Neutral Citation Number: [2019] EWCA Civ 849

Case No: A3/2018/0984

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Judge Berner and Judge Poole
[2018] UKUT 41 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2019

Before:

LORD JUSTICE LONGMORE
LORD JUSTICE HENDERSON
and
LORD JUSTICE NEWEY

- -

Between:

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
- and -	
FORTYSEVEN PARK STREET LIMITED	**Respondent**

- -
- -

Miss Hui Ling McCarthy QC (instructed by the **General Counsel and Solicitor to HM Revenue and Customs**) for the **Appellants**
Miss Melanie Hall QC (instructed by **KPMG LLP**) for the **Respondent**

Hearing dates: 10-11 April 2019

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Approved Judgment

Lord Justice Newey:

1. This case concerns the treatment for value added tax ("VAT") purposes of sums that the respondent, Fortyseven Park Street Limited ("FPSL"), has received from selling "Fractional Interests" relating to a property at 47 Park Street in London's Mayfair. The Upper Tribunal ("the UT") (Judge Berner and Judge Poole) concluded that the relevant supplies were exempt as the leasing or letting of immovable property, but HM Revenue and Customs ("HMRC") challenge that decision.

Basic facts

2. FPSL, the ultimate parent of which is Marriott Vacations Worldwide Corporation ("MVWC"), holds a long lease of 47 Park Street. In 2002, it refurbished the property to create 49 "residences" divided into five categories. With the benefit of both a site visit and evidence from Mr Lee Dowling, a director of FPSL and the senior vice president for Europe and Middle East at MVWC, the First-tier Tribunal ("the FTT") (Judge Morgan and Mr Coles) described the building in these terms:

> "[14] The building has a [pillared] entrance with no signage indicating that the Property is anything other than residential premises. In the entrance hall, there is a concierge desk and a 24 hour reception desk. The concierge is uniformed and occasionally may stand on the steps outside the building. Mr Dowling stated that the concierge provides services in a manner consistent with other high end residential developments in the area. There are limited public areas. There is a small guest lounge to the right of the entrance, an internet room on the first floor and there are cloakrooms for ladies and gentlemen. Mr Dowling said that the facilities could be described as comparable with those of a small boutique hotel but not in his view with those of a larger style of hotel where, for example, a bar and restaurant would typically be provided.
>
> [15] The residences are laid out over seven floors. On floors 1, 2 and 3 and in the basement there are a number of storage areas for members' property. Prior to a member's arrival these personal effects may be left in the residence for the member to unpack or may be unpacked by the housekeeping service as the member chooses. Each residence is accessed by a private door operated with a key card. Members report to reception to collect their key card on arrival; they hold key cards for a residence only during the period of occupancy. Mr Dowling stated that the arrival and departure process for members reflects those that would be experienced in any of the timeshare resorts operated under the Marriott brand.
>
> [16] Each residence has a living space with sofas and chairs, a dining area, one or two bedrooms and bathrooms and a small kitchen. The kitchen is equipped with crockery, glasses, cutlery and pans. The housekeeping service stock the kitchen with specified groceries on the request and at the cost of the

> member. Mr Dowling said that only about 30% of members use the kitchen facilities. Most of the members who eat at the premises use the in-room dining facilities. The decor of the residences is uniform (although the Members Committee has rights to approve changes …). Inside each residence there is information about the facilities and services available for ease of reference by the members and also for the information of any non-members staying at the Property. There are complimentary toiletries in the residences as well as dressing gowns and slippers."

3. When the hearing before the FTT took place, Fractional Interests cost between £93,000 and £243,000. Mr Dowling explained that the pricing gave purchasers (or "Members") around a 35% discount overall on the commercial rate which non-Members pay for occupying the residences (taking into account the time value of money on a net present value calculation basis) (see paragraph 11 of the FTT decision).

4. At the date of the FTT hearing, FPSL had effected sales of 617 Fractional Interests out of a total of 631. By the time the matter was before the UT, the last remaining Fractional Interest had been sold.

5. Marketing material explained what FPSL was offering in, for example, these terms:

> "Discover your home in Mayfair: the discreet and luxurious comfort of a private residence, with uncompromising levels of service that quietly anticipate, even exceed your expectations. Because you can store your clothing and personal items with us in between visits, your arrival is very much like coming home; letters waiting to be opened on the hall table, your wardrobe pressed and hanging in the closet, your favourite foods and wine stocked in the refrigerator and your family photos arranged on the night stand. Home at last.
>
> The property's concept of fractional ownership allows you to own a share of a residence at 47 Park Street, to be used at your convenience, while providing the amenities and service of a five-star hotel. Fractional ownership, under stewardship of the world renowned Marriott brand, eliminates the burden of managing your second home, provides compelling financial options, gives you flexibility and extends your lifestyle."

6. Someone wishing to buy a Fractional Interest would enter into a membership agreement ("the Agreement") comprising "Particular Terms" and "General Terms". There has been more than one version of the Agreement, but it was common ground that that dated December 2010 was representative.

7. "Fractional Interest" is defined in the December 2010 General Terms as "the right to occupy twenty-one (21) nights of Primary Use Time and up to a maximum of fourteen (14) nights of Extended Occupancy Time and all the rights and obligations deriving therefrom under this Agreement". Section I(A) states that a purchaser "acquires

personal contractual rights and obligations relating to the use of the Residences and the enjoyment of the Additional Plan Benefits during the term of the Plan". The "Plan" means "the rights and obligations described in the Agreement relating to the use and enjoyment of the Residences and the Additional Plan Benefits". The "Additional Plan Benefits" are:

> "as available, each of the Membership Marriott Rewards Points Programme, the Resale Programme, the Rental Programme and the Interval Exchange Programme affiliation".

8. The FTT summarised what a Member would receive on paying the purchase price as follows in paragraph 150 of its decision:

> "(1) Access to occupancy rights whereby, for each fractional interest purchased, a member may occupy a fully furnished and operational residence of a specified category:
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> (a) for 21 nights (of Primary Use Time) during each year until the expiry of the term on 31 October 2050 for no additional payment; and
>
> (b) where such nights have been used in full, a further 14 nights (of Extended Occupancy Time) in each such year on paying an additional Per Diem Rate (to cover certain housekeeping charges)
>
> in each case, subject to making an advance reservation (in accordance with the reservation rules …).
>
> (2) Access (as available) to a Rental Programme operated by the Manager of the Property. This enables a member in effect [to] turn the Primary Use Time rights to monetary value by opting to rent out nights reserved in a residence under those rights at the commercial daily rate. The Manager acts as the exclusive rental agent for members who join this programme in return for a fee.
>
> (3) Access to a Space Available Programme, whereby a member who has signed up to the Rental Programme and who has reserved all of his 21 nights of Primary Use Time, may (at the Manager's discretion) obtain further nights in any residence at a Per Diem Rate to cover certain housekeeping costs and subject to the reservation rules …. We note that this will not be available to members once all of the fractional interests have been sold.
>
> (4) Access (where available) to any Resale Programme which the Manager may set up to assist members in selling their interests should they wish to do so.

> (5) Under arrangements with third parties, access to all exchange programmes that are available or may become available under the Plan, including the Interval Programme [i.e. the 'Interval Exchange Programme'] and the Marriott Programme [i.e. the 'Membership Marriott Rewards Points Programme']. Under the Interval Programme a member can exchange one or more weeks of Primary Use Time for stays of an equivalent time in other properties. Under the Marriott Programme a member can exchange up to two weeks of Primary Use Time for points which entitle him amongst other things to stays in Marriott hotels. [FPSL] is not involved in the provision of the relevant benefits except that it bears the cost of each member's initial 12 months of membership of the Interval Programme. After that it is for members to choose whether to stay in the programme on paying the required fee to Interval."

9. The FTT gave this description of the reservation rules in paragraph 55 of its decision:

> "Members who want to occupy a residence must make a reservation request designating the desired date of occupancy and must receive confirmation from the Manager prior to occupancy. Requests are processed in the order of receipt:
>
> (1) Reservations can only be made for the purchased residence type as regards both Primary Use Time and Extended Occupancy Time.
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> (2) Primary Use Time can be booked for any time during the year but it must be booked in advance, there are limits on concurrent days, on the total number of days which may be reserved in peak times and on reserving a single night during weekends.
>
> (3) The ability to reserve up to a further 14 nights per year under the Extended Occupancy Time rights is subject to availability and on giving at least three and no more than 30 days' notice.
>
> (4) Reservations under the Space Available Programme can be made up to 72 hours in advance of the arrival date for any residence type and may only be made one at a time for up to a maximum of three nights each stay."

10. The FTT said this about the availability of residences in paragraph 59 of its decision:

> "It was put to Mr Dowling that, once all fractional interests are sold, the number of available stays at the Property in a year would be 17,885 but the maximum number of stays which could be required by members as occupation under Primary Use Time and Extended Occupancy Time rights would be 22,085. HMRC asserted that this means that members are not

> guaranteed to be able to reserve all of their Primary Use Time and Extended Occupancy Time in a year. Mr Dowling said that in practice this is not an issue. [FPSL] is able to satisfy the requirements of members as regards reserving their Primary Use Time albeit that members may not always get their first choice of nights or may have to go on the waiting list. Members use an average of only 3.4 nights of Extended Occupancy Time per year. He was confident that would continue to be the case even when all of the fractional interests are sold …. He noted that if there were a serious problem with reservations, the Manager has the right to amend the reservation rules and the Members Committee has the right to approve any such proposed changes, which gives the members some measure of control."

11. The "Manager" was in the first instance to be (and still in fact is) MGRC Management Limited ("MGRC"), another company ultimately owned by MVWC. The General Terms explain that MGRC has "entered into an agreement with [FPSL] whereby Manager shall be responsible for the maintenance, management and administration of the Property [i.e. 47 Park Street] …, the allocation of specific Residences for occupancy by Members and the establishment of rules and regulations for the use of the Property" (section IV(A)). Section IV(B) states:

> "Manager shall provide the following services: the collection of the Purchase Price, the preparation of the Annual Operation Budget and the collection of the Annual Residence Fee including the administration of defaults under the Agreement, the administration of the relationship with the companies that provide all exchanges that may be available under the Plan from time to time including the Membership Marriott Rewards Points Programme and the Interval Exchange Programme, the compiling and upkeep of the definitive register of Members, the operation of the customer service system and the reservation system, the provision of insurance to ensure the repair of the property and the replacement of fixtures, furniture and equipment, the administration (as available) of the Rental Programme and Resale Programme …, all dealings with the Members Committee and any other services required to discharge the obligations of Seller [i.e. FPSL] hereunder."

There is specific provision for the Manager to "obtain such insurance as may, in its reasonable opinion, be necessary or desirable for the protection of the rights of Members", including potentially "property insurance on all Residences and Administrative Areas in an amount equal to the replacement value", and for the Manager to "manage the Plan in accordance with Grand Residences by Marriott standards" (sections IV(C) and IV(H)). The General Terms also state (in Section II):

> "Throughout the duration of the Plan (barring periods required for capital repairs or maintenance) the Residences shall be operational with respect to electricity, water and telephone connections, furnished and ready for occupancy. The

> furnishings and fittings at the Residences shall be replaced over time by Manager in line with Grand Residences by Marriott standards and the changing needs of the Members and the Residence."

12. The General Terms provide for the Manager to "procure the management and administration of the Property and the Plan" "[i]n exchange for the Annual Residence Fee" (section I(A)). The Annual Residence Fee "is the mechanism by which the operating and capital costs and expenses of the Plan and the Management Fee, are charged to Members" (see section IV(D)). "It is intended," section IV(D) says:

> "in essence, to pass along all expenses (operating and long term) for administering the Plan and … managing, maintaining and operating the Property to Members through the assessment and collection each year of the Annual Residence Fee".

The Annual Residence Fee is to be "calculated based on the Annual Operating Budget presented by Manager to the Members Committee" (section IV(D)). The "Management Fee" is to equate to 15% of the Annual Residence Fee (section IV(E)).

13. The exercise of a Member's rights is "conditional on timely payment of the Annual Residence Fee" (see section IV(F) of the General Terms). Failure to cure a default can potentially allow the Manager to terminate the Agreement.

14. As the FTT noted in paragraph 62 of its decision, the services funded from the Annual Residence Fee include "a valet service, a 24-hour front desk, a concierge service and tour desk, a business centre, free Wi-Fi, fax and photocopying services, a daily maid service and luggage storage". Other services are available for an extra charge payable to the Manager: "room service and grocery deliveries, currency exchange, a laundry and dry cleaning service, an in-house florist, a personal shopping service, a car valet and limousine service and newspaper delivery".

15. Members also have access to a number of services supplied by third parties which are not referred to in the Agreement. These, the FTT said, are regarded by FPSL as commercial "tie-ins" which are intended to act as a marketing benefit for both FPSL and the third parties involved (paragraph 64 of the FTT decision). The FTT explained (in paragraph 64) that they comprise:

> "complimentary membership of the Marriott Park Lane Health Club (which includes a gym and indoor pool); a 25% discount on all food and non-alcoholic beverages at the Marriott Park Lane Hotel; access to the nearby Spa Illuminata and discounts on treatments and packages; until December 2013 membership privileges at London Golf Club (there is currently an informal arrangement only); access to [Pasley-Tyler], a private club designed for business people and travellers; access to Morton's private members club; and priority booking and tickets at the Royal Opera House".

FPSL does not, however, guarantee any such benefits.

16. The "Members Committee" is composed of a "volunteer representative body of Members". Its role is "primarily consultative and advisory", "all decisions concerning the management and operation of the Property and the Plan belong[ing] to the Manager" (see section IV(G) of the General Terms).

17. A Member may "sell" his Fractional Interest by surrendering it in favour of a third party (see section VI of the General Terms). He may also "lawfully charge, pledge, assign or surrender [his] rights and interest" as security for any money borrowed to fund the purchase price (see section VI). An entire agreement clause found in section VII(N) states that the General Terms and Particular Terms represent "the entire agreement between Member on the one hand and [FPSL] in its capacity as both Seller and Manager on the other in relation to the subject matter of the Agreement". However, Miss Melanie Hall QC, who appeared for FPSL, told us that Mr Dowling gave evidence to the effect that the description of FPSL as "both Seller and Manager" was incorrect.

18. The FTT considered it:

> "clear that, as a contractual matter, [FPSL] is agreeing itself (as it is the landlord as the owner of the leasehold interest in the Property) to provide occupation rights in respect of the fully furnished residences of the specified type and to procure access for members to the other Plan benefits provided by the Manager or by others such as Interval or Marriott"

(see paragraph 152 of the FTT decision). In the FTT's view, "in effect [FPSL], as the owner of the Property (under its leasehold interest), has sub-contracted or outsourced the maintenance and administration of the Property to the manager, MGRC" (see paragraph 291). The UT, in contrast, spoke of the Agreement "provid[ing] access to additional benefits, including the services provided by the Manager" (paragraph 74 of the UT decision). In paragraph 75 of its decision, the UT said:

> "We have reached this conclusion even on the assumption that the FTT was right to characterise the arrangements for the provision of the Manager's services as sub-contract arrangements. We do not consider, however, that such an analysis is correct. This is not a case, and the FTT evidently found that it was not the case, where FPSL is itself liable to supply to members the management and administration services for consideration and sub-contracts or outsources those obligations to the Manager for which it pays consideration under the sub-contract. There is no sense in the FTT's decision that FPSL made such a supply. The Membership Agreement itself recited (at IV A) that the Manager had entered into an agreement with FPSL whereby the Manager was 'responsible for the maintenance, management and administration of the Property … the allocation of specific Residences for occupancy by Members and the establishment of rules and regulations for the use of the Property' and this statement is not in our view consistent with the suggestion that the management services were supplied by the Manager to FPSL for onward supply to

> the members. In short, the supply of management and administration services was by the Manager to the members in return for the Annual Residence Fee, which was paid by members directly to the Manager."

The central legislative provisions

19. Article 135 of Council Directive 2006/112/EC (on the common system of value added tax) ("the Principal VAT Directive") stipulates that Member States are to exempt from VAT "the leasing or letting of immovable property" (see article 135(1)(l)). By article 135(2)(a), however, there is to be excluded from that exemption:

> "the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites".

Member States may, moreover, "apply further exclusions to the scope of the exemption".

20. Article 135 of the Principal VAT Directive, which replaced article 13B of the Sixth Council Directive of 17 May 1977 (77/388/EEC) ("the Sixth Directive"), is implemented in the United Kingdom by the Value Added Tax Act 1994 ("the VATA"). Section 31(1) of that Act provides for a supply of goods or services to be an exempt supply if it is of a description specified in schedule 9 to the Act. Part II of schedule 9 includes this as item 1 under the heading "Group 1 – Land":

> "The grant of any interest in or right over land or of any licence to occupy land … other than—
>
> …
>
> (d) the provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation or of accommodation in rooms which are provided in conjunction with sleeping accommodation or for the purpose of a supply of catering …."

That is supplemented by note (9), which explains:

> "'Similar establishment' includes premises in which there is provided furnished sleeping accommodation, whether with or without the provision of board or facilities for the preparation of food, which are used by or held out as being suitable for use by visitors or travellers."

The FTT and UT decisions

21. The FTT "concluded that [FPSL's] supplies to the members in return for the purchase price are of rights to occupy a reserved residence which fall within the land exemption as a licence to occupy land" (paragraph 234 of its decision). However, the FTT also considered that "the provision of the residences to members under their fractional

ownership interests, falls within the exclusion in item 1(d)" (paragraph 286). VAT was therefore payable at the standard rate.

22. The UT reversed the FTT. Summarising its conclusions in paragraph 112 of its decision, the UT said:

> "We have decided:
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> (1) agreeing with the FTT on the land exemption issue, that subject to the application of the hotel sector exclusion, the supply by FPSL of the grant of the Fractional Interests was exempt as the leasing or letting of immovable property; and
>
> (2) disagreeing with the FTT on the hotel sector exclusion, that the supply made by FPSL was not a supply of relevant accommodation for the purpose of Item 1(d) of Group 1 of Schedule 9 VATA."

Some legal principles

The land exemption: article 135 of the Principal VAT Directive and item 1, group 1, part II of schedule 9 to the VATA

23. The exemption for "the leasing or letting of immovable property" has been considered on a number of occasions by the Court of Justice of the European Union ("the CJEU"). Amongst the points that emerge from the authorities are these:

    i) The exemption has its own independent meaning in EU law and must be given an EU definition (see e.g. Case C-275/01 *Sinclair Collis Ltd v Customs and Excise* [2003] STC 898, [2003] ECR I-5965, at paragraph 22 of the judgment; Case C-284/03 *Belgian State v Temco Europe SA* [2005] STC 1451, [2004] ECR I-11237 at paragraph 16 of the judgment);

    ii) While the exemption should not be construed in such a way as to deprive it of its intended effect, it is to be interpreted strictly since it constitutes an exception to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (*Temco*, at paragraph 17 of the judgment);

    iii) In contrast, the exclusion in respect of "the provision of accommodation … in the hotel sector or in sectors with a similar function" "cannot … be interpreted strictly" (Case C-346/95 *Blasi v Finanzamt München I* [1998] All ER (EC) 211, at paragraph 19 of the judgment);

    iv) The concept of "the leasing or letting of immovable property" is "essentially the conferring by a landlord on a tenant, for an agreed period and in return for payment, of the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right" (*Temco*, at paragraph 19 of the judgment; also Case C-150/99 *Swedish State v Stockholm Lindöpark AB* [2001] STC 103, [2001] ECR I-493, at paragraph 38 of the Advocate General's opinion; *Sinclair Collis*, at paragraph 25 of the judgment;

and Case C-55/14 *Régie communale autonome du stade Luc Varenne v Belgium* [2015] STC 922, at paragraphs 21 and 22 of the judgment);

v) The "leasing or letting of immovable property" is "usually a relatively passive activity linked simply to the passage of time and not generating any significant added value" (*Temco*, at paragraph 20 of the judgment). If, however, a payment also takes account of other factors, that need not matter if they are "plainly accessory" (see *Temco*, at paragraph 23 of the judgment). In *Temco*, the CJEU said that it was for the national Court to establish "whether the contracts, as performed, have as their essential object the making available, in a passive manner, of premises or parts of buildings in exchange for a payment linked to the passage of time, or whether they give rise to the provision of a service capable of being categorised in a different way" (see paragraph 27 of the judgment);

vi) A landlord may reserve the right to visit the property without rendering the exemption inapplicable (see *Temco*, at paragraphs 24 and 25 of the judgment); and

vii) Article 135 of the Principal VAT Directive "does not … refer to relevant definitions adopted in the legal orders of the member states" (*Temco*, at paragraph 18 of the judgment). The exemption for "the leasing or letting of immovable property" can include arrangements that English law would categorise as licences rather than leases (see e.g. *Customs and Excise Commissioners v Sinclair Collis Ltd* [2001] UKHL 30, [2001] STC 989, at paragraph 35, per Lord Nicholls). Conversely, the words "any licence to occupy land", as used in schedule 9 to the VATA, "should not be construed so as to include the grant of rights that would not, for the purposes of the Sixth Directive [now, the Principal VAT Directive], constitute 'the leasing or letting of immovable property'" (*Customs and Excise Commissioners v Sinclair Collis Ltd*, at paragraph 58, per Lord Scott).

24. It is worth quoting in full some of the CJEU's judgment in *Temco*, the leading case:

> "20. While the court has stressed the importance of the period of the letting … it has done so in order to distinguish a transaction comprising the letting of immovable property, which is usually a relatively passive activity linked simply to the passage of time and not generating any significant added value (see, to that effect, *Stichting 'Goed Wonen' v Staatssecretaris van Financiën* (Case C-326/99) [2003] STC 1137, [2001] ECR I-6831, para 52), from other activities which are either industrial and commercial in nature, such as the exemptions referred to in art 13B(b)(1) to (4) of the Sixth Directive, or have as their subject matter something which is best understood as the provision of a service rather than simply the making available of property, such as the right to use a golf course (*Sweden v Stockholm Lindöpark AB* (Case C-150/99) [2001] STC 103, [2001] ECR I-493, paras 24 to 27), the right to use a bridge in consideration of payment of a toll (*EC Commission v Ireland* (Case C-358/97) [2000] ECR I-6301) or

> the right to install cigarette machines in commercial premises (*Sinclair Collis Ltd v Customs and Excise Comrs* (Case C-275/01) [2003] STC 898, [2003] ECR I-5965, paras 27 to 30).
>
> 21. The actual period of the letting is thus not, of itself, the decisive factor in determining whether a contract is one for the letting of immovable property under Community law, even if the fact that accommodation is provided for a brief period only may constitute an appropriate basis for distinguishing the provision of hotel accommodation from the letting of dwelling accommodation (*Blasi v Finanzamt München I* (Case C-346/95) [1998] STC 336, [1998] ECR I-481, paras 23 and 24) …
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> 23. Furthermore, while a payment to the landlord which is strictly linked to the period of occupation of the property by the tenant appears best to reflect the passive nature of a letting transaction, it is not to be inferred from that that a payment which takes into account other factors has the effect of precluding a 'letting of immovable property' within the meaning of art 13B(b) of the Sixth Directive, particularly where the other factors taken into account are plainly accessory in light of the part of the payment linked to the passage of time or pay for no service other than the simple making available of the property.
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> 24. Lastly, as regards the tenant's right of exclusive occupation of the property, it must be pointed out that this can be restricted in the contract concluded with the landlord and only relates to the property as it is defined in that contract. Thus, the landlord may reserve the right regularly to visit the property let. Furthermore, a contract of letting may relate to certain parts of a property which must be used in common with other occupiers.
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> 25. The presence in the contract of such restrictions on the right to occupy the premises let does not prevent that occupation being exclusive as regards all other persons not permitted by law or by the contract to exercise a right over the property which is the subject of the contract of letting."

25. The *Luc Varenne* case illustrates how a transaction involving the letting of immovable property (in that case, a football stadium) can be taken out of the land exemption by the provision of other services. In *Luc Varenne*, the CJEU ruled that article 13B(b) of the Sixth Directive (now article 135(1)(l) of the Principal VAT Directive):

> "must be interpreted as meaning that the act of making available, for consideration, a football stadium under a contract reserving certain rights and prerogatives to the stadium owner and providing for the supply, by the owner, of various services, including services of maintenance, cleaning, repair and

> upgrading, representing 80% of the charge which is agreed in the [contract] to be payable, does not constitute, as a general rule, a 'letting of immovable property' within the meaning of that provision".

In the course of its judgment, the CJEU said this:

> "29. In the circumstances of the main proceedings, what seems to be involved is the supply, by the corporation [i.e. the entity which ran the football stadium], of a more complicated service consisting of provision of access to sporting facilities, where the corporation takes charge of the supervision, management, maintenance and cleaning of those facilities.
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> 30. As regards, first, supervision, namely the rights of access to the sporting facilities and the control of that access conferred on the corporation, it is true that those rights cannot, in themselves, preclude the classification of the transaction at issue in the main proceedings as a letting within the meaning of art 13B(b) of the Sixth Directive. Such rights may be justified in order to ensure that the use of those facilities by the lessees is not disturbed by third parties. The court has previously stated that the presence of restrictions on the right to occupy the premises let does not prevent that occupation being exclusive as regards all other persons not permitted by law or by the contract to exercise a right over the property which is the subject of the letting contract (judgment in *Belgian State v Temco Europe SA* (Case C-284/03) [2005] STC 1451, [2004] ECR I-11237, para 25).
>
> 31. In the circumstances at issue in the main proceedings, the rights of access to the sporting facilities and the control of that access seem none the less to have the effect, by means of a caretaking service, that representatives of the corporation are permanently present at those facilities, which could be evidence to support the view that the role of the corporation is more active than that which would arise from a letting of immovable property within the meaning of art 13B(b) of the Sixth Directive.
>
> 32. As regards, secondly, the various services of management, maintenance and cleaning, it appears that they are, for the most part, actually necessary to ensure that the facilities in question are suitable for the use for which they are intended, in other words sporting events and, more specifically, football matches in accordance with the applicable sporting regulations.
>
> 33. It must therefore be held that the facilities required for that purpose are, by means of the offered services of repair and upgrading, made available to RFCT [i.e. the football club with which the corporation had contracted] in a condition which

> permits their use for the agreed purposes and that the provision of access to those facilities for that specific end constitutes the supply which is characteristic of the transaction at issue in the main proceedings (see inter alia, by analogy, the judgments in *Ministero dell'Economia e delle Finanze v Part Service Srl* (Case C-425/06) [2008] STC 3132, [2008] ECR I-897, paras 51 and 52; *Field Fisher Waterhouse LLP v Revenue and Customs Comrs* (Case C-392/11) [2013] STC 136, para 23; and *Minister Finansow v RR Donnelley Global Turnkey Solutions Poland sp z oo* (Case C-155/12) [2014] STC 131, para 22).
>
> 34. In that regard, the economic value of the various services supplied, those representing, according to the order for reference, 80% of the charge which is agreed in the contract to be payable, also constitutes evidence which supports the classification of the transaction at issue in the main proceedings, considered as a whole, as a supply of services rather than as a letting of immovable property within the meaning of art 13B(b) of the Sixth Directive"

(underlining added).

Supplies and suppliers

26. Article 1(2) of the Principal VAT Directive explains that the principle of the common system of VAT "entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services". Amongst the transactions subject to VAT are "the supply of goods for consideration within the territory of a Member State by a taxable person acting as such" (article 2(1)(a)) and "the supply of services for consideration within the territory of a Member State by a taxable person acting as such" (article 2(1)(c)). By article 73:

> "the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party …".

27. The VATA contains provisions to similar effect. Under section 4(1), VAT is to be charged on "any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him". "Supply" includes "all forms of supply, but not anything done otherwise than for a consideration" (section 5(2)(a)).

28. The following propositions can be derived from the case law:

    i) The concept of a "supply" is "an autonomous concept of the EU-wide VAT system" (*Revenue and Customs Commissioners v Airtours Holiday Transport Ltd* [2016] UKSC 21, [2016] STC 1509, at paragraph 20, per Lord Neuberger);

    ii) A supply of goods or services "for consideration", within the meaning of article 2(1) of the Principal VAT Directive, "presupposes the existence of a direct link between the goods or services provided and the consideration

received" (Joined Cases C-53/09 and C-55/09 *Revenue and Customs Commissioners v Loyalty Management UK Ltd* and *Baxi Group Ltd v Revenue and Customs Commissioners* [2010] STC 2651, at paragraph 51 of the judgment; see also Case 102/86 *Apple and Pear Development Council v Customs and Excise Commissioners* [1988] STC 221, at paragraph 12 of the judgment);

iii) A supply of services "is effected 'for consideration', within the meaning of art 2(1) of [the Principal VAT Directive], and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient" (Case C-653/11 *Revenue and Customs Commissioners v Newey* [2013] STC 2432, at paragraph 40 of the judgment; see also Case C-16/93 *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] STC 509, at paragraph 14 of the judgment);

iv) All or part of the consideration can potentially, however, come from someone other than the recipient of the supply. Article 73 of the Principal VAT Directive refers to consideration being received "from the customer *or a third party*" and, consistently with that, "it is not a requirement … that, for a supply of goods or services to be effected 'for consideration' … the consideration for that supply must be obtained directly from the person to whom those goods or services are supplied" (Cases C-53/09 and C-55/09 *Revenue and Customs Commissioners v Loyalty Management UK Ltd* and *Baxi Group Ltd v Revenue and Customs Commissioners*, at paragraph 56 of the judgment). In *Revenue and Customs Commissioners v Loyalty Management UK Ltd* [2013] UKSC 15, [2013] STC 784, Lord Reed explained (at paragraph 67):

> "consideration paid in respect of the provision of a supply of goods or services to a third party may sometimes constitute third party consideration for that supply, either in whole or in part…. Economic reality being what it is, commercial businesses do not usually pay suppliers unless they themselves are the recipient of the supply for which they are paying (even if it may involve the provision of goods or services to a third party), but that possibility cannot be excluded a priori. A business may, for example, meet the cost of a supply of which it cannot realistically be regarded as the recipient in order to discharge an obligation owed to the recipient or to a third party. In such a situation, the correct analysis is likely to be that the payment constitutes third party consideration for the supply";

v) "[C]onsideration of economic realities is a fundamental criterion for the application of the common system of VAT", including "as regards the identification of the person to whom goods are supplied" (Cases C-53/09 and C-55/09 *Revenue and Customs Commissioners v Loyalty Management UK Ltd* and *Baxi Group Ltd v Revenue and Customs Commissioners*, at paragraph 39 of the judgment; see also *Newey*, at paragraph 42 of the judgment). When deciding whether the person who pays for a supply is himself the recipient of it, therefore, it can be important to have regard to both the contractual

relationships and economic realities. In *Newey*, the CJEU explained as follows:

> "43. Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction … have to be identified.
>
> 44. It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.
>
> 45. That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions";

vi) When determining the nature of a taxable transaction, "regard must be had to all the circumstances in which the transaction in question takes place in order to identify its characteristic features (see *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* (Case C-231/94) [1996] STC 774, [1996] ECR I-2395, para 12, and *Stockholm Lindöpark*, para 26)" (*Sinclair Collis*, at paragraph 26 of the CJEU judgment); and

vii) Although "every supply of a service must normally be regarded as distinct and independent", "a supply which comprises a single service from an economic point of view should not be artificially split" (Case C-349/96 *Card Protection Plan Ltd v Customs and Excise Commissioners* [1999] 2 AC 601, at paragraph 29 of the judgment). There is therefore a single supply where "two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split" (Case C-42/14 *Minister Finansow v Wojskowa Agencja Mieszkaniowa w Warsawa* [2015] STC 1419, at paragraph 31 of the judgment). In particular, there is a single supply in cases where "one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service" (*Card Protection Plan*, at paragraph 30 of the judgment), and "a supply must be regarded as ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied" (*Wojskowa Agencja Mieszkaniowa*, at paragraph 31 of the judgment).

The issues

29. The issues we have to decide can be summarised as follows:

i) Was the land exemption inapplicable because "the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right" was missing from FPSL's supplies to Members? [Issue 1]

ii) Was the land exemption inapplicable because the supplies at issue did not involve merely a relatively passive activity but rather significant added value? [Issue 2]

iii) Supposing that the supplies were in principle capable of falling within the land exemption, were they excluded from the exemption by item 1(d) ("Item 1(d)") in group 1 of part II of schedule 9 to the VATA? [Issue 3]

30. I shall take these issues in turn.

Issue 1: Right to occupy property as if owner

31. It is common ground between the parties that the relevant supplies were made when Members entered into the Agreement and paid for their Fractional Interests. Miss Hui Ling McCarthy QC, who appeared for HMRC, argued that a Member did not at that stage obtain any "right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right", as required by the land exemption (see paragraph 23(iv) above). The Member would not acquire such a right unless and until he successfully made a reservation. There was, moreover, no guarantee that he would be able to reserve a residence for any particular dates (or at all), and even Primary Use Time could not be rolled over to a future year. What a Member obtained at the time of supply was, Miss McCarthy said, the *opportunity* to book accommodation, not an actual right to occupy property. An analogy could, Miss McCarthy suggested, be drawn with *Revenue and Customs Commissioners v Esporta Ltd* [2014] EWCA Civ 155, [2014] STC 1548, where a member of a health and fitness club was held by the Court of Appeal to be supplied with "membership of the club and the right to access its facilities" (see paragraph 34, per Vos LJ); in Arden LJ's words, "the supply was the right of access, conditional on payment, and not actual access" (paragraph 45). Likewise, the supply in the present case was of the right (or opportunity) to reserve (and stay), not actual occupation rights. The conditionality, Miss McCarthy said, rendered the land exemption inapplicable.

32. The FTT and UT were not persuaded by such arguments. The FTT said in paragraph 201 of its decision:

> "In our view, … it is clear that the members are paying the price in return for the right to occupy a residence under the Primary Use Time and Extended Occupancy Time rights albeit that these rights can be exercised only once a successful reservation is made. It must be the case that, in paying such a substantial sum upfront (ranging from £92,000 to £243,000), a member intends to obtain the right to reserve and occupy a residence of the specified type under these rights. In plain terms, a member pays the price in order to be able to occupy a luxury residence in a desirable location in the heart of Mayfair in London for a maximum period of time each year on an ongoing basis over many years."

The FTT did "not consider that the fact the occupation right is not immediate, that occupation has to be reserved and, that the precise period of occupation and particular residence which will be occupied is not known at the outset, means that [FPSL] is not

making a supply of a 'letting of immovable property'" (paragraph 208). The reservation system, the FTT said, "is merely the process by which the member obtains what he actually intends to acquire in return for the price, namely, occupation or enjoyment of a reserved residence of the specified type" and "is provided as part and parcel of those occupation rights" (paragraph 212). The FTT did not think that the "highly theoretical possibility" that a Member would not be able to reserve any nights detracted from "the economic reality of the position that a member intends to obtain occupancy rights in return for the purchase price" (paragraph 222).

33. The UT arrived at a similar conclusion. In its view:

> "The supply by FPSL is more than the grant of a right to enter 47 Park Street and to occupy a Residence if one is found to be available. It is the grant of a right to occupy which can be exercised by the making of a reservation"

(see paragraph 63 of the decision). The "true underlying supply", the UT said, "is of a licence to occupy, which a member can exercise by means of the reservation system" (paragraph 54); there was "no separate supply of an antecedent right to use the facilities, followed by a further supply of the facilities themselves if and when a member availed himself or herself of them" (paragraph 50). The condition that a reservation is made "is not an impediment to access or use of a Residence" but "facilitative as a mechanism for exercising the right provided by the licence to occupy" (paragraph 48).

34. I agree. Miss McCarthy herself accepted that the land exemption does not necessarily require the recipient of a supply to know from the outset which of a number of properties he is to occupy. She maintained that, at the time of the supply in the present case, there was no guarantee that a Member would be able to occupy *anything* for even the 21-night Primary Use Time. That, however, was a "highly theoretical possibility" (in the FTT's words) rather than a real one. As Mr Dowling explained in his evidence, there is no issue in practice: FPSL "is able to satisfy the requirements of members as regards reserving their Primary Use Time albeit that members may not always get their first choice of nights or may have to go on the waiting list" (see paragraph 10 above). In the circumstances, the UT was right to see the reservation system as "facilitative" rather than introducing conditionality such as to make the land exemption unavailable. The economic reality is that a Member gained a sufficient right to occupy from the start.

35. I would not accept Miss McCarthy's contentions on Issue 1.

Issue 2: Added value

36. As already noted, "leasing or letting of immovable property" is "usually a relatively passive activity linked simply to the passage of time and not generating any significant added value" (see paragraph 23(v) above). Miss McCarthy submitted that the transactions at issue in the present case amounted to more than "relatively passive activity". The position was rather that significant added value was being generated by FPSL. Miss McCarthy did not suggest that the commercial "tie-ins" mentioned in paragraph 15 above are relevant in this context. She relied on the provision to Members of, first, the hotel-type services provided by the Manager and, secondly,

"commercial add-ons" (specifically, the "Additional Plan Benefits"). The transactions thus involved going above and beyond the exploitation of "immovable property" as such.

37. Miss McCarthy's contentions were in part based on the proposition that the Manager, which has no contractual relationship with any Member, does not supply services to the Members direct but via FPSL. Her position was that the hotel-type services are supplied to Members by FPSL, by means of supplies made to it by the Manager.

38. The FTT did not address these arguments in terms. The UT did, and rejected them. The UT said this on the subject (at paragraph 74 of its decision):

> "It is true that the Membership Agreement provides access to additional benefits, including the services provided by the Manager. Even if the correct legal analysis is that FPSL procures, by sub-contract, the Manager's services for the benefit of members, such procurement is in our view itself a relatively passive activity as far as FPSL is concerned and, in view of the fact that the Manager's services are separately paid for by the members through the Annual Residence Fee, it adds no significant value to FPSL's supply. There is no evidence, as there was in *Luc Varenne* (see para 34) of the economic value of the individual elements of FPSL's composite supply, but there is no reason to conclude that the provision by FPSL of access to the Additional Plan Benefits can have attributed to it any material proportion of the overall economic value of the Fractional Interest supplied under the Membership Agreement. Nor was the grant of any such right, either in relation to the management of the property or of access to the Additional Plan Benefits, the active exploitation by FPSL of the property: all relevant services were supplied by others, with FPSL's role remaining passive at all times."

The UT went on, in paragraph 75 of its decision (quoted in paragraph 18 above), to reject the FTT's sub-contract analysis and to say that, in its view, the supply of management and administration services was in fact "by the Manager to the members in return for the Annual Residence Fee, which was paid directly to the Manager". In other words, the UT took the view that the hotel-type services were supplied by the Manager rather than FPSL but that, even were it wrong about that, FPSL's role was sufficiently passive for the land exemption to apply.

39. Miss Hall supported the UT's conclusion. She distinguished between access to services and the services themselves. FPSL, she said, was contractually obliged to provide Members with *access* to the services to which Miss McCarthy referred but did not itself supply the *actual* services. The grant of a Fractional Interest for a very large sum would, she accepted, have been hollow or illusory if it did not include the right to the hotel-type services that the Manager was to deliver. However, such services involved a distinct supply, and their supplier was the Manager, not FPSL. What FPSL was supplying (viz. access) was both ancillary and passive. Were, moreover, FPSL to be deemed to be the supplier of the hotel-type services, they should be seen as either ancillary or part of a composite supply of versatile ownership

rights. As for the "commercial add-ons", they were neither an essential feature of the arrangements nor even guaranteed, and they could fairly be categorised as ancillary.

40. One question then is: to whom does the Manager supply its services? Is it, as Miss McCarthy argued, FPSL? Or are the services supplied direct to Members, as Miss Hall maintained?

41. I do not find this an easy point. On balance, however, I have arrived at the conclusion that the Manager's services are supplied via FPSL. In other words, the Manager supplies its services to FPSL, which, in turn, supplies them to Members.

42. The contractual position is "the most useful starting point" (to use the words of Lord Reed in *WHA Ltd v Revenue and Customs Commissioners* [2013] UKSC 24, [2013] STC 943, at paragraph 27). The Manager cannot provide its services in pursuance of any contract with any Member since there has never been any such contract. In contrast, it can be seen from the Agreement that an agreement exists between the Manager and FPSL. Further, FPSL has not only entered into a contract with each Member but, even on Miss Hall's case, undertaken to procure the provision of the Manager's services. That FPSL should have contractual responsibility for the Manager's services makes obvious sense, moreover. Members were led to expect the services of a luxury hotel and, given that the Manager was not itself a party to the Agreement, the various references in the Agreement to what the Manager was to do would be nugatory if they did not bind FPSL.

43. The CJEU referred in *Newey* to the possibility of contractual terms "constituting a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions" (see paragraph 28(v) above). In the present case, however, there is no reason to suppose that the Manager's significance has been in any way disguised or played down in the contracts.

44. Nor, in my view, is there any other sufficient reason to conclude that the economic and commercial reality does not accord with the contractual position. It is true that it is the Manager which collects the Annual Residence Fee (including the 15% Management Fee), but that arrangement is not inconsistent with the Manager being considered to supply its services via FPSL. The consideration for a supply can potentially come from a third party (see paragraph 28(iv) above). It is also to be observed that the Agreement provides for the collection by the Manager of the "Purchase Price" as well as the Annual Residence Fee (see paragraph 11 above).

45. Pointing out that MGRC charges VAT on its supplies as the Manager, Miss Hall spoke of the danger of double taxation. Treating FPSL as the supplier of the hotel-type services would mean that it had to account for VAT too, she said. If, however, the correct analysis is that the Manager supplies its services to FPSL which, in turn, supplies them to the Members, FPSL must be entitled to recover as input tax VAT levied by the Manager. That removes any risk of double taxation.

46. In the circumstances, it seems to me, as I have said, that the better view is that FPSL itself supplies the hotel-type services provided by the Manager. It does not necessarily follow, however, that Issue 2 should be determined in HMRC's favour. The supplies at issue before us are those for which Members paid large lump sums and which it is common ground were made when Members entered into the Agreement and effected

payment. To my mind, those supplies cannot be assimilated with the supplies of hotel-type services that are made on an ongoing basis. While it may be right to regard FPSL as having *promised* to make the latter species of supply (using the Manager), I would still see the actual delivery of the hotel-type services as involving separate supplies from those with which we are concerned on this appeal. It thus remains to be considered, as it appears to me, whether the UT was right to think that, even if FPSL procured the Manager's services by way of sub-contract, its role was relatively passive and added no significant value.

47. In the course of her submissions, Miss Hall stressed features of the Agreement which could be said to indicate that the "essential object" of the transactions at issue was the making available of property rather than the provision of a service. A Member, she noted, is given the right to occupy a residence or, if he prefers, to "exercise the Additional Plan Benefits in lieu of occupancy". As the FTT observed, Members "can realise value from their interests in that they can rent out a reserved residence of the specified category rather than occupying it, they can sell their interest or use it as security and they can in effect exchange reserved nights for other accommodation/benefits" (paragraph 282(4) of the FTT decision). Further, a Fractional Interest lasts many years and a Member can play some (albeit limited) part in how 47 Park Street is run through the Members Committee. Miss Hall also made the point that no part of the purchase price can be identified as having been paid in return for FPSL's commitments in respect of the Manager's services.

48. As, however, Miss Hall recognised, the grant of a Fractional Interest would have been hollow without the services that were to be provided. Members did not pay large purchase prices to obtain bare physical space. Marketing material held out the prospect of "the amenities and service of a five-star hotel" (see paragraph 5 above), and that was reflected in the Agreement: a Member was promised hotel-type services. The FTT commented that, from a member's perspective, it "would expect the perception to be that the facilities and services to be enjoyed on occupying a residence are part and parcel of what he receives as an owner of a fractional interest" (paragraph 294 of its decision). That must be right.

49. In the end, I have concluded both that the grant of a Fractional Interest involved more than a mere letting transaction and that the obligations which FPSL undertook as regards the provision of hotel-type services cannot be regarded as ancillary or (in the words of the CJEU in *Temco*) "plainly accessory". The "essential object" of the transactions was not, as I see it, "the making available, in a passive manner, of premises or parts of buildings in exchange for a payment linked to the passage of time", but "the provision of a service capable of being categorised in a different way" (to quote the CJEU in *Temco* once again). This was not "simply the making available of property" (*Temco*, paragraph 20 of the judgment), but pre-payment for accommodation "in an environment similar to a hotel and with the services which can be expected in a hotel, repeatedly over a number of years" (paragraph 289 of the FTT decision). As in the *Luc Varenne* case, what was being supplied was "a more complicated service". It is also not without relevance that the land exemption has to be construed strictly (see paragraph 23(ii) above).

50. FPSL may also be said to have generated "added value" in relation to the Additional Plan Benefits. These lend some further support to HMRC's case. I would question whether FPSL's obligations in respect of the Additional Plan Benefits would, taken in

isolation, have prevented the land exemption from applying, but I do not need to decide the point.

51. I respectfully take a different view from the UT on Issue 2 and would allow the appeal on that ground.

Issue 3: Exclusion from exemption

52. The conclusions I have reached thus far are sufficient to dispose of this appeal. Having, however, heard full argument on the point, I also think it appropriate to address Issue 3, namely, whether, supposing that (contrary to my view) FPSL's supplies were in principle capable of falling within the land exemption, they were excluded from the exemption by Item 1(d).

53. The FTT decided that Item 1(d) was in point. It said this on the subject:

> "[285] Members and non-members both occupy the same residences and receive the benefit of the same facilities and services as can be expected at a hotel. Essentially the question is whether [FPSL] supplies a residence as a dwelling, rather than as accommodation in a hotel/similar establishment, by virtue of the fact that [FPSL] grants a member the right, which is paid for in full upfront, to stay in a residence on a repeated short-term basis over many years on the basis that the member pays for a proportionate share of the running costs of the property and for the type of services that can be expected at a hotel under separate fees paid to a different party. In other words, the issue is whether these factors (and the related ones referred to by [FPSL] …) create a 'passive' letting of dwelling accommodation or can be said to involve 'more active commercial exploitation' of the kind typical in the 'hotel sector'.
>
> [286] We have found this a difficult issue but looking at all the circumstances, we have concluded that the provision of the residences to members under their fractional ownership interests, falls within the exclusion in item 1(d). In forming that view we are mindful that, whilst the Directive exemption is to be construed strictly (but not such as to deprive it of its intended effect), the Directive hotel exclusion is to be interpreted broadly (as stated in *Temco* …).
>
> [287] It seems to us that the essential characteristic of occupation of accommodation in the 'hotel sector' is the flexible and relatively short-term nature of a stay in premises provided with the attendant facilities and services that can be expected for such short-term and/or occasional stays and the resulting required greater supervision and management. In that context, in our view it is the duration of the stays rather than the length of time through which such short stays may be enjoyed that is the key factor ….

> [288] In this case members occupy residences for short periods of time in each year, under a relatively flexible reservation system, whereby they may occupy for a single night or more at a time at any point during the year up to a permitted maximum of nights (albeit subject to restrictions, such as in peak periods and at weekends). The occupation is provided in premises which are similar to a boutique hotel with many of the attendant facilities and services which can be expected in a hotel. The purchase price a member pays for those stays is linked to the duration of the short-term stays in the residence in each year rather than to the duration of the agreement itself. Mr Dowling explained that essentially the pricing of the transaction with members gives members a discounted rate for their stays compared with non-members.
>
> [289] The commercial reality is that a member pre-pays for the flexibility to enjoy short stays of a stated maximum amount each year, in an environment similar to a hotel and with the services which can be expected in a hotel, repeatedly over a number of years. It is difficult to see that, as a matter of principle, such stays change their character because, in effect, the member has an on-going right to enjoy such short stays for which he pre-pays at the start."

54. A little earlier in its decision, the FTT had noted respects in which a Member's position differed from that of a non-Member. It identified the main ones as follows in paragraph 282:

> "(1) A non-member occupies on an occasional or ad hoc basis (subject to availability/prior reservation) at a single daily commercial rate. Members occupy under a long-term right in return for the payment of an upfront price and have rights to stay for a maximum number of nights per year. There are detailed reservation rules but, essentially, subject to making a successful reservation, a member has flexibility to choose when he wishes to occupy and for what length of period (subject to seasonal and weekend restrictions) up to the maximum permitted occupancy in any given year.
>
> (2) A member may permit others to occupy a residence reserved under his Primary Use Time rights.
>
> (3) A member's right to occupy is subject to the member paying the Annual Residence Fee, which covers both costs of the Property and services which may be termed 'hotel services' as set out above (and to remaining in Good Standing). There is no overt charge of an equivalent type for non-members.
>
> (4) Unlike a hotel guest, members can realise value from their interests in that they can rent out a reserved residence of the specified category rather than occupying it, they can sell

> their interest or use it as security and they can in effect exchange reserved nights for other accommodation/benefits.
>
> (5) Members have a Members Committee which has some limited input on the management of the Property/plan."

55. The UT recorded that there was no doubt, and it was common ground, first, that "one of the elements of the Fractional Interest obtained by a member is a right, subject to reservation, to occupy accommodation which is, or includes, sleeping accommodation" and, secondly, that "the setting of the accommodation was of the nature of a small boutique hotel, with many of the services associated with high-class hotel accommodation", so that 47 Park Street is a "similar establishment" to a hotel, within the meaning of Item 1(d) (see paragraph 94 of its decision). The UT also recognised that "the determination whether a supply falls within or outside the hotel sector exclusion involves a multi-factorial assessment" (paragraph 101) and that "an appeal court or tribunal should be slow to interfere with a multi-factorial assessment based on a number of primary facts" (paragraph 107).

56. The UT considered, however, that the FTT had made an "error of principle" by "having regard in the circumstances of this case to the length and characteristics of the individual stays to which a member was entitled by virtue of the Fractional Interest acquired, and not to the nature of the supplies of the Fractional Interests made by FPSL to the members, with their accompanying rights and obligations under the Membership Agreement" (paragraph 108 of the decision). In the UT's view, the supply at issue was of "a right which comprises more than something in the nature of short-term accommodation in the hotel sector" (paragraph 95). The UT continued:

> "The member obtains a right which not only endures, but which can be sold (whether as part of the Resale Programme or independently), used as security or as a guarantee for a loan to fund the purchase of the Fractional Interest or turned to account through the optional Rental Programme. Moreover, as Ms Hall submitted, the supply of a Fractional Interest carries with it financial obligations and risks that are alien to supplies of accommodation in the hotel sector. In order to preserve their rights, Members are required to pay an annual residence fee to the Manager to cover maintenance, management and administration, and, through the Members' Committee, they have a wider involvement in how the property is run."

As the UT saw things, the FTT had "erred in law in focusing on the duration of the individual stays that could be made by a member by virtue of the Fractional Interest which the member acquired from FPSL" (paragraph 94). In the UT's view (see paragraph 94):

> "That, in our judgment, failed to have proper regard to the nature of the supply made by FPSL. That supply was not of a series of individual short-term stays; it was a supply of a long-term right to occupy a reserved Residence during the relevant periods. It is not in our view permissible to apply Item 1(d) by reference to the individual, and short-term, stays which may be

> enjoyed as a consequence of the exercise of the long-term right acquired. Nor can the supply or supplies be characterised by the way in which the price for the supply has been set, or the fact that, when judged against the pricing for non-members, it can be calculated that members receive an effective discounted rate for the stays which can be reserved by virtue of their Fractional Interests."

57. Miss Hall advanced submissions to similar effect. The only way, she said, in which a typical customer can enjoy sleeping accommodation in a hotel or similar establishment is to sleep in it. The Fractional Interests granted to Members comprise a more complex bundle of rights. The supply to a non-Member staying at 47 Park Street might be of "sleeping accommodation", but the supply to a Member was fundamentally different. The fact that *one element* of the latter supply conferred the right to "sleeping accommodation" is irrelevant. What matters is the nature of the supply as a whole, not individual ingredients of that supply.

58. In my view, however, the UT was not entitled to interfere with the FTT's decision. Under Item 1(d), "the provision in an hotel … or similar establishment of sleeping accommodation" is excluded from the land exemption. It was common ground that 47 Park Street was a "similar establishment" and that the grant of a Fractional Interest carried with it the right to "sleeping accommodation". That was not necessarily conclusive: if "sleeping accommodation" is provided as part of a wider supply, Item 1(d) may not apply. On the other hand, Item 1(d), unlike the land exemption, is not to be construed narrowly. Moreover, I cannot see why the FTT should not have been able to have regard to "the length and characteristics of the individual stays to which a member was entitled by virtue of the Fractional Interest acquired" (to quote from paragraph 108 of the UT decision). The fact that Membership gives "the flexibility to enjoy short stays of a stated maximum amount each year, in an environment similar to a hotel and with the services which can be expected in a hotel" (as the FTT observed in paragraph 289 of its decision) was surely something that the FTT could properly take into account in arriving at its assessment. Further, the FTT clearly had in mind the features of FPSL's supplies which the UT thought took them outside Item 1(d). In particular, there is no question of the FTT having overlooked the matters to which the UT referred in paragraph 95 of its decision. The FTT specifically referred to these in paragraph 282 of its decision (for which, see paragraph 54 above).

59. As I understand it, the UT concluded that FPSL had supplied "a right which comprises more than something in the nature of short-term accommodation in the hotel sector" on the basis, essentially, that the supply was "of a long-term right". However, Miss Hall did not suggest that the CJEU has ever held that the grant of a right to short-term sleeping accommodation in an establishment similar to a hotel cannot fall within the exclusion from the land exemption to be found in article 135(1)(l) of the Principal VAT Directive merely because the right is to last for an extended period. Nor does it seem to me that the fact that such a right is of a long-term nature should necessarily preclude application of the exclusion. To my mind, the duration of the right is not of itself determinative but rather a factor which can properly be taken into account.

60. In my view, it was open to the FTT to consider that the grant of a Fractional Interest, carrying with it rights to "sleeping accommodation" in an establishment similar to a

hotel, is appropriately characterised as "the provision in an hotel … or similar establishment of sleeping accommodation" within the meaning of Item 1(d). As Miss McCarthy pointed out, Issue 3 only arises at all if the supplies at issue are taken to have had as their "essential object" the making available of premises "in a passive manner": the supplies would not otherwise be capable of falling within the land exemption and the Item 1(d) exclusion would be immaterial. If, however, FPSL's role was sufficiently passive for the land exemption to be in point, it is hard to see how, leaving aside the UT's concern that the supply was "of a long-term right" (which I have already commented on), "sleeping accommodation" could be considered to have been provided as part of a wider supply in such a way as to render the exclusion inapplicable.

61. In short, if I had not concluded that the appeal should be allowed in relation to Issue 2, I would have allowed it on the ground that it was not open to the UT to disturb the FTT's finding that Item 1(d) applied to the supplies at issue.

Conclusion

62. I would allow the appeal.

Lord Justice Henderson:

63. I agree.

Lord Justice Longmore:

64. I agree also.