[2017] UKFTT 463 (TC)

TC05926

Appeal number: TC/2010/07637
TC/2012/04404

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

FIRST-TIER TRIBUNAL
TAX CHAMBER

LOWCOST HOLIDAYS LTD T/A LOWCOST BEDS **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S **Respondents**

LOWCOST HOLIDAYS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT
SONIA GABLE

Sitting in public at The Royal Courts of Justice, London on 25 and 26 May 2017

Nicola Shaw QC, instructed by Pinsent Masons, for the Appellant

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

DECISION

1. This is an appeal by Lowcostholidays Ltd ("**LCH**") t/a Lowcostbeds.com and Lowcostbeds.com Ltd ("**LCB**"), collectively referred to below as Lowcost, against a decision by HMRC of 6 August 2010, upheld on review on 6 September 2010, and assessments of 27 October 2010, upheld on review on 4 January 2011. The assessments in question cover the period from 1 November 2005 to 31 January 2011.

2. Lowcost was a travel agent offering holiday accommodation in other EU member states, and other countries, for the most part to customers based in the UK. The issue between the parties is whether Lowcost provided holiday accommodation to customers as a principal, dealing in its own name, under article 306 of Directive 2006/112, the Principal VAT Directive ("**PVD**"), and therefore came within the Tour Operators Margin Scheme, or whether it acted solely as an intermediary or agent.

Scope of the hearing

3. There are currently 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, for the other appellants to be permitted to make representations on that issue. This application was dealt with by Judge Morgan at a hearing on 29 March 2016.

4. At that hearing Judge Morgan decided that, under rule 5(3)(b) of the Tribunal Procedure (First-Tier Tribunal (Tax Chamber) Rules 2009, 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.

5. Accordingly the initial hearing before the tribunal in this appeal and each of the related appeals is confined to consideration of whether, under the principles set out in *Secret Hotels2*, the appellant was acting as a principal or as a disclosed or undisclosed agent under English law principles.

Background

6. LCH was previously known as Lowcosttravelgroup Ltd and changed its name to Lowcostholidays on 19 January 2009. It traded until 28 February 2009 when its business was transferred to LCB. Until 28 February 2009 LCH had a direct

relationship with the accommodation providers and had a relationship with customers either directly, through its own website, or indirectly, via third party travel agents. After 1 March 2009 LCB maintained the direct relationship with the accommodation providers and dealt with customers either via third party travel agents or via LCH, which continued to hold the direct relationship with customers. LCB did not have a direct relationship with customers at any time.

7. It is common ground that after 1 March 2009 LCH only acted as an agent.

Legal Framework

8. Article 45 of the PVD provides that "the place of supply of services connected with immoveable property … shall be the place where the property is located". If therefore Lowcost was only providing services in this connection then, since the immoveable property in question was located in EU member states outside the UK, those services would fall outside the scope of UK VAT.

9. 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.

10. 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."

11. 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 the TOMS provisions which were 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."

12. 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.

13. 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 before setting out the facts and arguments in this case. In summary the Supreme Court held that an online travel agent, who operated a website through which hotel accommodation was reserved, was not a travel 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.

Case law – Secret Hotels2

14. 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.

15. 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".

16. 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.

17. 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."

18. 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]).

19. 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."

20. 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".

21. 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".

22. 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 interests 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.

23. 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".

24. 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."

25. 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".

26. 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]).

27. 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".

28. 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".

29. He went on to note (at [45]) the factors which had persuaded the First-tier Tribunal and the Court of Appeal to decide that Med was acting as principal. We 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.

30. 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".

31. 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]."

32. 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."

33. 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."

34. 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".

Evidence and Facts

35. We received a witness statement and heard oral evidence from Salman Rasool, who had been the Group Financial Controller and, from June 2008, the Group Finance Director of the Lowcost Group. We found Mr Rasool to be a credible witness.

36. We were also provided with an extensive bundle of documents containing copies of what we were informed was a random selection of the various contract documents.

37. We find the following as matters of fact:

(1) Mr Rasool was very clear that from the outset Lowcost's founder and CEO, Paul Evans, had been determined that the group would not take any risk as a principal in any commercial arrangements. He said that Mr Evans had 25 years' experience within the industry and this experience had persuaded him that travel agents should not take any risk as a principal. This had been the governing principle in all Lowcost's activities.

(2) Initially Lowcost sourced accommodation either from accommodation wholesalers, who acted for a number of hotels and apartments, or from intermediary agents who acted on behalf of smaller networks of hotels. Over time however Lowcost expanded its operating model to include direct contracting with the owners of hotels and apartments.

(3) Lowcost also engaged other UK travel agents to act as sub-agents in marketing and taking bookings. This had initially been on a commission basis but changed to a commission sharing basis with most sub-agents from April 2009.

(4) Lowcost had accounted for VAT under the TOMS provisions for some of their activities but this was only in respect of their supplies of "packages". This was where Lowcost was providing customers with both accommodation and flights for a single price. Mr Rasool explained that with such packages Lowcost had classified them as "Flight plus" for CAA purposes, which meant that the traveller could be protected under the ATOL bonding arrangements, and this had therefore brought them within the TOMS legislation.

(5) Mr Rasool confirmed that when Lowcost had provided these packages the accommodation had been procured on exactly the same agency terms as for its main business.

Contract with Customers

(6) In their dealings with customers both LCH and LCB dealt via a website. We were shown copies of the Terms and Conditions which a customer would have to agree to, on the website, before he could make a booking on the site. These Terms and Conditions state in a number of places that Lowcost was acting as an agent for the hotels, villas and apartments featured on the website.

(7) The Terms and Conditions also contain a number of other provisions which were referred to by both parties as follows:

(a) The initial payment received from the customer will be held by Lowcost and passed on to the accommodation provider in due course.

(b) Lowcost guaranteed that once the customer has booked the price will not change unless the customer made an amendment to the booking, although Lowcost did reserve the right to correct errors in both advertised and confirmed prices.

(c) If the customer found cheaper, like for like accommodation offered by any other company within 24 hours of booking then Lowcost would match that price ("Best Price Guarantee").

(d) Cancellation charges would be made according to a sliding scale, depending on the timing of the cancellation, ranging from 25% to 100% of the accommodation cost. These charges were increased to 100% in the case of bookings during periods of trade fairs, exhibitions or other special events.

(e) No refunds would be given for early termination of holidays or "no shows".

(f) Any changes made by the customer would be subject to a £25 administration fee.

(g) If any significant changes were initiated by Lowcost or the accommodation provider then the customer had the option of accepting other accommodation through Lowcost or being given a full refund. Compensation could also be paid but this again was on a sliding scale depending on the timing of the change, and was a maximum of £40.

(h) Lowcost could charge a booking fee in certain circumstances.

(i) In the case of complaints Lowcost said that it would act as an intermediary with the accommodation provider, but it was clear that the ultimate responsibility would rest with the provider.

Contracts with accommodation providers

(8) Lowcost entered into contracts with accommodation providers which could be broadly categorised as:

(a) Contracts with hotels or local intermediaries, and

(b) Contracts with wholesalers, some of whom acted as agents for the underlying accommodation providers and some of whom acted as principals.

Direct contracts with hotels and local intermediaries

(9) In his evidence Mr Rasool stated that when he had joined Lowcost the only evidence of any contract with the accommodation providers was a "front sheet" containing the main terms of the contract such as dates and rates and sometimes cancellation charges. Mr Rasool said that this had changed with effect from 2006 and after that date the contracts had been agreed with attached standard Terms and Conditions, setting out the formal relationship between the parties. It was clear from some of the front sheets we examined that contracts without attached Terms and Conditions had been commonplace for periods up to October 2007, but Mr Rasool explained that these were probably contracts negotiated in late 2006.

(10) In the case of the direct contracts with hotels and local intermediaries Mr Rasool explained that these all adhered to Lowcost's standard Terms and Conditions, whereas those with larger wholesalers would have Terms and Conditions which were specific to each contract. This simply reflected the greater negotiating power which Lowcost had as regards the smaller suppliers.

(11) The front sheets which we examined showed room rates which, Mr Rasool explained, were the net rates for the rooms for the stated periods. Lowcost was then free to charge the customer whatever price it wished and the difference would be its profit or commission. The early front sheets, which did not have attached Terms and Conditions, were totally non-committal as to

whether the relationship was one of agent or principal. The signature blocks were simply labelled "For and on behalf of Lowcosttravelgroup.com" and "For and on behalf of property".

(12) The new format front sheets, which applied from 2007 onwards had attached Terms and Conditions. These included some important terms:

(a) The Terms and Conditions consistently referred to principal and agent.

(b) Lowcost was entitled to a commission from the principal and that commission was to be any such sum as it could charge to the clients of the principal for the rooms which was over and above the prices set out in the agreement.

(c) There was no commitment on Lowcost's behalf to utilise the accommodation in question, ie Lowcost did not take on any inventory risk.

(d) The provider was allowed to sell any accommodation which was not utilised by Lowcost.

(e) The Terms and Conditions also included provision for cancellation and compensation payments but we noted that these payments were inconsistent as regards quantum with those contained in the contracts with the travellers.

(f) Various conditions were imposed on the hotelier such as a requirement to have full insurance cover, a requirement to clean the property regularly and a statement that the property was fully compliant with local regulations.

(g) If there were problems with the hotelier fulfilling his obligations then the hotelier would provide alternative accommodation, and would be liable for any additional cost involved in providing such alternative accommodation.

(13) Noticeably however, on the new format front sheets, the signature blocks referred to "buyer" and "seller", and not agent and principal. Very few of these contracts were however signed.

Contracts with wholesalers

(14) There were six contracts with wholesalers, of which we were given copies of five. As explained above, these contracts contained Terms and Conditions which were different from the standard Terms and Conditions and were specific to each contract. A further complication arose in that one of the contracts, with Edrichton Holidays, was expressed to be governed by Maltese and English law, and another, with Viajes Urbis.com, was to be governed by Spanish Law. Neither party presented any evidence as to any differences between Maltese law and English law and Spanish law and English law. We therefore chose to interpret these contracts in accordance with English law, as discussed in more detail below.

(15) Although the Edrichton contract did not contain as many obligations on the wholesaler as the standard terms, they were not significantly different. The contract did contain the following:

(a) It clearly refers to agent and principal throughout.

(b) Lowcost does not commit to utilise all the accommodation and will only pay for that which is utilised.

(c) Other obligations such as cleaning, insurance and the provision of alternative accommodation rest with Edrichton.

(d) The signatures are of Lowcost "as agent" and Edrichton "as the principal".

(16) The Viajes Urbis contract was again different from the standard Terms and Conditions, and did not impose as many obligations on Viajes Urbis. However it was headed very clearly "Agency Agreement" and contained a further reference to Lowcost being an agent. The commission arrangements are also different in that it states that bookings will be made according to the Viajes website prices and Lowcost will be entitled to an over-ride discount of 0.5% of invoicing up to 500,000 Euros and 1% for invoicing above that figure.

(17) A third contract, with Viajes Olympia, presented more of a problem in that there was no statement in the contract as to whether Lowcost was acting as an agent or as a principal. In many ways it was similar to the early direct booking front sheets, in that it contained considerable detail as to rooms and rates but no other conditions and no signatures. There was therefore nothing in this contract which was inconsistent with it being either a principal/agent contract or a principal/principal contract.

Contracts with UK sub-agents

(18) As stated above, Lowcost also dealt through other third party UK-based agents, including Hotels4U and Youtravel.com, and we were shown copies of these contracts. These were clearly stated to be agency agreements. The only point of interest which emerged was that under earlier arrangements the sub-agent had been entitled to charge whatever price it could to the traveller and thus obtained its commission from making a "profit" on this increased selling price. In these cases Lowcost would not be in a position to know the final selling price to the customer. This was later changed to a commission sharing agreement but we do not think that anything significant turns on this.

8th Directive claims

(19) In June 2007 Lowcost made claims to the Spanish, Portuguese and Greek tax authorities under the 8th Directive for the recovery of VAT charged by their Spanish accommodation providers, which HMRC argued meant that they were making claims as a principal for VAT which they had been charged on accommodation sold to them.

(20) Mr Rasool explained that Lowcost had made these claims as agent on the basis of advice received from Grant Thornton that they were entitled so to do.

We were shown a copy of the claim form which contains a statement to the effect that the goods or services in question were used by Lowcost in its business and that the goods or services were supplied to them.

(21) Lowcost asked its various accommodation providers to send them the invoices for the hotel rooms and they forwarded some 30,000 invoices to the authorities.

(22) The claims were rejected, at least by the Spanish authorities, on the basis that Lowcost was effectively within the Spanish equivalent of the TOMS regime. However, in its letter of appeal to the Spanish tax authorities, Lowcost made it clear that their claims were made as agents and that they were not therefore within this regime.

(23) HMRC argued that by making these claims, Lowcost was effectively saying that it was acting as a principal as regards the accommodation provided to it. However Mr Rasool maintained that Lowcost had always been clear that they were making these claims as an agent and that they had been advised by Grant Thornton, incorrectly it would seem, that they were entitled to do so. We accept this as a true statement.

Other findings of fact

38. Miss Mitrophanous, on behalf of HMRC, asked us to make some specific findings of fact for the purposes of their request for a referral to the CJEU of the article 306 issue, and, to the extent that we have not done so elsewhere, we are happy to do so as below:

(1) Lowcost set its own conditions as regards when payments were due, this included any initial deposit and the final payment, which was due before the customer travelled, even though the hotelier was usually paid after the accommodation had been used.

(2) The deposit and final payment were paid into Lowcost's bank account and Lowcost retained the interest thereon. It would also retain the deposit if the booking was cancelled.

(3) Lowcost guaranteed that the price would not change after the booking and in some cases might effectively fund this itself. However, Mr Rasool was quite clear that if the difference arose as the result of an error then, as provided in the contract, this would be explained to the customer who would either accept the revised price or be given a full refund.

(4) Lowcost set its own cancellation charges and terms on which a cancellation fee would be charged. These charges were not mirrored in its contracts with the accommodation providers, and if there were differences Lowcost would retain or bear the difference.

(5) Lowcost set its own Administrative Charges if a booking was amended by the customer. These were not passed on to the accommodation provider.

(6) Lowcost provided its own star-rating of accommodation on its website.

(7) Lowcost provided its own Price Promise/Best Price Guarantee on its website, which it would effectively fund itself if necessary. However Mr Rasool stated that this was a marketing tool and had never involved any actual payment in practice.

(8) Lowcost was committed to, and made compensation payments in some circumstances, which effectively reduced its commission, although these were primarily when Lowcost had made an error, and when it would be proper for them to bear the responsibility and the cost.

(9) If the accommodation provider was unwilling to resolve a complaint Lowcost would act as intermediary in attempting to settle any dispute. In practice it would on occasions settle the dispute with the customer and then attempt to recover any compensation from the accommodation provider. This was not always successful in practice but the amounts involved were small.

(10) Lowcost had the right to set its own commission by varying the eventual price charged to the customer, but in all cases it informed the accommodation provider of the final price charged.

(11) The accommodation providers did not issue invoices directly to the customers.

(12) Lowcost did not issue any invoices to the accommodation providers for its commissions, but similarly the accommodation providers did not issue any invoices to Lowcost in respect of the accommodation provided, other than when requested to do so to support Lowcost's claim under the 8th Directive.

Discussion

39. In SecretHotels2, at [31] Lord Neuberger 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, and nor is there is this case. As regards interpreting an agreement, Lord Neuberger 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]).

40. 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."

41. In addition, at [56], Lord Neuberger explained that in deciding whether article 306(1)[a] or [b] applied, 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."

Contracts with customers

42. If we apply this approach to this appeal we should therefore look first at the contract with the customer. This contract, as contained in the Terms and Conditions on the Lowcost website, is quite clear that the customer contracts with Lowcost as agent for the accommodation suppliers.

43. Although HMRC expressed concern at a number of aspects of the contracts with accommodation providers they did not question the basic structure of the customer contracts. They did however raise some issues as regards specific aspects of the customer contract which they argued gave the contract more of a flavour of a contract with a principal.

44. Specific reference was made to the fact that the deposits and final payments for the accommodation were paid into the bank account of Lowcost and that Lowcost retained the interest thereon, which HMRC considered was an indication of Lowcost acting as a principal rather than as an agent. This issue was also considered by the Supreme Court in *SecretHotels2* and in that case it was decided that the question of interest was a matter as between Lowcost and the customer and did not affect the fundamental nature of the contract with the customer.

45. In our view therefore, the contract between Lowcost and the customer, is one under which Lowcost is clearly acting as the agent of the accommodation provider.

Contracts with accommodation suppliers

46. We must then look at the various contracts between Lowcost and the accommodation providers. These are more mixed in nature and Miss Mitrophanous raised a number of specific issues:

(1) Most of the contracts are not signed

(2) On the face of the new format front sheets for the contracts with individual hoteliers and local intermediaries, the signature blocks referred to "buyer" and "seller", and not to agent and principal.

(3) Two of the wholesaler contracts are stated to be governed by foreign law, on which Lowcost had offered no evidence as to how they should be interpreted.

(4) The contract with Olympia was silent as to whether it was an agency or principal arrangement.

(5) In a number of areas the conduct of the parties was more akin to a principal to principal arrangement rather than an agency arrangement.

47. We will deal with these issues in order.

48. Most of the contracts with accommodation providers are not signed. However, it is well known that a contract does not even need to be in writing to constitute a valid contract, let alone signed.

49. On the question of the need for a signature however we were referred to *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA Civ 443. In this case it was held that a contract was not binding if the written offer preceding the contract required it to be signed for the contract to be effective. In this case however the evidence from Mr Rasool was that the contracts would have been sent to the accommodation with a request that they should be signed but there was no evidence that there was any provision in the contracts which stated that they would not be effective until they had been signed. Moreover, the parties clearly acted broadly in accordance with the contracts. In the circumstances therefore we find that the lack of a signature is not relevant and that the contracts were an accurate reflection of the relationship between the parties.

50. As regards the references to "buyer" and "seller" on the fact of the new format front sheets, Mr Rasool explained that this was a hangover from previous industry practice. In addition we found that these new format front sheets were always accompanied by Lowcost's standard terms and conditions. These standard terms and conditions were absolutely clear that the relationship was one of agency and we therefore accept Mr Rasool's explanation and find that the contracts were agency contracts in spite of the labels on the signature blocks on the front sheets.

51. The question of foreign law was considered in another of the associated hotel cases, *Hotels4U.com Ltd v HMRC* [2016] UKFTT 0718 (TC). In that case Judge McKeever concluded that since the matter of foreign law had not been pleaded in evidence then she could not make a decision as regards any contracts said to be governed by foreign law. We do not regard this as a satisfactory outcome.

52. We were referred to Chitty on Contracts at [30-046] and [30-048] on page 2275, which refers to the general rule that, in an English court, questions of foreign law must be proved or pleaded, failing which English law will be applied. This is however a rule of evidence and can only be applied where there is no artificiality or other clear reason why English law should not be applied.

53. We were also referred to Dicey on the Conflict of Laws at [9-002] on page 318. This again refers to the general rule that English law will prevail unless the foreign law is pleaded or proved as a matter of fact. There is an additional comment however that:

> "… 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 English domestic law."

54. In this case neither party chose to present evidence as to the true meaning of the contracts with Edrichton and Viajes Urbis. However, having considered the principles at issue in this case, we decided that there would be no unnecessary artificiality in applying English law to the words as written. The contracts in question use the words agency, agent and principal. Unless these words have a precisely opposite effect under Spanish or Maltese law, which we consider extremely unlikely, we therefore consider that we can interpret these words as meaning that the contracts in question are contracts creating an agency relationship.

55. The Olympia contract is slightly more troublesome because it contains no words or provisions which clearly indicate either an agency relationship or a principal to principal relationship. However, given that in every other aspect of its business Lowcost had been totally determined to avoid any principal to principal relationship, we conclude that the intention of the parties with the Olympia contract was to create an agency relationship.

56. We now move on to various aspects of the conduct of the parties which HMRC maintain were more indicative of a principal to principal relationship rather than one of agency:

(1) Lowcost set the price charged to the customer.

(2) The customer was informed that Lowcost was acting as an agent but was not generally informed as to the name of the principal.

(3) Lowcost set its own conditions as regards when payments were due from the customer. This included any initial deposit and the final payment, which was due and payable before the customer travelled, even though the hotelier was paid after the accommodation had been used.

(4) The deposit and final payment from the customer were paid into Lowcost's bank account and Lowcost retained the interest thereon.

(5) Lowcost guaranteed that the price would not change after the booking and in some cases might effectively fund this itself.

(6) Lowcost also offered a Best Price Guarantee, which was not a normal practice for someone acting solely as an agent.

(7) Lowcost set its own cancellation charges and terms on which a cancellation fee would be charged. These charges were not mirrored in its contracts with the accommodation providers and Lowcost might therefore make a profit or loss on such charges.

(8) Lowcost set its own administrative charges if a booking was amended by the customer. These were not passed on to the accommodation provider.

(9) Lowcost provided its own star-rating of accommodation on its website.

(10) Lowcost provided its own Price Promise/Best Price Guarantee on its website, which it would effectively fund itself if necessary.

(11) Lowcost was committed to, and made compensation payments in some circumstances, which effectively reduced its commission.

(12) If the accommodation provider was unwilling to resolve a complaint Lowcost would act as intermediary in attempting to settle any dispute. In practice it would frequently settle the dispute with the customer itself and then attempt to recover any compensation from the accommodation provider. This was not in accordance with the standard terms and conditions.

(13) Lowcost had the right to set its own commission by varying the eventual price charged to the customer, although in all cases it informed the accommodation provider of the final price charged, other than where a UK sub-agent was used before the commission sharing arrangements were introduced.

(14) The accommodation providers did not issue invoices directly to the customers.

(15) Lowcost did not issue any invoices to the accommodation providers for its commission.

(16) In the cases where UK sub-agents had been used other than under a commission sharing arrangement Lowcost would not know the final cost charged to the customer and it would therefore be impossible for Lowcost to pass this information on to the accommodation provider to enable the accommodation provider to account for VAT properly to its local tax authority.

(17) Lowcost made a claim for the refund of VAT under the 8th Directive and in doing so claimed that it had incurred the VAT on supplies made to it for the purposes of its business.

57. All these issues, with the exception of the claim under the 8th Directive, were addressed by the Supreme Court in *SecretHotels2*. Although some were found to have greater weight than others, the Supreme Court found that none of these issues affected the agency relationship if the underlying documentation made it clear that the relationships were ones of agency and not principal to principal.

58. As regards the claim under the 8th Directive we were informed that this claim was made, in accordance with professional advice, in the mistaken belief that the VAT could be reclaimed even though Lowcost was only acting as an agent. We find that the making of this claim does not therefore indicate any belief on the part of Lowcost that it was acting as anything other than an agent.

59. The heart of HMRC's case in this appeal was that although the various conduct factors listed above were rejected by the Supreme Court in *SecretHotels2*, in that case the underlying documents were held to be clear evidence that an agency arrangement was in place. In this case, Miss Mitrophanous argued, the underlying documents did not demonstrate the existence of an agency agreement for either the contracts with customers or the contracts with the accommodation providers. We disagree with Miss Mitrophanous on this point. In our view the underlying documents show clearly that Lowcost had an agency relationship with both its customers and the accommodation providers.

UK Wholesalers

60. Miss Mitrophanous also made an unexpected submission regarding the impact of Lowcost operating through UK wholesalers, such as Youtravel.com and Hotels4U.com. Miss Mitrophanous argued that where Lowcost transacted through UK based wholesalers then, even if it were acting as an agent, its services would still be subject to VAT because both parties were based in the UK and therefore, under article 44 of the PVD, the services would be deemed to be supplied in the UK, and therefore subject to UK VAT.

61. This argument had not been mentioned before by HMRC, either in their Statement of Case or in their skeleton argument. We were therefore somewhat surprised that it was brought up at this stage. However, in response, Ms Shaw submitted that since article 45 was a more precise provision than article 44 then that would override the more general provisions of article 44. Therefore, as long as the services in question were connected with immoveable property then they would be regarded as being supplied where the immoveable property was situated, which, in this case, was in EU member states outside the UK. In these circumstances the services would fall outside the scope of UK VAT.

62. We agree with Ms Shaw's submissions on this point.

Other Issues

63. Miss Mitrophanous also argued that since Lowcost had accounted for the accommodation provided in its holiday packages under the TOMS arrangements, and that the contracts used to procure accommodation for those packages was exactly the same as had been used for its main business, then this again proved that Lowcost's arrangements with its accommodation providers should be classified as principal to principal.

64. However, Mr Rasool had confirmed in his evidence that these packages had only been classified as "flight plus" packages under CAA rules in order to ensure that

customers could benefit from ATOL protection. On this basis, we accepted that the fact that Lowcost accounted for these packages under the TOMS legislation did not indicate that the contracts with accommodation suppliers were anything other than agency contracts.

65. At some points reference had been made to Lowcost arranging airport transfers for customers. This had been mentioned in the HMRC review letter and was also included in the contract with Viajes Urbis. We received no specific evidence on this subject but Ms Shaw submitted that it was immaterial in the context of the other services provided. We also saw no reason to believe that it was provided on any other basis than that applicable to the main business. We therefore decided that this too was arranged on an agency basis.

Decision

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

67. 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.

PHILIP GILLETT
TRIBUNAL JUDGE

RELEASE DATE: 5 June 2017