Appeal number: TC/2010/00446

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

FIRST-TIER TRIBUNAL
TAX CHAMBER

HOTELCONNECT LIMITED (IN LIQUIDATION) Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS Respondents

TRIBUNAL: JUDGE HARRIET MORGAN
MEMBER HELEN MYERSCOUGH

Sitting in public at the Royal Courts of Justice, the Strand, London on 18 and 19 April 2016

Mr Jospeh Howard, counsel, for the Appellant

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

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DECISION

1. The appeal is against (a) HMRC's decision not to repay VAT relating to the period from 1 May 2005 and 30 April 2008 in respect of which the appellant made a claim for repayment under s 80 Value Added Tax Act 1994 ("**VATA**") on the basis that it accounted for VAT as a principal when in fact it was an agent (in the sum of £1,518,574), and (b) assessments to VAT for the period 1 May 2008 to 31 July 2009, when the appellant accounted for VAT on the basis that it was an agent (in the sum of £275,138). The tribunal is not asked to determine the issue of quantum.

2. In summary, at the relevant time, the appellant was acting as an online travel agent whereby customers could reserve hotel accommodation through its website or on the telephone through a call centre. In outline, HMRC argued that during the relevant period, the appellant was dealing with travellers, who booked hotel accommodation through its website or call centre, either as a principal or as an agent acting in its own name and not solely as an intermediary. On that basis it 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**") provisions (see 3 to 7 below for further details). The appellant argued that these special VAT rules did not apply in relation to the relevant as it 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 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."

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 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 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.

Scope of the hearing

8. 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 at the hearing on 29 March 2016.

9. At that hearing I 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 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, 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 (assuming that is the relevant law governing the contracts).

10. HMRC made an application to amend their statement of case at the hearing. We decided to accept some of the changes but not one which would have allowed HMRC to raise an argument that the relevant contracts were not governed by English law such that English law principles on agency are not applicable. We decided that it was not in the interests of justice and fairness to accept this given that HMRC's case was clearly predicated on the basis that English law principles were in point and at no time in the many years since this appeal was lodged had HMRC indicated that there was any dispute in this respect. We have proceeded on the assumption, therefore, that English law principles are applicable as regards establishing the nature of the contractual relationships in this case.

Case law – Secret Hotels2

11. 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.

12. 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".

13. 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.

14. 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."

15. 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]).

16. 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."

17. 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".

18. 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".

19. 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.

5 20. 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
> 10 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
> 15 was contracting”.

21. 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
20 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
25 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.”

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

(1) The Terms of Use:

(a) explained that Med “provides information concerning the
30 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”.

35 (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
40 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".

23. 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:

5 (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]).

10 (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]).

24. Lord Neuberger considered (at [44]) that the failure to account for the 15 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 20 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".

25. As to Med's obligation to "try to provide alternative accommodation", (at [44]) 25 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".

26. He went on to note (at [45]) the factors which had persuaded this tribunal and 30 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.

35 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
> 40 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.

5 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 10 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 15 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 20 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 25 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 30 undermine the notion that Med acted as an agent.

27. 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 35 in every case". However, it seemed to him that "in the general run of cases, such a proposition would be correct".

28. 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 40 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]."

29. 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."

30. 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."

31. 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

32. We have based our findings of fact on the documents in the bundle and the evidence of Mr Chris Fraser who founded the appellant's business in 1994. He and his wife were equal shareholders and he was the company's managing director. We found Mr Fraser to be a credible witness. We also took into account evidence from

Mr David Bennett who was the appellant's VAT adviser (initially at Deloitte & Touche LLP and subsequently at Saffery Champness and Elman Wall Bennett).

33. The appellant's business was to sell hotel accommodation direct to travellers via a call centre and its website (the "**retail business**") and also to trade partners it referred to as "organiser clients" (the "**wholesale business**"). Mr Fraser said that when the business started the online part of the business was small and most sales were made via the company's call centre but, during the period in question, the vast majority of sales were made online.

34. Mr Fraser registered the company for VAT and took the view that it was appropriate to account for VAT using TOMS. In 2005 Mr Fraser learned from Mr David Bennett that a business operating as a disclosed agent falls outside the TOMS rules and that the appellant may be operating as such a disclosed agent. He did some research on this and found a number of articles online which seemed to support this. He also saw articles in the trade press which referred to competitors who it appeared were not accounting for VAT under TOMS. He realised that the business was operating at a competitive disadvantage with similar businesses and concluded that the appellant needed to be on an equal VAT footing with its competitors. He therefore contacted Mr Bennett in 2007 to conduct a full review of the business who concluded that the business should not be operating under TOMS. From then on Mr Fraser ceased to account for the business' VAT under TOMS and sought a repayment of previously overpaid VAT. Mr Bennett's evidence on this was consistent with that of Mr Fraser.

35. Although until the review in 2008, the appellant accounted for VAT on the basis it was subject to TOMS, Mr Fraser said that there was never any confusion on the appellant's part that it was acting as an agent. It was simply that the appellant had misunderstood how the TOMS regime applied to agents such as the appellant. Mr Fraser noted that this aspect of the VAT regime was sufficiently uncertain to be litigated all the way to the Supreme Court and is now being litigated by HMRC with a view to a reference to the CJEU. In Mr Fraser's view that must mean that it cannot be relevant to the correct VAT treatment that the appellant did not manage to get the VAT treatment right at first. It is for that reason that the appellant did not raise invoices for its agency services to the hotels. There would have been no point issuing VAT invoices to the hotels as the VAT was being accounted for by the appellant under TOMS. We note, however, that the appellant continued not to do so even following the review in 2008 when it ceased to account for VAT under TOMS.

36. The appellant entered liquidation on 28 June 2011. Mr Fraser said it was not right to say that the outstanding VAT claimed from HMRC was the sole reason for the liquidation but he believed it was a major contributory factor.

Overview of appellant's retail business

37. The appellant owned no accommodation itself. It entered into framework agreements (the "**accommodation agreements**") with hotels for the provision of the accommodation which it advertised and made available for booking on its website.

There were two examples of the type of framework agreement in place in the relevant period in the bundle and the terms are set out in more detail below.

38. Mr Fraser explained that, in most cases, the appellant agreed with the hotel an allocation of hotel rooms which the appellant could show as available on its website. The appellant did not commit in advance to paying a hotel for any accommodation. Such an allocation, therefore, meant, in Mr Fraser's view, that the appellant could be reasonably certain that rooms were available but it had no commitment to the hotel for those rooms; there was nothing to prevent a hotel from taking rooms back from an allocation or increasing the allocation. If the appellant had not sold its allocation for a given night and the hotel received a booking request direct, there was nothing to stop the hotel taking the direct booking and in effect reducing the appellant's allocation for that night; hotels frequently did that. On the other hand, if the hotel found its rooms were not selling well, it was possible for the hotel unilaterally to increase the appellant's allocation for the relevant period. He said that if a hotel wanted allocations back there was really nothing the appellant could do except by choosing not to contract with that hotel in the future. Mr Fraser noted that even if the appellant did not have an allocation for a particular night it could still sell the accommodation on behalf of the hotel; in that case it would have to approach the hotel to check availability rather than simply accepting a booking request from the traveller.

39. Mr Fraser gave the following overview of the booking process in place in 2004:

> (1) The appellant reviewed its online booking conditions in 2004. At that time the email confirmation procedure was introduced whereby travellers received booking details and terms by email rather than by post. From that time onwards all travellers, who made a booking online, had to accept the online terms at the time of making the booking. Those terms contained a statement that the appellant was acting as agent for the hotel (as set out below).
>
> (2) All customers with an email address received an email confirmation and a voucher which contained the main booking terms as shown in the pages from the website included in the bundles (described in 40 below).
>
> (3) Travellers who booked online could also elect to have details and terms confirmed by post but this was after they had accepted the online terms as part of the booking process. A traveller who elected to receive a postal confirmation would receive that in addition to the email confirmation and voucher (assuming the traveller had an email address).
>
> (4) The email confirmation included the following statement: "Thank you for booking your accommodation via HC. Your booking with the hotel is now confirmed". The traveller received a voucher by email shortly after or with the confirmation email. Where a postal confirmation was requested the traveller would receive a hard copy of a voucher by post also.

(5) The final document received by the traveller was the confirmation advice/invoice. That document confirmed that the booking was made with the hotel on behalf of the traveller. The reverse of the document contained notes, terms and conditions.

5 (6) The "blue ink" terms which were sent if a traveller asked for a postal confirmation (examples of which were in the bundles) stated that: "All vouchers issued by [the appellant] are subject to our terms and conditions. [The appellant] is acting solely as agent for the customer". Mr Fraser accepted that there was no reference in the "blue ink" terms in the bundles 10 to the appellant being the hotel's agent at all or to the hotel's conditions applying. However, he said that postal confirmations only went to a very small number of customers during the appeal period as by 2004 the vast majority were sent the online terms only by email.

(7) The reason why the "blue ink" terms stated that the appellant was 15 acting as agent for the customer is because the confirmation forms, which were printed prior to 2004, contained an error. It was really just a typo. The error was not detected probably because so few postal confirmations were actually sent out. When the postal confirmation forms were replaced (when the old ones had been used up) the terms were brought into line 20 with the online terms.

40. The bundle contained a number of printouts from the appellant's website which the appellant said reflected how the booking process operated at the relevant time. These showed that the process was as follows:

(1) When a traveller set out to make an online booking he/she would make 25 a search for available accommodation by entering the relevant details (such as destination and dates) on the search page.

(2) The traveller would then be presented with a list of hotels meeting the requirements of the search made. Extensive information on each hotel was available on clicking on the hotel name. In Mr Fraser's view, there could 30 be no doubt that the traveller knew a great deal about the identity of the hotel with which he or she was booking. The appellant never booked a mystery or unnamed hotel as was common with some of its competitors.

(3) The traveller could see a page "about us" which described the appellant as "one of the leading hotel booking agencies specialising in 35 quality hotel accommodation at excellent rates". This page also noted that the appellant was not obliged to work with any hotel which fell below its minimum standards and, therefore, was able to offer independent advice and recommendations to match each customer with a suitable hotel according to their needs and budget. The customer was given the choice 40 of booking online or speaking directly to one of the appellant's specialists. It was stated that "whilst many hotel companies are purely internet based, we still offer access to a friendly and professional call centre with hotel reservation specialists who can provide additional hotel booking

information or a more personalised service". It was noted that once a person had booked they would receive an information pack within 2 working days which "will include your confirmation and hotel voucher, instructions on how to reach your hotel, a hotel brochure, a city map and some useful information on your destination. Customer services support is also available 24 hours a day, 7 days a week, should any unexpected error occur".

(4) There was a page displaying the appellants' "goodnight promise" which included the following statements:

(a) The appellant was a bonded member of ABTA.

(b) "Only the choicest hotels are chosen by our choosy experts", who travelled the world searching for the finest stays and write honest reviews.

(c) An offer that "if a customer was able to find our hotels cheaper anywhere else we'll make sure they match the price."

(d) There was a 5% discount for online booking.

(e) The appellant promised a stress free booking "that's why we've designed our website so you can search to book in just 3 easy steps. If you prefer speaking to someone about your booking then our award winning customer services adviser will look out for you before, during and even after your stay. Your booking is always double confirmed, secure and guaranteed."

(f) There was a reference to the UK based call centre - "each member of our award winning call centre team has been carefully selected for their sunny personality, love of all things hotels and willingness to go that extra mile" with details of the telephone number.

(g) There was a statement that as long as the customer booked more than 7 weeks before arrival "you can cancel your stay and get your money back for 7 days after you've booked."

(5) There was a frequently asked questions page which, in outline, included the following:

(a) Details were provided of how to cancel a booking by calling the reservations team noting that "unlike many of our competitors we do not charge you an administration fee for amending your booking but that any cancellation or amendments must be made through the appellant and not with the hotel or this may affect any refund due to you".

(b) If the booking was cancelled within 48 hours or less, the hotel would charge the first night of accommodation and the appellant would charge £15 per person per destination.

(c) A name change could be made for no charge with a minimum of 24 hours of notice.

(d) There was no need to reconfirm and the traveller would receive a booking confirmation, voucher and quality feedback questionnaire.

(e) Details were given of an emergency phone number to contact out of normal hours of operation of the call centre.

(f) The price quoted was for all persons inclusive of breakfast and taxes.

(g) The site was secure.

(h) Usually full payment was required immediately, travellers could choose what currency to pay in and it was cheaper to book through the appellant than direct with the hotel, as the appellant had negotiated special rates.

(i) The appellant may where available offer special offers and discounts.

(j) Details were provided of the standard of hotel that could be booked and what could be expected of the relevant categories. Information was provided on parking, check in and check out times, whether hotels would charge for additional facilities, travelling with children and general travel advice (such as regarding visas).

(6) There was a page stating that the appellant made a guaranteed price promise - “we constantly check our prices against the competition so that we can guarantee you will always find the lowest prices on [the appellant’s] website……or we’ll refund the difference” and details of how to make any such reclaim.

(7) There was a page setting out the terms and conditions.

(8) If the customer wished to book accommodation, he was required to fill in various details including those required to make payment. On the relevant page, after filling in payment details, there was a box which the traveller had to tick in order to proceed which stated: “I accept your terms and conditions”. It was then stated that: “We will email you a confirmation of your booking immediately which contains a link to your hotel voucher. Please print this voucher and present it at check in. If you prefer we can post the voucher to you and you should receive it within 3 working days. There was a box to tick stating “yes please post me a voucher pack with a hotel brochure, city map, and useful information”.

(9) The traveller would then see a page stating “thank you for your booking. You will receive your confirmation email shortly. This email will contain a link to your voucher. A printed voucher will also be posted to you if you selected this option. If you are travelling in the next 3 days, please print out this page and present your booking reference at check in”.

41. Mr Fraser said that for online bookings, if a traveller was invited to "book now", that meant that the requested accommodation was within the allocation made available to the appellant by the hotel. If the appellant was invited to "contact us" that meant that the room was not within an allocation and the appellant would need to approach the hotel to confirm availability. In that case the travellers would usually call the call centre to finalise the booking.

42. Mr Fraser was questioned about the procedure for travellers who booked through the call centre. He noted that the appellant was "ahead of the game" in that it was already providing an online booking facility in 2000. He thought that by 2005, as regards the retail business, 80% of bookings were made wholly online with the remaining 20% going through the call centre to some extent. He thought those levels remained about the same throughout the relevant period. He thought that, by that stage, it was mainly only if the availability of a room had to be checked with the hotel that a traveller would use the call centre. He thought that was the main reason why it had not been possible to reduce the number of bookings being made via the call centre to below 20%, although that was the aim, in order to reduce costs. He also thought it was not possible to reduce the number of call centre bookings possibly because some older people did not have access to email. Mr Fraser said that the call centre staff would alert the customers to the online booking conditions as part of the script they had to follow in taking bookings over the telephone. Although he could not rule out human error, there should not have been any cases where a customer was not alerted to the online terms before a booking confirmation was made.

43. Mr Fraser said that the hotels dictated the following; room allocations (such as whether twin or double beds would be provided), that 10 persons is a group, special offers, check in/check out times, trade fair supplements and how they vary, how prices may vary, cancellation terms, reductions for children, rules about children under 18, rules if the hotel could not provide the booked accommodation and how to deal with dissatisfied customers.

44. Mr Fraser explained that the hotel would send its terms to the appellant with each booking made and, if any of the terms were not standard, the appellant would have to communicate these to the traveller (such as if the hotel required a 5 day cancellation policy). Full hotel terms could be provided to any traveller but it was very rare that a traveller would ask for these as they could easily be found by the traveller on the hotel's website. If the appellant did receive such a request, the traveller would be referred to the hotel's website. He noted that the online booking conditions also stated that bookings were subject to the conditions of the hotel.

45. The examples of vouchers issued to customers which are included in the bundle show the name of the traveller, the hotel booked, contact details for the hotel, the room and nights booked, the meal basis booked and a booking reference number. At the top of the voucher it is stated: "Voucher portion to be handed to hotel at check in." Immediately underneath it is stated "In exchange for this voucher please provide the following services" and there then follows the information listed. At the bottom of the voucher it is stated: "Invoice to: HotelConnect Ltd."

46. Mr Fraser was questioned as to why it was necessary to send the travellers a voucher. He said that he had probably devised the voucher system because he wanted to make sure that the hotels did not charge the traveller for the hotel accommodation again, given that advance payment was required to be made to the appellant, which passed the funds to the hotel. He did not want hotels making an error in charging travellers again.

47. Mr Fraser was shown a voucher in the bundle, which was an example of one sent to a traveller as a hard copy in the post, which had terms and conditions mirroring those in the "blue ink" terms. He said that this was very old. Such paper vouchers and confirmations were only used for a few people who wanted a postal confirmation as well as an email one. The numbers were small. Old papers had been used to use them up but they should not have been really. He was asked why these terms did not refer to the appellant acting as agent. He said it was just inaccurate and badly worded. It probably went back to the 1990s or certainly before the period in question. He thought the appellant was at that time also acting as agent but he had not taken advice back then on the correct wording to use in such documents.

Online terms and conditions

48. The appellant has no copies of its online terms and conditions, applicable to contracts with travellers, from before October 2008. However, Mr Fraser said that the terms, as outlined in his evidence, had changed only very slightly since 2004 and any such changes were immaterial. He said that the current online terms and conditions are representative of those in place during the relevant period. He noted that when making an online booking, the traveller was informed that he was entering into an agreement with the hotel, for which the appellant was acting as agent and, that in addition to the terms and conditions of the traveller agreement, the hotel's own terms and conditions would apply. He said that, although the terms and conditions changed over the years, it was always the case that it was made clear to the traveller that the appellant was acting as agent for the hotel.

49. The terms and conditions as taken from the appellant's website in October 2008 (the "**website terms**") stated that they were to apply to all bookings made with the appellant whether by phone, fax email or online. They contained the following main terms:

> (1) "The customer accepts that the written or emailed confirmation and voucher shows the details of the booking made with the hotel". Customers were asked to check the details and to advise the appellant should any of the details be incorrect or any conditions unacceptable within 3 working days of the confirmation. It was stated that:
>
> > "HotelConnect acts as an agent for the hotels and sets up a contract between the hotel (Principal) and the Customer. The hotel's own terms and conditions also apply, the key aspects of which are included below. Full details of the hotel's terms can be supplied on request."

(2) "Star ratings given to hotels are our own, having inspected them". There then followed an explanation of the rating system.

(3) "Since hotels often have many more twin rooms than doubles, they might occasionally allocate a twin even though a double room is reserved". If a double bed was "of paramount importance" to a customer, the customer was advised to inform the appellant of this which would "ensure that this is communicated to the hotel. In many destinations and hotels, all double rooms were made up of two single beds pushed up together and made up as a double bed."

(4) Details were provided of how triple rooms were configured.

(5) "Ten persons or more is a group booking. Lower prices are often available and the hotel had the right to apply certain conditions, which would be made clear at the time of booking" as would the hotel's payment and cancellation conditions.

(6) "Special offers involving free nights are always for a maximum of one free night. Long stay bookings could not be split into two to get more free nights. In both cases such split bookings may be refused by the hotel on arrival or rack rates charged".

(7) Check in/check out times were stated to "vary from hotel to hotel" and details were provided of the usual times.

(8) There was an explanation of the impact of trade fairs and festivals on pricing.

(9) "Payment for reservations is due at the time of booking. Regardless of whether vouchers have been issued or not, your booking may be cancelled if payment has not been received, or if payment is still outstanding for any other unrelated reservations made by the same Customer".

(10) "Prices may vary due to fluid pricing from hotels resulting in additional availability, currency fluctuations, or government action. However, such variations can only apply to future bookings. Once a booking is made the price is fixed".

(11) "Hotels may have their own cancellation policies and you will be liable to pay any cancellation charges or fees which the hotel may levy. In addition to any charge which the hotel levies, [the appellant] will charge its own administrative fee where cancellation is earlier than 48 hours prior to arrival; in these circumstances, a flat fee of £15.00 per person and per destination will be charged". Cancellation later than 48 hours prior to arrival in the hotel is normally treated by the hotel as a non-arrival and [the appellant] will normally pass on a charge equivalent to the first night of the stay. For practical reasons, 48 hours means by 17.00 hrs (UK time) two days before arrival. If any more stringent cancellation charges

applied, these would be advised at the time of booking. The rooms of non-arrivals are usually automatically released the following morning by the hotel. Such cancellations outside of office hours should be sent direct to the hotel with a copy to [the appellant]”. It was noted that different cancellation terms applied for groups of 10 persons or more.

(12) “If customers wish to alter their stay directly with the hotel, this office should be contacted (a) immediately if the Customer wishes to avoid higher rates being payable for extra nights (b) within 21 days of the end of the stay to obtain any form of financial adjustment, if the stay was being reduced for example”.

(13) Information was given on pricing policies for children.

(14) “[The appellant] must be advised of any children under the age of 18 planning to travel alone… prior to booking and this must be agreed by the hotel before the reservation can be fully confirmed” and “failure to notify the hotel in advance may lead to [such children]…being refused accommodation”.

(15) “Prices for trains, buses, taxi and parking are approximate. [The appellant] does not accept any responsibility for transfer or other services which the Customer arranges directly with the hotel”.

(16) “In the very unlikely event that the hotelier cannot provide the booked accommodation, the Customer accepts that the hotelier’s responsibility is limited to finding an alternative of a similar standard and to providing transportation as appropriate to this hotel. [The appellant] takes every precaution to select hotels which are professionally managed so that any such occurrence is exceptionally rare. The Customer also accepts that early notification of such a change cannot not be guaranteed. [The appellant] shall have no liability in respect of any costs, losses or damages existing out of or in connection with a relocation of accommodation, since such relocation is outside of [the appellant’s] control. Should the Customer reject a satisfactory alternative, this is at their own risk.”

(17) “If the Customer is dissatisfied with any aspect of his hotel, this MUST be brought to the attention of the hotel management immediately and the hotel management must be given adequate opportunity to rectify the situation from the outset. If the hotelier cannot resolve matters to the Customer’s satisfaction, [the appellant] must also be contacted at the earliest opportunity in order to be able to assist”. It was noted that a 24 hour on call service was provided outside office hours and that: “If having taken this action the customer is still dissatisfied, complaints should be received in writing within 14 days of the customer’s return”.

(18) Passports, visas etc were stated to be entirely the customer's responsibility.

(19) "All vouchers issued by [the appellant] are subject to ours and the hotel's terms and conditions. [The appellant] is acting solely as agent for the hotel and does not have any liability for any failure by the hotel to provide any element of the Customer's booking and/or for anything which may go wrong at the hotel and which causes damage, loss or personal injury or death to the Customer whether as a result of negligence or otherwise by the hotel, its servants or agent and the appellant only has liability to the Customer for claims which arise solely as a result of the appellant's own negligence. Every care is taken to ensure that hotel descriptions are accurate. Descriptive material on facilities provided at the hotel is drawn from information provided by the hotel. The appellant cannot be held responsible for any inaccuracies in such information, nor can liability be accepted for changes to facilities, which are not communicated to us by the hotel."

(20) "All services offered by [the appellant] are governed by English law and subject to the jurisdiction of the English courts".

(21) "To Hotel (or other suppliers); the appellant disclaims any financial responsibility for the payment of goods or services, which are not stipulated on the voucher, unless authorisation has been obtained from our office. Payment for extras not covered by the voucher must be collected direct from the customer. Hand-written amendments to the voucher should be backed up by written confirmation from our office and if the details on the voucher do not agree with the reservation you are holding, then this office must be contacted immediately. The voucher is only valid if you hold a current, live reservation from us."

(22) "If you have any questions, please call the number on our website. Outside office hours, an emergency telephone number is announced on our answering machine."

50. As noted there were two examples of the framework accommodation agreement which the appellant asserted were in place in the relevant period in the bundle ("**agreement 1**" and "**agreement 2**"). The first page of each agreement shows a schedule of applicable rates for the hotel accommodation according to the type of room and board and an allocation of rooms available to the appellant for sale. The first page was the signature page and Mr Fraser said that often only that page was returned by the hotel to the appellant. The second page set out the main terms and conditions (the "**hotel terms**") as follows:

(1) "The Hotel ("the Principal") hereby appoints [the appellant] ("the Agent") as its selling Agent and the Agent agrees to act as such. The Agent undertakes to deal accurately with booking requests and pass on all monies which it receives [for bookings][from the Principal's clients]

which are due to the Principal under the terms of the agreement". In agreement 2 only it is stated "Where the Agent sells accommodation on a wholesale basis to travel organisers ("Organiser Client"), then the contract shall be between the Agent and the Organiser Client".

(2) The Agent was stated to be entitled to commission or remuneration from the Principal which is "over and above the net rates set out in the agreement". The Agent agreed to "do its utmost to ensure that selling prices are reasonable and do not exceed published rack rates" and, in agreement 2 only, that they would be as close to, but not lower than, the best available rate of the day. The Agent was entitled to "sell some or all of rooms booked under the terms of the agreement" through Organiser Clients (under agreement 2) or sub-agents (under agreement 1).

(3) It was stated that "only charges extra to those covered by the voucher issued by the Agent should be collected by the Principal upon checkout".

(4) The Agent agreed to send payment to the principal for all bookings made within 30 days of receiving the Principal's invoice. In agreement 2 only, it is stated that invoices not received by the Agent (and for which payment has not been chased by the Principal) within 18 months of the departure date would be paid at the discretion of the Agent. The Agent was required to cancel a booking "if it believes it cannot get payment from the Client for the Principal."

(5) There were brief descriptions of definitions such as twin and double rooms. It was stated that a cot/crib would be provided for infants under 2 years free of charge and that breakfast for children over 2 years of age would be included unless otherwise stated.

(6) It was stated that for cancellations made later than 17.00 hours on the day before arrival and in the event of a no show, only the first night was chargeable unless otherwise agreed. Allotments were released at 17.00 hours on the relevant release date.

(7) It was stated that the allotment was agreed on the understanding that it would not be closed out and bookings from allotments were considered confirmed as soon as the Agent sent the reservation email, or under agreement 1, fax to the Principal. The purpose of the allotment was stated to be to allow the Agent more easily to effect sales on behalf of the Principal. The Agent's request for reconfirmation was only to ensure that the email or fax has been received. "In the unlikely event that the Principal cannot accommodate a booking, for whatever reasons, it is the Principal's responsibility to find an alternative of at least a similar standard and location" (agreement 1) or of "the same or superior standard and comparable location" (agreement 2). For all such occurrences the Principal was required to obtain prior agreement in writing from the Agent.

(8) Where allotments were full or released, the Agent was required to request bookings by telephone. The Agent was required to identify itself

as such and the Principal agreed to offer any available rooms at the contract rate unless discussed and agreed otherwise. The Principal accepted responsibility to ensure that staff who give verbal confirmations over the phone had the authority to confirm them and the parties agreed that such confirmations were binding. The Agent was required to confirm the client's acceptance of such bookings to the Principal by fax or email within the agreed time limit.

(9) In the case of "freesale" or, under agreement 2, "flexible allotments", the Principal was required to advise the Agent of any closed or reopened dates by fax or email, under agreement 1, or via the extranet or email, under agreement 2. The Agent had until the end of the day on which closed dates were advised to email or fax any new reservation for those dates to the Principal. Under agreement 2 only, the Principal could only use fax or email to close "freesale" dates during the appellant's working hours.

(10) In the event that the Principal reduced its rates to the public, it was required to advise the Agent and to give the Agent a sufficient reduction to the contracted rate to enable the Agent to maintain its commission and pricing structure.

(11) In agreement 2 only it was provided that the Agent accepted no responsibility for errors, and the consequences of errors, made by the Principal when changing rates and availability in the extranet.

(12) The Agent agreed to send the Principal an accommodation information form to be completed for each hotel. The Principal was required to inform the Agent of any changes which occurred after the completion of the form such as suspension of a facility, renovations etc, in order that the Agent may pass this information on to the Principal's clients.

(13) The Principal was required to ensure that all the rooms and any other services and facilities provided were of a standard which avoided any risk of injury to health and that all the rooms and any other services and facilities complied fully with all EC, national and local laws and regulations relating to hygiene, fire and other general safety standards. The Principal was also required to ensure that full insurance was arranged to provide cover against fire, flood storm, and all other third party risks.

(14) Agreement 2 only provided that the Principal must complete a fire and safety self-assessment audit form supplied by the Agent and when necessary facilitate the completion of any further audit carried out by the Agent or the Agent's consultants.

(15) The Principal was required to advise the Agent in writing of all renovations works well in advance of the commencement of any such works and to keep the Agent informed of full details and all latest finishing dates. In the event that the Principal failed to make the Agent aware of any such works, the Principal agreed that it would be responsible for

providing a full refund of all monies paid by the client should the latter wish to cancel or demonstrate a valid complaint.

(16) In the event of any claim by any third party being made against the Agent in respect of injury, loss or damage of whatever nature suffered whilst at the hotel, the Principal agreed to indemnify the Agent against all costs and expenses of whatever nature incurred by the Agent in dealing with such claims, including any sums which the Agent may be ordered to pay by any court or judicial body, or any sums which it may itself, at its absolute discretion, decide to pay. The Principal agreed to provide all assistance to the Agent in defending any such claims.

Evidence of signed accommodation agreements with signed terms

51. In the bundle there were only three examples of accommodation agreements which had been signed by the parties with hotel terms attached in the form of those set out above. The other samples in the bundle include some which do not include any terms or conditions and some which are unsigned and undated as well as examples of agreements concluded with organiser clients.

52. Mr Fraser said he was not sure why there were no more signed examples in the bundles. As far as he was concerned it was essential that the hotels signed the terms and conditions. The appellant could not have worked with a hotel if that was not the case. He said that the hotel was required to sign the terms and conditions in the first year of the agreement. The hotel terms were not always faxed or sent back with the signed top sheet as they were not needed.

53. Mr Fraser explained that the agreement then continued on a "rolling basis" with an updated rates sheet being sent out each year. The terms and conditions should have been re-sent to the hotels also in each year going forward by way of reminder but of course it was possible that errors were made sometimes. He noted that there were a number of people at the appellant dealing with the contracts with hotels. Some of them may have thought it was not necessary to send the terms and conditions each year. He could not be sure they were sent out in every single case although that was the intention.

54. He also noted that in many cases the terms would have been on the back of the rates sheet and whoever copied the documents in the bundles had only copied the front page. He noted that he was involved in auditing files at the time and he looked at the documents to make sure they were properly executed and to check the correct procedures were being followed. He must have been satisfied that hotels were signing the agreements with the relevant terms and that usually a reminder was sent of the terms on an annual basis as he had described.

55. Mr Fraser later produced further examples of signed accommodation agreements he had found in the appellant's online records which had the hotel terms attached. He confirmed that he had looked for such versions. He said that whilst they they were "not the first 10" he came across, most of the 1500 or so agreements he saw on the electronic file had the hotel terms attached.

56. Mr Fraser accepted there were different terms in an earlier period, which were silent on the agency issue, but confirmed that this sheet was not used for contracting with hotels in the period in issue. Mr Fraser referred to a green folder of documents and said that there were additional terms inserted into accommodation agreements from around 2010 onwards which were introduced "to deal with changes in technology, such as the introduction of XML", but in all material respects they were the same as the hotel terms set out above and always contained the terms appointing the appellant as agent of the hotel.

57. Mr Fraser said that if a hotel asked for deletion of the agency provisions he would not have agreed to it. He said this was important as the appellant did not want to assume the greater liability which went along with acting as principal. Initially both wholesale and retail business was conducted by the appellant as agent. However the organiser clients wanted one port of call so, to make arrangements work with those clients, the appellant agreed to act as principal. Otherwise the appellant did not want to take on the liabilities or insurance costs involved in acting as principal and so wanted to act as agent only as far as possible. He thought at the period in question around 75% of the business was in the wholesale market.

58. He accepted that the terms and conditions with the hotels, which were applicable when the appellant acted as principal as regards the wholesale business, were essentially the same as those which applied when, in its view, it was acting as agent in respect of the retail business. Similarly, the terms and conditions with the travellers which it asserts were applicable when, in its view it was acting as agent as regards the retail business, were mirrored by those that applied when it accepted it was acting as principal as regards the wholesale business (as was shown in the documents in the bundle). Mr Fraser said that having terms in that form for the wholesale business was probably a hangover from the days when the appellant had acted as agent in that context also. He thought that, as regards the wholesale business, leaving in terms appropriate for an agency relationship was either just a mistake or to try and influence the organiser clients not to hold the appellant responsible for the specified matters even if that was not technically correct. Mr Fraser accepted that the only way the hotel would know the difference, as to whether it was dealing with the appellant as principal or agent, was if it read the voucher held by the traveller to see if it had another travel agent's logo.

59. Mr Bennett explained how the accommodation agreements in the bundle were selected. He and the appellant's financial controller, Diane Woods, had selected them by reference to criteria set by HMRC as set out in their letter of 19 May 2009. He said this was why the bundle contained a number of examples of sales to organiser clients as principal.

Mr Fraser's evidence on the hotel terms and website terms

60. As regards the appellant's ability to charge an administration fee on cancellation, Mr Fraser noted that this was discretionary; it was not charged in all cases and the appellant assessed whether it should be charged on a case by case basis. The appellant rarely imposed the £15 administration charge for regular clients, who

accounted for around 80% of business. He said the ability to charge £15 was really just a deterrent to stop customers "place holding" bookings. It was separate from the hotel's cancellation charge. If there was such a cancellation charge, the appellant simply collected it on behalf of the hotel. In practice there were few cancellations; it was in the order of 1.5 to 2% of bookings and the only real cancellation charge was where cancellation was made later than 48 hours before arrival. That charge was always remitted to the hotel. On the promise to allow customers to cancel within 7 days of the booking, Mr Fraser described this as a marketing position in allowing customers a "cooling off" period.

61. On the appellant's liability to customers, Mr Fraser noted that the appellant was liable to customers for its own negligence. The appellant would pay compensation to customers where it could be shown it had been negligent such as by mis-describing a hotel on its website. Where the hotel was at fault, the obligation to pay compensation rested with the hotel. In that case the appellant merely forwarded to the traveller any compensation offered by the hotel.

62. However, Mr Fraser accepted that, in practice, the appellant did, from time to time, pay compensation in the form of its own vouchers to customers where hotel standards had not been met. The vouchers were for a stay in a different hotel in effect at the cost of the appellant. There were three examples of such vouchers being issued in the bundle. In one letter responding to a complaint, the appellant indicated that the hotel had provided a refund of £23.56 and the appellant provided a £20 voucher for future use with the appellant. In another case, there was a £33.06 discount from the hotel and a £40 voucher from the appellant. The voucher offered stated that it was "on behalf of the hotel" but as it is a voucher, it would appear to be a voucher in fact from the appellant. Mr Fraser accepted that the reference to the appellant issuing the voucher on behalf of the hotel was not correct. It was compensation from the appellant itself; this was a simple mistake based on a "cut and paste" template which was used by staff, probably a new employee.

63. Mr Fraser said that the issue of such vouchers was entirely discretionary on the part of the appellant. The appellant issued them in order to enhance traveller satisfaction and promote customer loyalty. Mr Fraser said that this was the "best opportunity to generate goodwill". When vouchers were given by the appellant to the traveller, the cost of these was born by the appellant (in effect when the traveller used the voucher) but Mr Fraser said that this was cheaper than acquiring a new traveller via Google "pay per click" which could cost up to £80 per traveller. The value of the voucher was never more than the cost of the appellant recruiting a new customer via the search engine marketing. Dealing with complaints and giving discount vouchers was therefore a marketing exercise carried on by the appellant as a sales agent to ensure that the customer would use the appellant again to make a booking. It was a way of demonstrating good service. That was also the purpose of the appellant using its own star ratings system.

64. The appellant's exposure for its own negligence was supported by its own professional indemnity insurance which covered it for actions arising as a result of the

appellant's own negligence. It was not covered for any costs arising from hotel actions.

65. Mr Fraser noted the following as regards the payment arrangements:

(1) The rate levels issued by a hotel to the appellant were on the understanding that advance payment would be taken. All agents on such rates operate in that fashion. The reason is that requiring advance payments gives the hotel a guarantee of revenue and very low cancellation rates. The alternative would be to take payment direct from the traveller on departure in which case the hotel would charge higher rates. The appellant only ever acted on the lower, advance pay pricing basis.

(2) As set out in the agreements, the appellant had to account to the hotel for the entire sum less its commission.

(3) Whilst each traveller paid for the accommodation by paying the appellant, the appellant was only collecting payment on behalf of the hotels subject to the appellant's right to deduct its commission. If the appellant had not collected the money, the hotel had the right to approach the traveller direct. The hotels often collected money direct from the traveller. For example, when checking in, it is normal practice for the hotel to take a credit card imprint, travellers may extend their stay which would be paid direct to the hotel as would extras such as bar bills and mini bar charges. If a booking was made late and the credit card payment failed, the appellant would notify the hotel which would take payment direct from the traveller. If the traveller were to refuse to pay, the appellant would be under no obligation to pay the hotel anything.

(4) Whenever a booking was made the appellant would fax the hotel providing the full details of the booking and the net sum that the appellant was due to account to the hotel for. This was described as the amount to invoice to the appellant. The hotel would then send the appellant an invoice for the amount due. There were examples of such invoices in the bundles. In Mr Fraser's view the term invoice was being used in a commercial and not in a VAT technical way. It was merely a convenient term to give to what is more properly described as a request for an account for or remittance of the sales proceeds.

(5) Mr Fraser was asked why the appellant never invoiced the hotels for its agency services for which it received commission. He said that he was advised it was alright to proceed in that way. He was eager not to over administrate when the appellant was only accounting for VAT on the margin under TOMS. There was, therefore, no reason to issue an invoice. He could not remember if any business traveller had asked to receive a VAT invoice when the appellant was operating under TOMS. During 2008 the appellant operated a software programme which pulled together all the information needed to compose a monthly commission statement

which was automatically sent to the hotel in the form set out in the bundles. Mr Fraser accepted that this was not operated before 2008 and that the appellant never informed the hotels of the selling price to any particular individual.

5 (6) Mr Fraser confirmed that the hotels would not know the actual price charged to the traveller. Mr Fraser was asked if it was a concern for him that hotels could not invoice travellers because they did not know the prices. He said he thought advice had been taken but he could not remember what happened if a traveller wanted a VAT invoice but he did 10 not think it was an issue (as otherwise it would have had to be addressed). He could not recall a hotel having raised any issue with the invoicing system.

(7) Mr Fraser said that, within a limited range, the appellant could set the price at which the accommodation was offered for sale to travellers but, in 15 reality, the price was constrained by market forces. The appellant specialised in city hotels located in city centres. City hotels need to control the distribution and pricing of their product to a much greater degree than resort hotels. City hotels are sold in all of the world's markets to business, leisure and local users. The rooms are sold direct, via agents 20 and sometimes in block, to operations such as destination management companies. This contrasts with resort hotels which are often sold entirely to one market and where the hotel is much more likely to see a tour operator or distributor as its customer to which large parts of its accommodation are sold such that it takes less interest in its product once 25 it has allocated it to retailers and the retailer is much freer to fix the retail price. On the other hand it is critical that city hotels keep very close control on the pricing and they like to verify the level of commission received by agents. The appellant was required to and did submit commission statements to hotels in respect of travellers (as set out in (5)).

30 (8) He noted that the contract with the hotel stipulated that the price could not be greater than the rack rate offered by the hotel. Rates could also be close to but not lower than the hotel's best available rate of the day.

(9) He concluded that in reality, therefore, the appellant had only a small range of prices which it was able to offer at any given time and only 35 limited authority from the hotel to move the price at its discretion within that narrow band. As it dealt only with city hotels, the appellant had no employees or representatives at any of the hotels.

(10) In practice as the appellant only booked accommodation and did not sell packages the price was always highly visible to the traveller. Mr 40 Fraser noted that customers could easily search online competitors to compare prices. He said that this increased the desire of hotels to retain a large degree of control over pricing and tightly constrained the appellant in what, in practice, it was able to charge UK travellers on behalf of the hotel.

(11) The appellant's "price promise" set out on its website was in reality a marketing device and in fact there was no real cost to the appellant because the hotel would nearly always agree to reduce its price if called upon to match a price given to another agent, although he accepted that was no guarantee that it would or contractual undertaking for it to do so.

66. Mr Fraser also gave the following evidence as regards other terms:

(1) He said that the provision in the hotel terms that invoices not received by the appellant (and for which payment has not been chased by the principal) within 18 months would be paid at the discretion of the Agent (see 50(4)), was to encourage prompt action and in reality it would not have been exercised by the appellant.

(2) As regards the appellant's ability to approve offers of alternative accommodation by hotels (see 50(7)), Mr Fraser said that in reality the appellant had no right to require the hotel to provide different accommodation to the alternative it suggested. In practice, there was no viable alternative. The appellant was just trying to push hotels to do what customers wanted.

(3) As regards health and safety requirement and information on works at hotels (see 50(12) to (15)), Mr Fraser said that as the point of contact for customers the appellant wanted to know what the situation was.

(4) As regards the website terms and other statements made on the website:

(a) As noted the rating system for hotels provided on the appellant's website was a marketing exercise to try to avoid the appellant receiving customer complaints.

(b) In offering on the website to deal with complaints the appellant was in effect offering to mediate between the hotels and the customers. The appellant's only objective was to make sure that customers returned and booked again and assisting in resolving complaints was a way of demonstrating good service (and see also 63 above).

(c) Mr Fraser accepted that the discount for online booking was offered to encourage the use of online sales.

67. Mr Fraser noted in his witness statement that ABTA (the Association of British Travel Agents), of which the appellant was a bonded member, had considered the appellant to be trading as an agent (and not a principal) from 2001 until its liquidation. It was the hotel, as principal, which was responsible for honouring bookings in the event of the appellant's failure. It was noted to Mr Fraser that agency registration with ABTA was by self-declaration by the appellant. He said that the appellant was audited by ABTA which confirmed that the appellant was carrying on an agency business in relation to traveller sales.

68. As regards foreign exchange risk, Mr Fraser commented that the appellant's pricing was fluid and, therefore, the hotel price advertised would vary as exchange rates fluctuated. The rate adopted by the appellant for both its payment to hotels and receipts from customers fell very close to the midpoint halfway between the banks' buy and sell rates. In addition the appellant entered into foreign exchange hedging arrangements and would forward buy currency to fix the exchange rate and remove the risk. For example, if in January Euro 500,000 was needed the following June to pay over to hotels, the appellant would purchase that amount in January from the bank at an exchange rate similar to the one applicable in January. Hedging was undertaken for approximately 75% of foreign exchange risk which was considered to be sufficient to remove any serious risk. In his view, therefore, the appellant was not taking any significant proprietary foreign exchange risk.

69. Mr Fraser said he had not thought the appellant needed to register for VAT purposes in other member states where the hotels were located. He had made enquiries at the time with the relevant authorities but they were not interested in the appellant registering. He thought he was acting in the way that other such businesses did and there was nothing unusual. He had later sought advice but was told he was not accounting incorrectly in the other member states. Mr Bennett said he could not recall if he had advised the appellant on this issue. If he had done so he would have said that it depended on the local VAT rules in the relevant member states.

Submissions

Outline of appellant's position

70. The appellant's view is that the facts of this case are on all fours with those of *Secret Hotels2*. On that basis the appellant was acting as an agent and so was outside the scope of TOMS in the relevant periods. The place of supply was (in the case of overseas hotels) where the hotel was located and so outside the scope of UK VAT.

71. The tribunal must follow the approach set out in *Secret Hotels2* at [31] to [33] of analysing the legal relationship created by the contracts governing the arrangements under which the relevant supplies were made; being the contract between the appellant and the traveller and the contract between the appellant and the hotel. It is to be assumed that the contracts were made under English law so that English law agency principles apply (as set out in Volume 1 of Halsbury's).

72. Under the approach in *Secret Hotels2* the starting point is to look at the contract with the traveller as that determines to whom the supply is made. If that contract is consistent with an agency relationship, it is necessary to assess whether the contract between the appellant and the hotel is inconsistent with that position (see [34] and [35] of *Secret Hotels2*).

73. In this case the contract with the traveller clearly stated that the appellant acted as agent for the hotel and was setting up a contract between the hotel and the traveller. There is nothing inconsistent with that in the accommodation agreements. On that basis, when a traveller booked hotel accommodation through the appellant, the

appellant made an agreement on behalf of the hotel, for the hotel to provide accommodation to the traveller.

74. As set out by Mr Fraser around 80% of the appellant's retail business was carried out through the online booking facility as governed by the website terms which the traveller who booked online was obliged to accept when booking. It is clear from the process (as explained by Mr Fraser and evidenced by the screen shots from the website) that the traveller would see the terms before the booking confirmation was received.

75. Due to technical issues copies of the website terms for periods before 2008 are not available (as it has not been possible to recover emails from that period). However, Mr Fraser has given clear evidence that the website terms available for 2008 were in place in substantially the same form in the earlier periods.

76. As regards the 20% of business carried out by telephone, Mr Fraser was clear that, subject to human error, all phone users were referred to the website terms. Under English contract law terms notified to such users are incorporated into the contract by reference, in outline, as long as they are not unduly onerous, whether or not the person has read them (see paras 13.04, 13.09 and 13.13 of Chitty on Contracts).

77. The accommodation agreements with the hotels also contain clear references to the appellant being appointed as the selling agent of the hotel. Mr Fraser has explained how in nearly every case the hotel terms were sent to hotels when the accommodation agreement was first made. The agreement then continued to apply on a rolling basis with the appellant providing an updated rates sheet each year. Mr Fraser thought that the hotel terms would also have been re-sent to the hotel each year on the renewal.

78. The initial sample agreements produced to the tribunal only contain a few examples of signed hotel terms. However, as Mr Bennett said and as shown in the relevant correspondence, these samples were produced to conform with what HMRC wished to see and are not representative. The ones now produced to the hearing all show terms and conditions executed and signed in materially the same form as the hotel terms. Mr Fraser selected these to give samples from a range of countries and thought that the majority (of around 1,500 contracts) were in the same form. If the appellant had known that HMRC required further samples these could have been provided but, in any event, the evidence suffices to demonstrate that the position is as Mr Fraser has said in his evidence.

79. Mr Fraser gave evidence that the appellant initially acted as agent as regards both the wholesale and the retail business. He said this changed as regards wholesale business because the main clients wanted one port of call. It was not VAT issues which drove the desire to maintain the position of acting as agent in the retail business; there were regulatory and commercial reasons, in particular, the additional costs which would be incurred by the appellant in acting as principal. The appellant's position that it was an agent in respect of traveller sales is wholly consistent with its commercial position, of maintaining its low overheads by mitigating risk. This is supported by its ABTA bonding and regulation as an agent.

80. The appellant has clearly shown that, in accordance with the principles set out in *Secret Hotels2*, it made sales to travellers as the agent of the hotels, and the terms of the accommodation agreements are wholly consistent with agency status for those sales. There is nothing in the facts put forward by HMRC which contradicts this conclusion.

Outline of HMRC's position

81. HMRC's overall position is that there is a difference between the concept of "agent" under domestic law and that of acting "solely as an intermediary" under EU law. Therefore, in their view, the question whether the appellant was an agent under domestic law, whether English law or the law of any other member state, is irrelevant. HMRC, however, accept that determining the rights and obligations of the relevant parties under the contracts between them is in considering whether the appellant acted solely as an intermediary under EU law.

82. HMRC do not accept that if the appellant is an agent in English law, it falls outside the first part of article 306. Irrespective of that position, the appellant was not acting solely as an intermediary within the meaning of article 306 and, therefore, must be understood to have dealt with customers in its own name in providing the accommodation. In light of the fact that there is to be a separate hearing as to that issue (whether the appellant was acting solely as an intermediary within article 306 and on whether there should be a reference to the CJEU in relation to that question), HMRC asked that any decision relating to this hearing be expressly made on a preliminary basis.

83. To the extent that the question of whether the appellant was acting as agent under English law is relevant, the appellant has failed to discharge the burden of proof that it was appointed as and was acting as such an agent. The hotel terms and the website terms (to the extent applicable) in any event are not consistent with agency status and/or were varied by the conduct of the parties, in particular, as a result of the invoicing and compensation arrangements as explained further below. The facts of this case are not on all fours with *Secret Hotels2* but are materially different.

HMRC's position on contracts with hotels

84. It is clear from *Secret Hotels2* (at [56]) that the nature of the contract with the hotel is a critical factor. Unlike in that case, the appellant does not have consistent documentation showing that it was appointed as agent by the relevant hotels in the relevant period. In particular:

(1) There are only three documents in the bundles which show signed copies of the hotel terms. This is only one third of the relevant documents in the bundle. There is no satisfactory explanation why if, as Mr Fraser asserts, most contracts were signed with terms in that form, there are not more examples available in the bundles.

(2) The other samples in the bundle include some which do not include any terms or conditions or contain ones which are unsigned and undated. Some of them do not refer to the appellant acting as agent or, if they do,

they also refer to it selling through sub-agents (thereby putting it in a position to make the sales itself).

(3) The new samples produced by Mr Fraser at the hearing are ones which Mr Fraser has specifically selected as including the signed terms. There is no evidence as to how representative these are.

(4) There is no substantiating documentary evidence at all that accommodation agreements were made with the hotels on a rolling basis as Mr Fraser asserts.

85. The appellant entered into agreements with hotels where it was acting as principal which contained substantially the same terms as those which it asserts applied where it claims it acted as a disclosed agent. Under English law, whether a party is an agent does not depend on the terminology used but on the true nature of the agreement. The true nature of the agreement cannot be one of agency given that it puts the appellant in the position of supplying accommodation as principal. This case, therefore, exemplifies the proposition set out in *Secret Hotels2* that the labels are not determinative of the position.

86. In any event the hotel terms contain provisions which are inconsistent with agency status:

(1) Where the hotel did not invoice or chase for payment within 18 months, the appellant had no obligation to pay the hotel.

(2) Contrary to the appellant’s claim, the allotment of rooms to it cannot be retrieved by the hotel until it is released.

(3) If the hotel could make the room available, it was up to the appellant what alternative could be offered and subject to the appellant confirming this in writing.

(4) The appellant determined the price at which it supplied the room and there is no obligation to inform the hotel or system in place by which the hotel invoiced its alleged customer; indeed the system in place required an invoice to the appellant for the net amount.

(5) The hotel owed an obligation to the appellant to ensure it complies with safety requirements and was insured and to supply a safety audit to the appellant.

(6) The hotel indemnified the appellant against costs relating to the appellant dealing with claims for loss, injury or damage that it may be ordered to pay or which it decided to pay.

(7) In effect the appellant had a contract with each hotel for the provision of accommodation at a specified net rate price. In its website terms the appellant purported to act as an agent bringing the traveller and the hotel into a legal relationship. However, there was no tangible contract between the hotel and the traveller.

Appellant's position on contract with hotels

87. The appellant countered that, as set out above, there is sufficient evidence from Mr Fraser that the hotel terms were entered into as a regular matter. The fact that the appellant was authorised to sell accommodation as principal to a different class of customers, the organiser clients, and that both types of contract could be made pursuant to a single framework agreement does not change the legal position as regards travellers. For VAT purposes there was no supply until the contract was actually formed with the traveller or organiser client, for the provision of accommodation either by the hotel, as regards travellers and, by the appellant, as regards organiser clients. The fact that the agreement enabled either type of supply to be made as regards the same subject matter cannot determine the capacity in which the appellant was acting in a particular case. VAT attaches to sales made under agreements and not to the agreement itself.

88. The hotel terms which HMRC point to as indicating that there was not an agency relationship are not relevant and/or were held in *Secret Hotels2* not to affect the agency position. In particular:

(1) Mr Fraser's evidence is that the term requiring the hotel to invoice within 18 months was to encourage prompt action and in reality it would not have been exercised by the appellant. This term was not in the later agreement 2.

(2) Mr Fraser's evidence is that, in practice, the right to approve what alternative room could be offered where there was an overbooking, was of little consequence because in the rare circumstances where it was engaged, there would be no other alternative accommodation.

(3) The agreement provided for the agreed room rate to be reduced in certain predefined objective circumstances. The room rate could not be controlled, post agreement, at the option of the appellant.

(4) The appellant could theoretically set the selling price to the traveller, which gave rise to its commission, but, as Mr Fraser explained, that was subject to the hotel's control of the base price and subject to market forces limiting the upper price. It was specifically held in *Secret Hotels2* that the fact that the appellant could fix its own commission did not mean that it was not acting as an agent. The appellant's comments on the provision of commission statements are set out below.

(5) That the hotel was required to ensure it complied with safety requirements and that it indemnified the appellant against certain costs merely demonstrates the appellant's bargaining power.

(6) It is not correct that there was no tangible contract between the traveller and the hotel. The contract between the appellant and the traveller (as supported by the contract between the hotel and the appellant), whereby the appellant was clearly acting as a disclosed agent only, is

sufficient in English law to bring a contract into existence between the traveller and the hotel.

HMRC's position on contracts with travellers

89. The website terms from October 2008 refer to the appellant as the agent of the hotels but the appellant could not produce any evidence that the website terms applied prior to October 2008, even though the relevant request was made by HMRC only in 2009. As regards the period before October 2008 the only documentary evidence is the "blue ink" terms which stated that the appellant's terms applied and that the appellant was acting as agent for the customer. That is also reflected in the hard copy vouchers sent to customers. There was no reference to the appellant being the agent for the hotel or that the terms and condition of the hotel applied. Mr Fraser accepted this although he said that the "blue ink" terms and hard copies of the vouchers were used in a minority of cases only.

90. Moreover it is evident that references in the website terms to the booking being made with the hotel through the appellant as agent are mere labelling. The substance of the terms is identical or nearly identical as regards bookings made for organiser clients where the appellant accepted it acted as principal. The labelling of itself as an agent, therefore, is not reflective of the true position.

91. Under the website terms, essentially the appellant set the terms with the travellers. The appellant took on particular rights and obligations towards travellers independently of and above those of any hotel:

(1) It rated the hotels under its own system.

(2) It determined what constituted a group booking.

(3) It demanded early payment at the time of booking even though the appellant had no obligation to pay the hotel until later.

(4) It was entitled to apply a flat cancellation fee of £15.

(5) It undertook to consider complaints.

(6) It applied cancellation charges of one night if the cancellation took place later than 48 hours prior to arrival; the cancellation charges of the hotel applied, however, under the hotel terms only if the cancellation occurred after 5.00pm the day before arrival.

92. In addition the appellant took on further rights and obligations through its website:

(1) The appellant provided a customer service and support line made available 24/7 for any problems, described also as an emergency helpline. Travellers who could not resolve problems with the hotel had to contact the appellant on its 24 hour help-line or complain in writing to the appellant.

(2) In contrast to *Secret Hotels2*, taking on the obligation to deal with complaints was not simply what the appellant did but is what the contractual obligations reflected. Nor is there any indication that the hotels compensated the appellant at all, again in contrast to the *Secret Hotels2* position.

(3) The appellant inspected the hotels and wrote "honest reviews" of these, applying its own star system.

(4) The appellant offered a 5% reduction for online bookings and a "goodnight promise" guaranteeing to match any lower price that may be identified and did so independently of what the hotel's rate was. This, in particular, is a principal-like obligation that was absent on the facts of *Secret Hotels2*. Mr Fraser said that the appellant would ask the hotel to meet the price promise but conceded that there was no guarantee that it would or contractual undertaking for it to do so. He accepted that the discount for online booking was offered to encourage the use of online sales. This suggests that phone bookings were in wider use than Mr Fraser suggested.

(5) The travellers were referred to as the appellant's customers.

(6) The appellant specified that travellers could cancel and get their money back if they booked more than seven weeks before the holiday and only for a seven day window. This is in contrast to the hotel terms. Although cancellation charges were considered in *Supreme Hotels2* that was not in the context where there had been no appointment as agent at all.

(7) In addition from the documents in the bundle and, as accepted by Mr Fraser, the appellant clearly offered compensation to customers in the form of vouchers as set out above. It was not in any way compensated for this by the hotels.

Appellant's position on contract with travellers

93. The appellant responded that Mr Fraser was clear in his evidence that the website terms as at October 2008 also applied in prior periods. He was also clear that the "blue ink" terms were only sent out infrequently and the reference to the appellant as the agent of the customer was merely an error – a typo. The "blue ink" terms are inconsistent with all the other contractual terms, particularly those notified to and relied upon by the traveller before and at the time of booking. The majority of travellers who received these terms would in any event have seen the website terms on the website and/or as set out in an email confirmation.

94. In any event, the "blue ink" terms do not affect the contract created between the hotel and the traveller because they were only provided after the website terms were accepted by the client. The contract was formed over the web before the travellers could have been aware of the "blue ink" terms. Therefore, they cannot have any bearing on the legal relations created by the online contracts unless they amount to a variation of the contract. That would require that there was a consensus/meeting of

minds that the parties were not acting as agent but there is no evidence to that effect. That the appellant was acting as agent for the traveller is inconsistent with the evidence and with industry practice.

95. As regards the website terms and undertakings given on the website:

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(1) It is not correct that the appellant set the terms and conditions which applied between the travellers and the hotels. As set out in Mr Fraser's evidence, the appellant replicated the hotel's terms in its website terms in order to facilitate sales. Hence the website terms stated "the hotels own terms and conditions also apply; the key aspects of which are included below". In any event, in so far as the appellant did set terms, this was merely a function of its economic power, which as set out in *Secret Hotels 2*, is not inconsistent with an agency relationship.

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(2) Mr Fraser said that offering compensation in the form of the appellant's own vouchers for a stay at another hotel was the "best opportunity to generate goodwill". Dealing with complaints and giving discount vouchers was, therefore, a marketing exercise carried on by the appellant as a sales agent. The appellant's star rating system was also merely a marketing exercise.

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(3) As regards the 5% reduction for online bookings and a "goodnight promise", the appellant was under no obligation to sell accommodation at a lower price than its cost and its position was protected by the hotel's obligation to reduce its price to the appellant if it reduced its rate generally. In any event this was mere puff, not a contractual term giving rise to a guarantee. It is a mere representation that the appellant's price was the best price "at the time" not a guarantee to reduce the price to the traveller once booked. The website terms clearly state that "once a booking is made the price is fixed".

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(4) The cancellation terms referred to by HMRC simply provided a "cooling off" period in which there is no cancellation charge. Mr Fraser accepted this promise was made but did not accept that it implied there would be no money back in other cases.

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(5) The right to cancellation in other cases was governed by the hotels' own policy (usually 48 hours from arrival). The £15 administrative fee which the appellant could charge was again a mere marketing puff. As Mr Fraser said, it was a deterrent to stop "place holding" and was to cover the appellant's administration costs. It was considered on a case by case basis and normally not charged so as to maintain customer goodwill.

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(6) HMRC's reading of the cancellation terms is not supported by the written agreement. The appellant did not agree to collect and pass on any cancellation fee other than that charged by the hotel. Only where there was a cancellation charge imposed by the hotel was it collected by the appellant and passed on to the hotel.

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(7) Mr Fraser noted that group booking condition reflected standard industry practice.

Submissions on interest and foreign exchange risk

5 96. HMRC also pointed to the fact that the appellant retained traveller deposits and interest and took the risk/reward of currency fluctuations between the time of payment by the traveller and remittance to the hotel, as indicating that the appellant was not acting as agent. HMRC acknowledge that the retention of deposits and interests were not held in *Secret Hotels2* as being sufficient of themselves to point to agency in that 10 case. However, they noted that all the circumstances have to be considered and, in the context where there are also other factors pointing to agency, these factors assume more significance. Moreover taking currency fluctuation risk and reward is a clear indicator of principal status and inconsistent with a party acting solely as an intermediary.

15 97. The appellant responded that, as regards the retaining of deposits and interest there is simply no reason to reach a different conclusion in this case from that in *Secret Hotels2*. The appellant argued that there is no reason why as a matter of principle taking foreign exchange risk should be any different from the retention of interest. In any event the appellant did not assume any significant proprietary foreign 20 exchange risk. The appellant's sterling advertised price fluctuated with the exchange rate. The appellant then entered into foreign exchange hedges to eliminate 75% of the settlement risk. This was considered commercially acceptable.

HMRC's position on invoicing and compensation arrangements

98. HMRC argued that there is no satisfactory explanation as to why the correct 25 VAT invoicing arrangements were not adopted as regards thousands of hotels or why the hotels never queried the position. The appellant has not provided any evidence as to how the hotels dealt with VAT themselves or that the hotels accounted for VAT on the basis that the appellant was an agent. Although the appellant had business customers, no business traveller sought a VAT invoice from the hotel. The appellant 30 never invoiced the hotels for its purported agency services. The only plausible explanation is that even where the parties used the label "agent", this did not properly reflect the relationship and the agreement.

99. Moreover if the hotels were in fact supplying the rooms to the travellers through the agency of the appellant, the hotels would have needed to know the final price 35 which was charged. On a systematic basis no pricing information was given to the hotels and none was requested by the hotels. Mr Fraser claims that from 2008 onwards commission statements were produced for the hotels but there is no satisfactory evidence that this was done on a regular basis. There are only a couple of examples which do not include any statement regarding VAT. Mr Fraser accepted 40 that the appellant never informed particular travellers of the selling price so that the hotel could not invoice the traveller in any event.

100. As regards the compensation arrangements, the appellant offered vouchers to customers of its own volition in circumstances where, unlike in *Secret Hotels2*, it did not receive any recompense from the hotel. This is a very clear indication that the appellant was acting as principal.

5 101. HMRC acknowledged that the fact that the hotels invoiced the appellant for the net amount agreed between the parties was held by the Supreme Court in *Secret Hotels2* at least of itself not to affect the contractual arrangements between the parties on the basis that (i) they post-dated "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 10 could affect her contractual rights or obligations" (at [48]). However, in this case there are important differences:

> (1) As far as the hotel is concerned, the supplies it made were the same whether it was making supplies to the appellant as principal or as agent and it invoiced the appellant in each case in the same way. Mr Fraser 15 accepted that the only way the hotel would know the difference was if it read the voucher held by the traveller to see if it had another travel agent's logo. When acting as a wholesaler, the appellant received similar invoices from the hotels, which it can be assumed the appellant accepts correctly reflected the supply it received.
>
> 20 (2) In contrast to the situation in *Secret Hotels2*, the invoicing was very much directed by the appellant and was made known to the traveller. The traveller was aware of the position from the voucher he/she received before the supply of the hotel accommodation took place and, therefore, before the contract was thereby performed.

25 102. In *Secret Hotels2* there were written contractual terms that were held to evidence an agency relationship. In this case, as set out above, in HMRC's view there is insufficient evidence of any such terms such that the conduct of the parties as regards invoicing and compensation, in particular, taking into account the above factors, clearly indicates that the appellant was acting as principal/in its own name. In 30 any event, HMRC's view is that, if the tribunal does not accept that the initial contract was affected by the invoicing and compensation arrangements, it was nevertheless subsequently varied by the conduct of the parties as regards these arrangements.

103. The law on when a contract is varied was considered in the High Court decision in *(1) Globe Motors Inc. (2) Globe Motors Portugal-Materiel Electrico Para A* 35 *Industria Automvel LDA (3) Safran USA Inc. v (1) TRW Lucas Varity Electric Steering Limited (2) TRW Limited [2014] EWHC 3718 (Comm)* in relation to whether another party than those who had signed the original written contract had become a party to it. The courted noted at [470] that the law in that respect was "common ground". For a contract to be varied, the court must be satisfied on the balance of 40 probabilities:

> "first that there was a valid and subsisting contract between the parties, secondly consensus between the parties as to the manner in which the

Agreement was to be varied and thirdly that the parties acted in some way to their benefit or detriment, providing consideration".

104. The court held at [488] that there was a variation in that case as it was demonstrated to the court that the relevant party:

5 "engaged in a series of open, obvious and consistent dealings which constituted a variation to the basis of dealings provided for in the [relevant agreement]. There is no other commercially realistic explanation for what happened: i.e. the evidence of conduct unequivocally demonstrates an intention to add [the relevant party] to the contract (and, so, the fact of 10 variation)."

105. HMRC argued that in this case there clearly was such a course of dealing in relation to the invoicing arrangements as regards the hotel invoicing the appellant and the appellant failing to invoice the hotel for its purported agency services as well as a result of the compensation arrangements. The fact that in effect the parties changed 15 their status and thereby acquired new rights suffices for there to be consideration.

106. HMRC also noted that the appellant's business commenced in 1995 and up until the submission of the voluntary disclosure on 27 November 2008, considered that it acted as a principal with VAT due under the TOMS. It is striking that the appellant's position is that it acted on an incorrect basis for over 13 years with no evidence that 20 the accommodation providers brought this to their attention through seeking invoices for the purported supply of intermediary services (which the appellant contends it had been making without its knowledge).

107. Finally HMRC noted that where the appellant accepts it acted as a principal, it should have issued invoices to its organiser clients but did not do so. It failed to 25 register in the member state where the relevant property was situated to account for VAT there on the supplies it accepts that it made. The appellant accepts in relation to such supplies that it also did not account for them under TOMS in the UK.

Appellant's submissions on invoicing and compensation arrangements

108. The appellant responded that from Mr Fraser's evidence it is clear that the 30 "invoices" issued by the hotels were just a mechanism for accounting for commissions. The hotels simply used the mechanism they had in place, which they would use when dealing with travellers direct, in effect as a request for payment. The request was for the net amount as that was the amount they were actually entitled to receive under the contractual arrangements. There was no need for the appellant to 35 invoice the hotels for its commission. The appellant was in receipt of the cash funds and simply retained the commission amount. Moreover the appellant was at that time mistakenly operating under TOMS such that, as Mr Fraser explained, it was not considered necessary to issue invoices. In any event, as HMRC has noted, the Supreme Court in *Secret Hotels2* did not consider that such incorrect VAT accounting 40 was financially inconsistent with an agency relationship. There is no reason for treating this case differently.

109. The travellers' knowledge of the invoicing arrangements has no impact on the analysis. The notification of the invoicing arrangements to the traveller was made after the contract was formed with the traveller. The fact that, when acting as wholesaler, the appellant received similar invoices from the hotels is irrelevant. In any event this again puts the cart before the horse. The VAT treatment has to follow the legal position not the other way around.

110. The fact that the amount received from the traveller was not disclosed to the hotel was not considered in *Secret Hotels2* to be contrary to agency. In any event, from 2008 onwards the appellant did provide the hotel with monthly commission statements. The fact that the appellant provided the hotels with statement of its commission earned in the month is completely consistent with an agency relationship and totally inconsistent with a relationship of a principal trading with a principal. A principal trader does not send its suppliers a monthly statement saying "this month we made £x from the sale of the products we bought from you". That would be an incitement to allow its suppliers to put up prices.

111. That this was insufficient to allow the hotel properly to complete its VAT return was dismissed in *Secret Hotels2* as an argument against agency. Where the appellant has provided its principal with more information than was provided by Med in that case (and sufficient information to fulfil its fiduciary duties as an agent, and to allow its principal to check and verify the agent's commission), this cannot be taken as an argument against agency on the basis of the approach in *Secret Hotels 2*.

112. As to the mistaken operation of TOMS the mistake was not as to whether or not the appellant was an agent but whether the appellant, as a travel agent, had to operate TOMS.

113. As set out in the passage from *Globe* cited by HMRC, for there to be a variation of a written contract there has to be a "consensus" between the parties as to the manner of variation. This means that there has to be a meeting of minds; each of the parties must have considered the point, thought about it and reached agreement that the appellant was not acting as agent notwithstanding the written terms. For a contract to be varied the variation has to take place before the contract has been performed. In this case HMRC has not offered evidence sufficient to prove (on the balance of probabilities) that there was such a consensus reached between all of the parties that, before the completion of each contract of sale (constituted by the stay at the hotel), they intended to vary the terms of the sale such that all parties agreed that the appellant was no longer acting as agent but was purchasing the accommodation and then selling it as principal.

114. The invoicing by the hotels relied on by HMRC was so ambiguous that it cannot be treated as evidence of anything let alone a change of intention of all the parties (including the traveller). It is unrealistic to suppose that the fact that the traveller saw the reference to the hotel invoicing the appellant on the voucher means that the traveller thought it was dealing with the appellant as principal. Travellers cannot be expected to have specialist VAT knowledge. In *Secret Hotels2* the travellers were

not aware of the invoicing arrangements but, the fact that they were in this case, does not make any difference to the conclusion.

115. This submission is also contrary to the express evidence of Mr Fraser who stated that he believed that the appellant was always acting as agent in relation to sales to travellers. HMRC has also failed to show any evidence of the consideration required for such a variation, and this must include consideration passing to each of the parties, (the appellant, the hotel and the traveller). HMRC has not given evidence of any consideration passing to any party before the completion of the contract.

Discussion

116. 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*:

> (1) HMRC argued essentially that the appellant supplied hotel accommodation to customers who booked that accommodation on its website as principal (or undisclosed agent) acting in its own name using services provided by the hotel.
>
> (2) The appellant argued that it was not acting in its own name but rather as a disclosed agent/intermediary ultimately between the hotel and the appellant's customers.

117. As set out in detail above (see 14 and 15 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". Although HMRC has raised certain evidential matters, there is no suggestion that any of the agreements in this case were a sham.

118. We note also the comments in *Secret Hotels2* (see 15 above) that the court or tribunal must have regard to the words used, to the provisions of the agreement as a whole and to the surrounding circumstance, so far as known to both parties, and to commercial common sense and that subsequent behaviour or statements are not an aid to interpreting a written agreement. Such behaviour/statements can be relied on to support a claim that a contract has been varied or rescinded or that the written agreement represented only part of the parties' contractual relationship.

119. 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".

Characterisation of the relationship – hotel and website terms

120. In this case, therefore, we must determine the correct nature of the relationship between the hotels, the appellant and the travellers according to the contractual arrangements between (a) the hotel and the appellant and (b) the appellant and the customers/travellers. The written evidence presented of those arrangements are the hotel terms in the accommodation agreements and the website terms. The proper law of the contract with travellers is stated to be English law in the website terms. The accommodation agreement does not contain any statement that it is governed by English law but the parties had been assuming that it was and we assume it was for the purposes of this decision (for the reasons set out in 10 above). The position is further complicated, as regards the contractual arrangements with the travellers, in that there were also written "blue ink" terms which were applicable when a customer requested a hard copy confirmation of a booking and a hard copy of a voucher. Also the appellant made a number of representations on its website on pages a customer would have seen during the booking process, when booking online, which arguably may form part of the contractual terms with the traveller.

121. HMRC submitted that the appellant has failed to discharge the burden of proof that it was acting as a disclosed agent essentially on the basis that there is insufficient written evidence that was the basis on which the appellant was acting. HMRC argued that there is insufficient evidence (a) that the terms which applied between the hotels and the appellant were in fact the hotel terms for the reasons set out in full in their submissions and (b) that the website terms applicable in the period were as set out above, on the basis that no copy of those terms is available and the only written evidence is the "blue ink" terms which do not refer to the appellant acting as agent for the hotel or to the terms set by the hotels. HMRC also argued that the fact that the appellant entered into the same form of accommodation agreement in cases where it accepts it acted as principal (as regards the wholesale business) shows that the references to the appellant acting as agent is mere "labelling" which does not reflect the true nature of the relationship.

122. Mr Fraser gave evidence on the nature of the contractual arrangements. We found him to be a credible witness. We note that a substantial period of time has elapsed since the period in question such that HMRC suggested the documentary evidence is to be preferred to the evidence of a witness whose memory may have faded. However, Mr Fraser was the founder and managing director of the business and he and his wife were the only shareholders of the appellant. From his evidence he was actively engaged in the business as the key stakeholder with his wife such that it seems unlikely that he would not have a reliable recollection of essential commercial matters such as on what basis the appellant intended to engage with hotels and travellers. In our view, Mr Fraser gave clear evidence on matters he was able to recollect. Where he was not able to recollect particular details, he said so.

123. We note that the documentary evidence taken in isolation presents an incomplete picture. However, overall, as explained in further detail below, we find that, looking at the documentary evidence in combination with Mr Fraser's evidence (in particular as set out at 52 to 58 above), on the balance of probabilities (a) the hotel terms did apply in the majority of cases to the initial contract and on a rolling basis, as described by Mr Fraser and (b) the website terms were substantially the same as those set out above and, in particular, contained provisions stating that the appellant was acting as an agent for the hotel and, for the reasons, set out below that those terms also applied in the majority of cases.

124. We have proceeded, therefore, to examine the hotel terms and website terms on the basis that they governed the relevant contractual relationships. We have concluded from those terms that, on the balance of probabilities, under English law principles, the appellant was acting as a disclosed agent on behalf of the hotels.

Contractual arrangements with travellers

125. As set out in further detail in 39, 40 and 42 above, at the time in question around 80% of bookings made with the appellant in the retail sector were made online through its website. In that case, according to the process required to make a booking, the traveller had to accept the applicable website terms for the booking to be completed and received an email confirmation which included those terms. A traveller who booked on the website could elect to receive a postal confirmation also. In cases where travellers booked using the appellant's call centre, the traveller was referred to the website terms as a matter of course. Essentially the call centre operators followed a script which referred the customer to the website terms but there may of course have been human error in some cases. Travellers who booked in that way may in some cases have received only a postal confirmation as opposed to an email (for example, if the customer did not have an email address).

126. We accept that, as the appellant noted, the fact that travellers who booked through the call centre were referred to the website terms, means that those terms were usually in effect incorporated into the agreement. In the majority of cases, therefore, the relationship between the traveller and the appellant was governed by the website terms (and arguably by the other undertakings on the appellant's website). In a relatively small number of cases travellers also received or, in some cases, only received, a postal confirmation which contained the "blue ink" terms. We have commented further on those terms in 131 and 132.

Website terms

127. Looking first at the website terms, they stated that the appellant was acting "as agent for the hotels" and "sets up a contract between the hotel (Principal) and the Customer". It was noted that "the hotel's own terms and conditions also apply", the key aspects of which were included in the terms and the full details of which could be supplied on request. There was a statement that the customer accepted "the written or emailed confirmation and voucher shows the details of the booking made with the hotel". It was later stated that all vouchers issued by [the appellant] were subject to

"ours and the hotel's terms and conditions". It was then again noted that the appellant "was acting solely as agent for the Hotel" and so "does not have any liability for any failure by the hotel to provide any element of the Customer's booking and/or for anything which may go wrong at the hotel" and only had liability for its own negligence.

128. HMRC point to a number of terms and undertakings given on the appellant's website which they state are inconsistent with this stated agency status which they consider is mere labelling. We have commented on each point raised below. However, as a general point, we note that in *Secret Hotels2* the Supreme Court rejected that a number of terms in the arrangements in that case were inconsistent with agency status on the basis essentially that they stemmed from and reflected that Med had a substantial business based on the website and that it had thereby built up substantial goodwill in the holiday market which it wished to protect. That Med was able to negotiate the relevant terms with the hotels merely demonstrated that it was in a powerful position due to the success of its online business. Overall we consider that the relevant terms which HMRC point to both in the website terms and the hotel terms reflect similar factors. The appellant may not have had as substantial a business as Med but it plainly had a business which it wished to enhance and protect through the applicable terms and, on the basis of Mr Fraser's evidence, many of the terms were included with that end in mind.

129. Accordingly, as regards the website terms:

(1) The fact that the appellant used its own star rating system for hotels and carried out its own reviews of hotels, we regard as commensurate with its role as agent, seeking to make a profit from commissions as regards bookings made on its website. It does not seem surprising that an agent with its own goodwill and business to protect and enhance would want to implement its own rating system to ensure the consistency of quality of what was provided in each category.

(2) Mr Fraser's evidence was that the statement that ten persons or more is a group booking was essentially set by the hotels and in any event this was merely an industry standard practice. This was not a case of the appellant dictating terms that were not set by the hotels.

(3) The charging by the agent of an administration fee for last minute cancellations was not held to be inconsistent with agency status in *Secret Hotels2*. Lord Neuberger noted that in that case there was nothing to suggest that the fee did not reflect the administrative cost to the taxpayer. Similarly there is nothing to suggest otherwise here. In any event we accept Mr Fraser's evidence that this was rarely charged due to a desire to maintain customer goodwill; it was rather a deterrent to prevent "place holding" (see 60 above). That the appellant wished to deter customers from cancelling does not seem to us to be inconsistent with a party acting as agent. Clearly it would be in the commercial interests of both the hotel, as principal, and the appellant, as agent, to minimise late cancellations thereby enhancing both of their businesses.

(4) HMRC submitted that the fact that the terms on cancellation policy are different in the hotel terms and the website terms shows that the appellant was dictating terms, as a principal would. The website terms refer to cancellation charges arising where cancellation was made later than 48 hours before arrival on the basis that the cut off point was treated for practical purposes as falling by 5.00pm two days before arrival. On the other hand the hotel terms refer to the charge arising where cancellation was not made before 5.00pm on the day before arrival. Mr Fraser was clear in his evidence that, apart from the appellant's administration fee discussed above, there was only a single cancellation charge by the hotel (and not by the appellant) which was collected by the appellant to pass to the hotel (see 60 above). The difference in the precise timing in the terms would appear to be just a discrepancy. This could be regarded as a breach by the appellant of the terms with the hotel but we cannot see that has any material affect on the analysis here.

(5) HMRC also point to the fact that to some extent the appellant undertook to deal with customer complaints. Mr Fraser said that in dealing with such complaints (and providing its own compensation) the appellant's only objective was to make sure that customers returned and booked again through the appellant; resolving complaints was a way of demonstrating good service (see 62, 63 and 66 above). On that basis we consider that the desire to deal with complaints is commensurate with the appellant wishing to protect its own goodwill in its agency business to enhance the prospect of it receiving repeat business from travellers.

(6) We do not consider that the reference to the general terms set by the hotels in the website terms meant that the appellant was setting terms and conditions which applied between the travellers and the hotels. It is clear from the wording and the context that the appellant was merely setting out the hotel's terms with its own terms for convenience so that the customer could see all the main applicable terms when making a booking.

130. As regards the representations on the appellant's website which HMRC argue indicate principal rather than agency status:

(1) We do not see that the fact that the appellant carried out hotel reviews' and inspections, applying its own rating system as set out above, is inconsistent with the appellant acting as agent for the hotels. In our view, a desire to present consistent and accurate information on its website as regards hotels is commensurate with the appellant acting as an agent which wished to enhance and its protect its reputation and goodwill with customers as a booking engine.

(2) As regards the 5% reduction for online bookings and the "goodnight promise", the appellant noted that it was under no obligation to sell accommodation at a lower price than its cost and its position was protected by the hotel's obligation to reduce its price to the appellant if it reduced its rate generally. The appellant submitted that in any event this was a mere marketing puff, not a contractual term giving rise to a guarantee; it was a

mere representation that the appellant's price was the best price "at the time" not a guarantee to reduce the price to the traveller once booked. The website terms clearly state that "once a booking is made the price is fixed". We consider it is debatable whether this is a contractual term. We agree that it could be construed as meaning merely that the price was the best price at the time and not a definite offer to refund moneys should that not be the case. In other words it was merely offering an assurance that the person was not likely to find a better price elsewhere such that it was not necessary to look for one. In any event if the appellant was undertaking to give a reduction, we would regard that as again commensurate with it wanting to attract customers to book hotel accommodation using its services in order to generate income from its agency activities.

(3) Referring to the travellers as customers, in our view adds nothing to the debate. We can see that the appellant would see travellers who booked using its services as its customers, albeit that the actual accommodation was provided by the hotels.

(4) As regards the fact that the appellant did on occasions offer its own vouchers for a stay in another hotel as compensation, Mr Fraser said that this was the "best opportunity to generate goodwill". Dealing with complaints and giving discount vouchers was, in his view, a marketing exercise carried on by the appellant as a sales agent (see 62, 63 and 66(4) above). Again this is commensurate with the appellant wanting to enhance and protect its agency booking business.

(5) Finally, HMRC noted that the appellant specified that a traveller could cancel and get their money back if they booked more than seven weeks before the holiday and only for a seven day window. Mr Fraser said that this was merely a cooling off period for customers. Again, we see this as in line with the appellant seeking to enhance its agency business by making booking through the appellant an attractive option.

Postal terms

131. The "blue ink" terms and hard copy vouchers, which a relatively small number of travellers are likely to have received, did not refer to the terms set by the hotels and referred to the appellant as the agent of the customer. As noted, we accept that where a telephone booking was made, the traveller would usually have been referred to the website terms and that suffices for them to be incorporated into the contractual position between the parties. That means that there are likely to be very few cases in which travellers were not aware of the website terms and only received the "blue ink" terms.

132. In any event, the "blue ink" terms are not inconsistent with the appellant acting in an agency capacity albeit that the appellant was stated to be agent for the customer rather than the hotel. In a sense in providing a booking service of this type a business is acting for both the hotel and the traveller. We also accept Mr Fraser's explanation that sending this wording out was an error. Overall we do not consider that this affects our conclusion given that it is likely that only a relatively few of these terms

were sent out and, in any event, the only terms stated are not inconsistent as such with the appellant acting as a disclosed agent.

Hotel terms

133. The hotels terms record that the hotel, which is defined as "the Principal", appointed the appellant, defined as "the Agent", as its selling Agent and that the Agent agreed to act as such. The appellant undertook to "deal accurately with booking requests and pass on all monies which it receives [for bookings][from the Principal's clients] which are due to the Principal under the terms of the agreement".

134. We do not agree that the terms which HMRC point to are inconsistent with an agency relationship:

> (1) HMRC note the requirement in agreement 1 that where the hotel did not invoice or chase for payment within 18 months, the appellant had no obligation to pay the hotel. Mr Fraser's evidence was that this was to encourage prompt action and in reality it would not have been exercised by the appellant (see 66(1)). We regard such a provision as simply reflecting the strength of the bargaining position between the parties. It does not of itself lead to a conclusion that the appellant was not acting as agent.
>
> (2) HMRC noted that the appellant had the right to approve alternative accommodation offered by the hotel if it could not supply the booked accommodation. Mr Fraser's evidence was that, in practice, the right to approve what alternative room could be offered where there was an overbooking was of little consequence because in fact there would be no other viable alternative (see 66(2)). He also said he wanted to steer the hotels to do what the customer wanted. Again we regard this as simply a sign of the appellant's bargaining power.
>
> (1) As regards the appellant in effect setting the price to the traveller, we note Mr Fraser's evidence that, in practice, the price was constrained essentially in that it was subject to the hotel's control of the base price and subject to market forces limiting the upper price (see 65(7) to (10)). In any event, it was specifically held in *Secret Hotels2* that the fact that Med could fix its own commission did not mean that it was not acting as an agent. We cannot see that the position is any different here.
>
> (2) The fact that the hotel was required to ensure safety requirements were satisfied and that the hotel indemnified the appellant against costs for claims, we do not consider affects the position. Mr Fraser said that as the point of contact for customers the appellant wanted to know what the situation was (see 66(3)). Again this can be taken to reflect the respective bargaining position between the parties.
>
> (3) We cannot see that there is any relevance in the fact that there was no actual written agreement between the traveller and the hotel.

135. HMRC also pointed to the fact that the appellant retained traveller deposits and interest and took the risk/reward of currency fluctuations between the time of payment

by the traveller and remittance to the hotel, as indicating that the appellant was not acting as agent. HMRC acknowledge that the retention of deposits and interest were not held in *Secret Hotels2* as being sufficient of themselves to point to agency in that case. However, they argued that all the circumstances have to be considered and, in this context where there are also other factors pointing to agency, these factors assume more significance. Moreover, in their view taking currency fluctuation risk and reward is a clear indicator of principal status.

136. As regards the deposits and interest we can see no reason to reach a different conclusion in this case from that in *Secret Hotels2*. As set out above, we do not agree that there are other material differences from the circumstances in that case which, on the principles established in that case, indicate that the appellant was not acting as an agent as it was specifically stated to be acting in the relevant terms. We cannot see any reason why as a matter of principle taking foreign exchange risk should be any different from the retention of interest.

Invoicing arrangements and whether there was a variation of the contract.

137. It is not disputed that the invoicing arrangements do not reflect what should have happened for VAT purposes under an agency arrangement. HMRC asserted that this evidences that the parties were acting on the basis that the appellant was a principal. HMRC's view is that, if the tribunal does not accept that the initial contract was affected by the invoicing, that and the compensation arrangements nevertheless demonstrate that the contract was subsequently varied by the conduct of the parties. In that regard they relied on the High Court decision in the *Globe* case where it was held that there was a variation as a result of a course of conduct (as further set out in their submissions). We note that the *Globe* decision was subsequently appealed to the Court of Appeal and the decision was released after the hearing of this appeal. However, the material part of the decision of the High Court to which the parties referred at the hearing was upheld by the Court of Appeal.

138. We cannot see any reason why the invoicing arrangements in this case lead to any different conclusion to that in *Secret Hotels2* as regards the similar invoicing arrangements there. As set out above, in that case it was recognised that, as here, the arrangements were not those which should apply where a party is acting as an agent; (a) Med did not provide the hoteliers with invoices in respect of its commission (nor did it 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 the relevant member state, and (b) the hoteliers invoiced Med for the net sum in respect of each customer at the end of the relevant holiday. We note that in this case there is at least some evidence that from 2008 onwards the appellant did actually provide the hotels with commission statements so they would have known the amount of the commission.

139. On the first point Lord Neuberger said (at [47]) that "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 also whilst 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". Precisely the same point applies here.

140. On the second point he said (at [48]) that if Med was an agent as it contended, 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". Again the same applies here. He continued that 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".

141. HMRC acknowledge what Lord Neuberger said but state that there are important differences in this case. In their view, these are that (a) as far as the hotel was concerned, the supplies it made were the same whether it was making supplies to the appellant as principal or as agent; it invoiced the appellant in each case in the same way, and (b) the invoicing was very much directed by the appellant and was made known to the traveller. The traveller was aware of the position from the voucher he/she received before the supply of the hotel accommodation took place and, therefore, before the contract was thereby performed.

142. On (a) we cannot see that it can simply be assumed that because the hotels adopted the same invoicing arrangements in all cases that they thought they were dealing with the hotel as principal in all cases when, as regards the retail customers, that is contrary to the express terms of the written hotel terms (which for all the reasons set out above we accept applied). There could be a number of explanations for why the hotels did this. Mr Frasers' evidence is that the invoices from the hotels were really just requests for payment as the hotels were expecting to receive and were entitled to the net sum (after deduction of the appellant's commission) only. Another explanation is that the hotels simply got the VAT accounting wrong, as did the appellant. We also note Mr Fraser's evidence that the appellant always thought it was acting only as an agent; the mistake was not to apply the VAT rules correctly to that type of agent.

143. On (b) we note that the Supreme Court did not consider, as it was not necessary, what impact it would have had on the contractual arrangements in that case if the traveller had known of the invoicing position. In this case, we consider it unlikely that travellers would have in mind that the appellant could be acting as principal, contrary to the express wording in the website terms, simply because they were presented with a voucher which referred to the hotel directing its invoice to the appellant. From the traveller's perspective, the voucher made it clear that the traveller had already paid the appellant for the hotel accommodation and therefore was not required to pay the hotel for that. A traveller may well have interpreted the reference to the invoicing as between the hotel and the appellant simply as a mechanism for recouping from the appellant the monies ultimately owed to the hotel.

144. The same considerations apply to the argument that the invoicing arrangements and the fact that the appellant occasionally gave compensation vouchers to dissatisfied customers demonstrate that the parties intended the contractual arrangements to be varied, in the sense set out the *Globe* case. For there to be a variation on the basis set out in that case there would need to be a "consensus" between all of the parties as to the manner in which the agreement was to be varied and the parties would need to have "acted in some way to their benefit or detriment, providing consideration". The court reached the conclusion that there was a variation in that case on the basis of "a series of open, obvious and consistent dealings" which constituted a variation for which "there is no other commercially realistic explanation for what happened: i.e. the evidence of conduct unequivocally demonstrates an intention to add [the relevant party] to the contract (and, so, the fact of variation)."

145. We do not consider that the invoicing and/or the compensation arrangements can be construed as a course of conduct unequivocally evidencing an intention to vary the contractual arrangements so that the appellant acted as principal rather than agent for which there is no other commercially realistic explanation. Again we note Mr Fraser's evidence that the appellant simply got the VAT accounting wrong; the appellant knew it was acting as agent but misapplied the VAT rules. It seems to us that is a likely or certainly a realistic explanation as regards the hotels as well. As set out above, we consider it unrealistic that the travellers thought their contractual rights were affected by the statement in the voucher that the hotels were to invoice the appellant. As regards the compensation arrangements, as noted, we accept Mr Fraser's explanation (see 130(4)) that from the appellant's perspective this was a marketing exercise to generate customer goodwill. We do not consider that a traveller would necessarily consider that because the appellant offered compensation it was acting as principal (such that the traveller had no recourse to the hotel as principal) or that in accepting the compensation the traveller accepted that was the case. From the traveller's perspective also a commercially viable explanation is simply that the appellant wished to retain the traveller's business on future occasions.

146. Finally we cannot see that it is relevant to the analysis of the arrangement between the hotel and the appellant that the appellant used the same form of accommodation agreement in cases where it accepts that it was acting as principal (as regards the wholesale business). As set out above the applicable hotel terms are in our view demonstrative of an agency relationship. That those terms applied in cases where the appellant entered into arrangements with organiser clients may impact on an analysis of the relationship between the appellant and hotels as regards that wholesale business but that is not part of the issue before the tribunal.

147. Finally we consider that the conclusion that the appellant was acting as a disclosed agent for the hotels is in accordance with the commercial reality of what was actually happening. As there is to be separate consideration of the meaning of "act solely as intermediary" under article 306, we have not considered whether the concept of agency under English law is consistent with the European law on the meaning of the term intermediary (although we note the comments of the Supreme Court in *Secret Hotels2* (at [50] to [58] (see 27 to 31 above)).

Conclusion

148. 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 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.

149. 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: 18 April 2017