transactions in the present case was to be based upon an assessment of the economic reality of the transactions. Counsel confined his citation of authority for this proposition to the decision of the ECJ in Revenue and Customs Commissioners v Loyalty Management UK Ltd [2010] STC 2651. The decision in that case contains the following passage:

> "39. It must also be recalled that consideration of economic realities is a fundamental criterion for the application of the common system of VAT (see, first, as regards the meaning of place of business for the purposes of VAT, *Customs and Excise Comrs v DFDS A/S* (Case C-260/95) [1997] STC 384, [1997] ECR I-1005, para 23, and *Planzer Luxembourg Sarl v Bundeszentralamt fur Steuern* (Case C-73/06) [2008] STC 1113, [2007] ECR I-5655, para 43, and, secondly, as regards the identification of the person to whom goods are supplied, by analogy, *Auto Lease Holland BV v Bundesamt für Finanzen* (Case C-185/01) [2005] STC 598, [2003] ECR I-1317, paras 35 and 36)."

112. There is, no doubt, scope for argument as to how that passage is to be interpreted and applied. But, whatever its meaning, I do not think that an approach which uses a contractual analysis to determine the identity of the supplier of hotel accommodation and which results in that supplier, rather than someone else, bearing the liability to account for VAT, in any way lacks economic reality. It is quite possible in a case like the present for the relevant parties to adopt different legal structures to produce similar (but not identical) economic results. Thus it would be possible for the hotel operators, Med and the holidaymakers to adopt a legal structure of sale and sub-sale with Med buying hotel accommodation from the hotel operators and then supplying the same to holidaymakers. Conversely, it is possible for the parties to adopt a different legal structure whereby the hotel operators through the agency of Med supply hotel accommodation to holiday makers. In both cases, matters could be arranged whereby the hotel operators receive the net sum of £X for the accommodation and the holidaymaker pays £X plus a mark up, so that in each case Med benefits to the extent of the mark up. The different legal structures will nonetheless have different legal and different economic consequences. I do not see how it can be said that the sale and sub-sale structure is economically real and the agency structure is economically unreal. It might even be argued that the agency structure is more apposite rather than the reverse. After all, the party who provides the hotel accommodation is the hotel operator and the person who uses the hotel accommodation is the holidaymaker. If the hotel operator and the holidaymaker adopt a legal structure where the hotel accommodation is provided to the holidaymaker

through an intermediary, I do not see how that legal structure should be regarded as lacking economic reality so that it must for the purposes of VAT be analysed as if it were a different legal structure which the parties have chosen not to use. I also record that this point was not argued before the FTT.

113. Finally, on this question, I record that the Commissioners did not contend that the transactions in the present case constituted an abusive practice as that concept is understood in the line of cases from Halifax plc v Customs and Excise Commissioners [2006] STC 919 onwards.

114. Accordingly, I conclude that I should analyse the contracts entered into by the relevant parties in this case. For that purpose, I should construe the written agreements in accordance with the established principles as to construction of such agreements. When I have identified the identity of the supplier under those contracts, that person will be the supplier of the hotel accommodation for the purpose of the provisions relating to VAT.

Discussion and decision

115. Having identified the legal principles which apply, I can now address the critical question which is: in the transactions with which this case is concerned, who supplies the hotel accommodation to the holidaymakers? Is it the hotel operators (through the agency of Med) or is it Med?

116. There is no doubt that the holidaymakers enter into contracts with someone for the supply of hotel accommodation to the holidaymakers. It seems to me that for the purpose of answering the above question, it is natural to start with those contracts and to ask: with whom do the holidaymakers make those contracts? If I were to hold that the holidaymakers make their contracts with Med acting as principal, then that would seem to be the end of the inquiry. If, conversely, I hold that Med purports to act as agent in relation to the contracts with the holidaymakers, then it will be necessary to ask whether Med had the authority of the hotel operators to enter into those contracts as agent for the hotel operators and so as to bring into existence a contract between the hotel operators and the holidaymakers.

117. As I explained when I referred to the contracts which were made by the holidaymaker, there are essentially two relevant contracts. One is a contract between the holidaymaker and Med relating to the use by the holidaymaker of Med's website. The other contract is the relevant one, providing for a supply of hotel accommodation to the holidaymaker. As the holidaymaker enters into these two contracts at around the same time, the terms of these two contracts can be referred to as part of the relevant background when construing either contract.

118. There does not appear to be any other relevant background which is admissible as an aid to construing the contracts with the holidaymaker. In particular, the terms of the agreement between the hotel operators and Med are not admissible for this purpose because those terms would not be available to the holidaymaker. Further any course of dealing between the hotel operators and Med prior to the relevant holidaymaker contract would similarly not be

available and not admissible. There does not appear to be any relevant course of dealing between Med and every holidaymaker after the holidaymaker contract is entered into. Even if there was some conduct in relation to a particular holidaymaker, for example, the making of a complaint and the settlement of that complaint by the payment of compensation, that information would not be available to other holidaymakers and would not be admissible as an aid to construction of those other holidaymakers' contracts. Even in relation to the holidaymaker who, in the example given, made the complaint and received the compensation, that conduct which is subsequent to that holidaymaker's contract is not admissible to construe the contract and the FTT made no finding that the original contract was superseded by a different contract for the supply of hotel accommodation, although there might have been a subsequent contract dealing with the payment of compensation. In this way, the true construction of the contracts with the holidaymakers turn upon the wording of the contracts themselves without the addition of any other material and they are not to be construed by reference to "the behaviour" of Med as the FTT suggested.

119. I have set out at paragraphs 10 to 28 above the express terms of the contract to provide hotel accommodation to the holidaymaker and the contract as to the use of Med's website. Those terms make it clear that: (1) the holidaymaker is not contracting with Med for Med to provide hotel accommodation; and (2) the holidaymaker is contracting with "the accommodation provider", who is not Med, for the provision of hotel accommodation. I do not see how the contract made by the holidaymaker is open to any other reasonable interpretation.

120. The FTT said, at paragraph [62], that the express terms "attempt" to make clear that the holidaymaker was contracting with the hotel operator. The FTT then went on to refer to the way in which the express terms dealt with payment and cancellation and then held that there was "no contract" between the hotel operator and the holidaymaker. In my judgment, the express terms dealing with payment and cancellation are not inconsistent with the holidaymaker contracting with the hotel operator (through the agency of Med).

121. The FTT said, at paragraph [63], that Med agreed in certain circumstances to "try" to provide similar accommodation to the holidaymaker. This was said to be inconsistent with Med only acting as agent for the hotel operator. In my judgment, the terms are not inconsistent. The agreement makes it clear that the contract to provide hotel accommodation is with the hotel operator. In some circumstances, and therefore not in all circumstances, Med agrees to "try" to provide alternative accommodation. An obligation to try in some circumstances is plainly different from an absolute obligation to provide hotel accommodation in every case. Read in context, the obligation to try to provide alternative accommodation is plainly capable of being complied with by putting the holidaymaker in touch with another hotel operator who will then provide the alternative accommodation to the holidaymaker.

122. Taking the express terms as a whole, I find that they clearly and unambiguously state that the contract for the provision of hotel accommodation is to be between the hotel operator and the holidaymaker. It is

not suggested that these express terms are a sham and they therefore have full legal effect in accordance with the construction at which I have arrived.

123. It does not matter whether the holidaymaker contracts are made as a result of a direct contact with Med or by means of indirect contact with Med through a travel agent. It is common ground that the travel agents are true agents and do not themselves contract with the holidaymaker to provide hotel accommodation. Whether the arrangements involving Med are direct or indirect, they are on the terms of the Booking Conditions which I have held clearly state that the hotel accommodation is not to be provided by Med but is to be provided by the hotel operators.

124. The next question is therefore: does Med have authority to make contracts on behalf of the hotel operators to provide hotel accommodation to holidaymakers? This turns upon the terms of the agreement between Med and the hotel operators.

125. If there were a course of dealing between Med and a particular hotel operator before those parties entered into a written agreement setting out the terms which were to govern their future relationship then the previous course of dealing would be admissible as an aid to construction of the written agreement. However, the course of dealing between Med and one operator would not be admissible as an aid to construction of a subsequent contract between Med and another operator unless, unusually, that other operator would be aware of the course of dealing with the first operator. Even where a previous course of dealing is admissible, it would not follow that the parties intended that the written agreement, which is designed to govern their future relationship, would record the previous course of dealing, rather than meaning what it appeared to say. As regards subsequent conduct between Med and one or more operators, that conduct is prima facie not admissible as an aid to construction of the prior written agreements. Although the FTT referred to "the behaviour" of Med, it did not make findings that would enable me to separate out conduct which came prior to a particular written agreement so that I could consider whether that conduct helped with the interpretation of that particular agreement. Further, it does not seem to me that the findings of the FTT could possibly be relied upon to construe every single written agreement between Med and all hotel operators. In these circumstances, I will have to construe the agreements between Med and the operators without being influenced by the behaviour which the FTT referred to. These general remarks are subject to the point that the agreements between Med and the hotel operators are in two parts. One part consisted of the written terms and conditions; the other consisted of the agreement made as to room rates, and periods of availability and the making of advance payments by Med to some hotel operators.

126. I have set out the terms of the agreement between Med and the hotel operators as paragraphs 36 to 40 above. In my judgment, that agreement clearly confers actual express authority on Med to enter into contracts on behalf of the hotel operator to provide hotel accommodation to holidaymakers. The agreement states that the hotel operator is "the Principal" and that Med is "the Agent". The Principal appoints the Agent as its selling agent and the Agent agrees to

act as such. The holidaymakers are referred to as the Principal's clients. The Principal contracts with Med that the Principal will provide accommodation to the holidaymaker and will honour all reservations taken by the Agent.

127. The FTT referred to a number of matters in relation to the agreement between Med and hotel operators. It referred to the very limited obligations undertaken by Med. It referred to Med's commission being taken in the form of a mark up on the price received by the hotel. It referred to the way in which some of the hotels invoiced Med and the way in which VAT was accounted for. It referred to the fact that Med placed the monies received from holidaymakers in its own bank account, retained the interest and ran a currency risk before paying sums over to the hotel operators. Finally, it referred to occasions when Med compensated holidaymakers.

128. In my judgment, none of the matters which were stressed by the FTT, whether taken individually or collectively, allows me to ignore the clear provisions in the agreements between Med and the hotel operators which confer upon Med authority to contract on behalf of the hotel operators to provide hotel accommodation to holidaymakers. The limited obligations undertaken by Med are not inconsistent with this grant of authority. Nor is the fact that Med's commission is taken in the form of a mark up on the price received by the hotel. Med's conduct in placing the monies received from holidaymakers in its own bank account, retaining the interest and running a currency risk is not contrary to the agreements with the hotel operators. As to the way in which some of the hotels invoiced Med, all that shows is that the terms of the agreement were not correctly operated in some cases. In the absence of an allegation that the written agreements were shams or were superseded by later agreements on different terms, I do not see that I am able to disregard the effect of the written agreements. Further, the findings of the FTT appear to be limited to some cases and cannot therefore be applied to every case. As to the way in which VAT was accounted for, it is clear that VAT was not accounted for correctly in any case. Med did not account for VAT in accordance with its contentions as to the legal position but, of course, neither did it account for VAT in accordance with the Commissioners' contentions as to the legal position. Finally, the occasions when Med compensated holidaymakers can be explained, as Mr McLintock did explain, on the basis of Med protecting its own economic interest in the arrangements.

129. The FTT relied on other matters which were also stressed by the Commissioners on this appeal. These included the arrangements under which Med made advance payments to hotel operators and the fact that Med engaged travel representatives in some resorts. I do not find that those arrangements were incompatible with the terms of the written agreements between Med and the hotel operators nor do they throw any doubt on the express grant of authority to Med enabling it, as agent for the hotel operators, to enter into contracts with holidaymakers.

130. Accordingly, I conclude that none of the matters relied upon by the FTT, nor the other circumstances of the case referred to in the course of argument, allow me to ignore the express grant of authority to Med. It is not alleged that the express terms of the agreements to which I have referred are a sham.

131. It follows that the contracts which were made for the supply of hotel accommodation to holidaymakers were made by the hotel operators acting through the agency of Med. The hotel operators are the suppliers of that accommodation both for the purposes of the law of contract and for the application of the VAT provisions.

132. At the hearing, there was discussion as to what the result would be if I held that the holidaymakers purported to contract with the hotel operators through the agency of Med but Med did not have authority to make such contracts. That possibility does not arise and although the submissions in relation to the point were interesting I do not think that it is appropriate to consider that possibility in this judgment.

133. I have reached the opposite conclusion to that reached by the FTT. It seems to me that the FTT was persuaded by the Commissioners to approach the question in an impermissible way. The FTT appears to have lost sight of the point that it was common ground that the written agreements were not shams and their legal effect was to be arrived at by a process of construction of their express terms. The FTT does not seem to have applied conventional principles as to the construction of written agreements. It appears to have read far too much into the decision in Reed Personnel Services and to have ignored (although it cited the decision) the very helpful statements of principle in A1 Lofts. It had regard to what it called "behaviour" in a way which would have been more appropriate if there had been no written contracts and the FTT had to infer the contractual terms from a course of dealing. Further, it seems to have extrapolated from events which occurred in some cases so that all of the contracts in all of the cases were governed by those events. Finally, it seems to have regarded anything which could be argued to be inconsistent with an agency relationship as far more weighty than the many matters which pointed unambiguously towards an agency relationship.

The result

134. The result is that I will allow the appeal.

135. It has been agreed that, in the event of the appeal being allowed, I should order that the Commissioners are to pay Med's costs of the appeal before the Upper Tribunal, such costs to be assessed if not agreed.

Mr Justice Morgan

Upper Tribunal (Tax and Chancery Chamber)

RELEASE: **29 July 2011**