[2017] UKFTT 778 (TC)

TC06185

Appeal number: TC/2011/07775

VAT – application of article 306(1) of the VAT Directive and the Tour Operators' Margin Scheme

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALPHA INTERNATIONAL ACCOMMODATION LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE HARRIET MORGAN
MEMBER ELIZABETH BRIDGE

Sitting in public at the Royal Courts of Justice, the Strand, London on 13 and 14 February 2017

Ms Nicola Shaw QC, counsel, instructed by Pinsent Mason, for the Appellant

Ms Claire Darwin, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents ("HMRC")

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DECISION

1. The appellant is a travel agent based in the UK specialising in the marketing and supply of holiday accommodation to UK travellers at over 239,000 hotels and apartments in more than 29,000 destinations, including in other member states of the European Union. The vast majority of its business is conducted through its website www.alpharooms.com.

2. In outline, HMRC has assessed the appellant to under-declared VAT in respect of accounting periods from 01/06 to 12/10 inclusive on the basis that the appellant was acting as a "travel agent" within the meaning of article 306 of Council Directive 2006/112/EC (the "**Directive**") so that it should have accounted for VAT under the special scheme for travel agents provided for under articles 306 to 310 of the Directive as implemented by s 53 of the Value Added Taxes Act 1994 ("**VATA**") in the Tour Operators Margin Scheme ("**TOMS**") (see 3 to 7 below for further details). HMRC's stance was that the appellant fell within these rules as regards supplies made to travellers, who booked hotel accommodation in member states through its website, as it was acting either as a principal or as an agent acting in its own name and not solely as an intermediary. The appellant argued that these special VAT rules did not apply in relation to the relevant period as the appellant was acting as a disclosed agent or intermediary only.

Law

3. Chapter 3 of Title XII of the Directive establishes a special scheme for travel agents in order that they can account for VAT in the country where they are established. In the absence of such a scheme, a person who provides hotel or holiday accommodation in other member states would have to register for VAT in all of those member states.

4. The special scheme is contained at Articles 306-310 of the Directive. Article 306 provides that:

> "1. [a] Member States shall apply a special VAT scheme, in accordance with this Chapter, to transactions carried out by travel agents who deal with customers in their own name and use supplies of goods or services provided by other taxable persons, in the provision of travel facilities.
>
> 1. [b] This special scheme shall not apply to travel agents where they act solely as intermediaries and to whom point (c) of the first paragraph of Article 79 applies for the purposes of calculating the taxable amount.
>
> 2. For the purposes of this Chapter, tour operators shall be regarded as travel agents."

5. Provisions equivalent to articles 306 to 310 were contained in article 26 of the previous Directive 77/388/EEC (which was slightly different in both wording and layout, but identical in its central provisions and effect). Those provisions were given effect in the UK in TOMS which was established pursuant to s 53 VATA which provides as follows:

> "(1) The Treasury may by order modify the application of this Act in relation to supplies of goods or services by tour operators or in relation to such of those supplies as may be determined by or under the order. ………
>
> (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."

6. Details of TOMS can be found in the Value Added Tax (Tour Operators) Order 1987 (SI 1987/1806) and in VAT Notice 709/5. Both s 53 VATA and the 1987 Order were intended to implement the relevant provisions in the Directive set out above. As there was no dispute between the parties as to the VAT position under TOMS if those provisions were held to apply, we have not set out further details of those rules.

7. We note that article 306(1) of the Directive does not contain a sub-paragraph [a] and [b]. However the Supreme Court used this numbering in *Secret Hotels2 Ltd v Revenue and Customs Commissioners* [2014] UKSC 16 and we have used it also for ease of reference. The decision in that case is relevant here and we have, therefore, set out a summary of that decision below. In summary the Supreme Court held that an online travel agent, who operated a website through which hotel accommodation was reserved, was not an agent acting in its own name under article 306(1)[a] but rather acted only as an intermediary under article 306(1)[b] so that it was not within the special rules for travel agents.

Law - Secret Hotels2

8. Lord Neuberger, who set out the judgment of the Supreme Court in *Secret Hotels2,* described the facts as follows (at [2] to [4]). Secret Hotels2 Ltd ((formerly called Med Hotels Ltd, and known as "Med"), marketed holiday accommodation, including hotels in the Mediterranean and the Caribbean, through a website. The vast majority of the sales of hotel rooms from the website were made to travel agents; the remainder were made direct to holiday-makers. An hotelier who wished his hotel to be marketed by Med had to enter into a written accommodation agreement with Med in which case his hotel would normally be included among those shown on the website. When a potential customer logged onto the website, the customer would see some "Terms of Use". If, after considering what was available, the customer wished to book a stay at a hotel, the customer would fill in a form on the website, which set out standard "Booking Conditions", which included terms as to payment. The customer had to pay the whole of the sum which the customer agreed with Med to pay for the holiday ("the gross sum") before the holiday-maker arrived at the hotel. However, Med only paid the hotel a lower sum ("the net sum") in respect of the holiday concerned, pursuant to an invoice which was rendered by the hotelier when the holiday had ended.

9. HMRC assessed Med for VAT under the TOMS rules on the basis that Med was a "travel agent" within the meaning of article 306(1)[a], which "dealt with its customers in its own name and used the services of the hoteliers in the provision of

travel facilities". Lord Neuberger summarised HMRC's analysis (at [10]) as, in effect, being that:

> "Med booked a room in a hotel for the net sum, which it paid to the hotelier when the holiday had ended, and Med supplied the room to its customer in return for the gross sum, which it received in advance of the holiday".

10. Med argued that the nature of its business was such that it was a "travel agent" which was "acting solely as an intermediary" (under article 306(1)[b]). Its analysis was (at [12]) that, "through Med's agency, the hotelier supplied a hotel room to a customer for the gross sum, and that Med was entitled to the difference between the gross sum and the net sum as a commission from the hotelier for acting as his agent". On Med's approach (at [13]), TOMS would not apply, and it was agreed that the difference between the gross sum and the net sum would be Med's commission for providing services to the hotelier, who was entitled to the gross sum from the customer.

11. Lord Neuberger noted (at [22] and [23]) that the correct meaning and application of article 306 is a matter of EU law, "a topic on which the decisions of the Court of Justice of the European Community, the CJEU, are binding on national courts". However:

> "in so far as the provisions of article 306 depend upon the precise nature and character of the contractual relationship between two or more parties, that issue must be determined by reference to the proper law of the contract or contracts concerned as must the subsequent conduct of the parties in so far as that is said to affect that nature and character."

12. At [31] he noted that where parties have entered into a written agreement which, on the face of it, is intended to govern the relationship between them, then, in order "to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham". There was no suggestion the agreement was a sham in that case. As regards interpreting an agreement, he noted the following:

> (1) The court must have regard to "the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense" (at [32]).
>
> (2) Under English law it is not permissible to take into account the subsequent behaviour or statements of the parties as an aid to interpreting their written agreement (at [33]).
>
> (3) Such behaviour or statements can, however, be relied on for other limited purposes including to support a claim that the written agreement was subsequently varied, or rescinded and replaced by a subsequent contract (agreed by words or conduct) or to establish that the written agreement represented only part of the totality of the parties' contractual relationship (at [33]).

13. He concluded (at [34]) from the principles of contractual interpretation that he had outlined that, in these circumstances, the correct approach is "to characterise the nature of the relationship between Med, the customer, and the hotel, in the light of the Accommodation Agreement and the website terms", next to consider whether "that characterisation can be said to represent the economic reality of the relationship in the light of any relevant facts" and finally, "the result of this characterisation so far as article 306 is concerned."

14. As regard the nature of the relationship he concluded (at [36]) that both the accommodation agreement and the website terms made it clear that Med was acting as agent:

> "both as between Med and the hotelier, and as between Med and the customer, the hotel room is provided by the hotelier to the customer through the agency of Med, and the customer pays the gross sum to the hotelier, on the basis that the amount by which it exceeds the net sum is to be Med's commission as agent".

15. He noted (at [37] and [38]) the following as regards the accommodation agreement:

(1) It identified the hotelier as "the Principal" and Med as "the Agent".

(2) It provided that, for a specified season, certain types (and sometimes certain numbers) of rooms in the hotel will be available at certain rates.

(3) It stated that the Principal "hereby appoints the Agent as its selling agent and the Agent agrees to act as such".

(4) It immediately went on to provide that the Agent agrees "to deal accurately with the requests for accommodation bookings and relay all monies which it receives from the Principal's Clients ("Clients") which are due to the Principal".

16. He did not consider that any of the 4 aspects of the agreement which HMRC relied on to justify its contentions were convincing. These were (at [39]):

(1) The basic nature of the financial arrangement under which Med was entitled "to receive a commission … calculated as any sum charged to a Client by the Agent which is over and above the prices set out in the rate sheet".

(2) Some of the financial provisions were said to be inconsistent with an agency relationship.

(3) The terms of the accommodation agreement included provisions which indicated that Med's interest were wider than that of a mere agent - such as covenants by the hotelier to honour customers' bookings, to insure the hotel against a number of risks, to keep the hotel clean, and to permit Med's representative to inspect the hotel.

(4) The agreement was very one-sided, in that it contained no express obligations on Med beyond those in the opening provision, not even an obligation to promote the hotel, whereas there were many obligations imposed on the hotelier.

17. Lord Neuberger said he was "unimpressed with these points" (at [40]). In his view they merely reflected that Med was in a powerful negotiating position due to its substantial goodwill in the holiday market:

> "They all stem from, and reflect, the fact that Med had a substantial business based on the website (as is evidenced by Med's turnover, the number of hotels for which it had an exclusive agency, and the fact that it was a member of a large group of companies including lastminute.com). This in turn means that it had built up a substantial goodwill in the holiday-making market which it wished to protect, and that it was in a much more powerful negotiating position than the hoteliers with which it was contracting".

18. More specifically, he said (at [41]) that there was "no reason why an agent should not be able to fix its own commission". As to the other financial terms, he noted (at [41]) that the hotelier was obliged to compensate Med for its losses (including loss of commission) if it did not provide the accommodation it had agreed to provide and that Med was entitled "to retain the equivalent of the last 100 bed-overnights as a guarantee to cover marketing costs for the next season". However again he thought such terms merely reflected the "relative negotiating positions of the parties". The fact that the hotelier agreed to do things which would be of benefit to people staying in the hotel he thought was "easily explained by the point that Med was anxious to maintain its goodwill among holiday-makers and travel agents, and was in a strong enough bargaining position to impose such terms on the hotelier."

19. Turning to the website terms, he noted the following (at [42]):

(1) The Terms of Use:

(a) explained that Med "provides information concerning the price and availability of hotels" and that reservations made on this site would be "directly with the hotelier"; and

(b) emphasised that Med "acts as agent only for each of the hotels to provide you with information on the hotels and an on-line reservation service".

(2) The Booking Conditions stated:

(a) that Med "act[s] as booking agents on behalf of all the hotels … featured on this website and your contract will be made with these accommodation providers".

(b) "[o]nce 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…".

(c) "[b]ecause [Med is] acting only as a booking agent", it has "no liability for any of the accommodation arrangements".

20. Lord Neuberger rejected HMRC's assertion that some of Booking Conditions were inconsistent with the notion that Med was acting as the hotelier's agent in that:

(1) If a customer (i) made a change to a booking or (ii) cancelled a booking, the customer was liable to pay to Med (i) an administration

charge or (ii) a cancellation charge, whose quantum depended on how late the cancellation occurred, and in neither case did it appear that the charge was passed on to the hotelier (at [43]).

(2) If the hotelier was unable to provide the room as booked, Med agreed to "try to provide [the customer] with similar accommodation of equal standard", but if this was not possible, Med would allow a cancellation free of charge (at [43]).

21. Lord Neuberger considered (at [44]) that the failure to account for the administration charge was "irrelevant; there was no reason to think that it did not reflect the genuine cost to Med". The failure to account for the cancellation charge, the "no show forfeit", and the interest on the deposits he thought "was more striking". He noted that as a matter of law, these sums would have been payable to the hotelier, but the fact that they were not so paid represents a breach of the agency arrangement on the part of Med or an accepted variation of the accommodation agreement, either of which again he thought "would merely have reflected the relative bargaining positions of Med and the hotelier, and did not alter the nature of the relationship of the arrangement between Med, the hotelier and the customer".

22. As to Med's obligation to "try to provide alternative accommodation", (at [44]) Lord Neuberger said that it was clear, "as a matter of interpretation, that the obligation could, and no doubt in practice would, have involved Med procuring the provision of accommodation by another hotelier". He continued that "in any event, the obligation was clearly included to protect Med's goodwill".

23. He went on to note (at [45]) the factors which had persuaded this tribunal and the Court of Appeal to decide that Med was acting as principal. I have set these out as set out in the decision but with Lord Neuberger's comments (at [46] to [50]) in respect of each one below it for ease of reference:

(1) Med dealt with customers in its own name (a) in respect of the use of its website and (b) in the services of its local handling agents.

On (a) Lord Neuberger said (at [46]) "until a customer selected a particular hotel on the website, Med had to deal with the customer in its own name, but that does nothing to undermine the point that, once a hotel was selected, Med acted as the hotelier's agent". On (b) he said:

> "it is true that Med appointed its own local agents to look after holiday-makers, but that was not inconsistent with its status as an agent of the hotelier, and is easily explicable by reference to Med's need to maintain goodwill in the holidaymaking market".

(2) Med dealt with customers in its own name (and not as intermediary) in those cases where the hotel operator was unable to provide accommodation as booked and the customer rejected the alternative accommodation offered.

Lord Neuberger had already dealt with this (see 25 above).

(3) Med dealt with matters of complaint and compensation in its own name and without reference to the hotelier.

Whilst Lord Neuberger said (at [46]) this could be said to be contrary to one of the terms of the contractual documentation (which envisaged a customer sorting out complaints with the hotelier) he considered that:

> "given that (i) Med recovered from the hotelier any compensation which it negotiated and paid to a holiday-maker and (ii) Med's activities in this connection were not inherently inconsistent with its status as the hotelier's agent (albeit an agent in a strong bargaining position), the departure from the contractual terms was not of significance for present purposes".

(4) Med used the services of other taxable persons (the hoteliers) in the provision of the travel facilities marketed through its website.

Lord Neuberger thought this took matters no further (at [46]).

(5) In relation to VAT, Med dealt with hoteliers in other member states in a manner inconsistent with the relationship of principal and agent. In particular, Med did not provide the hoteliers with invoices in respect of its commission (nor even notify the hoteliers of the amount of that commission); so making it impossible for the hoteliers to comply with their obligations to account to the tax authorities of that Member State in accordance with the Directive.

Lord Neuberger said (at [47]) that this was true and "this can be said to represent some sort of indication that the arrangements were not as the contractual documentation suggests". However, he thought that:

> "not only is it not a very strong point in itself, but, as Morgan J said, while "Med did not account for VAT in accordance with its contentions as to the legal position", it did not "account for VAT in accordance with the Commissioners' contentions as to the legal position" either".

(6) (a) Med treated deposits and other monies which it received from customers and their agents as its own monies. It did not account to the hoteliers for those monies. (b) It did not enter those monies in a suspense account so as to take advantage of article 79(c); and so cannot rely on the exclusion from the scope of article 306(1)[b].

Lord Neuberger said (at [48]) that 6(a) was of no assistance and 6(b) was merely part of factor 5.

(7) Hoteliers would invoice Med for the net sum in respect of each customer at the end of the relevant holiday.

Lord Neuberger said (at [48]) that if Med was an agent as it contends, one would have expected the hotelier's invoices to have been for the gross sums with a deduction for Med's commission. However, the invoices were not financially inconsistent with the contractual arrangements contended for by Med, as the hotelier would expect Med to pay the net sum, not the gross sum. In any event, at least on their own, such invoices

cannot change the nature of the contractual arrangements between Med, the customer and the hotelier, given that (i) they post-date not merely the contracts but their performance, and (ii) the customer was not aware of the invoices, so it is hard to see how they could affect her contractual rights or obligations.

(8) Med reserved a number of rooms, and sometimes specific rooms, in many hotels for which it paid the net sum in advance.

Lord Neuberger said (at [49]) that there was nothing inconsistent "in terms of logic or law" in Med reserving a hotel room in its own name in anticipation of subsequently offering it on the market, on the basis that a customer who booked the room would not contract with Med, but would contract through Med with the hotelier. He thought the purpose was "obvious, namely to maximise its opportunity to earn commission and to maintain or improve its goodwill with potential customers". He considered that the fact that Med had to pay for the rooms it reserved was unsurprising, but such payments were always recoverable, in that, if there were insufficient bookings by customers at the hotel for the season in question, the amount paid by Med was carried forward to the next season. He noted that Med ran a risk of losing its money, but that fact did not undermine the notion that Med acted as an agent.

24. Lord Neuberger then went on to consider the EU law position. He said (at [54]) that the assumption that, once it was concluded as a matter of English law that Med was an agent for the hotelier with whom the customer booked accommodation, Med fell within article 306(1)[b] rather than [a] was not one which could "safely be made in every case". However, it seemed to him that "in the general run of cases, such a proposition would be correct".

25. He thought it clear (at [55]) from guidance given by the CJEU that the concepts of an "intermediary" and an agent are similar, as are the concepts of a person dealing "in his own name" and a principal. He continued that furthermore, the CJEU's suggested approach as to how the issue should be determined seems very similar to that of the English court, namely that:

> "the travel agent's contractual obligations towards the traveller are of particular importance in deciding whether article 306(1)[a] or article 306(1)[b] applies, but it is also necessary to "hav[e] regard to all the details of the case", and, in that connection, the "economic and commercial realities" represent "a fundamental criterion". A contract which does not reflect "economic reality" and a "purely artificial arrangement" are similar to the shams, rectifiable agreements and other arrangements [as he had already considered]."

26. Lord Neuberger continued (at [56]) that thus, in deciding whether article 306(1)[a] or [b] applies, the approach laid down by the CJEU in order to decide whether a person such as Med is an intermediary is very similar to the approach which is applied in English law in order to determine whether Med was an agent:

> "One starts with the written contract between Med and the customer, as it is the customer to whom the ultimate supply is made. However, one

> must also consider the written contract between Med and the hotelier, as there would be a strong case for saying that, even if Med was the hotelier's agent as between it and the customer, Med should nonetheless be treated as the supplier as principal (in English law) or "in its own name" (in EU law) if, as between the hotelier and Med, the hotel room was supplied to Med."

27. So for the reasons he had already set out he concluded (at [57]) that "the contractual documentation supported the notion that Med was an intermediary" and that "economic reality" did not assist a contrary view. Further, he noted that:

> "one aspect of economic reality is that it is the hotelier, not Med, who owns the accommodation and it is the customer, not Med, to whom it is ultimately supplied: that does not, of course, prevent the hotelier supplying the accommodation to Med for supply on to the customer, but it makes it hard to argue that Med's analysis that it is no more than an agent is contrary to economic reality. Further, one must be careful before stigmatising the contractual documentation as being "artificial", bearing in mind that EU law, like English law, treats parties as free to arrange or structure their relationship so as to maximise its commercial attraction, including the incidence of taxation."

28. In conclusion (at [58]) once it has been decided that Med was the hotelier's agent in relation to the supply of accommodation to customers as a matter of English law "it follows, at least on the facts of this case, that it was an intermediary for the purpose of article 306(1), and accordingly this appeal must succeed".

Scope of the hearing

CJEU referral

29. There were before the tribunal several other appeals of a very similar nature to this one (together with this appeal the "**hotel appeals**"). Shortly before the hearing of the hotel appeal made by Opodo Limited, which took place on 29 March 2016, the other appellants in the hotel appeals became aware that HMRC proposed to make an application at that hearing for the tribunal to make a referral to the Court of Justice of the European Union ("**CJEU**") "regarding the proper interpretation of article 306 and in particular the term "act solely as intermediaries"" (the "**CJEU referral**"). As HMRC proposed to make the same application in all of the hotel appeals, the appellants made an application to the tribunal requesting, in outline, for the CJEU referrals to be dealt with all together separately at a later hearing, in which all the appellants would participate, or, that the other appellants be permitted to make representations on that issue at the hearing on 29 March 2016.

30. At that hearing the tribunal decided that under rule 5(3)(b) of the rules governing the tribunal (the Tribunal Procedure (First-Tier Tribunal (Tax Chamber) Rules 2009 (S.I. 2009/273 (L.1) (the "Rules") the CJEU referral in relation to each of the relevant appeals, including this appeal, is to be treated as a separate issue to be dealt with in a separate hearing at which all of the CJEU referrals will be considered together. Accordingly the initial hearing before the tribunal in this appeal and each of the related appeals is confined to consideration of whether the appellant was acting as a principal or disclosed or undisclosed agent under English law principles (or other relevant foreign law governing the contracts).

HMRC's amended statement of case

31. There was a preliminary issue as to the scope of HMRC's case. HMRC wrote to the appellant on 9 January 2017 stating: "In HMRC's view, a sensible way to progress this matter would be with an amended and pared down case. With this in mind, we have prepared the attached draft amended statement of case for your consideration." In the amended statement of case, which appeared to be supplemental to the original statement of case, they set out a suggested list of agreed facts, they listed a number of matters they no longer relied on and stated they continued to rely on the following points:

> "HMRC maintain their argument that the appellant has not shown that it was acting as agent under the relevant governing law of the contracts (and therefore has not shown that it was acting solely as intermediary) with respect to transactions involving one or more of the following features. As noted above, in relation to the circumstances set out below, HMRC reserve the right to rely on the matters listed in the previous section.
>
> a) The absence of contractual documentation containing terms and conditions and/or any terms and conditions stating that the appellant is appointed as agent, whether such documentation is missing/incomplete or unsigned (see Further Information paragraph 23).
>
> b) Written agreements governed by foreign law as well as or instead of English law (see Further Information paragraph 26).
>
> c) Agreements that are only "rate sheets" and do not refer to the terms and conditions between the parties (see Further Information paragraph 23).
>
> d) Agreements where the "rate sheets" do refer to terms and conditions but do not expressly identify the terms and conditions (see Further Information paragraph 23)."

32. The matters which HMRC said they were no longer relying on were various factual matters and contractual terms that, in their view as set out in their original statement of case, demonstrated that the appellant was not acting as a disclosed agent under English law principles.

33. On 16 January 2017 the appellant responded to HMRC stating that they appeared to be to conceding that the appellant was, as a matter of English law, acting as a disclosed agent subject only to the matters specified above. The appellant asked HMRC to file and serve a single revised statement of case as soon as possible. The appellant rejected HMRC's suggestion that the parties should agree an agreed statement of facts and suggested that HMRC should agree with the witness statement of the appellant's witness, Mr Shuker, or specifically identify those paragraphs of the statement that were not agreed. The appellant made a number of points on the issues above including that they were prepared to accept that the issue of whether the contracts relied on by appellant are governed by foreign law as well as or, instead of, English law was an issue which should properly be determined by the tribunal.

34. In their reply of 23 January 2017 HMRC noted the appellant's comments on the revised statement of case and confirmed that HMRC would file their amended statement of case with the tribunal very shortly which they did that day. At the hearing HMRC said that they understood the request for the amended statement of case to be filed as soon as possible to mean that the appellant agreed with the way forward of filing the amended statement of case.

35. On 30 January 2017 the appellant filed and served its skeleton argument, which included arguments on parts of HMRC's case that HMRC said in the amended statement of case they were no longer pursuing. On the same day the appellant wrote to the tribunal requesting that HMRC provide a further single revised statement of case.

36. On 31 January 2017 the tribunal wrote to the parties confirming that the tribunal had approved the amended statement of case noting that the tribunal understood the appellant had no objection (having not had sight at that point of the appellant's objection). On the same day the appellant wrote to the tribunal setting out its objections.

37. HMRC said that their position, as confirmed in a letter to the tribunal on 3 February 2017, was that there was no need to provide a further statement of case. The appellant was insisting on undue and needless formality. HMRC had confirmed in open correspondence that it no longer relied on a number of issues between the parties. On 7 February 2017 the appellant wrote to the tribunal maintaining its objections and in addition applying for the amended statement of case to be struck out.

38. HMRC asserted that the appellant has been aware of the points HMRC intends to pursue for a long time, noting the following:

(1) On 5 March 2015 HMRC requested further information from the appellant including as regards whether the contracts relied on by the appellant were in writing, signed and retained by the appellant. On 21 October 2015 the appellant responded to the request and acknowledged that some contracts were not signed.

(2) In February 2016 HMRC provided further information (the "further information") to clarify their case which included noting the following:

> "Before turning to the differences in contractual terms, it is worth noting that a significant number of the contracts provided to the Revenue by way of sampling process are in fact either unsigned or are rate sheets that do not refer at all to terms and conditions. Even those which do refer to terms and conditions do not expressly identify these as being those of the appellant. It will be a matter of evidence which contracts in fact governed how many of the supplies and which were agreed to be the applicable terms and conditions. This is in contrast to the position in Secret Hotels2 where the parties were agreed that the two contracts considered in that case were the applicable contracts.

> The further contrast with Secret Hotels2 is that a number of the contracts supplied by the appellant appear to be governed by both English law and the law of the place where the relevant accommodation is situated."

39. HMRC asserted that they took the decision to narrow their case reasonably and entirely consistently with the overriding objective governing the Rules. HMRC said this was not intended to a replacement for HMRC's statement of case and further information, it was simply intended to clarify their position so that the appellant was entirely clear about the points that were and were not maintained by HMRC. HMRC said the application for the amended statement of case to be struck out was surprising given the appellant's position is that the amended statement of case has not been accepted and given that Rule 8 of the Rules does not give the tribunal any power to strike out a statement of case on the basis it prejudices the other side.

40. HMRC noted that the appellant has been aware of HMRC's case since it received the further information in February 2016 as set out above (and HMRC raised the issue in relation to the unsigned contracts as early as March 2015) and has known precisely what arguments HMRC still relies on since 9 January 2017. The appellant's witness evidence was not produced until June 2016 so it had every opportunity to deal with the points made by HMRC in the further information in its witness evidence and, indeed, it purported to do so. Further, its skeleton argument produced on 30 January 2017 responds to and deals with the arguments in the further information. So there cannot be any suggestion that the appellant was acting on the basis that it did not think matters set out in the further information were at issue. At no stage has the appellant suggested that it was prejudiced by having to respond to the matters set out in HMRC's further information. There is no such prejudice to the appellant.

41. HMRC noted that the tribunal has already accepted the amended statement of case and submitted that the decision should not be reviewed or the original decision should merely be confirmed.

42. The appellant responded that it is not a mere formality for HMRC to state their case. The taxpayer is entitled to know the case which it is expected to meet, and in particular, to know the extent of the burden of proof that it is required to discharge. In order to introduce these new arguments HMRC must amend its statement of case; this is not something to be dealt with piecemeal in correspondence leaving the appellant and the tribunal to work out what HMRC's case is. The appellant emphasised that HMRC was seeking to introduce new argument at this late stage; it was quite clear HMRC had abandoned its original case.

43. The appellant noted that whether or not HMRC should be allowed to amend its case is ultimately a matter for the tribunal's discretion (under Rule 5(3)(c) of the Rules). The appellant asserted that there are a number of important principles the tribunal should have in mind in exercising that discretion, as established in case law in the context of the Civil Procedure Rules, which contains a similar overriding objective to that in the Rules, of dealing with cases fairly and justly. The appellant referred to *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd and others (No 3)* [2015] EWHC 1345 (TCC) and, in particular, the following summary at [19]:

"In summary, therefore, I consider that the right approach to amendments is as follows:

(a) The lateness by which an amendment is produced is a relative concept…. An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resitting party to revisit any of the significant steps in the litigation… which have been completed by the time of the amendment.

(b) An amendment can be regarded as "very late" if permission to amend threatens the trial date…, even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason…

(c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise…. In essence, there must be a good reason for the delay…

(d) The particularity and/or clarity of a proposed amendment then has to be considered because different considerations may well apply to amendments which are not tightly drawn or focused…

(e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being mucked around…, to the disruption of and additional pressure on their lawyers in the run-up to trial…., and the duplication of cost and effort… at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments…

(f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered…. Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise…."

44. The appellant made the following points applying the above principles:

(1) The amendment is plainly late. It was prompted by the judgment of the Supreme Court in *Secret Hotels2*, which made HMRC's original pleaded case untenable, and the tribunal's decision in the *Hotels4u.com Ltd v The Commissioners for Revenue and Customs* [2016] UKFTT 718 (TC), where HMRC's attempts to re-argue the points that they had argued in *Secret Hotels2* were unsuccessful. These decisions were released in March 2014 and October 2016 respectively. On any view, it would have been obvious to HMRC that their case, as originally pleaded, had no prospect of success, and, if they were to continue to maintain their defence, they needed to amend the basis of their challenge.

(2) HMRC has offered no real explanation for the lateness of the application.

(3) The amended pleading is entirely lacking in terms of clarity and particularity. It appears HMRC are trying to dress up the amendments as

an attempt to narrow the issues, when in reality it is a completely new case. They refer to four points only but reserve their position on points previously raised. It is impossible to see how the previous points concerning the contractual terms can be relevant to HMRC's new case, namely, that the agreed contractual terms are inapplicable because the contracts either do not exist or the contracts are governed by foreign law. The other factors concern invoicing arrangements and Eighth Directive claims are again are not relevant to the new case. It is obvious from HMRC's skeleton argument that they are not relying on these factors at all.

(4) There is clear prejudice to the appellant as HRMC's position now is that the appellant bears the burden of proof. Their case is that it is for the appellant to show that the contracts applied and the nature of the applicable foreign law. The appellant's view is that HMRC are wrong about the evidential burden but that does not detract from the fact that the appellant should not be subject to an entirely new burden of proof issue at this stage.

(5) There is no prejudice to HMRC in striking out the statement of case. The effect will be that HMRC will essentially have to concede the position as a matter of domestic law on the basis that their argument is untenable now in light of *Secret Hotels2* and *Hotels4u.com*. That is not any great hardship, because it was open to HMRC to amend at a much earlier point if it regarded this as a key cornerstone of its remaining case. In truth, the battle has already been lost for HMRC as far as the domestic law position is concerned. Their real challenge is in relation to article 306 as regards their application to get a reference to CJEU.

45. The appellant asserted that HMRC had not in fact flagged up these points in the further information provided in March 2016.

(1) The reference to the points about whether the contracts were signed was raised merely as an evidential point; they were not raised as forming part of HMRC's case. Mr Shuker's witness statement addressed this very point and the appellant was perfectly entitled to assume that, upon receipt of Mr Shuker's witness statement in June 2016, HMRC no longer held any concerns on these matters or that, if they did, they would have amended their statement of case.

(2) As regards the statement about governing law, HMRC did not say that the burden of proof was on the appellant to show that foreign law produces the same result as English law.

(3) HMRC did raise points they acknowledged would require an amendment to the statement of case but these related to different matters relating to differences in the contractual terms compared with *Secret Hotels2* and the making by the appellant of Eighth Directive claims.

46. The appellant concluded by emphasising the prejudice to the appellant if HMRC is permitted to amend their statement of case at this stage (having known they would need to do so if they wanted to change the basis of their position) by introducing new

issues in the guise of attempting to narrow the issues. The appellant noted that these appeals are over six years old. They were stayed pending the decision in *Secret Hotels2* on the basis that the parties understood that the matter would be dispensed with by *Secret Hotels2*, so similar were the facts. HMRC's pleaded case is now untenable. The appropriate course of action is for HMRC to concede the relevant issues so that the tribunal can focus on the real issues, which is to find the necessary facts, and then for HMRC to make their application for a reference to the CJEU.

47. HMRC replied that:

(1) The amendments to the case were not sought as a result of the *Secret Hotels2* litigation. In fact it was in light of the tribunal's decision in *Hotels4u.com* that HMRC decided to narrow its case (as stated in the amended document). HMRC reiterated that the arguments now being pursued were raised in February 2016.

(2) There is no prejudice to the appellant as shown by the fact that the appellant has not applied for an adjournment. As noted issues regarding unsigned and incomplete contractual documentation were dealt with in Mr Shuker's witness statement and in the appellant's skeleton argument. The foreign law argument was noted in the further information and the appellant also dealt with the foreign law point in the skeleton argument and, as set out above, accepted on 30 January 2017 that that point was to be determined by the tribunal. Moreover it is clear from their comments in that letter that they were aware of the issue of the burden of proof. HMRC does not have to plead in its statement of case where the evidential burden of proof falls.

(3) It cannot simply be assumed that Mr Shuker's evidence was not in dispute. If the appellant genuinely believed that all of his witness evidence was agreed and not in dispute, then there would be no reason to bring him to give evidence (noting he was called under a witness summons). HMRC do not consider the appellant assumed the evidence was agreed but, in any event, there was no reasonable basis for the making of such an assumption.

Conclusion on amended statement of case

48. Overall we considered that it was in the interests of justice and fairness for HMRC's to be permitted to refine their case by reference to the amended statement of case.

49. We note that HMRC were to some extent seeking to narrow their case rather than to expand it, which was evidently in the appellant's favour. In that context, we cannot see any basis for refusing to allow the voluntary withdrawal of the relevant points, however late that may occur in proceedings.

50. The amended statement of case was not drafted helpfully in that, as the appellant noted, HMRC referred to reserving the right to rely on the matters listed but they related to aspects of the case that were being dropped. We queried this with HMRC at the hearing and they clarified that they were not relying on these matters in relation to their English law case and any reservation was only intended in relation to their CJEU referral case. Our view was that the amended statement of case should be

admitted, therefore, subject to the deletion of the relevant wording. We do not consider that any confusion created, however, was sufficient to prevent the appellant taking on board HMRC's other points. Clearly the appellant did take the points on board as they were covered in the appellant's skeleton argument

51. The appellant argued that HMRC was taking a new position in asserting that the burden of proof was on the appellant as regards the applicability of the relevant contracts and foreign law.

52. It did not appear to be disputed that, as is usual in tax cases, the burden was on the appellant to prove its case to the required standard (although, as set out below, the appellant argued that it had provided a sufficient case such that the evidential burden shifted to HMRC in certain respects). An essential part of the evidence put forward by the appellant to discharge that burden is the documentary evidence. It is an inherent part of the proceedings that evidence put forward by one party may well be challenged by the other party. It is not necessary for a party to be able to make such a challenge for it specifically to plead that it intends to do so.

53. In any event, the appellant was clearly put on notice that it was HMRC's intention to challenge the quality of the documentary evidence when HMRC provided further information in February 2016. We cannot see any basis for the appellant simply assuming that HMRC agreed to Mr Shuker's comments on the documentary evidence in his witness statement which was produced in June 2016. Again it is an accepted and usual part of the proceedings for a party to have the opportunity to challenge witness evidence by cross examining the other party's witnesses.

54. As regards the foreign law issue, we note that HMRC's original statement of case was predicated on the basis that English law principles were in point as regards the interpretation of the relevant contractual arrangements. This case was stayed behind *Secret Hotels2*, a case which was to be decided on English law agency principles. HMRC noted in the further information that a further distinction, in their view, between this case and that in *Secret Hotels2* is that a number of the contracts supplied by the appellant were stated to be governed by both English law and foreign law. They did not draw any conclusion on their stance on that issue and, it appears, they did not make any further point on this until they produced the revised statement of case on 9 January 2017. Until that time, therefore, the significance and extent of HMRC's argument on the foreign law point was not clear given, in particular, that their case remained predicated on the basis that English law principles were applicable. We accept, therefore, that HMRC were late in raising this point in an express and clear way.

55. At the hearing the appellant argued that it was prejudiced by HMRC raising this point at this stage because, whilst its case was that the burden of proof as regards foreign law was on HMRC, the appellant would not have had time to ascertain what any applicable foreign law position was. We note, however, that following receipt of the revised statement of case, the appellant agreed in correspondence with HMRC that the foreign law issue should be dealt with by the tribunal. That indicated they saw no difficulty with dealing with that point in the available time prior to the hearing. It appears that the appellant did not intend to deal with the foreign law point by obtaining views on the construction of the documents under foreign law, whether time

permitted or not. On that basis any prejudice is theoretical only. We do not consider that a sufficient basis to prevent the issue being raised and dealt with by the tribunal given that it is clear from *Secret Hotels2* that the relevant contracts must be construed according to the proper law of the contract (as set out below).

5 **Evidence**

56. We have based our findings on the material in the bundles produced to the tribunal and the witness evidence of Mr Jamie Paul Shuker who attended the hearing to give evidence on behalf of the appellant.

57. Mr Shuker confirmed that he worked for the appellant for a long period of time
10 and left the company in September 2014 on a formal basis. He explained that, as there was a quite a bit of change in personnel and staff at the appellant, it was felt he was best positioned to submit a witness statement, having had such a long tenure at the company. In terms of the method of preparing the witness statement, the appellant's legal team helped collate some information. They sat down with him for a
15 number of question and answer sessions and produced a number of drafts of the witness statement and eventually it was one that "I felt was representative of the truth, and that was the witness statement that was submitted to the court". The legal team produced the various drafts of the witness statement but he contributed to the facts and the narrative of the statement and then read it, suggesting amendments where they
20 were appropriate, and then signed it: "But clearly it's written in some legalese. I'm not a lawyer, so I couldn't say that I had written this witness statement and these are purely my own words, no."

58. He confirmed he became a managing director of the appellant's business in April 2010 and held that position for eight months of the period in question, from 1
25 January 2006 to 31 December 2010. For the remainder of the period he was marketing director or IT director. He confirmed that during that time he was not in day-to-day control of the section of the business which dealt with concluding contracts but had an awareness of how it worked. Even when he was managing director he personally would not have signed a contract with an hotelier and probably
30 he would not have read individual agreements in a great deal of detail. But he was aware of the issues, in particular, from the tax enquiries and had "a reasonable understanding of what the issues at stake were". Throughout his employment with the business there was either a purchasing director, who might have had custody of that particular piece of responsibility or the finance director might have overseen it. So it
35 would be rare and, in fact, he could not think of any example, where he had actually read the agreements with hoteliers or other suppliers personally: "I may offer an opinion on it in a board meeting or we may chat about it informally in an office, but I wouldn't have put pen to paper on behalf of the company."

59. He agreed that the relevant purchasing director would be better placed than him
40 to speak to the details of individual contracts. He said that if he was shown an individual contract then possibly it would not be that helpful but he questioned whether, with the passage of time, anyone's recollection would actually be that helpful as regards that level of detail. He said that as regards the "process of signing contracts of the company's overall position in agency/principal, I would have a
45 general understanding".

60. HMRC seemed to suggest that we should draw an adverse inference from the fact that the appellant did not call other witnesses who may have been more closely involved in the contract negotiation and signing process. They noted that Mr Shuker was, with the exception of the eight month period referred to above, responsible for marketing or IT. He did not have responsibility for negotiating and signing these contracts. They asserted he was simply unable to provide the detail needed to work out what was being agreed. However, we found Mr Shuker to be a credible witness who was clear as to what he could and could not say from his own knowledge as regards the operation of the appellant's business. We have accepted his evidence as set out below except where expressly stated otherwise.

Facts

Nature of the business – overview

61. The appellant is a travel agent based in the UK specialising in the marketing and supply of low cost flights and holiday accommodation to UK travellers principally through its website. The appellant's target market is leisure travellers. At the relevant time round 95% of bookings made through the website were made by private individuals and the remainder through other travel agents acting as agents for UK individuals.

62. When it was first incorporated the appellant operated as a principal in purchasing EU accommodation for resale to UK consumers. It accounted for VAT on sales made on that basis under TOMS. In late 2005 the appellant decided to move to a business model where it acted as agent of the EU accommodation providers (the "**provider**"). A significant driver for this change was the opportunity to reduce risk exposure. For example it understood that if it acted as a disclosed agent it would not primarily be liable for health and safety issues at the accommodation which would bring a saving to the premium payable by the appellant for its associated liability insurance policy. Also a result of the lower risk profile of operators using the agency model is that costs of BTA and CAA membership and requirements were reduced, as, for a time, were the regulatory fees payable to the CAA.

63. The appellant was also aware from its advisers that a number of operators within the industry had changed to an agency model and that, in doing so, they did not have to account for VAT in respect of supplies of EU accommodation. The appellant did not want to be uncompetitive although it was not able to predict how great any VAT saving would be in practice (as the EU suppliers might pass on the additional VAT burden through an increase in the net room rate and the frequent changes in rate made such an analysis unlikely to be accurate).

64. Mr Shuker explained that at the same time the appellant's business evolved from one where initially it dealt with a few wholesalers only to one where it dealt with individual hotels directly. This was because it perceived it could obtain a more advantageous price by dealing with providers directly. So the appellant selected its better-selling hotels and approached them directly.

65. The appellant implemented the change in its business model by changing its contractual arrangements with the providers and with travellers. Mr Shuker said in his witness statement that, with the exception of a very small number of providers, the appellant was only prepared to offer accommodation to UK consumers through the

website on the basis that it was engaged by the provider as a disclosed agent. He noted that almost all of the providers were agreeable to contracting with the appellant on that basis.

66. The appellant wrote to HMRC on 6 February 2006 seeking confirmation that following its restructuring it would be treated as an agent for VAT purposes. On 24 February 2006 HMRC responded stating that it considered the appellant to be acting as an agent on the basis of the documentation provided. On 27 October 2010 HMRC wrote to the appellant stating that it had been acting as principal and therefore was liable to UK VAT on the relevant supplies. On 23 December 2010 HRMC issued an assessment for under declared VAT in respect of the accounting period ending 12/06. Further VAT assessments were received by the appellant for annual VAT accounting periods ending 12/07 to 12/10 inclusive.

67. Mr Shuker stated in his witness statement that every supply of EU accommodation facilitated by the appellant was governed by the written terms agreed between the appellant and the provider, essentially being those set out in the examples in the bundles (the "**standard provider terms**"), and the booking terms and conditions displayed on the website (the "**website terms**"). All of those terms refer to the appellant acting as agent. He said that, except where indicated otherwise in his statement, those written terms accurately reflected the appellant's relationships with the parties and its business practices throughout the relevant period. We have commented further on the applicability of the standard provider terms in the discussion section below.

68. He noted, however, that the appellant reluctantly agreed to act as principal in its arrangements with eight wholesalers on the basis that there was a perceived commercial advantage in having access to the large volume of accommodation owned or accessible by those particular providers, who were major established wholesalers. It was thought that increasing the volume and variety of EU properties offered on the website would increase the volume of visitors to the site resulting in an increase in the volume of agency sales. As a result of an oversight the appellant failed to produce separate booking terms and conditions to govern these relationships. So even in cases where the appellant accepts it was acting as principal it did so on the standard provider terms. As it accepted that it was acting as principal, it accounted for VAT on relevant supplies under TOMS. The advertised price for the relevant accommodation included the UK VAT that the appellant was liable for. These supplies comprised a small proportion (0.12%) of the appellant's total sales of EU accommodation during the relevant period.

69. Mr Shuker confirmed that this was the case at the hearing; the appellant used the same standard booking conditions as when it claimed it was acting as agent. He said "we accept that was an oversight" and "it wasn't correct". He added, however, that the actual terms and conditions put in place with providers would have been different. So he noted that one of the sample contracts actually said that the appellant was the principal (as shown in the documents in the bundles) so "the [appellant]/accommodation provider side of the equation would be different. The [appellant]/traveller side of the equation would be the same."

70. At the hearing Mr Shuker was asked what happened when the business model changed, as described above, as regards non-EU business. He said that "by default we would have also tried to secure that supply on an agency basis, I would believe." He thought there not "have been any different policy" and the same terms and conditions would apply. It was put to him that he was saying the same terms applied to all accommodation providers, not just EU ones. He said "yes, I don't think the business would have seen any downsides to not having an agency relationship with a non-EU accommodation provider." He was asked if it followed, therefore, that the contractual terms with non-EU accommodation providers would be the same as the ones in the bundles. He said "some of them I think there are a couple of - a couple of them fall into the principal list…..But, yes, but for individual hotels there wouldn't have been that many and they would have been - I imagine under standard terms and conditions".

71. Mr Shuker explained that the appellant identified 1,499 agreements with providers in place in the relevant period and it was agreed with HMRC that it would provide a sample of 10% of those agreements. The sample was randomly selected but reflected the proportion of the total number of agreements with hoteliers, travel intermediaries and wholesalers. Of the 151 provided, 147 were agreements with hoteliers, one was with a travel intermediary and three were with wholesalers. He noted that 103 of the agreements with hoteliers, the agreement with the travel intermediary and two of the agreements with the wholesalers were signed by both parties. The other agreement with a wholesaler was signed by one party as were 35 of the hotelier agreements, the remaining nine being unsigned. Of the 35, nine were signed only by the provider and 26 only by the appellant. He said there were no other contractual terms in play so that "the sample agreements can safely be taken to represent the agreement reached between the parties". We have commented on this in the discussion section.

72. Mr Shuker said in his witness statement that all contracts with hoteliers were concluded on the standard provider terms of which there were three versions in use during the relevant period. Mr Shuker could not confirm the precise periods for which each version applied. There was no data within the company that could be found at that point to say when exactly the terms and conditions changed. He could say that the versions were applicable in the following order from earliest to latest; first the version entitled E-res internet booking system ("**version one**"), then that titled agency agreement ("**version two**") and then the untitled version ("**version three**").

73. He said that each such agreement with an hotelier contained a front sheet which set out any additional terms agreed with the specific hotelier. In all cases those additional terms included the net room rate charged by the hotelier. Other terms may include any specific cancellation fees imposed by the hotelier or discounts and any special offer the appellant was permitted to offer to customers. In cross examination he explained that the "front sheet was more about the commercial aspects of how the room was priced or what the hotelier's policies were about that particular room or about that particular hotel…. how the prices were constructed or…..what kind of maybe perhaps cancellation period a hotelier might need or all of this kind of stuff would go on the front sheet" and the remainder would be the standard provider terms

that the appellant did not want to change on every contract with a different hotel as "we wanted to keep legal costs down to a minimum as much as anything."

74. The agreements with the travel intermediary was broadly the same, in particular, in confirming that the appellant was acting on a disclosed agency basis. Typically arrangements with intermediaries did not include bespoke terms and so did not include a front sheet.

75. Mr Shuker said in his witness statement that, although the standard provider terms typically placed more obligations on the providers than on the appellant, that was to be expected given the greater profile the appellant had in the marketplace. The accommodation offered for sale on the website would be seen by a large number of potential customers and would, therefore, drive more sales by the providers than they could have achieved through any direct marketing initiatives of their own.

76. He said that the standard provider terms would "usually" be accepted by providers without challenge. Any particular pricing required by the provider was displayed to customers on the appellant's website. Further information and specific terms required by the provider or relating to the specific accommodation, such as check in times, instructions on key collection and any specific cancellation terms were stated on the accommodation voucher which the appellant provided to the customer.

77. In re-examination, consistently with what he had said in his witness statement, he said it was very rare that the standard provider terms were not accepted by the provider:

> "unless it was an extremely large hotel group or….frequently US companies would always want [the appellant] to be the principal, largely for health and safety and litigation reasons. But most of the time, I'd say nearly all of the time, the [standard provider terms] were accepted and all of the [the appellant's] competitors were contracting with agency terms and conditions too".

78. He said in his witness statement that the position was different with wholesalers, whose greater market position meant that the appellant could not always insist on the use of its standard terms, and it might have to adopt specific terms required by them. Any such terms did not typically result in a material departure from the standard terms but instead included specific non-standard processes for matters such as the remittance of funds and cancellation fees. The decision as to what terms were acceptable varied according to the value the appellant placed on securing the contract with the particular wholesaler.

Applicability of contracts/contractual terms

79. As noted, it was a key part of HMRC's case that the appellant had not proven on the balance of probabilities that contracts with providers were made on an agency basis given a number of the agreements in the bundles were unsigned and/or comprised front sheets with no actual terms or conditions attached. Mr Shuker was cross-examined on the applicable provider terms at some length.

80. He was asked how he could be sure that version two of the standard provider terms was the final version and not a draft as it stated at the top of the first page: "NB: There will be a front page. Once below wording is approved we'll put it all together.

The front page is the same as on the other contract attached in email." He said that, to his knowledge, there was no other version.

81. He was shown version three which comprised a rate sheet and three other pages of terms and conditions. He agreed that the rate sheet would in each case need to be amended or adapted according to the particular provider. He thought the terms otherwise would be more or less the same, certainly, for individual hotels. There were completely bespoke agreements with either larger bed banks or perhaps even the occasional larger hotel group, where they might dictate contract terms, but for the independent hoteliers, the standard provider terms would be the starting point.

82. It was put to him that it appeared from the format of version three that the appellant would have had to adapt the conditions in pages two to four in relation to each provider such as by inserting the contracted period and the relevant dates or the name of the accommodation. He said in effect that he thought that would just refer back to the rate sheet so that, rightly or wrongly, he did not think those pages would be amended.

83. It was noted to him that the governing law clause in version three referred to the law of the "supplier host nation" and he was asked if it would have remained like that, with no actual country inserted. He said his suspicion was it would remain like that as it was worded in such a way "so that there was a generic set of terms and conditions."

84. He was asked if his evidence was that these three pages of standard provider terms attached to version three applied to all of the rate sheets in the bundle, many of which did not have the actual terms attached. He said "I'm fairly sure but without actually seeing all the original source documents, I couldn't say categorically."

85. Mr Shuker was then taken to a number of rate sheets in the bundle which, in each case, did not refer to the rate sheet being one of four pages as was the case with version three (where there was the rate sheet and three pages of standard provider terms). A number of these rate sheets referred to them being one of three pages, one to it being one of one of five pages and one to it being one of ten pages and, in each case, there were no terms and conditions attached. As regards the rate sheet with an additional nine pages, he said he could only speculate but he thought, as this related to a small hotel group, there may have been rates for each member of the group:

> "Hoteles Benidorm SA is a small hotel group, and there might be rates for six hotels with the same terms and conditions. There would have been six front sheets or seven front sheets, plus standard agency terms and conditions. That's speculation. Again, I think, the - you know, the documentary archive at Alpha may confirm that".

86. He clarified in re-examination that this hotel may have owned six hotels or apartments and the appellant "may have signed effectively six rate sheets with the revenue manager at that particular hotel group in one visit to that particular hotel group, so it would have then been six rate sheets and then the terms and conditions." He was also asked whether, in relation to a provider who owns a number of different hotels or properties, as he thought may be the case here, the appellant consolidated each of those properties within one rate sheet or whether it was the usual practice to have a different rate sheet for each different property. He said he thought it would be difficult to fit all the information about the prices and conditions on to one rate sheet.

87. He was asked in cross examination if he was saying in his comments at [85] above that the appellant has the complete set of contractual documentation in a documentary archive. He said "no, not really. It may have, it may not have. I've not conducted that search myself."

88. He was asked if it was the appellant's usual practice to keep a full set of documentation. He said that was not always the case. Sometimes "hoteliers would frequently - they may be in receipt of the whole thing, I guess. They maybe sign the front sheet and send that back because that was where the signature was." He agreed that he could not be sure that there were not some different terms and conditions in the relevant pages.

89. As regards a front sheet which was described as being one of three pages, he said he had no idea why there were only three pages in total. He was asked if there was another version of standard provider terms. He said "not to my knowledge". He thought it unlikely that this document could have incorporated some different terms and conditions that are not available, "it's not impossible, but I feel like that's unlikely. But we don't know". He noted the document was from 2008/2007.

90. He was asked how it could be known what terms and conditions applied in these cases. He said "I guess the inference that we're making is that the rest….was presumably terms and conditions. I guess we don't necessarily know that." It was put to him that the information could be in the documentary archive he had referred to. He said "it could well be. I don't know without doing that work….."

91. He later said that whilst he could not give a 100% definitive answer without actually having the relevant provider terms in from of him he thought that perhaps:

> "I don't know if these are perhaps pre-printed contracts where we've got the standard terms and conditions that we've seen on three pages, I think. I don't know if these originally came from perhaps a pre-printed sheet or something like that that had the terms and conditions on the two pages instead".

92. He was shown a front sheet which was not that of the appellant and it was put to him that in that case it could be assumed that it would not have been the appellant's standard provider terms attached. He said:

> "I'm not sure that's a fair assumption, really. I probably think in the absence of anything else it is difficult to say, but the contractor might sign that rate sheet for expediency, or the hotelier might have just given him it. So it's hard to say I think."

93. It was put to him that it could not be safely assumed that version three or indeed any version of the standard provider conditions applied to these transactions. He said "in the absence of any other information, no. On the balance of probabilities, I would say it would, but there's no documentary evidence to support that."

94. He also put forward as an explanation for the fact that a front sheet had no reference to the number of pages that "someone could have scanned it and it might not have said the page numbers. It's a different copy of a front sheet". He was shown another front sheet which appeared to be that of the provider. He said "It's a different copy of a front sheet. I don't think that necessarily presumes that the agency terms

and conditions weren't seen or understood." He added that whilst it did not appear to be the appellant's sheet "for expediency there might not be a reason to copy the same information and put it into Alpha's front sheet format."

95. He was shown a front sheet for a contract with Hotetur Club SL ("**Hotetur**") which he explained was one of the guarantee contracts (see [188] to [191]). He said:

> "I'm not sure there were any other terms and conditions. I think the hotel just sent us the prices….We had a standard agency agreement imposed with Hotetur, so that would have been one of the standard agency agreements. But I don't think there was a separate set of terms and conditions to vary that. The hotelier ….wouldn't have been particularly bothered about that. So they would just want - they were more interested in financial commitment from the rooms".

96. It was put to him that, to summarise, it follows from the particular rate sheets that he had been taken through that it is not the case that, as he suggested in his witness statements, that all of the agreements that the appellant entered into with hoteliers were governed by one of the three versions of the standard provider terms. He said:

> "I don't feel as if anything you've put forward completely invalidates that statement. So there's clearly a contract format where there are only two pages of the terms and conditions. But I don't think that necessarily disproves the fact that there wasn't one of those sets of terms and conditions. And then there are some contracts with more pages in, but we don't really know without looking at the information in more detail if there were more pages in there because there were more room rates, because there were more hotels in that particular group or because it was a different set of standard terms and conditions."

97. It was put to him that it was not correct to suggest that the content of the provider terms accurately reflected the relationship between the appellant and the providers and the appellant's business practice throughout the relevant periods, due to the absence of actual terms attached to the front sheets such that in many cases it was wholly unclear what terms applied, in particular, as so many front sheets refer to being one of three pages. He replied that to the best of his knowledge there were no other terms and he did not think it could be assumed that different terms applied due to the different number of pages attached in some cases; there was merely a different format:

> "I think I agree that there's perhaps a lack of support maybe to that argument that there's - those were the three sets of terms and conditions. Probably what I perhaps disagree about is that there was some hidden or extra set of terms and conditions or some variance of the terms and conditions that the court or I haven't necessarily seen. So to the best of my knowledge, I don't think there were any other sets of terms and conditions. I think what you've put to me shows that there may be a different format of them. You know, I don't think it is beyond the realms of possibility perhaps that there's a slightly different iteration of them for those – for sets of contracts that you showed me at the front where it was one of three. But what I would probably take

> issue with is the fact that because there's a different number of pages in some of those faxes that, therefore, there was a different set of terms and conditions. I'm not sure that we can go from one to the other. I think we could say that the documentation is unclear, perhaps inconclusive, and I would agree with that, but I don't think you can automatically infer there's another set of terms and conditions, let alone another set of non-agency terms and conditions."

98. He later said, on being asked a similar question, that:

> "to the best of my knowledge there were no other terms and conditions that were standard and above the three or that we haven't highlighted as specific variances or different contracts, really. So I appreciate the documentary record isn't - is a long distance from being perfect, and we can't disprove that there were further terms and conditions, but all I can say is to the best of my knowledge I don't think there were any."

99. In re-examination, he said that he thought that the most likely explanation for the rate sheet which stated it was one of five pages was that that the provider probably did own more than one property. As regards rate sheets referring to one of three pages, he was taken to an agreement with JM Hoteles, and it was noted that the terms and conditions, which in that case were included with that contract, were similar to the standard provider terms. So it appeared to be a slightly different iteration, as he had described. The position was similar as regards a contract with Edrichton and D'Or hotels. He said it "does appear to be in general that the pages one of three copies of the contracts indicate a separate iteration of the terms and conditions, but presumably they are a kind of change we made to the form or something like that".

100. It was noted to Mr Shuker that the earliest of the rate sheets which stated it was one of four pages was dated 15 July 2008 and most of them were dated 2009/2010. The latest of the rate sheets which stated it was one of three pages was dated 18 November 2008, and most of those versions were dated 2007. Mr Shuker said that in the period when the three page version was in use the appellant had another company in the group called Vacenza.com, a wholly-owned subsidiary of the appellant, and the Vacenza logo is on the actual contract, and:

> "it would have been possibly an indication to the hotelier that the contracted rate would appear on both websites, effectively……and then there's an absence of the Vicenza logo on the later contracts, the one of four contracts, so that could be the reason for the difference. But, again, without revisiting every contract and personally looking at it, I couldn't say with 100 per cent accuracy, but that's perhaps a reasonable explanation for the difference."

Signatures on rate sheets

101. As regards the fact that some of the rate sheets were not signed, Mr Shuker said he did not know if further signed rate sheets are in existence. He did not personally undertake any of the investigatory work around producing the sample contracts. He was asked if he had any reason to believe that samples were unrepresentative. He said he did not do the job and could not say. He did not think the appellant's lawyers would pick unsigned contracts if there were signed ones.

102. He was asked if it was the appellant's normal practice to sign agreements when entering into contractual arrangements. He said:

> "I think in general, yes, to the best of my knowledge we would have aimed for a signed document. Having said that……at the time when a lot of these arrangements were put in place, you know, the fact is that in terms of how the company was run probably a signature wasn't seen as being crucial if a hotelier sent us the rates."

103. He was asked if hotels did not sign, he would have expected them to have informed the appellant in another way that agreed to the terms. He said he would at least have expected a disagreement:

> "So I think if the hotelier or the accommodation provider disagreed with the terms and conditions as they stood, they would have proposed alternatives or fundamentally not traded with us. I think by the fact they traded with us there was a tacit acceptance of some basis to the relationship in place……Yes, because we couldn't do business, I don't think, if it was absolute silence. I think if they rejected the terms and conditions, the relationship wouldn't have continued, I guess."

104. He agreed he would have expected an agreement to be signed and added:

> "The other scenario that perhaps may have happened, just to complicate things further, is that the rates here in the front sheet was ultimately loaded on to an electronic system and the hotelier or the accommodation provider would vary the rates throughout the year, depending on how full the hotel was, and it may have been the case that that particular hotelier was set up on that system and ….. it would be quite easy for us to make a data entry mistake when we were copying the numbers in - into the system, and perhaps it was the case that the contractor in this instance loaded the rates in and then the hotelier effectively accepted the rates and the terms and conditions when they logged in to check the system. So it is kind of another scenario that I can offer as to why it perhaps wasn't signed."

105. He was asked if this meant there was a whole subset of data that had not been disclosed. He said "Yes….I think because it is maybe an old system I wouldn't even know if [the appellant] had access to it".

106. On the particular unsigned contract he was shown he noted that the provider, the Ambassador, was one of the appellant's best-selling hotels. It would have been in the top four of five hotel sales every year but he did not know if the appellant could produce contemporaneous records to say these were the terms and conditions signed. He thought, however, that this agreement definitely was in place because "it's a very notable, popular hotel and it would have sold an awful lot". Med Playa another unsigned one was another very popular hotel: "So, again, there would have definitely been some kind of trading relationship there" although he could not say precisely what that was. He commented similarly on another unsigned agreement with a set of apartments that this was perhaps the "best seller in that particular year, and the company or group had maybe five or six hotels. So it might have been the case that they were under one set of terms and conditions rather than terms and conditions with every single rate sheet".

107. It was put to him that in his witness statement he suggested that the standard terms and conditions would be attached to every front sheet but he seemed to be saying that in relation to some providers there would just be one contract. He said: "It's a possibility. I can't really remember - well, yeah, not in 2008, no, about one contract." It was put to him that, as this was supposed to be a representative sample, it could be assumed that a significant percentage of the other front sheets were also not signed. He said "yes, I don't think we deny that".

108. In re-examination he was asked to explain further the process of contracting with the providers during the period in question. He said a contractor acting on behalf of the appellant would approach the particular provider directly. They would usually go and meet in person. They would discuss the prices. The contractor would have an idea of the market rate, and the prices that the appellant would need to be able to offer a competitive rate to the consumer. He thought it was rare that they would sign things there and then on the day. The provider would maybe confirm the rates or sign the rates in some kind of electronic means, fax or something like that, and send it back to the appellant who would load the rates into the system. The appellant would invite the provider usually to check the rates again just for accuracy, as if there was a data entry error it could be an expensive mistake for either party. Then the property would fundamentally go live on the appellant's website with that particular rate.

109. On being asked to clarify when in the process the particular rate was uploaded on to the website, he said that for wholesalers, there was a real-time electronic connection, so the prices would always be fed through to the website on a live basis. For other providers, the process could take place in a number of ways; the prices might be loaded onto the system by the contractor, a member of staff in the appellant's office or the provider itself.

110. In re-examination he was asked to clarify the status of the two agreements with Hotelbeds S.L.U. ("**Hotelbeds**"), a Spanish accommodation provider. He said that there was a signed agreement for a period, and then that period expired, and then there was a draft replacement agreement that was unsigned. The initial agreement was stated to apply from 1 October 2006 to 30 September 2009.

111. His recollection of why the second agreement was not signed was that, it "sounds a bit ridiculous" but "it was just too long". The parties had spent a long time arguing "about different clauses within the agreement, and it covered all sorts of things in there that didn't necessarily relate to the agency position, but it was - I seem to remember it being a long document". The personnel dealing with it at the appellant and the provider were not lawyers and "it went through a number of iterations, and I think both parties came to an agreement that actually we seemed to be getting no further forward and why don't we just let the old agreement continue". As nothing really changed with the relationship with Hotelbeds "we assumed they were happy with the agreement as it stood, so we didn't reach….a point where either party really could sign the new agreement, but…..I don't recollect any single specific reason. It was just…. too long".

112. This accorded with his witness statement where he said that the parties were unable to agree new terms and so the original contractual terms continued to govern

the relationships. We accept from this that the first agreement with Hotelbeds remained in place and the second one did not take effect.

Governing law clauses

113. Mr Shuker was also questioned at some length about the governing law clauses in the standard provider terms and in the sample contracts.

114. We note that HMRC put it to Mr Shuker that there were nine sample contracts which specified foreign law was to apply or that both English and foreign law applied. However, in re-examination it was pointed out that the number of contracts in issue in this respect was lower, as is borne out on a closer inspection of the documents in the bundles. HMRC referred to the one of the guarantee agreements (see [188] to [191]) but that is outside the scope of this dispute; it is agreed that the appellant is within the TOMS scheme in respect of those agreement. There were also in two instances duplicates of contracts and one of the agreements in fact related to a non-EU provider. The appellant also argued that the second agreement with Hotelbeds to which HMRC referred was not in point as it was a draft only which did not come into effect (as we have accepted as set out in [110] to [112] above). The earlier signed agreement with Hotelbeds was stated to be subject to English law. We accept, therefore, that there were only five sample contracts of relevance which stated they were governed both by English and foreign law.

115. In cross examination Mr Shuker explained the lack of a governing law clause in one of the guarantee contracts on the basis that as "it was a shortly timed contract just for that particular season I don't think it would have been debated between the parties, really. I mean, the expectation was we wouldn't fall out in, you know, four months." As noted the guarantee contracts are not in any event in point.

116. He was taken to a contract with Sun Hotels, a wholesaler, which stated it was to be "constructed or construed in accordance with and jointly governed by English law and Swiss law". He was asked which part of the contract was meant to be governed by English law and which part by Swiss law. He said:

> "The only assumption I can make about it really is if they wanted to litigate against us, they would do in the Switzerland, and if we wanted to litigate against them we would do it in the UK. But I wouldn't think there – there's not a Swiss part to it nor an English part to it, I assume. I can only think in the negotiations Sun Hotels says, I don't know, "Can we have Swiss?" Or we said we probably prefer English law and then perhaps a compromise was reached, I don't know……… I can only think in the negotiations Sun Hotels says, I don't know, "Can we have Swiss?" Or we said we probably prefer English law and then perhaps a compromise was reached, I don't know." "

117. It was noted that version three of the standard provider terms stated that it was governed by both the laws of England and those of the relevant overseas country (see [132]). He was asked whether his understanding was that was the effect of that provision when he devised that standard term. He said "no, not really. The….standard terms and conditions certainly evolved over a number of years, and I can't speak to as to why the two jurisdictions clause was actually in there. I can only speculate that it satisfied both parties in some way, but as a rationale behind it, I couldn't say, really".

118. On being asked again if he could say which parts of the contract were governed by England and what parts by the other country, he said:

> "I think it is the same answer as previously, my recollection was it wasn't intended that any particular clauses were governed by one jurisdiction over and above a different jurisdiction. I think the clause was such as it was to, you know, just what both parties agreed".

Terms and conditions with providers

119. The three versions of the standard provider terms in the bundles contained the following main terms and conditions. In all cases the appellant was described as the "Agent" and the provider as the "Principal". We note that Mr Shuker provided a description of some of the terms in his witness statement but we have taken the wording from the documents themselves.

Agency relationship

120. All versions contained the following statement (or similar):

> "In accordance with this agreement the Principal hereby appoints the Agent as its selling agent [or in version three, non-exclusive selling agent] and the Agent agrees to act as such. The Agent undertakes to deal accurately with the requests for bookings and relay all monies which it receives from the Principal's clients, which are due to the Principals under the terms of this agreement, but shall have no further commitment to the Principal under this agreement."

Providers' key obligations

121. The provider's key obligations were to:

(1) Provide all accommodation, services and facilities as described in its brochure or website (version one).

(2) Notify the Agent immediately of any withdrawal of or alteration to the accommodation or any facilities or services at the accommodation or any other matter which may alter any information previously given to the Agent (all versions).

(3) Inform the Agent in writing immediately of any building, maintenance work or other activity at the relevant property such as may adversely affect the enjoyment of the clients at the accommodation (all versions).

(4) Under version two (a) notify the Agent of any planned refurbishment with a minimum of 90 days of notice (and if that was not observed or the hotel was not able to accommodate clients at the agreed start date, the Agent reserved the right to terminate the contract debiting any financial loss incurred as a consequence to the Principal) (b) ensure the performance of the arrangements with all due skill, care and diligence and (c) ensure that the accommodation, premises, contents, facilities and services are and will remain throughout the periods of the contract of a good and clean standard, in full working order and safe for occupation and use by the Principal's clients.

(5) "Complete and sign the "Liability report" and a detailed description of the accommodation" (versions one and two) and, in version two, the Agent

warranted that the descriptive wording would remain correct through the contract term. Under version three, the Principal was required to complete, verify and continually provide an up to date detailed description of the accommodation provided to the Agent and to procure that the supplier of the accommodation to the Principal has fully complied with the Principal's health and safety programme to the intent that the accommodation was safe and compliant with the description provided to the Agent.

(6) Allow the Agent's representatives to inspect all accommodation at any reasonable time on request by the Agent (all versions).

(7) Honour all reservations, options and requests confirmed to the Agent. However, if any reservation option or request could not be honoured the Principal was required to notify the Agent immediately (all versions).

(8) Take out and maintain liability insurance to cover risks relating to the accommodation (all versions).

(9) Ensure that the accommodation complied with requirements such as health and safety regulations and planning and licensing rules (all versions).

122. Mr Shuker commented in his witness statement that the above obligations enabled the appellant to protect its reputation and goodwill in the UK market by ensuring that accommodation booked through the appellant's website was of a high quality and was as advertised.

123. As regards failures to honour reservations, there were the following further provisions:

(1) Under all versions the Principal was required to notify the Agent immediately if a reservation could not be honoured and, under version one, the Principal was required to comply with the Agent's request and instructions concerning alternative arrangements and, under versions two and three, use all reasonable endeavours to offer alternative arrangements.

(2) Under all versions, unless otherwise advised by the Agent, the Principal was required to locate replacement accommodation for the Principal's clients at accommodation of at least equal standards with similar services, facilities and location (and any additional cost was to be borne by the Principal).

(3) Under all versions, the Principal was required to meet any additional costs arising because of the Principal's failure to honour the reservation/option/request including the cost of taxis to the replacement accommodation.

(4) Under all versions, the Principal was required to ensure that the alternative accommodation complied with the conditions in the agreement.

If the alternative arrangements were not deemed acceptable by the client and the client wished to cancel, the Principal was required:

(a) Under version one, to pay compensation for loss of profit and loss of costs (including committed airline seats, administration fees, client compensation and travel agent's commission where applicable); and

5 (b) Under versions two and three, to "refund all money paid to the Principal in respect of the booking and may, at its complete discretion offer reasonable compensation" such reasonable compensation to be discussed "on the merit of each case" and under version three, with any agreed amount to be limited to
10 the maximum value of the booking.

124. In all versions the provisions regarding complaints were essentially as follows:

(1) "In the event of a complaint being made to the Agent or the Agent's representatives by any of the clients of the Principal relating to the inadequacy or non-provision of the accommodation or any other service or
15 facility provided or agreed to be provided by the Principal, the Agent shall notify the Principal of any such claim or complaint", and, under versions one and two, "the Principal will deal with the complaint directly with the client" or, under version three "the Principal will then fully investigate the complaint and respond to the Agent."

20 (2) Under versions one and two:

(a) "If the Principal receives a complaint from a client concerning the services it will….immediately take all responsible steps to resolve it and….if it is serious, or if it involves a personal injury, immediately notify the Agent of the
25 complaint and the Principal's response to it; if requested to do so by the Agent, keep the Agent informed of the developments concerning the complaints as they occur".

(b) "If the Agent receives a complaint concerning the services, the Principal will, at the Agent's request, promptly and at its
30 own cost, give all assistance requested by the Agent….."

(3) Under version three, if the Principal received a complaint from the client in resort it was required to forward the complaint immediately without delay to the Agent together with a full and accurate report regarding the circumstances that motivated the complaint and the Principal
35 was required to respond to the Agent within 5 working days.

(4) Under version three, the Agent was required to "immediately notify the Principal of complaints or claims made by customers in relation to the Products".

Commission

40 125. Under versions one and two, the Agent was entitled to "a commission from the Principal, to be any such sum as it may charge to clients of the Principal, which is over and above the prices set out in this agreement."

126. Under versions two and three the Agent was obliged to collect and pass to the Principal all monies due to the Principal in respect of bookings and the Principal had the right to terminate the agreement if the appellant did not comply with this. There were also provisions about the Principal's invoicing requirements.

5 *Indemnities*

127. In all versions the Principal accepted "liability and agrees fully to indemnify the Agent in respect of all loss damage liabilities expenses and demands of whatever nature (including without limitation any professional fees incurred by the Agent and any compensation payments, refunds or credits…which the Agent may suffer or incur
10 directly or indirectly as a result of ..

> (1) Any breach by the Principal of any of these conditions or any other terms or this agreement; and/or
>
> (2) The death, injury or illness ….of
>
> (3) any person for whom the Agent may be responsible or for which the
15 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 contract by, the Principal, its employees, agents or sub contracts; provided that the Principal shall not be liable in respect of anything arising directly as a result of the sole fault of the Agent."

20 *Obligations on the appellant – versions two and three*

128. Versions two and three contained:

> (1) An indemnity from the Agent to the Principal in respect of all losses arising from any breach by the Agent of the provisions of the agreement save to the extent arising out of the Principal's negligence.
>
25 (2) An undertaking from the Agent to comply with all laws and regulations applicable to its business and with the rules of conduct of any trade association of which it was a member.
>
> (3) If the Agent failed to collect from customers and pay to the Principal all the monies it was liable to compensate the Principal for:
>
30 (a) The cost of the booking where the Principal has issued Confirmation/Final Invoice for a confirmed booking.
>
> (b) Amendment charges for approved amendments.

Room allocations

129. Versions two and three contained provisions on room allocation. Rooms on
35 allocation to the Agent remained at its disposal up to the agreed number of days before the client's arrival (the release date). On that date unsold rooms were automatically released back to the Principal but the Agent could request additional rooms. The allocation remained available to clients unless instructed to close unavailable dates by the Principal directly to the Agent. All bookings taken prior to
40 this instruction had to be accepted by the Principal. Version two stated that: "In no way should the allocation offered by construed as commitment or guaranteed rooms".

Cancellations

130. Under versions two and three there were provisions regarding cancellations. Cancellations of confirmed bookings had to be notified in writing by email. There was a penalty charge which depended on the type of hotel but in each case there was no charge for cancellation unless made less than 24 hours or 48 hours before the arrival date.

131. Under version three the Agent had obligations to:

(1) "make reservations through the system agreed with the Principal, ensuring that customers are referred to the Principal's booking conditions",

(2) "collect from customers and pass to the Principal cancellation fees or other monies due in respect of bookings [in accordance with the Principal's booking conditions]",

(3) "use its best endeavours to promote and increase the sale of the Products,"

(4) "pass on fully, accurately and immediately to customers all customer invoices…any pre-departure information provided to the Agent by the Principal in connection with bookings and the Products..", and

(5) "not to confirm any booking to a customer without the express authority of the Principal in each case."

132. The governing law clauses were as follows:

(1) Under version one, "This agreement shall be construed in accordance with and governed by English law, and the parties hereby submit to the exclusive jurisdiction of the competent courts of England."

(2) Version two had no clause.

(3) Under version three: "This agreement shall be constructed in accordance with and jointly governed by English and Supplier Host Nation law, and the parties hereby submit to the exclusive jurisdiction of the competent courts of England and Supplier Host Nation."

Website terms

133. The bundles contained a number of different versions of the website terms applicable in the relevant period. In summary, these contained the following main terms and conditions and, whilst there are variants in the different versions from the precise terms set out below, the key provisions are in all cases in material respects the same.

Agency and booking

134. The appellant was to "act as a booking agent on behalf of all hotels, apartments and villas featured on this website" and it was stated that "your contract will be made with these accommodation providers and not [the appellant]".

135. "When you book accommodation either via the internet or telephone, your booking is confirmed immediately and it is at this time a binding contract comes into existence, email confirmation of your booking will also be sent to you and a voucher

will follow once full payment has been taken". The contract was stated to be subject to the website terms. The customer was warned that if he/she wished to cancel or amend the booking there could be cancellation or amendment fees (as further set out below).

5 *Deposit*

136. If the booking was more than a specified period away (twelve weeks in some versions and five weeks in others) and the total amount due was more than a specified amount the customer was required to pay a 20% deposit which was non-refundable. The balance was due twelve or five weeks before travel which had to be paid or the
10 booking would be cancelled. Mr Shuker said in his witness statement that the requirement for a deposit ensured that the appellant held sufficient funds to withhold any applicable cancellation fee due in the event of cancellation by the customer. He confirmed in cross-examination that this deposit was not passed on to the provider if it was forfeited.

15 *Insurance*

137. It was a condition of the booking that the customer had sufficient travel insurance. The appellant noted that it sold travel insurance. Mr Shuker said that this reflected ABTA's published advice that travellers should not travel without insurance.

Board basis and pricing

20 138. There was a description of what was included in the price depending on what board basis the customer had booked.

139. The appellant guaranteed that "once you have made your booking, we will not increase the price of your accommodation – this includes any changes to VAT or Government Taxes. Please note that once you have agreed a price and made you
25 booking this is the price you pay. If the price decreases, you are not entitled to the accommodation at the changed rate."

140. It was noted that if there were any special requests the appellant would pass these on to the providers but it could not be guaranteed that these would be met.

Changes to bookings

30 141. It was stated that if the customer wanted to change any of the details of the booking after the appellant had sent confirmation of the booking the appellant would do its best to help. If the change could be made a fee was due with the level depending on the date the request was received. Mr Shuker confirmed that the appellant set the administrative charges for any changes to a booking which it
35 retained. The fees payable were charged at a fixed fee of between £10 and £35. He said that the fee was principally to cover the appellant's costs in processing the change, in particular, those of having staff available to receive and administer the changes. During its peak level of staffing the appellant employed around 110 to 120 members of staff and almost a third of them were responsible for administrative
40 matters including processing changes to bookings.

Cancellations

142. Cancellation fees were charged according to a sliding scale, on an increasing scale of cost to the customer based on the proximity of the cancellation to the

scheduled arrival date at the accommodation. For example, in some versions, for cancellations made more than 12 weeks before the arrival date, no fee was charged but, for those made less than 14 days before the arrival date, a fee was incurred equal to the full booking cost. The precise scale and cut off dates varied in the different versions of the terms.

143. Mr Shuker said that the appellant ensured that cancellation fees payable by customers did not exceed the funds held in respect of the booking by requiring that full payment was made no later than the day before cancellation fees could be incurred. Almost all cancellation fees were funded through full or partial forfeiture of the customer's prepayment. To deter late payment and the associated risk that the appellant would not hold sufficient funds to cover any cancellation fees, the appellant from time to time imposed a one off late payment fee of £20 which it retained.

144. The appellant reserved the right to cancel the contract "if one or more of the order was listed at an incorrect price due to a typographical error or an error in the pricing information received by us from our suppliers." Mr Shuker said this was rarely exercised.

145. There was also a cooling off period during which a customer could cancel without penalty or charge: "A cooling off period of 48 hours will apply to accommodation bookings made more than 72 hours in advance of the arrival date. Cancellations notified directly to the accommodation will not be effective. All cancellations or amendments must be made directly to [the appellant.]"

Penalty protection insurance

146. Under a heading "Booking Cancellation Penalty Protection" it was stated that "if for any reason you decide to cancel your booking up to two days prior to check-in, we will pay your cancellation fee. If you purchased our "Booking Cancellation Penalty Protection" when you made your accommodation booking, the following conditions apply" and there was a list of conditions including that the protection must be purchased at the time of booking and must be paid for in full to be effective.

147. Mr Shuker confirmed that this referred to a form of insurance which the appellant sold to customers under which, if the customer cancelled the booking within the applicable time frames, the appellant wold not impose the cancellation charges set out in the website terms. The appellant paid the cancellation fee due to the provider out of the revenues generated by the sale of this protection to customers. Any excess balance of the total sales revenues after meeting the providers' cancellation fees, were retained by the appellant.

Change in accommodation

148. It was stated that providers could change the accommodation as follows: "The accommodation providers reserve the right to change your accommodation to an alternative of the same or superior standard within the same resort. Occasionally the accommodation providers may have to offer alternative accommodation of a lower standard or in a different resort…in these circumstances compensation may be offered to you by the accommodation providers. When accommodation providers are unable to confirm a suitable alternative, we reserve the right to cancel the booking…"

Liability

149. Under the heading "Your contract" it was stated: "Once the contract is made, it is the accommodation providers' responsibility to provide you with what you have booked and it is your responsibility to pay for the accommodation".

150. It was also stated:

> "As we are acting only as a booking agent we have no liability for any of the accommodation arrangements and in particular any liability for any illness, personal injury, death or loss of any kind, unless caused by our negligence. Any claim for damages for 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."

151. It was stated that on booking :

> "you accept responsibility for any damage to property or accommodation caused by you or a member of your party. The [provider] reserves the right to terminate ….your holiday … due to misconduct … In these circumstances full cancellation charges will apply and no refund will be given…the [provider] shall be under no obligation to pay compensation or meet any costs or expenses you may incur as a result of your accommodation being terminated. You agree to indemnify us against any claims (including legal costs) made against us or on behalf of the owner….finally you are also liable to make a reimbursement to the [provide] for any damage caused, before you end your stay."

Complaints

152. As regards complaints it was stated:

> "If you have a complaint while you are staying at the accommodation in question, you must inform the accommodation management immediately, in order to give them chance to resolve the problem. You may lose your right to compensation, if you fail to do so. If the issue is not resolved to your satisfaction, you should contact our UK office on 08700 670030 from the resort. We will act as an intermediary to try to rectify the problem. In the event that we are unable to do so and you wish to take the matter further, you must do so directly with the [provider] concerned. It is only if "your problem is concerning [the appellant] that you must put your complaint in writing to our Customer Relations Department within 14 days of your return of travel."

153. Under some versions if the provider was unable to investigate a complaint, the appellant offered to try and do so, and it would then investigate and report back to the traveller. Mr Shuker explained that the appellant "would try and expedite that process. Sometimes accommodation providers' standards of customer service might not be always what a UK client is used to".

Price promise

154. There was sometimes a price promise on the website that said: "If you book a hotel room with us and then find a lower price on the Internet, subject to terms and conditions we will refund you the difference."

Further witness evidence on provider terms and website terms

5 *Basis of arrangements with providers*

155. Mr Shuker confirmed that the appellant entered into contracts with travellers either directly or through other travel agents "to place bookings with principals on behalf of the customer".

156. It was put to him that when the appellant entered into the contracts with 10 travellers, either directly or through travel agents, it was entering into those contracts for the appellant itself because it set the selling price, the commission and the cancellation charge (see below). He said that sounded more like a legal question which he could not answer. He could say "yes, we did set the price, yes, we did keep some cancellation monies. Does that mean that we're making a principal supply to 15 the customer? I would say not, no, just because of those things. I don't think that could be inferred." We note that we draw no inference from the facts we have found that the appellant entered into contracts "for itself", to the extent that means as principal or on its own account.

Booking procedures and invoicing

20 157. Mr Shuker explained that the appellant's agreements with providers were predominantly on a "free sale" basis which meant that it was permitted to continue to take bookings for a provider until the provider notified the appellant that there was no remaining availability on specific dates. This notification was referred to as a "stop sale" which once received meant the appellant would not take further bookings on the 25 dates notified. This accords with the allocation provisions in versions two and three of the standard provider terms.

158. During the term of an agreement, the provider could contact the appellant to amend the net room rate, authorise special offers, including discounted non-refundable rooms, or issue a "stop sale". Hotels or local agents did this by email or 30 fax and the amendment would be loaded manually into the system or via the appellant's extranet site to which the hoteliers were provided access. For wholesalers this information was provided via an XML connection. For wholesalers, the appellant would upload data to its website for each of the accommodations offered by the wholesaler including images, ratings, addresses and similar information.

35 159. As set out in Mr Shuker's witness statement:

> (1) When a customer selected a property or room on the appellant's website, a gross sales price was generated by the website's pricing algorithms and displayed to the customer. If the customer wanted to proceed, he would be directed to a payment page indicating when payment 40 would be taken.
>
> (2) Once the customer provided payment details, the booking was complete.

(3) The appellant took the payment and notified the provider of the booking by fax or email or, for wholesalers, by an XML link. The notification included the customer's name, number and type of rooms booked, the number of guests, the check in and check out dates and any special requests/requirements. He said that at the same time the appellant notified the provider of the gross sales price achieved (but see the further evidence below).

(4) The appellant issued the customer with an accommodation voucher and invoice. The voucher confirmed the details of the booking and specific conditions imposed by the provider such as details of check-in and check-out times. The customer had to produce the voucher at check in as evidence of the booking. The invoice was for the full price payable for the booking.

160. The provider issued the appellant with a statement setting out the total amount due to it from the appellant. This was issued on a regular basis to cover a number of customers following their departure from the accommodation. The appellant regarded this as a request for payment by the provider of the gross price less the commission. The appellant checked the statement against its own records and, if the net sum matched its records, it made payment. Mr Shuker confirmed at the hearing that the providers did not issue invoices to travellers but they issued VAT invoices to the appellant for the accommodation, which showed the amount due from the appellant to the provider plus local VAT.

161. The appellant did not initially issue invoices to the providers for its agency commission. Practically it did not consider it necessary as it only had to remit the net room rate to the providers and, given there was no UK VAT due, it seemed an unnecessary and considerable administrative burden as the appellant concluded such a high volume of low value transactions. However, following the decision in *International Life Leisure* in 2006 (MAN/02/0524) the appellant understood that it was required to issue invoices and started to do so showing both the gross sales price charged to the customer and the commission due to the appellant as well as issuing invoices retrospectively for completed sales. Mr Shuker did not know precisely when the appellant started to issue such invoices to the providers.

162. The appellant received payments from customers on behalf of the providers and paid the providers through its single bank account. Between receipt and payment the appellant used the funds as working capital. Any accrued interest was retained by the appellant and any bank charges were paid by the appellant. The appellant also bore some risk on currency fluctuation as it received payment from customers in pounds sterling but had to make payment to providers in euros. It hedged this position appropriately. Mr Shuker did not think these issues were discussed with providers. His understanding was that this method of cash handling was common practice among UK online agents and he was not aware of a provider raising it as an issue of concern.

Compensation and complaints

163. Mr Shuker said in his witness statement that it was not uncommon for providers to fail to honour bookings notwithstanding that the appellant accepted customer bookings and communicated them to the provider immediately on receipt.

Nevertheless overbookings would regularly occur primarily as some hoteliers did not always have "clear visibility of their own availability on a real time basis" or, as he said at the hearing, they did not "really have an accurate picture of what their occupancy was at any given future point in time". He noted that, even if that was not the case, sometimes they deliberately overbooked to avoid the risk of under occupancy on the basis they may get cancellations as the arrival date came close. Mr Shuker said that in a summer season this may happen once in every 250 bookings made on the website.

164. At the hearing he said that, in his view, these over booking practices meant that providers may try to move guests booked through the agent who complains the least. So the provisions in the standard provider terms relating to where the provider had a difficulty in providing the booked accommodation, were in place commercially so that "some of our guests may be more difficult to move" as "some properties would as a matter of - not intentional business practice but just from maladministration overbooked and then they may move guests to inferior properties, and obviously some had booked a room with [the appellant]…..we wanted the customer to get what they had paid for, really."

165. Mr Shuker said that the situations where bookings could not be honoured were dealt with in practice as follows.

(1) Where the appellant was notified ahead of the customer's arrival at the accommodation, the provider did not often offer alternative accommodation but authorised the appellant to reimburse the customer. The appellant promptly notified the customer of the cancellation and would refund the full price. The customer was free to book an alternative if they chose to do so. Given the customer had an opportunity to make alternative arrangements, compensation was rarely requested.

(2) When the appellant was notified only when the customer arrived at the accommodation, in the first instance, the appellant would usually speak to the provider to see if the provider could honour the booking. If that was not possible the appellant would enforce the contractual obligation for the provider to locate suitable alternative accommodation or provide compensation. Mr Shuker said this afforded some protection to the appellant's own commercial reputation. It was felt that, a bad experience in resort, which was not resolved by the provider, inevitably would leave the customer with a sour impression of those involved in the booking including the appellant. This was often exacerbated by providers claiming to the customer they had not been advised of the booking by the appellant.

(3) If agreement between the provider and the customer could not be reached in resort, the appellant may be contacted by customers on their return to the UK. Although the appellant was not contractually obliged to assist the customer, as a matter of brand protection, it would do so. That would usually result in the appellant discussing the customer's complaint with the provider and trying to agree an appropriate level of compensation. The appellant would pay the agreed amount to the customer which it would then recover from the provider by way of set off against amounts

> outstanding in respect of net room rates. The appellant hoped that through the prompt resolution of a complaint/ compensation a customer would be more likely to return to its website and make another booking in future. If the appellant could not agree an amount with the provider, the appellant would decide for itself the amount it considered reasonable and retain the equivalent from monies due to the provider. This was preferable to pursuing the provider for breach of contract which was not practical. Given the relatively low sums involved, the providers did not challenge the appellant's determination.

166. As regards customer complaints more generally, Mr Shuker said that the procedure he had outlined in relation to failures to honour booking was also followed as regards other complaints notified to the appellant. Where the appellant made a payment of compensation on behalf of the provider, the appellant did not accept liability for the issue. His understanding was that this approach to complaints handling was standard practice across the online agent market.

167. At the hearing he also said that cases where the appellant paid the compensation where the provider was at fault were not frequent occurrences. His best guess was that if the appellant received 100 complaints a month, maybe there would be one complaint which the appellant would not be able to reach agreement on with the provider. He thought such an occurrence would be ten to twelve times a year.

168. He noted that complaints which resulted from a fault on the appellant's part, such as an incorrect description of the accommodation, were not in practice passed to the provider but were resolved by the appellant itself. If the appellant considered that the complaint merited compensation it would make a payment. In a competitive market place it was in the appellant's best interests to ensure that the customer received as positive an experience as possible. He noted that such a business works largely on word of mouth recommendations and repeat business and adverse publicity from dissatisfied customers, particularly postings on social media, can be extremely damaging. He estimated that around 50% of complaints were considered by the appellant to be as a result of the appellant's failures. He noted that the appellant's trial balance for the quarter ending March 2007 showed total compensation paid by the appellant of £25,138.73 and total compensation received from providers of £12,063.31. However, total compensation payments were very small in the context of total sales. In that quarter they were 0.23% of the total sales of £11,067,759.64.

Pricing

169. Mr Shuker noted in his witness statement that the prices set out in the agreements with providers are the net room rates which with the addition of commission, forms the selling price. At the hearing he agreed that the appellant and the accommodation providers entered into agreements under which the appellant set the price at which the accommodation was sold. He agreed that, in effect, the appellant usually or, for the majority of the time, set the price at which the accommodation was sold to travellers and to travel agents but on occasion, albeit quite rarely during the period in question:

> "the [provider] may have instructed us to set the price at a certain rate so that they had the same prices in the market. So some of the

> [providers] would not necessarily want an agent undercutting their own rates, so they would try……and protect …..it is a bit like an RRP, they would try and give the same rate to all the market."

170. In theory the appellant could request whatever level of commission it liked but in practice the final selling price was driven by the market given that most accommodation offered on the website was typically available on competitors' websites.

171. He noted that the later versions of the standard provider terms included a provision whereby the appellant was liable to the provider where it failed to comply with its obligation as agent to properly collect sums due from the customer and pass them over to the provider. In the later versions the appellant also provided the provider with an indemnity in the event of breach of the agency agreement by the appellant. He said this recognised that the appellant's compliance with the terms produced a quantifiable benefit to the provider and exposed it to risk of financial loss in the event of failure by the appellant to carry out its duties.

172. There was no obligation in any of the versions of the standard provider terms for the appellant to inform providers of the price at which accommodation was sold to customers. In his witness statement Mr Shuker said the provider was informed of the final total selling price. At the hearing he confirmed that was his recollection but he could not remember when that came into place. We note that the providers would certainly have been aware of the total price once the appellant started to issue invoices for their commission although the precise date when that started it not known.

173. In re-examination Mr Shuker was asked to explain further how the net room rates are set. He said essentially this was a matter of initial negotiation between the provider and the appellant although the provider frequently changed the price during the contract term. The provider would usually supply the prices and the person managing the relationship "would have an idea really of if we could actually make any money from those room rates and if they were competitive or not" and the appellant had its own large database of those rates from other providers, and also knew the position from other competitor websites, which gave an idea "if those room rates were going to be competitive". So there might be some dialogue with the revenue manager at the hotel or the hotel owner, and the two parties would eventually reach agreement and then sign the contract. The prices that were initially agreed were just "a snapshot at a point in time" as especially with the complexities of technology and how that has changed over time, the providers would "change their prices an awful lot really" even in 2007/08. So even though the initial rate sheet "almost sets the tone of the relationship" and [the appellant] would know what a good price in the market was, the provider would change those prices over time.

174. As regards why the provider would change the price, he said, perhaps the provider might have set their prices too high and not achieved the occupancy that they wanted to achieve for the busiest season in the summer, so they might consider later reducing their prices, after the usual peak booking time, to ensure full occupancy. Alternatively, if they had sold some rooms too cheaply, they might increase the prices to reduce the future sales of their product. So there could be a variety of reasons why the prices changed. It might be that the hotel next door has dropped their prices and

they are going to drop theirs as well. The hoteliers in a particular place are in competition with each other.

175. He was also asked how the appellant went about fixing its commission. He said this was done in a variety of ways. The appellant had intelligence about what price was competitive for a customer from looking, for example, at other websites and from general intelligence about what commission other competitors might take from the price. Most of the time the appellant knew "we had some overheads to pay for the business, we had some marketing costs to pay for the business, there were some general expenses. We knew we roughly needed between….maybe 12 and 20 per cent commission to make the business profitable. So starting at the price the customer may pay that's competitive, deducting, let's say, between 10 and 20 per cent from that would give us an idea of what the prices on the rate sheet should be".

176. Mr Shuker said that the normal payment terms were that the provider was paid the net room rate after the customer's stay. He was asked if the appellant set its own conditions about when payments were due to the providers. He said:

> "No, certainly not always, no….In some ways I would say quite rarely because if we didn't remit the monies to principals reasonably quickly, they would ultimately stop distributing via our platform. So there was a kind of - you know, we couldn't just not pay principals whenever we wanted to. They had to be paid at some point and some principals would say that they - if we didn't have very – you know, if a particular principal didn't trust – didn't have a great deal of trust in us, for whatever commercial reason, they may insist on monies sooner than another principal who may give [the appellant] some credit".

177. He confirmed that travellers' payments received by the appellant were not lodged in an escrow or other account held jointly with or on behalf of the providers but were entered into the appellant's bank accounts. It was from the appellant's bank account that payments of amounts due to the providers were made. Interest earned on those amounts held in the appellant's bank account was kept by the appellant.

178. He confirmed that the appellant set its own conditions about the deposits required by customers and when deposits would be payable or forfeited most of the time but not all of the time: "Probably in terms of the dispute maybe 90 – probably 95% of the time." As noted, he confirmed that the deposit was not passed on to the provider if it was forfeited.

179. He confirmed that the appellant had no obligation to pass on to the providers any interest that it received on early payments from travellers or other travel agents or on forfeited deposits or on cancellation payments received above those set by the providers and it did not in fact pass on any such amounts. He was asked how much interest the appellant made on such sums. He said, as a best guess, maybe £300,000 to £400,000 per year when interest rates were around 5%.

180. As noted, customer monies were held by the appellant and applied as working capital until the relevant amounts were paid to the provider. Mr Shuker said that the payment terms in the standard provider terms reflected a commercial balance between the appellant's need to offer to customers competitive payment terms to attract business and the appellant's need for working capital.

Indemnities

181. Mr Shuker said that the indemnity from the provider to the agent was included in the standard provider terms as it was important in order to manage any residual risk to the appellant of financial loss as a result of a provider's actions. He said that insurers in the travel industry are very uncomfortable with travel agents accepting liability for health and safety issues at the accommodation. As the law on the respective liabilities of principals and travel agents for such issues was unclear at the time, additional contractual protection was deemed necessary (and he also noted the obligation for the provider to have insurance cover).

Price promise to customers

182. In his witness statement Mr Shuker described the price promise in the website terms as a marketing tool to encourage customers to book through the website rather than through a competitor. He said it was rare for a customer to make a claim under this provision. If a customer did so, the appellant would compare the price obtainable from other online agents with the providers' net room rate. If the price obtainable was higher than that rate, the appellant would honour the price promise by reducing its commission on the sale. If it was lower, the appellant had to cancel the booking as it was uncommercial to match the price in that case and it refunded the full amount paid by the customer. The value of reductions in the appellant's commission and/or cancellation of bookings as a result of the price promise was very low. For example in the period from 1 July 2010 to 31 December 2010 there were 16 successful customer claims against the price promise. The reduction in commission amounted to less than 0.001% of total sales (commission reductions totalling £362.14 as compared with total sales of £36,300,741.08).

183. At the hearing it was put to Mr Shuker that the appellant honoured the price promise unless the difference in price effectively required it to subsidise the room rate rather than simply reduce its commission, in which case the appellant would then cancel the booking. He said:

> "No, that very rarely if ever happened. There might have been the odd scenario where, you know, there was a room price to £50,000 on our website it might have been by a honeymoon suite or something. It may be someone found it for £1 on someone else's website because it was a pricing error, but it's not a general case that we would cancel the room rather than not, and….the rates of people actually calling in the price promise were minuscule I believe….I mean, the amount of price promises actually made was tiny, so less than 5%…..I don't know, 0.001 per cent, it is absolutely tiny in the context of the business. And I think most of the time under my jurisdiction I would have rather have given the customer the money because it would have been - you know, if we have to deal with one complaint over a negative bit of PR it kind of easily exceeds what that cost might have been, so for commercial expediency we would have taken the loss in that particular instance, I think."

Security arrangements

184. In his witness statement Mr Shuker said that, except in some limited circumstances, the appellant took no inventory risk on the EU accommodation it offered for sale on the website. For example, there were no minimum booking requirements on the appellant. However, some providers did require security against the risk of default by the appellant in the performance of its contractual obligations to ensure that the provider received the net room rate, being the amount the provider was left with following the deduction of the appellant's commission from the total price.

185. As payment was not made to the providers until after the customer's stay, there was a window of financial exposure for the provider. If the appellant did not remit the funds, the provider had no recourse to recover this from the customer, as the customer had already made full payment to the appellant. This could be crystallised into a loss if, for example, the appellant became insolvent. Providers sought to protect against this risk by (a) requiring the appellant to provide a letter of credit from a bank covering customer bookings to a specified level (b) setting a limit on the amount the appellant could owe to a provider in respect of open bookings, on the basis that when reached the appellant could not conclude any more sales on the provider's behalf until payment was made to reduce the amount outstanding below the limit and (c) requiring a cash deposit from the appellant based on anticipated volume of sales.

186. Under a cash deposit arrangement the provider would require the payment of a deposit for a specified season, typically summer as the busiest time. If the amount of outstanding payments owed to the provider reached the value of the deposit the appellant was not authorised to take further bookings for that provider until it reduced the balance to below the limit. At the end of the season the deposit was rolled over to be used in the same way the following season or was refunded to the appellant. Mr Shuker was aware of thirteen providers who required the appellant to pay deposits of this type during the periods in question.

187. The appellant was not exposed to financial risk as regards (a) and (b) given that it collected any amount due to the provider from the customer before it became payable to the provider. The appellant was exposed to some risk of financial loss under the deposit arrangement but it considered the risk was acceptable as the deposits tended to be paid to the more established providers where there was less risk of loss of the monies.

188. For the summer season of 2007 only the appellant trialled a guaranteed payment arrangement with Apartamentos HM Martinique ("**Martinique**") and Hotetur as regards the Bellevue property ("**Bellevue**"). The properties offered by these providers were very popular with customers and had been subject to "stop sales" at an early stage the following year. The appellant wanted to maximise its share of the volume of bookings being made through online agents. It made a series of staggered non-refundable payments, for example, under the agreement with Martinique, of euro 87,169.50 in December 2007 and January 2008 with further monthly instalments from May to October 2008 (inclusive). In return the appellant was guaranteed a certain level of room availability at each of the properties for that season and any bookings made were offset against the advance payments made.

189. The appellant expected that bookings would comfortably exceed the value of total bookings so that in practice it would not suffer a financial loss. It made a small profit of £47,379 as regards the Martinique property. It was not possible to identify from the records any profit/loss on the other property but Mr Shuker thought it was in the same region. There was no repeat of the arrangement as the cost of committing the amounts in advance was not justifiable on that level of profit. Also the management of the arrangements was more burdensome than anticipated for the volume of sales. In total sales under the Martinque arrangement in 2008 accounted for £300,844 against total accommodation sales of £60,523,223 in that year. As noted, it was clarified at the hearing that, as Mr Shuker said in his witness statement, the appellant accepted that it was liable to VAT under TOMS as regards the arrangements with these parties.

190. It was put to Mr Shuker that the cash security deposit arrangements meant that the appellant had to pay for rooms prior to bookings being made by travellers. He said that he did not think it was accurate to characterise that as paying for rooms. It was "more accurate to say that it was a security deposit for the credit risk in case the [provider] did not receive payment for travel bookings. The only time it paid for rooms in advance was the two guarantee contracts for the [Martinique] and the [Bellevue]. There was no actual inventory given to [the appellant] for most of those cash deposits". We do not consider that the appellant was paying for rooms under the cash security deposit arrangements as these arrangements were described as set out above.

191. He was asked how many rooms the appellant paid for in relation to the Martinique and the Bellevue. He said "I think we took an inventory commitment for one season in the summer. It might have been about 40 rooms in [each hotel]. I think the order of the amount was 700,000 to 800,000 euros or something like that over the course of that particular season." He agreed that the appellant was exposed to risk of financial loss as regards those two providers for the relevant season.

192. He was asked how much financial loss the cash security deposits exposed the appellant to. He said "I guess in practice it would be probably little to no financial loss because those security deposits would only be paid to [providers] where we knew……we would place a certain amount of bookings….. There was a potential for some financial loss, for the general security deposits where we would pay some money to be advanced to the [provider] to cover credit risk. In practice, there wouldn't really be a risk of significant - any financial loss really to [the appellant] because we knew that the bookings we would place would always be greater than what that security was". He described this as a tiny risk. He thought the deposits were less than 200,000 euros a year, maybe, on placed bookings of around 90 million euros.

Cancellation

193. It was noted that, as set out above, the cancellation charges were based on a sliding scale depending upon how close to departure the cancellation took place, so, for example, if the traveller cancelled more than 56 days before departure, the cancellation fee would be 20 per cent and if there was a cancellation very shortly before departure it might be as much as 100 per cent.

194. As regards cancellation procedures, Mr Shuker said in his witness statement that the appellant checked the cancellation fee required by the provider as recorded in the relevant agreement, cancelled the booking on its own system and notified the hotelier/travel agent. Where the accommodation was to be provided by a wholesaler, it logged onto the wholesaler's website to make the cancellation and it was notified of the fee payable to the wholesaler. The appellant paid the required fee to the provider on behalf of the customer out of the funds the appellant received from the customer under the website terms. To the extent the sums charged to customers exceeded the fee payable to the provider, the appellant retained the balance which it regarded as compensation for handling the cancellation. If the fee required by the provider was equal to that charged by the appellant, the appellant paid the full amount to the provider and the appellant bore any administrative cost. The appellant considered amending the website terms to permit an additional charge in such cases but given the amounts involved were small and that it would require it to commit additional resource to pursue the customer to make further payment, the appellant decided against it.

195. At the hearing Mr Shuker agreed that for most of the time the cancellation charges in the website terms differed from those in the standard provider terms. He said "we had a standard cancellation charge……we don't deny that we would have kept some of the money if it was on better terms than what the underlying [provider's] terms were". So he agreed that effectively the appellant set the cancellation charge "effectively, yes, in the [website terms]". He noted that whilst, as he said, if there was some money left over it would be retained "sometimes on behalf of the customer we would pay extra to the supplier or to the [provider]". He could not say how often that would occur or provide any accurate numbers.

Eighth Directive claims

196. In his witness statement Mr Shuker noted that in early 2007 the appellant became aware that a competitor had successfully submitted claims to the Spanish and Portuguese authorities for an amount equivalent to the local VAT chargeable by the provider on net room rates. The appellant was referred by its accountant to Grant Thornton UK LLP ("**GT**") who said they were advising and submitting similar claims for other online agents. The appellant explained its agency model to GT and was told that these claims were possible as a result of national differences of interpretation of VAT legislation between the relevant countries but Mr Shuker could not recall the precise technical basis being explained.

197. In around May 2007, the appellant engaged GT to submit claims to the Spanish and Portuguese authorities and in total six claims were submitted in 2007 to 2009. The appellant's understanding at the time was that the claims could be brought without any contradiction to its established status as a disclosed agent and it was assured by GT that the claims would not impact on that status.

198. The letter to the Spanish authorities included the following:

> (1) "AIA were within [TOMS] until October 2005 when they restructured their contractual arrangements to revert to an agency.
>
> (2) The terms and conditions on the company's website state they are a booking agent and that the customers' contract is directly with the hotel

and not with AIA…..AIA passes the monies received from the customers to the hotels and retains a commission. It is then the hotel's responsibility to provide the room to the customer and any complaints must be made by the customer directly to the hotel.

(3) As customers deal directly with the hotels after they have made the initial booking with AIA and the company does not package the hotel with flights, they cannot fall within Regiment Especial da las Agencias da Viajes [the Spanish equivalent of TOMS]. AIA merely act as an agent in bringing the parties together and receive a commission from the hotels."

199. Ultimately no repayment was received from the Spanish tax authorities. The claims submitted to the Portuguese authority were paid with some minor adjustments to quantum. However, on 2 February 2012, the Portuguese tax authorities wrote to the appellant requesting recovery of the amounts paid and Mr Shuker said that these amounts are now being repaid.

200. Mr Shuker said that the appellant's primary motivation for making these claims was to protect its position in the market as it would have been competitively disadvantaged in circumstances where other operators were supplementing their agency income with payments from overseas tax authorities. All claims were made on the express understanding and genuinely held belief that the appellant was acting as the agent of the providers and this understanding was communicated to both of the authorities. Mr Shuker has been advised in the last couple of years that the appellant was not entitled to the repayment and this was the case whether it was acting as agent or principal.

201. At the hearing it was put to Mr Shuker that the claims were made on the appellant declaring that it had received supplies and used these in its own business. Mr Shuker said the only part of this he took issue with was the reference to "received supplies". His understanding was that GT advised the appellant that there "may be a valid reason to reclaim the local VAT …Notwithstanding that, we did say that we were an agent, and I don't recollect the phrase or saying that we received supplies". He was asked if GT advised about that in writing. He said he did not remember but presumed they must have done. He did not recollect any minutes of meetings with GT. We accept Mr Shuker's evidence that the claims were made on the basis that the appellant was acting as agent of the providers.

202. He confirmed that the appellant made Eighth Directive claims to Spain in 2006 and 2007 for a total of over 4 million euros and to Portugal in 2007, 2008 and 2009 for a total of just over 231,000 euros and it in fact received a refund from Portugal of 179,996.90 euros.

Discussion

203. The issue is whether or not the appellant is liable for VAT under article 306(1), as enacted in the UK in TOMS and, as interpreted in *Secret Hotels2*, as regards supplies to travellers who booked accommodation with EU providers though its website. The appellant argued that it was not within TOMS as regards such supplies on the basis that under English law principles it was not acting in its own name but rather as a disclosed agent/intermediary ultimately between the provider and the customers (under article 306(1)[b]).

204. As set out in detail above, it was held in *Secret Hotels2* that, in so far as the provisions of article 306 depend upon the precise nature and character of the contractual relationship between two or more parties, that issue must be determined by reference to the proper law of the contract or contracts concerned as must the subsequent conduct of the parties in so far as that is said to affect that nature and character. Where parties have entered into a written agreement which, on the face of it, is intended to govern the relationship between them, then, in order "to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham".

205. Lord Neuberger considered that it was not just the contract between the on-line agent and the customer which was relevant. He said, at [56], that the correct approach, was to start with that contract as "it is the customer to whom the ultimate supply is made". However, one must also consider "the written contract between [the online agent] and the hotelier, as there would be a strong case for saying that, even if [the online agent] was the hotelier's agent as between it and the customer, [the online agent] should nonetheless be treated as the supplier as principal (in English law) or "in its own name" (in EU law) if, as between the hotelier and [the online agent], the hotel room was supplied to [the online agent]".

206. As Lord Neuberger continued to state in *Secret Hotels2*, having characterised, so far as possible, the nature of the relationship between the hotels, the appellant and the customer in the light of the applicable agreements, we must then consider whether "that characterisation can be said to represent the economic reality of the relationship in the light of any relevant facts" and finally, "the result of this characterisation so far as article 306 is concerned".

207. In this case, the contractual arrangements of relevance, therefore, are those between the providers and the appellant and the appellant and the customers/travellers. The written evidence presented of those arrangements are the sample contracts with the providers (and the related standard provider terms) and the website terms.

208. We note that it is not disputed that the appellant entered into binding contractual terms with travellers on the basis of the website terms, those terms were governed by English and those terms were, therefore, to be interpreted under English law. It was also not disputed that the effect of those terms, under English law, was that the appellant was acting as agent for the provider in its dealings with the travellers. The only question, therefore, was whether the arrangements between the appellant and the providers were consistent with that or demonstrate that supplies of accommodation were made by the providers to the appellant.

209. The appellant argued that the appellant entered into binding contractual arrangements with the providers on the standard provider terms and, construing those terms under English law, as it considered was the proper law for the reasons set out below, the arrangements were entirely consistent with the appellant acting as a disclosed agent for the providers.

210. HMRC had originally argued that a number of the contractual terms were inconsistent with the appellant acting as disclosed agent but they withdrew those

arguments under their revised statement of case. Instead they focussed on what they argued were evidential deficiencies as regards the arrangements between the appellant and the providers. They said that the appellant had not in fact established, to the required standard, that the appellant had entered into binding contracts with the providers or what the terms of any such contracts were or that the proper law of the contract was English law (as a number of contracts referred also to foreign law) or what the construction of the contract would be under applicable foreign law. They did not put forward any alternative view as to the applicable terms or any evidence on the effect of the relevant foreign law. They asserted that the appellant had simply failed to discharge the burden of proof on it; it had provided insufficient evidence for the tribunal to conclude that the relationship between those parties also indicated that the appellant was acting as a disclosed agent (or at least was not inconsistent with that).

211. The appellant responded that the logical outcome of HMRC's case was that there were no contracts with providers or it was not known on what basis they contracted with the appellant. On that basis there was simply no position to contradict the clear evidence that under the website terms, as regards its dealings with travellers, the appellant was acting as a disclosed agent.

Contractual terms

212. As regards the applicable provider terms, HMRC noted that a significant number of the written contracts are in fact either unsigned or are "rate sheets" that do not refer at all to terms and conditions or, if they do so refer, do not expressly identify them as being those of the appellant.

213. HMRC referred to *RTS Flexible Sys-tems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14, [2010] 1 WLR 753 as the leading case on the test of whether parties intended to create legal relations. They cited the following passage from the decision of Lord Clarke at [45] that:

> "Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations."

214. In their view, the appellant has not proved the existence of binding contracts, because there is no evidence that any offer (of the written terms) was accepted noting the following.

(1) An offeree is not bound by an offer if he does nothing in response to that offer (Chitty, 32nd Ed, 2-068).

(2) If a party has a right to sign a contract before being bound, it is open to it by clear and unequivocal words or conduct to waive the requirement and to conclude the contract without insisting on its signature: *Oceanografia SA de CV v. DSND Subsea AS (The Botnica)* [2006] EWHC 1360 (Comm); [2007] 1 All E.R. (Comm) 28 at [94], per Aikens J.

(3) Further, if the requirement for a signature is for the benefit of both parties to a contractual document, it must be clear that both parties have waived it: see *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA Civ 443, para 41. HMRC noted that the appellant relies on the earlier High Court decision in *Reveille International v Anotech International* [2015] EWHC 726 (Comm).

(4) Acceptance of an offer can be communicated by conduct which as a matter of objective analysis shows an intention to accept the offer: *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666; *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA Civ 443, para 40.

215. They said that, in this case, there is no evidence of the waiver of the requirement for a signature, that all of the terms were agreed, or of any subsequent clear and unequivocal words or conduct evidencing the acceptance of an offer. As such, the tribunal cannot find that the unsigned written contractual documents have contractual force. This argument was successfully made by HMRC in the recent *Hotels4u.com* case (see [265] and [413]). The position in this case is different from *Secret Hotels2,* where the parties were agreed that the contracts before the court were the applicable contracts.

216. HMRC continued that it can be assumed that the sample contracts in the bundle were the best versions that the appellant could find and yet the state of the contractual documentation is wholly unsatisfactory. The appellant's own evidence undermines their case that the written terms represented the entire and true nature of the contractual relationship:

(1) Mr Shuker said, for example, that the Hotelbeds contract was not signed by the parties because all of those terms and conditions were not agreed. It follows that the parties must have agreed between themselves some other terms, not the written terms, on which they were prepared to continue to do business with one another.

(2) It is not known, in almost all of the cases, what terms the two parties agreed on or what law governed the contract. Even if the tribunal were to accept that the provider standard terms governed the various contractual relationships it is not known which version of the standard terms was in use at any particular time.

(3) Many of the front sheets are unsigned and Mr Shuker said that he would have expected the contracts to be signed if they were agreed, and, as noted, as regards Hotelbeds, they were not signed.

(4) Many of them refer to "terms overleaf", which are not in fact overleaf, although Mr Shuker thought that some of them might be on the electronic system that the appellant has not produced.

(5) Many of them say they are one of three pages, but Mr Shuker's evidence referred to standard terms that were four pages long. Some of them say they are one of ten pages but we do not have the other nine pages.

217. HMRC noted that Ms Shaw suggested to Mr Shuker in re-examination that at some stage there had been a three-page set of standard provider terms in existence, even though Mr Shuker had not referred to this in his witness evidence. They noted that in the bundle there were four-page long standard terms that were being used in August 2008 and it is clear that three page contracts were still being used well into late 2008.

218. HMRC said that whilst acceptance of an offer can take place in a number of different ways including by conduct, Mr Shuker said he expected acceptance to be by way of signature. In any event, the tribunal would need to receive detailed witness evidence of clear and unequivocal conduct to prove that any offer was accepted by way of conduct. In fact there was simply silence from the provider in the face of an offer. For very important public policy reasons the courts have historically found and still find that silence cannot be equated to acceptance. The position on that is clearly set out by Chitty under the subheading "Silence": "An offeree who does nothing in response to an offer is not bound by its terms. This is so even though the offer provides that it can be accepted by silence."

219. The appellant acknowledged that there were a handful of instances where the contracts were not signed but in each case, as Mr Shuker said, the terms agreed between the parties were the provider standard terms, and it was pursuant to those written terms that the parties acted. In such circumstances, the absence of a signature is irrelevant. The contract does not need to be signed in order to be binding as was held by the High Court in *Reveille* where, at [23], the court said: "The signature of the parties to a written contract is not a precondition to the existence of contractual relations as a contract can equally be accepted by conduct ..."

220. The appellant noted that there was no dispute in that case that the parties had acted on the agreement. The wrinkle in the *Reveille* case was, as the court said at [20]: "The deal memorandum which recorded the terms agreed between the parties stated on its face that it was not to be binding on *Reveille* until signed by both parties." So the question in *Reveille* was whether that requirement had been waived by the parties and in particular by the claimant in its conduct. In this case there is no such difficulty. There is no such provision in any of these written contracts stating it was not binding until signed. The only question is whether the parties acted in accordance with those written contracts and, if they did, then the contract is accepted by conduct.

221. The appellant said that it is clear that the parties acted in accordance with the standard provider terms. Indeed, HMRC's own decision and the assessments made pre-suppose that supplies were made. It is not open to HMRC to say there were no binding contracts and no supplies of accommodation when HMRC have assessed the appellant to VAT on that basis. The quality of the evidence before the tribunal is sufficient to discharge the burden of proof, and the tribunal had no difficulty in accepting similar quality of evidence in the *Hotels4u.com* case (see [242]). This is not a situation where there was silence from the provider. There was plenty of activity in that, as in *Hotels4u.com*, the providers provided the accommodation and honoured bookings and sent invoices which were paid by the appellant. It is not possible for HMRC to dispute that there is a contract here because they have assessed the appellant on the basis that there is such a contract.

222. The appellant continued that the real argument is as to the terms of that contract (as to which see [244] of the *Hotels4u.com* judgment). HMRC's case is really that the tribunal cannot be sure beyond all reasonable doubt that the standard provider terms were agreed in all cases. But on the applicable standard of proof, on the balance of probabilities, the appellant has made a prima facie case that the supplies of accommodation were made on an agency basis. The actions of the parties cannot be explained on any other basis. Mr Shuker, gave clear evidence on what terms applied. HMRC have not suggested there are any other applicable terms. The burden then shifts to HMRC to show otherwise as set out in the *Perenco Holdings v HMRC* [2015] UKFTT 0065 (TC) case as cited in *Hotels4u.com*. HMRC has put forward no other basis. (We have considered the *Perenco* case as regards the foreign law issue below.)

223. The appellant asserted that the logical outcome of HMRC's case is that there were simply no terms and conditions governing the relationship between the appellant and the providers in the relevant period, as they do not point to any terms and conditions other than those they assert do not apply. The effect of the website terms between the appellant and the traveller is clearly to create an agency relationship. If, as HMRC assert, the contracts provided between it and the providers do not in fact apply, there is no other contract to govern that relationship. The question then arises on what basis it can be said that the relationship between the provider and the appellant contradicts the clear effect of the agency relationship evidenced by the contract between the appellant and the traveller.

224. Finally, the appellant noted that HMRC now take issue with the sample contracts provided. However, at no point during the disclosure exercise did HMRC say that they did not accept that the sample contracts were not representative. They did not ask the appellant to review their disclosure exercise and provide the written terms and conditions in addition to the rate sheets. In any event, Mr Shuker's evidence on this is clear as set out above.

Conclusion on the applicability of the provider standard terms

225. As regards the fact that some of the agreements were not signed, we consider that the appellant has established that, on the balance of probabilities, they were nevertheless concluded by conduct.

226. It is established that a contract does not need to be signed as set out in the *Reveille* case the appellant referred to. It was not a requirement in any of the provider standard terms or terms attached to the rate sheets that it had to be signed to be binding although there was a space for each party to sign. We note that Mr Shuker said he would expect the other party to sign the contract as acceptance of it. However, that there is such an expectation is not the same thing as a condition to that effect.

227. It is clear that the relevant parties acted in accordance with the contract as the appellant set out. This is not a case where it can be said there was simply silence. The appellant's dealings with travellers were all on the basis that it acted as agent. That is clear from the website terms and the invoice and accommodation voucher provided to travellers. The appellant marketed the accommodation to travellers via its website, it held itself out as an agent in doing so, the appellant was invoiced for and accounted to the provider for the net room rate, the appellant charged an additional

amount to travellers by way of its commission and the travellers checked into the accommodation they booked on presenting the accommodation voucher to the provider. Supplies of accommodation were made. The appellant invoiced the provider in respect of its commission, and at least for some of the period in question, it told the accommodation provider of the gross sales price.

228. We also accept that, on the balance of probabilities, taking into account both the documentary evidence and the evidence of Mr Shuker, the terms applicable to the contractual relationship between providers and the appellant were those set out in the standard provider terms or terms substantially similar to those. The terms and conditions which were attached to the sample rate sheets in the bundles, were substantially the same as those in the standard provider terms. They all refer to the appellant as the agent of the provider. As the appellant noted, Mr Shuker's evidence was that the agreements consisted of both the rate sheets and the standard provider terms. He said that so far as he knew there were no other terms and conditions which formed the basis of the agreements with the providers. He described the standard provider terms as the starting point for all negotiations with providers. He said that if the provider did not agree the terms and conditions, the appellant would not have done business with them.

229. We do not consider that we can draw any contrary conclusion from the fact that the latest standard provider terms contained three pages of terms whereas there are many references in the rate sheets in the bundles to terms comprising two pages and in some cases to other numbers of pages. The applicable conditions may have been differently formatted. We note that the two page version mostly related to earlier periods and the three page version to later periods from 2009 onwards. We note that Mr Shuker provided plausible explanations as to why there may have been different numbers of pages. We note HMRC's comments on the Hotelbeds contracts but, as set out above, we accept Mr Shuker's explanation that the first contract remained in place for the reasons he set out.

230. Overall we have concluded, therefore, that on the balance of probabilities, during the relevant period to which the disputed VAT relates, the appellant contracted with the providers, under binding contractual terms which, if not signed were accepted by conduct, on the standard provider terms or substantially similar terms. We also consider that, if these terms are interpreted in accordance with English law, it is clear that there is nothing in the arrangements which shows the appellant was acting as anything other than a disclosed agent only. The further question, however, is whether it is correct to interpret the contracts under English law.

Foreign law argument

231. HMRC pointed to the comments of Judge McKeever in *Hotels4u.com* on the approach Lord Neuberger set out in *Secret Hotels2* that contracts should be construed in accordance with the proper law. She noted, at [286], that although his comments were made in the context of article 306, "that statement must be correct generally; if a court or tribunal is considering the effect of a contract, the effect must be determined in accordance with the law which governs the contract." She went on to conclude, in effect, that, if the contract was governed by foreign law and no evidence was produced of that law, the tribunal was not able to construe the contract.

232. HMRC said that, accordingly, it would be wrong for the tribunal simply to apply English law to the contracts in this case which do not state they are governed by English law. Where the governing law is not English law (and it is stated in some cases to be foreign law and on other to be both English law and foreign law) it is not appropriate to apply English law principles to determine the relationship established by the contract. As no evidence of foreign law was presented, the appellant has not made out its case that the appellant acted as agent under the applicable foreign law.

233. The appellant said that the English rule in disputes brought before English courts and tribunals, is that foreign law must be pleaded and proved, failing which English law will be applied. Foreign law is a question of fact; it must be pleaded and proved by the party whose case depends upon it. In this case it is for HMRC to plead and prove the applicable foreign law as it is HMRC which seeks to rely on that as a factual matter. The appellant is content for the tribunal to construe the agreements in accordance with English law and indeed the tribunal must do so in the absence of any evidence from HMRC to show what the relevant foreign law is and specifically that it is different to English law.

234. The appellant referred to Chitty at paragraph 30-048 headed "Law neither pleaded nor proved" in commenting upon Article 3.1 of the Rome Convention which provided that a contract shall be governed by the law chosen by the parties:

> "The question arises to as whether a court faced with a contract containing a choice of law is required to apply that law if that law is neither pleaded nor proved by either party. The use of the word 'shall' in the first sentence of Article 3.1 appears to carry a mandatory connotation. However, the English rule that foreign law must be pleaded and proved, failing which English law will be applied, is a rule of evidence or procedure and as has been pointed out above, such matters are excluded from the scope of the Convention by Article 1.2(h). It is suggested that the practice of the common law remains unchanged and that the court is not bound to apply a foreign applicable law which is neither pleaded nor proved by the parties. However, this conclusion cannot be free from doubt in the light of the potential lack of harmony which it might introduce into the application of the Convention amongst the contracting states."

235. The appellant interpreted this as meaning that, whilst the matter is not free from doubt, the better view is that, if foreign law is not pleaded or not proved, then as a matter of English evidence and procedure rules, the court should simply apply English law. The appellant asserted that this is supported by Dicey & Morris, chapter 9 (as referred to in a footnote in Chitty) at 9-002, 9-003 and 9-004:

> "In any case to which foreign law applies the law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means. In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case. The principle that in an English court foreign law is a matter of fact has long been well established: it must be pleaded and it must be proved……..It also said to follow that if the parties elect not to prove the content of foreign law, a case will be decided by the application of English domestic law as though the case were a wholly domestic one

and this is generally true. But in recent years there have been increasing signs that this cannot invariably follow, and in cases where it would be wholly artificial to apply rules of English law to an issue governed by foreign law, a court may simply regard a party who has pleaded but who has failed to prove foreign law with sufficient specificity as will allow an English court simply to apply it, as having failed to establish his case without regard to the corresponding principle of domestic law [and there was a footnote reference to the Shaker case referred to below]……..Foreign law must be pleaded. The general rule is that if a party wishes to rely on a foreign law he must plead it in the same way as any other fact. Unless this is done, the court will in principle decide a case containing foreign elements as though it were a purely domestic English case…..English courts take judicial notice of the law of England and of notorious fact but not of foreign law. Consequently foreign law must be proved in each case….."

236. The appellant also referred to the following passage in Dicey & Morris at 9-011:

> "The treatment of foreign law as a question of fact to be pleaded and proved by either or both of the parties means that the question of the applicability of foreign law in a case involving the conflict of laws may ultimately depend in England on the rules of procedure and evidence, since it is to that legal category that the question belongs once this approach is accepted. The consequences may be illustrated by an example. According to [the Rome Convention], "a contract shall be governed by the law chosen by the parties". A contract which becomes the subject of English litigation may contain an express choice of foreign law. Although the language of [the Rome Convention] may suggest that the court is bound to apply the foreign law chosen, the rules of the regulation are expressed, subject to a limited exception, not to apply to matters of evidence and procedure: and it is apparently the case that whether a particular rule belongs to this category is a matter for the law of the forum. If neither party relies on the chosen foreign law, the case will be decided exclusively by reference to English law since the procedural and evidential nature of the English rule concerning pleading and proof of foreign law is untouched by the Regulation….."

237. The appellant argued that it is clear from the above passages that, unless a case can be shown to fall into the category of exceptional cases in which it would be wholly artificial to apply English law, in fact English law must be applied where there is no evidence regarding foreign law.

238. The appellant said that the tribunal in *Hotels4u.com* misinterpreted the dicta of Lord Neuberger in *Secret Hotels2* in the comments made at [286]. Lord Neuberger was not saying in the passage referred to that, if the contract states that it is governed by foreign law and neither party pleads or proves foreign law, the tribunal is unable to construe the contract. He was simply saying that the construction of a contract depends upon the applicable law. In a case where the contract is said to be governed by foreign law and neither party pleads or proves that foreign law, the applicable or proper law is English law because that is the rule of evidence and procedure. He

obviously did not intend to leave the construction of contracts in a state of limbo such that, in the absence of evidence, it cannot be construed.

239. The appellant further submitted that, even if there was a burden of proof on the appellant to show that foreign law is the same as English law, it does not advance HMRC's case. As is common ground, the website terms unequivocally demonstrate that the appellant acted as an agent in relation to the supply of accommodation to travellers. The question in relation to the contracts with accommodation providers is whether they contradict that position specifically by indicating that the accommodation was supplied to the appellant (as Lord Neuberger said at [56], as set out above). If, in the absence of evidence on foreign law, it is impossible to conclude what the contract means (as was in effect was the outcome in *Hotels4u.com*), the result is that there is simply no contradictory evidence.

240. HMRC responded that it is not correct that HMRC has to plead or prove that a foreign law is applicable to the contracts. In summary:

(1) Where the contract states it is to be governed by foreign law that law must apply as the parties have elected for the contract to be governed by that law. As set out in Chitty, the opening sentence of Article 3.1 of the Rome Convention provides that a contract "shall be governed by the law chosen by the parties."

(2) As regards the contracts which state they are governed by both English law and foreign law, there cannot be a position whereby a contract is governed by two different laws interchangeably. The whole system set up by the Rome Convention is intended to provide legal certainty, and it is intended so that everybody, whether in the UK or in another member state, understands which law will govern the contract. So it must be the case that the parties agreed between themselves that part of the contract was governed by the law of one country and part of the contract was governed by the law of another country. In such circumstances the appellant should have produced evidence as to which parts of those agreements were governed by English law and it has not done so. The appellant has failed to make out its case in this respect.

(3) In relation to all of those contracts which the appellant has not proved are governed by English law it is entirely inappropriate to apply English law principles. It is acknowledged in Chitty at 30-48, on page 2276, that to apply the rule of convenience relied on by the appellant would undermine the Rome Convention. Chitty says: "This conclusion cannot be free from doubt in the light of the potential lack of harmony which it might introduce into the application of the Rome Convention amongst the contracting states."

241. The parties had different views on the effect of the decision in *Shaker v Al-Bedrawi and others; Shaker v Masry and another; Shaker v Steggles Palmer (a firm) and others* [2002] EWCA Civ 1452, the case which was referred to in the passages from Dicey and Morris set out above. HMRC said that in fact it is clear from this that the starting point is that English law does not have to be applied because a party has either chosen not to prove or failed to prove the law which is

otherwise applicable (citing the words in italics set out in the passage from that case in [213] below).

242. The issue in *Shaker* was whether a provision of the Companies Act 1985, which only applies to companies registered under the Companies Act, could nonetheless be applied to a US incorporated company. The question arose in the context of whether a distribution which had been made by the US company was an unlawful distribution. The court at first instance decided, by reference to the relevant provisions of the Companies Act, that the distribution was unlawful because of the English statutory requirement that the company must have requisite accounts to show that the distribution is made out of distributable reserves. On appeal the Court of Appeal considered the propriety of that application and said at [66] and [67]:

> "Furthermore, in the present situation, the 1985 Act cannot be applied literally to the Pennsylvanian company, since Part VIII is only applicable to companies registered under the Companies Acts, and the statutory requirement to produce "relevant accounts" in a particular form…….. cannot apply to it……
>
> *The starting point must be that not every English statute is to be applied to a transaction because a party has either chosen not to prove or failed to prove the law which is otherwise applicable.* On the face of it, Part VIII is inapplicable to a company not registered under the Companies Act. Thus, the judge was correct to seek to satisfy himself that Part VIII did not represent some merely domestic rule of English law. He did so by asking whether the requirements of Part VIII with which he was concerned represented a generally applicable rule of company law.
>
> As we have said, Mr Lyndon-Stanford has made his submission on the basis that this requirement has to be met, and we are content also to accept that as the test in the circumstances of this case. However, if a rule of English statute law has to be adapted in the way explained above before it can apply, then although it is not necessary to express a final view on this point on this appeal, it may well be that that factor alone is a sufficient indication that the case falls within the class of case where English statute law creates some special institution and thus cannot be applied simply because a party has failed to prove the relevant law." (emphasis added)

243. HMRC said that this demonstrates that this rule of evidence or convenience, if it applies, is not an absolute one and should not be applied inflexibly. Moreover in *Shaker,* at [64], the court noted that there are other exceptions from the general rule apart from those which Dicey & Morris cite. In HMRC's view that means that Dicey & Morris can hardly be a very reliable commentator on this particular principle. HMRC noted that the exceptions referred to in that passage include that a court or tribunal should not apply English law when it is asked to construe a document governed by foreign law.

244. The exceptions to which HMRC referred were set out by the Court of Appeal, at [64], as follows:

> "For instance, the court does not apply English law to a foreign transaction to which it would not otherwise be applicable simply

> because a party fails to prove the applicable foreign law in a situation where English law creates some special institution……..
>
> Nor does the principle apply in prosecutions generally in respect of acts committed abroad where the acts in question may be lawful under the law of the place of the performance. Nor need it be applied in summary judgment…..In certain circumstances the court does not apply the principle where it is asked to construe a document governed by foreign law……These authorities show that the principle is not applied inflexibly….
>
> We further note that in *Carl Zeiss Stiftung v Rayner & Keeler Ltd*... Lord Wilberforce described the principle as one "never more than a fragile support" in the context of an issue as to the effect of a foreign judgment where its effect under foreign law was not proved."

245. The appellant responded that this principle of evidence and pleading is not an immutable rule but there must be a compelling reason, as there was in the *Shaker* case, as to why it should not apply. In the present case there is no such reason. And, furthermore, there is every reason to apply English law in this case because the contracts themselves state they are subject to English law. There is even more justification for applying English law here in the absence of any evidence as to foreign law. That is not contrary to the Rome Convention. The Rome Convention excludes matters of evidence and procedure (in Article 1(e)).

246. The appellant said that the Court of Appeal was saying that if the concern is with an element of domestic law which is unique to domestic law such that it creates some "special institution", then it is not appropriate to apply English law in the absence of evidence as to foreign law. Here the concern is the interpretation of a contract, specifically a contract which states on its face that the appellant is an agent and the provider is a principal. The issue is whether that contract establishes a relationship of agency or principal, according to the common law of agency and the common law of contractual interpretation. There is no reason to suppose that the English rules create some special institution that it is simply unnatural to apply it.

Conclusion on foreign law issue

247. From *Secret Hotels2* it is clear that we must construe the relevant contracts in this case in accordance with the proper law. However, we do not consider that decision tells us anything more on that aspect than just that. It was not disputed in that case that the proper law of the contract was English law. Lord Neuberger was not concerned, therefore, with any issue as to how the proper law is to be determined, which party must demonstrate the proper law or how the matter is to be dealt with where the proper law is foreign law. He was simply saying that the proper law, whatever that may be, is the applicable law under which the contracts must be construed.

248. In this case, the majority of the sample contracts with providers in the bundles state that they are governed by English law. It is not disputed that in those cases English law is the proper law of the contract, as the law clearly chosen by the parties (in accordance with the Treaty of Rome). The issue is that five of the sample contracts are stated to be governed by both English law and foreign law. We note that HMRC also pointed to two sample contracts which referred only to foreign law law

but one of those was a guarantee contract, which is not within the scope of the dispute and one was the second draft contract with Hotelbeds which was never put in place. The initial Hotelbeds contract, which we accept, remained in place at the relevant time, stated it was governed by English law.

249. We note that the standard provider terms stated that English law applied, in version one, were silent on governing law in version two and stated that both English and foreign law applied in version three. As the documents in the bundles are a sample only and we have accepted that the contracts with providers were concluded on the standard provider terms, it is possible that there were other applicable contracts which referred to foreign law.

250. Where the laws of two countries are stated to apply, we do not know what the intention was behind referring to two countries. Mr Shuker noted that it could be the case that the parties could not agree on a single country because they each thought they would want to rely on the laws of the country in which they were carrying on business, in any contractual dispute with the other party. HMRC suggested that it must be the case that the parties intended the two country's laws to apply to different parts of the contract.

251. The fact is that in those cases where both English law and foreign law is referenced there is no clear choice single choice by the parties. We note that in the Treaty of Rome there are provisions for allocating the laws of one country as the applicable law where there is no clear choice. The parties did not make any submissions on the applicability of those provisions. HMRC submitted that the appellant has failed to show which parts were intended to be governed by English law and which by foreign law. The appellant submitted that the clauses may simply be invalid.

252. In any event, our view is that it is appropriate to apply the rule of evidence set out in the authorities and adopted in the courts, namely, that if neither party pleads and proves what the potentially applicable foreign law is, the court or tribunal can apply English law. This is an established principle, although the authorities refer to it as a flexible rather than an inviable rule which, as stated in Dicey and Morris, has been held not be applicable in cases where it would be "wholly artificial" to apply rules of English law to an issue governed by foreign law.

253. We do not consider that the *Shaker* case affects our ability to apply English law in this case. The Court of Appeal was not saying that the general position is that this rule of evidence and procedure should not be applied. They were saying, as the appellant noted, that it cannot be assumed that it applies in all cases. It may not apply in some cases such as, in particular, where, in line with the guidance in Dicey & Morris, to apply English law would be artificial in the sense that it creates a special institution (or in the other circumstances they identify). In other words it does not necessarily apply where there is a good reason for that to be the case. We do not consider that it would be artificial to apply English law in this case for the reasons set out by the appellant in its submissions (nor are any of the other exceptions in point).

254. We note that in effect that means that English law applies by default. The appellant said that it was content to rely on English and, therefore, did not need to plead and prove foreign law. The appellant considered that it was for HMRC to plead

and prove foreign law given they were the party who wished to rely on it as a factual matter. HMRC said that, on the contrary, under the normal burden of proof rules it was for the appellant to establish the foreign law position.

255. We note that the authorities indicate that we may adopt the position that English law applies rather than simply deciding that the relevant party has not made out its case due to a failure to establish what the relevant foreign law is. However, in any event, we consider that the appellant has established its cases sufficiently, that the evidential burden on this point passed to HMRC.

256. We were not referred to any authority on the meaning of burden of proof other than the *Perenco* case, but the general meaning is well-established. According to Phipson on Evidence (18th edition), at 6-01, that expression is used to describe the duty which lies on a party either to establish a case or to establish the facts upon a particular issue. At 25 6-03, Phipson says that one effect of the burden of proof is that, if the party bearing the burden has not pleaded a positive case, the other party need not plead and prove that alternative states of affairs do not exist. The case of *Seashore Marine SA v Phoenix Assurance Plc (The Vergina) (No.1) [2001] 2 Lloyd's Rep* 719 is cited as authority for that proposition.

257. In tax cases, once HMRC has raised an assessment, it is accepted that the legal burden is generally on the taxpayer to prove, on the balance of probabilities, that the assessment is not correct. In this case, therefore, the legal burden is on the appellant to demonstrate that it is not within article 306(a) according to the contractual effect of the arrangements. As the effect of the contractual arrangements has to be assessed in accordance with the proper law of the contract, it would seem to follow that, for the appellant to discharge this burden in these circumstances, it must demonstrate what the correct construction is under that proper law, whether it is English law or proper law.

258. However, it is also established that if a person has established a prima facie legal case, the evidential burden may shift to the other party. That this principle applies in tax cases, as in other matters, was recognised by the tribunal in the *Perenco* case to which the appellant referred.

259. In *Perenco*, the tribunal was referred to the decision in *Wood v Holden* [2006] STC 443 (see [100]). The issue in that case was whether the taxpayers were liable to capital gains tax on the sale of shares in a company which depended on whether the holding company which sold the shares was resident in the UK, as HMRC argued, or in the Netherlands, as the appellant argued. The High Court and the Court of Appeal held that the Special Commissioners erred in law in holding that the taxpayers had not established that company was not resident in the UK for tax purposes. One of the reasons was that they had incorrectly applied the burden of proof rules. It was not disputed that it was for the taxpayers to show that the amendments made to their self-assessments imposing capital gains tax had been wrongly made. The Commissioners had failed to recognise, however, that the taxpayers had produced sufficient evidence to make a prima facie case that the company was resident in the Netherlands such that the evidential burden had shifted to HMRC. As HMRC provided no positive evidence to demonstrate that residence was instead in the UK, they failed to discharge that evidential burden.

260. As set out by the Court of Appeal (at [31] and [32]) Park J said in the High Court at [35], "there plainly comes a point where the taxpayer has produced evidence which, as matters stand then, appears to show that the assessment is wrong. At that point the evidential basis must pass to the Revenue." The Court of Appeal, at [33], also referred to *Rhesa Shipping Co SA v Edmunds, The Popi M* [1985] 1 WLR 948 at 955-956 noting that:

> "Lord Brandon of Oakbrook pointed out that a judge is not bound, always, to make a finding one way or the other with regard to facts averred by the parties: 'He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden'. But that is not a course which should be adopted unless 'owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take'."

261. They continued to note that it is a feature of tax litigation that, in the first instance, the facts are likely to be known only to the taxpayer and his advisers. The Court of Appeal said they had "no doubt that there are cases in which the evidence before the Special Commissioners is so unsatisfactory that the only just course for them to take is to hold that the taxpayer has not discharged the burden of proof" but equally they had no doubt that the judge was correct, for the reasons which he gave, to hold that the present case was not one of those cases: "There was no reason to think that the material facts had not been disclosed; and the commissioners did not hold that it was for that reason that they were unable to decide the question of residence".

262. The tribunal in *Perenco*, therefore, accepted at [101], that:

> "where the legal burden of proof lies upon the taxpayer, if the taxpayer adduces sufficient evidence to establish a prima facie case in favour of the validity of its claim the evidential burden then passes to HMRC so that, if HMRC produces no evidence of its own, the taxpayer must win."

263. Clearly what will suffice to establish a prima facie case will depend on the particular facts of each case. Here, we consider that the appellant has made out its case sufficiently such that, if HMRC wishes to rely on foreign law as showing a contrary result, it is incumbent on HMRC to demonstrate why that would be the case under the relevant foreign law.

264. We form that view on the basis that, as set out above, there is clear evidence that the appellant was acting as disclosed agent under the arrangements with travellers. As Lord Neuberger said in *Secret Hotels2*, that is the primary contractual relationship of relevance but the position under the contracts with providers must also be considered. The majority of the sample agreements with providers in the bundles are governed by English law. We accept that, whilst this is a sample only, the majority of contracts with providers in the relevant period were also likely to be governed by English law. It is clear that on English law principles there is nothing inconsistent in the arrangements which shows the appellant was acting as anything other than a disclosed agent only.

265. In such circumstances, in our view there must be some onus on HMRC to show why, as regards contracts which refer to both foreign and English law, foreign law is

to be taken as the applicable law under the Treaty of Rome (given both English law and foreign law is referenced) and why, if it is applicable, that would produce a different result (albeit that it is possible that the burden may shift again). It is not sufficient simply to assert that the appellant must fail when (a) they have not established that foreign law is otherwise the law of choice and (b) it is a matter of pure speculation whether construing the relevant agreements under the relevant law would make any difference to the analysis or not. In any event, as the appellant noted, the outcome of HMRC's stance is that, in the absence of evidence on foreign law, it is impossible to conclude what the contracts mean such that there is simply no evidence to contradict the clear position under the website terms that the appellant was acting as a disclosed agent.

266. For all the above reasons, therefore, we consider that it is appropriate to construe all of the contracts under English law principles. On that basis, as set out above, it is clear that the contractual arrangements with the providers are entirely consistent with the appellant acting as a disclosed agent. In our view that characterisation can be said to represent the economic reality of the relationship in the light of the facts as set out above.

Conclusion

267. For all of the reasons set out above, we have concluded that the appellant was not within the special VAT regime in TOMS as regards the transactions in issue on the basis that the appellant was acting as a disclosed agent under English law principles and solely as an intermediary but, that conclusion is subject to the determination at a later hearing of whether there is to be a CJEU referral as set out above and, if so, the outcome of that referral.

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

HARRIET MORGAN
TRIBUNAL JUDGE

RELEASE DATE: 27 OCTOBER 2017