[2016] UKFTT 718 (TC)

TC05447

Appeal numbers: **TC/2009/15599**
TC/2010/00680
TC/2010/03063
TC/2011/01892
TC/2015/04192

VAT – Tours Operators' Margin Scheme – hotels and other services provided to travellers through website –whether hotel/transfers provided by company operating website as disclosed agent for hotelier/transfer provider or as principal – whether VAT should be accounted for in UK

FIRST-TIER TRIBUNAL
TAX CHAMBER

HOTELS4U.COM LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER

Sitting in public at the Royal Courts of Justice, London on 23-27 May 2016

Ms Valentina Sloane, instructed by Deloitte LLP, for the Appellant

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

DECISION

1. *PRELIMINARY MATTER*

2. The Tribunal at the hearing consisted of Judge McKeever and Ms Gill Hunter. After the hearing, but before the decision was released to the parties, Ms Hunter was offered, and accepted, employment with the Appellant's representative. The parties and their representatives were given the opportunity to make representations on the issue of apparent bias. Whilst no-one questioned Ms Hunter's integrity or alleged that there was any actual bias, Ms Hunter considered that the proper course of action was to recuse herself. Accordingly, this decision has been made by the judge alone.

3. *BACKGROUND*

4. The issue in this case may be simply stated: was Hotels4U.com Limited (H4U) supplying travel services to travellers as the agent of a disclosed principal, as H4U contends, or was it selling those services as principal, as HMRC contends. If the Appellant is right, its supplies were not liable for VAT in the UK. If the Respondents are right, the Appellant should be accounting for VAT to HMRC in accordance with the Tour Operator's Margin Scheme (TOMS).

5. The consolidated appeals cover the period from 1 August 2006 to 31 March 2014.

6. Appeal TC/2009/15599 is an appeal against HMRC's decision of 25 August 2009 (upheld on review on 26 October 2009) that the Appellant should have been accounting for VAT under TOMS.

7. Appeal TC/2010/00680 is an appeal against the assessment dated 23 November 2009 for £2,619,952.77 VAT resulting from the August decision. The Appellant subsequently accepted that £279,128.66 was due from it under the TOMS in this period.

8. From 1 September 2009, H4U began to account for VAT under the TOMS. The remaining appeals relate to Error Correction Notifications given by H4U reclaiming VAT which it says was overpaid, because it should not be within the TOMS. The Appellant later accepted that some of these supplies should properly have been accounted for under the TOMS as it had been acting as principal. In a few cases, the Appellant decided not to pursue the reclaim, although it did not necessarily accept that it had acted as principal. Appeal TC/2010/03063 relates to a reclaim of £1,709,457 (subsequently reduced to £1,445,591.51) for the periods 1 August 2009 to 31 October 2009 and TC/2011/01892 relates to a reclaim of £1,858,797 (subsequently reduced to £1,628,709.09) for the period ending October 2010. TC/2015/04192 relates to an appeal against HMRC's refusal of the Error Rectification Notifications totalling £14,423,642 plus interest in respect of the period from 1 November 2010 to 31 March 2014.

9. The Supreme Court has already considered this issue in the case of - *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Commissioners* [2014] UKSC 16 (the "SH2 case"). That is to say, the Court considered whether SH2 was acting as agent or principal in selling hotel rooms to holidaymakers on its website. I will consider the SH2 case in some detail below but I note the following background to avoid confusion. Secret Hotels2 (SH2) was owned by the lastminute.com group. SH2 had formerly been called Med Hotels Ltd. The SH2 case concerned periods of account up to 2008. In 2009, SH2 was sold to H4U which was part of the Thomas Cook group. Thomas Cook changed the name of the company back to the Medhotels brand and that company's business became part of the current claim from the transfer in 2009. So SH2/Medhotels is involved in both the SH2 case and the present appeal, but in relation to different accounting periods.

10. *THE LAW*

11. The applicable law is derived from the Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax (the Principal VAT Directive). This replaced the EC Sixth VAT Directive, which was, so far as relevant to this case, materially identical, with effect from 1 January 2007.

12. Article 45 of the Principal VAT Directive provides that "*the place of supply of services connected with immoveable property, including the services of estate agents and experts …shall be the place where the property is located*." Article 135 exempts from VAT the leasing or letting of immovable property, but excludes "… *the provision of accommodation… in the hotel sector…*" from this exemption. So the starting point is that the place of supply of services connected with immovable property including hotels is the place where the property is located and that is the place where VAT should be charged.

13. Article 306 of the Directive requires Member States to apply a special VAT scheme to "*transactions carried out by travel agents [(which includes tour operators)] 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.*

This special scheme shall not apply to travel agents where they act ***solely as intermediaries****…"* (emphasis added).

14. The "special scheme", that is the TOMS, was given effect in the UK by section 53 of the Value Added Tax Act 1994 (VATA) and the Value Added Tax (Tour Operators) Order 1987 (SI 1987/1806) (the Order).

15. Section 53 VATA, provides, so far as relevant:

"(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.

(2) Without prejudice to the generality of subsection (1) above, an order under this section may make provision—…

(b) for the value of that supply to be ascertained, in such manner as may be determined by or under the order, by reference to the difference between sums paid or payable to and sums paid or payable by the tour operator;…

(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."* (emphasis added).

16. Article 2 of the Order provides:

"This Order shall apply to any supply of goods or services by a tour operator where the supply is for the benefit of travellers."

17. Article 3 provides:

"(1) Subject to paragraphs (2). . . and (4) of this article, a "designated travel service" is a supply of goods or services—

(a) acquired for the purposes of his business; and

(b) supplied for the benefit of a traveller without material alteration or further processing;

by a tour operator in a member State of the [European Union] in which he has established his business or has a fixed establishment.

(2) The supply of one or more designated travel services, as part of a single transaction, shall be treated as a single supply of services…"

18. Article 5(2) provides:

"(2) A designated travel service shall be treated [for the purposes of this Act] as supplied in the member State in which the tour operator has established his business or, if the supply was made from a fixed establishment, in the member State in which the fixed establishment is situated.]"

19. Article 7 provides:

"… the value of a designated travel service shall be determined by reference to the difference between sums paid or payable to and sums paid or payable by the tour operator in respect of that service, calculated in such manner as the Commissioners of Customs and Excise shall specify."

20. Finally, Article 12 provides:

"…input tax on goods or services acquired by a tour operator for re-supply as a designated travel service shall be excluded from credit under sections 14 and 15 of the Value Added Tax Act 1983."

21. So in summary, the TOMS applies where a travel agent acting as principal, acquires travel services from another taxable person and supplies those services to travellers. The place of supply is the Member State in which the travel agent has his business. VAT is to be charged only on the travel agent's margin, that is the difference between the amount he pays for the services and the amount he charges travellers. The travel agent cannot reclaim the input tax he paid to the person who supplied the services to him.

22. The TOMS does *not* apply where the travel agent does not act as "principal" ie where he acts as a disclosed agent. In this case, the normal rule applies: VAT is only chargeable by the hotelier, or other supplier of travel services in the Member State where the provider operates and the agent is not liable for VAT as it is not providing the travel services.

23. It was accepted in paragraph 9 of the Supreme Court decision in the SH2 case that the TOMS has the same effect as Articles 306 to 310 of the Principal VAT Directive. So if H4U has provided hotels, transfers and other services to its customers as a disclosed agent, it is not liable for any VAT and its appeal must be allowed. If it in fact made those supplies as principal, then the TOMS applies and HMRC succeeds.

24. *THE SCOPE OF THIS HEARING*

25. The Appellant contends that its case is indistinguishable from the SH2 case such that its appeal must succeed. There are a number of other appeals currently before the Tribunal where the appellants also argue that their fact are identical to those in SH2. HMRC is seeking a reference to the Court of Justice of the European Union (CJEU) in all the cases regarding the meaning of "acting solely as an intermediary" within Article 306 of the Directive and whether that is different from an agent in English law. The various appellants strongly object to the reference as being an attempt to re-argue the matter before the CJEU.

26. In one of the cases, which was heard by the Tribunal on 18 April 2016, Judge Morgan, by Directions issued on 8 April 2016 ordered that the hearing consider only whether the appellant in that case was acting as "principal or agent as correctly characterised under the proper law of the contract (English Law) following the approach in [SH2]"

27. Those Directions provided further "The CJEU referral shall be treated as a separate issue to be dealt with in a separate hearing in conjunction with the consideration of the same issue in relation to the relevant appeals made by [the other appellants] and Hotels4u.com Limited. (The tribunal will issue to all parties shortly further directions regarding the decision made for the CJEU referral for all these appeals to be dealt with together … and for a proposed case management hearing.)"

28. In the light of this, the Tribunal in this appeal has considered only the categorisation of the Appellant as disclosed agent or as principal under English law and has not considered the further issue as to whether the Appellant was acting "solely as an intermediary".

THE BASIC FACTS

29. Ms Sloane described the Appellant's business as being a "shop window" for the hotels and apartments in various countries which were available for the traveller to book. For convenience, I will refer to all the properties as "hotels". The Appellant entered into contracts with the suppliers of the hotel rooms and displayed details of the hotels on its website.

30. Travellers, or more usually, travel agents, could browse the website and book hotels online. As part of the booking process, they would accept the Appellant's terms and conditions and on confirmation of the booking and payment of the deposit the party leader would receive a "retail sales invoice" confirming the booking and the price. The traveller would also be sent an "Accommodation Voucher" to be presented to the hotel or other accommodation provider on arrival in order to claim the room.

31. Where bookings were made through a travel agent, the same terms and conditions applied to the traveller and the agent was required to bring the terms and conditions to the notice of the traveller before the booking was completed.

32. There were, accordingly, two sides to the arrangement: the "buy side" i.e. the contract between the hotel and H4U and the "sell side" i.e. the contract between H4U and the traveller, or more usually, between a travel agent on behalf of a traveller and H4U.

33. In the period in question, H4U contracted with about 7,500 hotels inside and outside the EU. Generally contracts were entered into on an annual basis, so the total number of relevant contract is well in excess of 70,000. Each hotel provided a number of rooms, so the number of contracts on the "sell side" is even greater. Of those, the proportion of direct sales ("business to customer" or "B to C") was around 15% or lower so approximately 85% of bookings were via a travel agent ("business to business" or "B to B"). It is clearly impractical for the parties or the Tribunal to review every contract and the Appellant has adopted a sampling approach on the basis that there are a number of clear categories of contract. The Appellant took us through each category and it is for the Tribunal to determine the principles which apply to each category. The parties will then seek to quantify the claim on the basis of those principles.

34. The fundamental terms of all the contracts with travellers were in a standard form.

35. The vast majority of the contracts with travel service providers, over 90%, were, or were stated by the Appellant to be, on standard terms. Within this category there are three sub-categories:

- Standard form contracts which were signed by the parties
- Standard form contracts which were not signed (20% of the standard contracts)
- Missing contracts which were alleged to be on standard terms.

36. Non- standard contracts were 9.6% of the total by number, but 22% of the value of the claim, so they are more significant than their number would suggest. The non-standard contracts also fall into a number of sub-categories:

- Contracts governed by foreign law (1.7% of all contracts and 17.4% of non-standard contracts)
- Non-standard contracts where the Appellant is clearly identified as agent
- Non-standard contracts where the Appellant is not explicitly appointed as agent
- "Bedbank" contracts (3.11% in 2011 and 8.57% of the total in 2014)
- Ground handler contracts
- Transfer contracts

37. The agreements which were contained in the bundles were intended to provide representative samples of the kinds of contracts which were in use but were not intended to be a proportionate representation of the various categories of contract. I can, of course, only make findings about the actual contracts I have seen (or contracts in identical terms) but in making those findings I have endeavoured to establish principles which the parties can apply in discussing the issue of quantum.

38. Ms Mitraphanous invited the Tribunal to make a number of specific findings. I was not able to make all the finding sought or to make some findings in exactly the terms set out by Ms Mitraphanous. To the extent that I was able to make the findings sought, in whole or in part, they are included in this decision.

39. *APPROACH IN DOMESTIC LAW*

40. Lord Neuberger set out the correct approach to considering the status of the Appellant in paragraphs 31 to 33 of the Supreme Court judgement in SH2and it is helpful to set it out in full here.

"Where parties have entered into a written agreement which appears on its face to be 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.

[32] *When interpreting an agreement, 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. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and may often be of little weight. As Lewison J said in* A1 Lofts Ltd v Revenue and Customs Comrs *[2009] EWHC 2694 (Ch), [2010] STC 214 at [40], in a passage cited by Morgan J:*

'The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in Street v Mountford *[1985] 2 All ER 289, [1985] AC 809); or as a fixed or floating charge (as in* Agnew v IRC *[2001] UKPC 28, [2001] 2 AC 710), or as a consumer hire agreement (as in* TRM Copy Centres (UK) Ltd v Lanwall Services Ltd *[2009] UKHL 35, [2009] 4 All ER 33, [2009] 1 WLR 1375). In all these cases the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them.'*

[33] *In 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—see* L Schuler AG v Wickman Machine Tool Sales Ltd *[1973] 2 All ER 39, [1974] AC 235. The subsequent behaviour or statements of the parties can, however, be relevant, for a number of other reasons. First, they may be invoked to support the contention that the written agreement was a sham—ie that it was not in fact intended to govern the parties' relationship at all. Secondly, they may be invoked in support of a claim for rectification of the written agreement [2014] STC 937 at 949. Thirdly, they may be relied on to support a claim that the written agreement was subsequently varied, or rescinded and replaced by a subsequent contract (agreed by words or conduct). Fourthly, they may be relied on to establish that the written agreement represented only part of the totality of the parties' contractual relationship."*

41. There is no suggestion in the present case that the agreements were a sham, nor is there any claim for rectification. HMRC do seek to argue that the subsequent conduct of the parties amounted to a variation of the written contracts and I come to that in due course.

42. Lord Neuberger went on to say, in paragraphs 34 and 35 of his judgement:

"…it appears to me that (i) the right starting point 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 ('the contractual documentation'), (ii) one must next consider whether that characterisation can be said to represent the economic reality of the relationship in the light of any relevant facts, and (iii) if so, the final issue is the result of this characterisation so far as art 306 is concerned.

[35] *… one must identify the nature of the relationship between Med, the hotelier, and the customer, and, in order to do that, one must first consider the effect of the contractual documentation, and then see whether any conclusion is vitiated by the facts relied on by either party."*

43. The important points I take from Lord Neuberger's comments are:

- One must start with the agreements themselves and identify the rights and obligations of the parties
- To do this I must construe the words used in the context of the agreement as a whole and all the surrounding circumstances, but only in so far as they were known to both parties, and the construction must be in accordance with the commercial context.
- In the light of that construction, I must characterise the nature of the relationship between the parties, recognising that the labels attached to the relationship by the parties may be of little weight.
- One then checks whether the characterisation on that basis is in accordance with the economic realities
- If *prima facie* the circumstances establish a particular relationship between the parties, one must then consider whether that conclusion is vitiated by facts which are inconsistent with that finding.

44. As I am concerned, in this hearing, only with the domestic characterisation, I do not need to consider Lord Neuberger's final issue; how art. 306 applies to the characterisation.

45. *THE STANDARD CONTRACTS*

46. *The contract with the traveller or travel agent and ancillary documents*

47. We will start, as Lord Neuberger suggests, with the written contract between H4U and the customer and will consider the standard booking conditions which apply to a traveller booking directly with H4U via its website. The terms I reviewed were those which applied from September 2008, with minor variations. I did not have a copy of the conditions which applied between 2006 and 2008. At the hearing, Ms Mitrophanous raised the issue that the Appellant had not proved the terms of the standard Booking Conditions which applied between 2006 and 2008. This had not previously been challenged by HMRC in all the years of negotiations and preparation for the case and I do not consider that they are entitled to raise it now. I will assume that the Booking Conditions in that period were materially identical with the conditions I saw.

48. The Booking Conditions constitute the terms of H4U's contract with the traveller, separate from any contract there may be with the hotelier.

49. A traveller, making a direct booking with H4U would see these booking conditions on its website. I note at this stage that the same booking conditions apply in relations to transfers between airport and accommodation as they do to hotels. When providing transfers the company used the trading name "Transfers4U".

50. The booking conditions are headed with the statement "the following Booking Conditions together with the General information contained on our website form the basis of your relationship with Hotels4U,com Limited t/a Hotels4U.com and Transfers4U.com."

51. The first paragraph states:

"Please note:

We act as agent only in respect of all bookings we take or make on your behalf. We accept no liability in relation to any contract you enter into or for any accommodation and/or transfers ("arrangements") that you book or for the acts or omissions of any accommodation or transfer providers ("principal(s)")… . For all bookings your contract will be with the principal of the arrangements concerned. The principals' booking conditions will apply to your contract. Copies of these terms and conditions are available on request."

52. Clause 1, headed "Your Contract" states:

"Once we have received your booking and all appropriate payments, we will…confirm your arrangements on behalf of the principal concerned by issuing a retail sales invoice…As we act only as agent we will have no responsibility for any errors in any documentation except where those errors were made by us….A binding contract between you and the principal concerned comes into existence when we send your retail sales invoice on the principal's(s') behalf to the party leader and the terms and conditions of the principal, in addition to these conditions, will be applicable to the contract."

53. Clause 2 requires the traveller to pay a deposit of £60 per person where bookings are made more than 56 days before arrival. The balance is to be paid by the "balance due date" on the invoice, which I infer is 56 days before the date of arrival as bookings made within this period must be paid in full on booking. Clause 2 goes on to say *"if we do not receive all payments due…we are entitled to assume (on behalf of the principal(s) concerned) that you wish to cancel your booking….As we act only as agents for the principal(s) concerned, we reserve the right to pass on to you in full all additional costs and charges…imposed by the principal(s) in accordance with its own terms and conditions."* These are H4U's own terms and do not necessarily reflect the requirements of the hotelier.

54. If a customer wishes to make changes to a booking he is required to meet any costs of H4U and *"any costs or charges incurred or imposed by any of the principals of your arrangements"* in addition to fixed administration fees set by H4U (Clause 4). Cancellation charges may be made and where the number of travellers is reduced, the price may be recalculated e.g. because the property is now under-occupied.

55. Clause 5, on cancellation, *provides "the cancellation charge is made up of our fee and the principal's cancellation charge."* The cancellation fee is charged on a sliding scale depending on the period before departure. Where cancellation is more than 56 days before departure, the charge is the lower of £60 and 15% of the booking cost and the charge increases to 100% of the cost where cancellation in made within a week of departure. These charges generally represent the Appellant's fee. As discussed below, if the hotelier makes a cancellation charge at all, it is generally limited to the cost of one or two nights and only in the case of last minute cancellations.

56. Clause 6 provides that if the principal makes a change to, or cancels, a booking *"we will pass on the new details to you together with any compensation that the principal may offer. As agent for the principal we cannot accept any liability for any changes or cancellations made to your booking."*

57. Clause 8 deals with H4U's responsibility to the customer:

"We act only as agent for the principal(s) concerned. Your contract for your arrangements is directly with the principal(s) concerned. We accept no liability in relation to the arrangements themselves or for the acts or omissions of the principal(s) concerned. For all bookings, the terms and conditions of the principal will apply to your contract (copies available on request from us).

The clause goes on to limit H4U's liability where it is at fault itself in relation to any service provided as agent, but there is no exclusion or limitation *"for death or personal injury which arises as a result of our negligence or that of our employees…"*

58. Clause 9 sets out the complaints procedure and requires the customer, in the event of any problem, immediately to *"inform our representative (if any) and the principal of the arrangement(s) in question. …If you remain dissatisfied,…you must*

write to us within 28 days of [your return]…NB please bear in mind that we act only as agent for the principal(s) concerned and therefore cannot accept any liability for your arrangements. Any assistance provided in resolving a complaint…is provided on a goodwill basis and in our capacity as agent only."

59. Clause 10 alerts the customer to the fact that "*Principals reserve the right at any time to terminate your stay/transfer… due to misconduct, where justified in their reasonable opinion."*

60. Clause 12 deals with the website descriptions and *provides "we cannot accept responsibility for any changes or closures to area amenities or attractions. We cannot accept any responsibility for any inaccurate, incomplete or misleading information about any accommodation or its facilities and/or services, except in the case of our negligence."* Miss Sloane submits that this emphasises the "shop window" nature of the Appellant's business model.

61. Clause 16 is headed "Conditions of Principals" and provides:

"The services which make up your arrangements are provided by independent principals. Those principals provide those services in accordance with their own terms and conditions. Some of those terms and conditions may limit or exclude the principal's liability to you. Copies of the relevant part of these terms and conditions are available on request from ourselves or the principal concerned."

62. We were shown two further versions of the standard booking conditions, applicable from 2011 and 2013 respectively. The 2011 version contained a few new provisions.

63. A new clause 6 relating to changes to and cancellation of bookings by either the principal or H4U states *"…As agent only for the principal we cannot accept any liability for any changes or cancellations made to your booking unless they are due to our own acts or omissions. However…if you accept the significant change or amend to different accommodation offered for sale by us, you will receive compensation in accordance with the table below*". The table set out fixed rates of compensation. If, as a result of the change, the traveller cancels their booking, they do not receive compensation, but H4U will make a full refund of monies paid to them.

64. Clause 18 is a new provision dealing with errors arising from technology.

65. Clause 19 is a new provision dealing with excursions and activities.

"Hotels4U.com Ltd do not sell any excursions or organise activities. However in some destinations we work closely with agencies who offer a booking service. To assist our guests in identifying these agency representatives, we have provided them with Hotels4U.com branding i.e. T-shirts, stationery, books and boards. …when taking part in any excursion or activity, your contract is with the excursion provider .."

66. Clause 20 sets out an express choice of law and jurisdiction which is English law, although there is no suggestion that the earlier form of the contract was governed by anything other than English law.

67. The 2013 version of the booking conditions is not materially different.

68. I now turn to the documentation which applied, where, as in the majority of cases, the booking was made by a travel agent. I was shown three different versions of these, applicable in different years, but again, there were no material differences and the excerpts below are taken from the 2008 version. Again, the documents were available on H4U's website, or rather, the part of it which could only be accessed by travel agents.

69. The Agent Booking Conditions begin with an "Agent's Note", which states:

"You are acting as the agent of the customer when you make a booking with us. The numbered paragraphs immediately below set out your responsibilities as the customer's agent when you make a booking with us."

70. It then provides that the agreed commission is to be deducted from all transactions at the time of booking. The "agreed commission" was not set out in the Agents' Booking Conditions (which were of general application). The commission was fixed (by the travel agent) and could be changed in the travel agent's account (see paragraph 74 below). Travel Agents could choose to work either on the basis of a fixed percentage commission or on zero commission. In the latter case, the travel agent would be remunerated by applying its own mark up to the price charged by H4U and retaining the difference between what it charged the traveller and what it paid to H4U as its commission.

71. The Note makes provision for payment of sums due and states *"…your failure, as the customer's agent, to make these payments…will enable us on behalf of the principal to treat the relevant bookings as cancelled."*

72. Importantly, paragraph 6 of the Note provides:

"…You must also advise the customer prior to making the booking in question that both Hotel4U.com Limited's booking conditions and the booking conditions of the accommodation/transfer principal concerned…apply to the booking and that by making the booking the customer will be deemed to have accepted those booking conditions. Prior to making the booking you must also provide the customer with the opportunity to read Hotel4U.com Limited's Booking Conditions, a copy of which is set out below."

73. The Booking Conditions are set out at the end of the Agent's Note. These are identical to the Booking Conditions which would be seen by a customer booking directly through the website except that Clause 1 provides that the retail sales invoice will be sent to "your travel agent", special requests must be made via "your travel agent" and other communications including amendments to bookings and cancellations must be made through "your travel agent". In other words, the initial

part of the Agent's Note consists of instructions to the travel agent and the Booking Conditions set out are those which the travel agent must pass on to the customer and they are addressed to the customer.

74. Ms Sloane took us through the practical process which a travel agent would go through when setting up an account with H4U. The travel agent is required to enter into an Agency Agreement and as part of this process positively to accept the Agents' Booking Conditions. The travel agent also accepts the Agents' Booking Conditions when making a booking for a customer. By entering into the Agency Agreement and setting up an account, the travel agent gains access to the part of the website available only to travel agents. Within the account, the travel agent can set its own commission, either by choosing a fixed percentage from a drop down menu, or by choosing "zero commission". In the latter case, I was not given any indication that the travel agent was required to notify H4U of its mark up.

75. The bundles contained screenshots of some of the agents' screens dated 2016. Although this related to the Medhotels brand it stated that this refers to Hotels4U.com Limited trading as Medhotels. As between Medhotels and the travel agent, the agent could either be the agent the consumer making the booking on the consumer's behalf or the purchaser of the accommodation in order to onsell it to the consumer as principal. The preamble to the Agency Agreement, which includes the Agents' Booking Conditions, states:

"You may also have agreed terms with Medhotels under a sub-agency agreement between you and Medhotels ("Agent Specific Terms"). The Booking Engine [effectively use of the website] is offered to you conditional on your acceptance of these Booking Conditions subject to any Agent Specific Terms that may have been agreed between you and Medhotels. By accessing and using the Booking Engine and completing any Bookings, you agree that these Booking Conditions then in force shall apply to any such Bookings (subject to any Agent Specific Terms)…".

So bookings by the travel agent would always be on the standard booking conditions shown on the website from time to time, but varied by any express agreement between H4U and the travel agent.

76. The Agency Agreement also expressly stated that Medhotels "*acts as a disclosed agent of …accommodation providers*".

77. The bundles contained a number of examples of individual contracts with travel agents, which set out "Agent Specific Terms". Some, but not all, expressly stated "*A full copy of our booking conditions is available on our websites…. These terms detail the basis of our contract with the exceptions detailed below*". Even where the contract did not include such a statement, the Agent Booking Conditions would still form the basis of the relationship between H4U and the travel agent as a result of the terms of the Agency Agreement set out above. My understanding is that the travel agent would not have access to the Booking Engine without having an account and it had to accept the Booking Conditions in order to set up an account The individual contracts do not therefore stand alone, but set out variations to the standard terms.

78. The variations related to matters such as:

- enhanced commission terms
- payment of "overrides"-additional commissions.
- reduced cancellation charges
- reduced or nil deposit terms
- reduced or nil amendment charges
- service levels including an undertaking to ensure that the advertising and promotion of all accommodation descriptions are accurate
- an agreement to pay compensation to the travel agent's customers where certain changes were made to the booking or if the client did not accept the change to provide a full refund of the booking cost instead of compensation
- an undertaking to favour bookings through that travel agent
- an agreement to provide staff incentives; and
- sponsorship of the travel agent's conference

79. Not all of these provisions appeared in every contract. Some just dealt with commissions and cancellation charges for example. These enhanced terms were presumably intended to incentivise travel agents to book through the H4U website. Even though the Agent Specific Terms do not specify that the Appellant is the agent of the hotelier, I find that these agreements do not affect the nature of the relationship between the Appellant and the travel agent, or the status of the Appellant vis-à-vis the hotel providers.

80. In relation to the general booking conditions, Ms Sloane submitted that the terms in this case are materially identical to the terms which the First Tier Tribunal considered in the SH2 case, although she does not go so far as to say that H4U's contract has already been considered by the courts.

81. We were shown examples of the retail sales vouchers which were sent to the customer as confirmation of the booking in accordance with clause 1 of the Booking Conditions. These show whether the booking was direct or through a travel agent, the number in the party, dates and cost. They also contain the statement *"Hotels4u.com are acting as retail agent for [hotel] with whom your accommodation is booked*", in the case of a direct booking, or *"Hotels4u.com are acting as a retail agent for [hotel] with whom your client's accommodation is booked"* in the case of a booking through a travel agent.

82. The Accommodation Voucher which was provided to a customer and which they needed to present at the hotel to obtain their accommodation also contained the statement "*Hotels4u.com are acting as retail agent for [hotel] with whom your accommodation is booked*".

83. On the face of it, the standard Booking Conditions make it quite clear that that H4U is acting as agent of the accommodation providers. Whilst the Agent Specific Terms do not refer to the Appellant's agency status, those terms are subject to the Agents' Booking Conditions which do. That is, of course, not the end of the matter.

The Supreme Court in SH2 pointed out that, having considered the terms of the documents, one must consider whether the apparent relationship is vitiated by any of the facts and I consider this below.

84. A further element in the customer side of the documentation is an "Indemnity for Travel Agents". I saw various examples of these from 2007, 2011 and 2012. I do not know whether H4U entered into such agreements with all travel agents, but it clearly entered into them with some. The agreements I saw were all in similar, but not identical, form.

85. The purpose of the deed was to indemnify travel agents against personal injury claims by travelling customers. It recited Hotels4U's status as a disclosed booking agent for various accommodation and transfer providers and the travel agent's role as agent for H4U acting in the purchase of the accommodation and transfers. It specifically provides that the relationship between H4U and the travel agent is governed by the Agent Booking Conditions (which, so far as relevant were incorporated in the deed) and any specific agreement.

86. Clause 1.1 of the 2007 version sets out the indemnity provided by H4U to the travel agent *"against the [travel agent's] liability to the Customer .for personal injury or death of the Customers while Customers are at the accommodation."*

87. The 2012 version indemnified the travel agent "*against the [travel agent's] liability to the end consumer… for any personal injury or death (only) of the end consumer due solely to the Accommodation and/or Transfer Provider's proven negligence or breach of local standards"*.

88. H4U can decide (in its reasonable opinion) if a provider has been negligent and the indemnity does not cover the travel agent's own negligence or misconduct.

89. The standard contracts with the hotels contain a similar indemnity given by the hotelier to H4U in respect of a claim against it, H4U, arising as a result of the hotelier's negligence or other wrongful act (see below). So, in the case of standard form documentation, the Indemnity for Travel Agents is part of a chain of indemnity for the intermediaries in the sale process, but applying only where a claim arises from the actions of the hotelier. Contracts other than the standard allotment contract such as non-standard hotel contracts would not necessarily have had a "back to back" indemnity from the accommodation providers , although there were indemnities in some of the bedbank contracts.

90. It seems that these indemnity arrangements were put in place as a result of the tragic events in 2007 when two children from the UK died of carbon monoxide poisoning in a holiday apartment in Corfu. This also resulted in Med Hotels (now part of the H4U group but then called Secret Hotels 2 and part of the lastminute.com group) changing its business model to act as principal for a period. In the First Tier Tribunal decision in SH2 [2010] UKFTT 120 (TC) at paragraph 7, the Tribunal states:

"It is not in dispute that for the remainder of the period of assessment (1-30 June 2007) the Appellant operated as principal. Between 1 June 2007 and 21 July 2008 the

Appellant changed its business model and accepted that in that period it was acting as principal. The reason given by the Appellant for this change was that there was commercial pressure on it from travel agents following the deaths of children on holiday from the United Kingdom in Corfu from carbon monoxide poisoning. The travel agents wanted to ensure that the Appellant was acting as principal in relation to the supplies of hotel accommodation and was therefore in a position to indemnify them against claims from any holidaymaker or his family for any such incidents which might occur in the future. Some adjustments were made to the contractual arrangements covering this period but on 21 July 2008 the Appellant reverted to what it claimed to be an agency model."

91. I consider the significance of he indemnities below.

92. In the Supreme Court in SH2 Lord Neuberger said:

"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 none the less be treated as the supplier as principal (in English law) … if, as between the hotelier and Med, the hotel room was supplied to Med."

93. Accordingly, I now turn to consider the contracts between H4U and the suppliers of the accommodation and other services. I will begin with the standard allotment contract.

The standard allotment contract

94. This is the contract which represents the vast majority by number of the agreements concluded between H4U and the hotels and other accommodation providers. The contracts varied slightly over time. The important provisions were contained in all versions although the precise wording of some clauses in the different versions were similar but not identical. The contract is in two parts. The first page is a rate sheet which sets out the name of the hotel, the season to which it relates, the number and types of room to be provided, the rates to be paid and any provisions which were specific to the hotel such as early booking discounts, any other special offers and any commitment payment or guarantees which were to be given. The rates shown were net rates, that is the price to be paid by H4U to the hotel. The second part of the contract was the "terms and conditions of the allotment contracts". The extracts and comment below relate to the 2009 version unless otherwise stated.

95. The contract defines the "supplier of the accommodation overleaf" i.e. named on the rate sheet part of the contract, as "the Principal" and Hotels4u.com as "the Agent".

96. It then says *"The Principal hereby appoints the Agent as its selling agent and the Agent agrees to act as such."*

97. The Agent's only obligation under the agreement is to *"deal accurately with requests for accommodation bookings and relay all monies which it receives from the Principal's Client(s) which are due to the Principal."*

98. The Principal has a number of obligations to the Appellant, set out below.

99. The principal had an obligation to provide accommodation and other services to the Client i.e. the traveller in accordance with the advertising materials supplied to the Agent and an obligation to keep the Agent i.e. the Appellant informed about any changes to the property and available services (Clause 1.3)

100. The Principal must notify the Agent of any withdrawal or alteration of services or property or of any building or maintenance work which might adversely affect the Client's stay (Clause 1.4).

101. Clause 1.5 provides that *"the Principal shall honour all Client accommodation requests, options and reservations…taken by the Agent."* If the Principal cannot honour a booking, it is under an obligation to notify the Agent, comply with the Agent's requests and instructions concerning alternative accommodation and locate alternative accommodation of at least equal standard at its own cost.

102. Clause 1.6 provided "*In the event of the Principal being unable or unwilling to comply with clause 1.5…immediately or within such period of time as is agreed by the Agent, the Agent may, at its option, secure alternative arrangements to the arrangements in question. The Principal shall be responsible for the costs of any such alternative arrangements*." Further, by clause 1.7, where the Principal is unable or unwilling to comply with clause 1.5 it must "*meet and/or indemnify the Agent in respect of the full amount of damages, expenses, refunds, fines, costs…losses and all other sums…including…committed airline seats, administration fees, client compensation and the Agent's commission where applicable which the Agent incurs or has to meet as a result*". So if the Hotelier fails to provide the booked accommodation, in the first instance it must provide an alternative, but if it fails to do so, the Appellant can make alternative arrangements itself, but claim an indemnity from the hotelier.

103. By Clause 1.7, *"if the replacement accommodation is not deemed acceptable by the Client and the Client wishes to cancel his/her booking, the Principal shall pay to the Agent compensation for loss of profit, all costs including …Client compensation and the Agent's commission."*

104. In the 2007 version of the contract, there was no equivalent to clause 1.6 above and clause 1.7 provided "*If the replacement accommodation is not deemed acceptable by the Client and the Client wishes to cancel his/her booking, the Principal shall pay the Agent compensation for loss of profit, all costs including…committed airline seats, administration fees, Client compensation and the Agent's commission where applicable*".

105. Clause 2 contains provisions under which the Principal agrees to indemnify the Agent against losses including compensation payments, losses or refunds to a Client

which the Agent suffers as a result of the breach by the Principal of the agreement or the injury, illness or death of anyone for whom the Agent is responsible or to whom the Agent has liability which arises from a wrongful or negligent act or omission or breach of contract of the Principal. This is the "back to back" indemnity which H4U had, at least in relation to the standard allotment contract, when giving its indemnity to travel agents.

106. If the Client complains to the Agent regarding the accommodation or services provided by the Principal, the Agent must notify the Principal and the Principal must resolve the matter directly with the Client (clause 2.2). If the Client complains to the Principal, the Principal is obliged to take all reasonable steps to resolve the matter and if it is serious or involves personal injury, the Principal must notify the Agent and keep it informed of developments (clause 2.3)..

107. By Clause 2.4, if the Agent receives a claim or complaint about the Principal, the Principal, at its expense, must provide assistance to the Agent as requested.

108. Clause 2.5 deals with the payment to be received by the Agent. It states:

109. *"The Agent is entitled to receive a commission from the Principal. The Agent may calculate such commission as any sum charged to a Client which is over and above the prices set out in the rate sheet attached to this Agreement. The Agent will send to the Principal a Retail Purchase Detail in respect of every booking which shows the amount paid by the Client on that booking."*

110. So H4U was, essentially, entitled to set its own commission by way of mark up on the price it paid and it was supposed to notify the Principal of the final amount paid by the Client so that it could calculate what that commission was. This is important in relation to the proper accounting for VAT by the hotel. If H4U is the agent of the hotel, the hotel is making the supply of the hotel room to the traveller and should be accounting for VAT locally on the total price paid by the traveller. Similarly, H4U, as agent, should have been invoicing the hotels for its commission. This was not done. The obligation to inform the hotel of the amount paid by the Client was not always carried out and in many cases, where the travel agent fixed its own commission, could not be carried out because H4U did not know the final price charged to the traveller.

111. Some hotels required H4U to charge a minimum commission so that the hotel could market itself directly at a competitive rate.

112. Clause 2.6 was the only provision in the standard terms and conditions referring to cancellation which provided *"Automatic release dates are shown on the attached rate sheet. Any reduction in the number of rooms or nights booked (short of a complete cancellation) notified to the Principal after a release date will not give rise to cancellation charges."* The release dates set the period when rooms are allocated to the Appellant.

113. I saw a selection of contracts consisting of rate sheets and standard terms and conditions. The rate sheets were, of course, specific to the hotel. Most of the contracts

in the bundles did not specify any cancellation provisions. Those that did set out those provisions in the rate sheet part of the contract and typically charged a cancellation fee of one night where there was a cancellation within a day or two of arrival or a no show. This contrasts with the cancellation provisions in the standard Booking Conditions which gave H4U a right to impose their own substantial cancellation charges for cancellation many weeks before the date of travel.

114. Clause 4 required the Principal to carry insurance in relation to the property, public liability and its indemnity obligations to the Agent.

115. Clause 5 imposed obligations on the Principal to maintain the property and services to a good, clean and safe standard, to comply with all applicable national, local, trade and other laws and regulations relating to hygiene, fire and safety standards and irrespective of local requirements to meet specified safety standards in relation to fire and swimming pools including making sure that each bedroom had instructions in English about what to do in an emergency.

116. H4U's representatives were entitled to inspect the property (clause 6).

117. By clause 9.2 "*the Principal authorised the Agent to sell or offer for sale the Property and the services through any sub-agent appointed by the Agent*".

118. Finally, the contract was governed by English law (clause 9.4).

119. There was a slightly different standard contract for city break hotels. For example, clause 7.3 of those contracts provided "*The Principal agrees that clients of the Agent will not be accommodated in any annexe or other building outside the main property".*

120. We were shown other allotment contracts from other periods. Although the formats differed, the essential terms remained the same. In particular, the agreements all contained an express appointment of H4U as agent to sell the principal hotel's rooms via its website with the hotel being responsible for providing the accommodation, accepting liability for claims and complaints from the customer, indemnifying H4U against liability for claims made by customers in relation to the accommodation and providing for H4U to charge commission by way of a mark-up on the price it paid to the hotel.

121. These terms are essentially identical to the terms of the contract considered in SH2.

122. Once a booking was made, a series of other documents would have been issued. I was shown a set of documents from 2013 as an example. These related to apartments in the Canary Islands, which are not part of the EU, and so not within the ambit of VAT, but the Appellant relied on them as examples of the form of documents which were used at the time for both EU and non-EU sales..

123. The first document is a computer generated email which is sent to the accommodation provider to confirm the booking. It shows the total price to be paid to the provider in Euros.

124. There is also a Retail Sales Invoice which is sent to the customer, and where relevant, the travel agent, which sets out the details of the booking and the total cost to the customer in pounds sterling.

125. On making full payment, the customer also receives an Accommodation Voucher to be produced to the hotel on arrival which includes the statement "Hotels4u.com are acting as a retail agent for [hotel] with whom your Accommodation is booked".

126. The final document is a "Remittance Advice" sent to the hotel on a regular basis setting out all the bookings made in the period and the total amount to be paid by H4U to the hotel for that period in Euros. At the bottom of the page, it then states the "overall sales value achieved in respect of these bookings", that is, the aggregate price charged to the customers, in pounds sterling "therefore our commission" (the difference between the two figures) is shown in pounds sterling.

127. It is not clear when H4U began to provide hotels with information about the commission received. I saw a document from 2006 which was confusingly marked both "Retail Sales Invoice" and "Retail Purchase Detail" and which set out the "total booking cost" in Euros and the "total sales price" in pounds sterling. It did not refer to commission. It is unclear whether such a document was provided to the hotels at this period.

128. In a note of a meeting between HMRC and H4U held in June 2008, H4U stated that "*a purchase detail is made available for the Hotelier to view on the Hotels4U booking system. This shows the gross, topline price, the customer is charged for the accommodation booking*." So at this stage the information was only available to the hotelier online.

129. Notes of a further meeting in November 2008 indicated that a documents was now being issued to hotels showing total remittance due and the commission earned by H4U. The only documents in the bundles from 2008 showing this information were in US dollars and related to non-EU hotels. The earliest evidence of a hotel within the EU being sent information about the sale price to the customer and the commission earned was in 2010.

130. I was taken to further examples of remittance advice documents which set out the overall sale price achieved and H4U's resultant commission. There was no evidence that the hoteliers requested any further information about the price paid by the customers e.g. where accommodation was booked through travel agents.

131. Whenever it was that H4U began to provide such information to hotels, it would not, in any event, have been able to provide information of the final sale price to the customer in the case of many of the 85% of bookings which were made through travel agents where the travel agent had set their own commission by way of mark up.

Where the Agency Agreement provided for "zero commission" H4U would not know the price paid by the customer. There was no evidence that the Appellant sought such information.

132. We were also taken to some examples of invoices issued by hotels to H4U which showed the price actually paid by H4U in Euros, including the local VAT charged.

133. *How payments were made*

134. Having reviewed the standard documentation on both sides of the transaction, I now consider how the cash flows worked in practice. In addition to the evidence of the contracts, I also heard evidence from Mrs Liz Brown who was the Payables Manager for H4U from May 2015 having held other roles within the accounts payable team since 2006.

135. Mrs Brown explained that the process differed according to whether the booking was made direct or through a travel agent and whether the booking was refundable or non-refundable.

136. In the case of a direct refundable booking, the customer pays a deposit to H4U immediately and pays the balance of the price at least 56 days before the start of the stay. If booking less than 56 days before arrival, the customer pays the whole amount at the outset. This is in accordance with the website booking conditions discussed above. H4U does not make any onward payments to the hotelier when paid by the customer.

137. Mrs Brown said that the hotelier would be entitled to payment no earlier than the commencement of the stay. The rate sheets attached to several standard allotment agreements provided that payment was due 30 days from the issue of an invoice which would be sent on the departure of the customer. Initially, hoteliers sent individual invoices, but as there were thousands of bookings, around 2012, a system of statements was introduced. Hoteliers send H4U a statement showing all the bookings in a period and the sums due for each of them together with the aggregate sum due. Typically they were sent monthly, but the periods varied. H4U did not chase the hotels for their invoices/statements; it was the responsibility of the hotel to seek payment.

138. About a third of hoteliers receive payment using a V-Payment card which allows them to draw down payment from H4U's account through the Amex system. H4U then pays Amex the following month. The hotelier can normally claim payment on the customer's arrival.

139. The remaining two thirds of hoteliers are paid by direct transfer of funds to their bank accounts in response to an invoice/statement.

140. This means that H4U would typically hold the customer's money for 8-9 weeks where the hotelier was paid by V-Payment card and for 16-17 weeks if the hotelier was paid by bank transfer.

141. Where the booking is non-refundable, the hotelier can obtain immediate payment through the V-Payment system or include the booking on its next statement, so the funds are held by H4U for a much shorter period of time.

142. As agent, H4U would have had a fiduciary duty to pay interest on these funds to its principal. Mrs Brown was not aware whether any interest was paid to the hotelier in respect of funds held by H4U but there was no evidence that any interest was paid.

143. H4U did not issue any invoices in respect of the commission for the agency services provided by them by to the hoteliers.

144. Mrs Brown was also able to confirm that the invoices and, later, statements received from the hotels showed only the price which H4U was to pay to them. They did not show the final price which was paid by the traveller, even when it was a direct booking and so the final price was known. As noted above, H4U would not have been aware of the final price paid by the traveller in those case (the majority) where the booking was through a travel agent and the travel agent determined its own commission.

145. Where bookings were made through a travel agent, the payment process to the hotelier was the same as for direct bookings.

146. The terms and conditions agreed with the travel agent determined when the travel agent had to make payment to H4U irrespective of whether the booking was refundable or non-refundable. The "Agent's Note" required the travel agent to provide a weekly statement on a Monday setting out deposits made on bookings more than 35 days in advance, balances due on booking due to depart in the next 35 days and full payments for new bookings departing within 35 days. Payment was due on the Friday of the same week. Mrs Brown said that some agents had different terms and condition which meant they paid H4U later, in some cases 30 days after the end of the stay.

147. I conclude that in most cases, H4U received monies from the traveller before it had to pay the hotelier, in some cases, many weeks beforehand. Where the travel agent had special arrangements to pay later, H4U might have to pay the hotelier before receiving payment and there was a risk of loss through non-payment. At all events, there was no correlation between payment by the customer to H4U and payment by H4U to the hotel. The payments on each side were made in accordance with their own, generally mis-matching, contracts.

148. The cancellation charges imposed by H4U on customers were not a mirror image of the hotel's own cancellation provisions. As noted, many hotels imposed no cancellation charges and those that did generally only charged the cost of one or two nights' stay where cancellation was within a few days of departure. During the period in question, H4U's booking conditions provided for cancellation charges of progressively increasing percentages of the booking cost, depending on the date of cancellation. In the case of non-refundable bookings, the cancellation charge was 100% of the cost. Mrs Brown indicated that there were situations where the hotel's charge was more than H4U's charge so that H4U would be out of pocket, but

generally, H4U's charges would be higher. Mrs Brown suggested that as H4U dealt with thousands of hotels it would be impractical and unworkable to set up its system to deal with all the different permutations. Accordingly, in order to make the process manageable and provide clarity to the customer, H4U's booking conditions contained standard provisions relating to cancellation. Clause 5 of the booking conditions states that the standard charge includes both the hotelier's and H4U's fees.

149. Mrs Brown was unaware of how the cancellation policy operated, but where a charge was imposed by H4U, the company would collect the charge from the customer. If the hotelier was entitled to make a cancellation charge itself, funds would only be paid by H4U to the hotelier if the hotelier requested it. The hotelier would, of course, always be aware of a cancellation but if it failed to claim its share (or was not entitled to a charge) H4U would retain the whole amount.

150. So again, there was a lack of symmetry between the customer/H4U arrangements and the H4U/hotelier arrangements.

151. Under the standard allotment contracts, H4U was obliged to relay all monies received from Clients which were due to the hotelier but had no other obligations to make payments to the hotelier in respect of additional cancellation charges or interest on payments made by Clients. The hotels invoiced H4U for the rooms and H4U paid the amount of those invoices.

152. *Signed standard contracts: the relationship between H4U and the hotels*

153. Having considered the terms of the standard booking conditions and the standard allotment contract together with the commercial practicalities of how these operated in practice, I must now determine what the relationship between H4U and the hotels was. In this part of the decision, I consider only standard contracts and only those which were signed by the parties.

154. It is perhaps worth noting at this stage that the burden of proof is on the Appellant. It is for the Appellant to make its case and show, to the ordinary civil standard, on the balance of probabilities, that it was acting as agent and not as principal. This, of course, also applies in relation to the other kinds of contract which I discuss below.

155. The wording of the key provisions in the contracts in this case are virtually identical to the equivalent provisions in the SH2 case as set out in the decision of the First Tier Tribunal in that case, which the Supreme Court ultimately held established a contract of agency.

156. I am mindful of the fact that the labels which the parties choose to attach to a relationship are not determinative and one has to look at the actual rights and obligations under the contract terms to determine the correct status of the parties.

157. The standard allotment contract begins with an express appointment of the Appellant as its selling agent in relation to the Principal's accommodation and the

Appellant agrees to act as such. This is an unequivocal conferring of authority on the Appellant to conclude bookings on behalf of the Principal, the essence of agency.

158. The fact that the agent's obligations towards the principal are limited (to dealing accurately with bookings and remitting to the Principal all monies due to it) and the principal's obligations to the agent are more onerous does not, of itself, prevent the contract being one of agency. It simply represents the commercial reality that the balance of power in these cases was with H4U. H4U dealt with many single hotels and small chains which were anxious to obtain access to a much larger part of the UK market through the Appellant's "shop window" than they would have been able to do on their own. H4U was therefore able to impose obligations on the hotels and it was in its commercial interests to ensure that customers who booked through its website had a good experience, that the applicable health and safety standards were those which a UK holidaymaker would expect which would often exceed local requirements and that if something did go wrong, the accommodation provider was required to put it right and, if necessary, indemnify H4U in respect of any claim of a customer against it by reference to the hotel's actions. H4U's owners, Thomas Cook have a reputation and goodwill to protect. That reputation was damaged by the events in Corfu in 2007 and at least some of the provisions in the standard contracts were designed to avoid similar issues in the future.

159. The website booking conditions which formed the basis of the contract with a traveller were similarly clear as to the status of H4U and that it was accepting bookings on behalf the ultimate accommodation providers as its agent. If H4U undertook obligations one might not expect of an agent, that too can be explained as a commercial strategy to protect its reputation. I shall return to this later.

160. On the face of the documents and taking account of the commercial context, I find that *prima facie* H4U was the disclosed agent of the accommodation provider which was its principal and the entity with whom the customer's contract was made.

161. I now consider whether there is anything in the contract or in the surrounding circumstances which would vitiate that prima facie finding.

162. HMRC put forward a number of factors which it said was inconsistent with a relationship of agency, many of which had already been considered in SH2.

163. The Respondents relied on the fact that when the Appellant enters into a contract with the traveller or travel agency it set its own terms and conditions, in particular in relation to cancellations, payments and deposits. As noted, those provisions did not mirror the provisions in the contracts with the hotel providers.

164. This was dealt with by Lord Neuberger in paragraph 44 of the Supreme Court decision in SH2 where he said, in relation to similar provisions in SH2's terms and conditions:

"The failure to account for the cancellation charge, the 'no show forfeit', and the interest on the deposits is more striking. As a matter of law, these sums would have been payable to the hotelier, but the fact that they were not so paid represents a

breach of the agency arrangement on the part of Med or an accepted variation of the Accommodation Agreement, either of which 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."

165. As in SH2, the Appellant sets its own selling price to the customer, without reference to the hotelier. The Supreme Court in SH2 said *"there is no reason why an agent should not be able to fix its own commission. It is common for agents acting in the sale of financial products, e.g. many types of insurance policies, to do so, and it has been specifically held to be an arrangement which is consistent with agency—see* Mercantile International Group plc v Chuan Soon Huat Industrial Group Ltd *[2002] EWCA Civ 288, [2002] 1 All ER (Comm) 788."*

166. The charging and retention of fees for changes and amendments to the booking was also rejected by the Supreme Court in SH2 as a factor undermining the relationship of agency.

167. The Respondents regarded it as important that the Appellant did not inform the hotelier of the price paid by the traveller until 2008 and even after that date, the final price was not evident from the information supplied. As noted above, where bookings were made through travel agents who set their own commission, H4U did not have the information about the final price to pass on. The information was available where the travel agent took a fixed percentage commission. This factor was also present in SH2, where one of the elements on which the Court of Appeal in its decision ([2012] EWCA Civ 1571) placed particular weight was the fact that:

"In relation to value added tax, Medhotels dealt with hotel operators in other Member States in a manner inconsistent with the relationship of principal and agent. In particular, Medhotels did not provide the hotel operators with invoices in respect of its commission (nor even notify the hotel operators of the amount of that commission); so making it impossible for the hotel operators to comply with their obligations to account to the tax authorities of that member State in accordance with the Sixth Directive."

168. The Supreme Court dealt with this at paragraph 47:

"…it is quite true that Med failed to provide the hoteliers with the information necessary to enable them to provide proper VAT returns, and that it failed to account for VAT as it should have done if it had been the hoteliers' agent as it contends. It is also true that this can be said to represent some sort of indication that the arrangements were not as the contractual documentation suggests. However, 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."

169. The Respondent's points that the cancellation terms imposed on travellers were different from those of the accommodation providers, that H4U did not pass on those

charges in full or at all and that it required non-refundable deposits from the traveller which it did not pass on to the accommodation providers are all dealt with in the quotation from the SH2 Supreme Court judgement set out in paragraph 164 above.

170. The Appellant accepts that in some cases it was acting as principal and there is no evidence that the contracts where H4U acted as principal were different from the contracts under consideration in this appeal. I have also mentioned that that there was a period when SH2 changed status from that of agent to principal then back to agent again. The First Tier Tribunal in SH2 [2010] UKFTT 120 (TC) found that there was very little material difference between the agency contract and the principal contract but that the terms of the latter could not affect the former. I was not taken to any contracts where H4U accepts that it acted as principal but even if they differed little from the contracts I have seen, I agree with the SH2 Tribunal that they are not relevant in considering the relationship created by the contracts under consideration. That relationship must be determined in accordance with the applicable contracts and all the relevant circumstances.

171. HMRC contend that the travel agents with whom the Appellant deals cannot be both sub-agents of the Appellant vis-à-vis the accommodation providers and agents of the travellers. They say that "*the apparent position is that the Appellant determines the obligations to be imposed on other travel agents without recourse to the accommodation provider at all*". They go on to say "In relation to yet other travel agents the Appellant enters into particular agreements which do not correspond to the Agent Booking Conditions". This is not a point which was considered in SH2.

172. I do not consider there to be an inherent inconsistency. The Agent's Note begins by saying "You are acting as the agent of the customer when you make a booking with us". In other words, the agent acts on the customer's behalf when making the booking. It accepts the booking terms on behalf of the customer and pays the deposit and other payments on behalf of the customer. That does not prevent the travel agent from also being H4U's sub-agent for the purpose of making the contract between the customer and the hotelier.

173. Clause 9.2 of the standard allotment contract in use from 2009 provides *"the Principal authorises the Agent to sell or offer for sale the Property and the services through any sub-agents appointed by the Agent."* So there is express authority to appoint a sub-agent. The 2008 contract was not quite as clear but clause 8.2 *provides "the Agent reserves the right to …sub-contract any of its rights and/or obligations under this Agreement to any subsidiary or any associated company of the Agent or to any authorised third party."* So again there is a right to appoint a sub-agent.

174. In relation to the Respondent's assertion that there were contracts with travel agents which are not governed by the standard Booking Conditions, it would be helpful to refer back to the process by which a travel agent gains access to the part of H4U's website reserved for travel agents. The travel agent must set up an account which requires him to enter into an agency agreement accepting the Booking Conditions. The agency agreement contemplates that the travel agent may be acting as H4U's sub-agent or may be acting as principal, buying accommodation through H4U

for onward sale to its own customers. It also acknowledges that the travel agent may have entered into a separate agreement setting out specific terms. As noted, such agreements tended to give the agent more favourable terms e.g. regarding deposits or cancellation than were set out in the Booking Conditions. The agreement provides that the Booking Engine i.e. the restricted website is offered subject to acceptance of the Booking Conditions, but this is subject to any "Agent Specific Terms". Use of the Booking Engine constitutes acceptance of the Booking Conditions in force from time to time (subject to Agent Specific Terms). The agency agreement describes H4U as the disclosed agent of the accommodation provider and, where the travel agent sells arrangements to a consumer as sub-agent on behalf of the accommodation provider, it is expressly provided that the consumer's contract is with the accommodation provider.

175. So the travel agent enters into a sub-agency agreement when it initially registers to gain access to the website and it expressly accepts the Booking Conditions, subject to any special terms it has agreed, as governing the relationships between the parties. The travel agent may be a sub-agent or principal, but in the former case it is clear that the customer's contract is with the hotelier in accordance with the Booking Conditions. In the former case also, the travel agent is allowed to set its own level of commission. If the travel agent act as principal, its contract would be with the hotelier; it does not make H4U a principal. In neither case is there any suggestion that H4U is itself acting as principal. On the contrary, its capacity as disclosed agent of the hotelier is clear.

176. HMRC's next point was that the accommodation provider took on a number of obligations to the Appellant in relation to health and safety and insurance and so on. The accommodation providers in SH2 took on similar obligations and the Supreme Court was unimpressed with these points. *"They all stem from, and reflect, the fact that Med had a substantial business based on the website (as is evidenced by Med's turnover, the number of hotels for which it had an exclusive agency, and the fact that it was a member of a large group of companies including lastminute.com). This in turn means that it had built up a substantial goodwill in the holiday-making market which it wished to protect, and that it was in a much more powerful negotiating position than the hoteliers with which it was contracting."* These comments are equally applicable to this case.

177. Under clause 6 of the later Booking Conditions H4U agrees to try and find alternative accommodation in some circumstances where the booked accommodation becomes unavailable and would offer compensation to travellers if the hotelier made significant changes. Lord Neuberger's comments in SH2 again apply here.

"As to Med's obligation to 'try to provide' alternative accommodation, it is 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; in any event, the obligation was clearly included to protect Med's goodwill".

And

"Factor (3) (that Med dealt with matters of complaint and compensation in its own name and without reference to the hotelier) is correct, and can be said to be contrary to one of the terms of the contractual documentation, which envisage a customer sorting out complaints with the hotelier. However, particularly 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."

178. The Appellant entered into indemnities with travel agents making bookings for travellers in relation to potential personal liability claims from travellers arising from the negligence of the accommodation provider. I considered the indemnity agreements at paragraph 84 *et seq* above. In the case of standard contracts, the Appellant's potential liability was offset by the accommodation provider's liability to it under clause 2.1(b), backed up by the insurance the accommodation provider was required to take out under clause 4 to cover, among other things, that very liability. So the Appellant did not undertake any risk in these cases.

179. Not all allotment contracts were in standard form and there may have been contracts under which the hotelier did not provide a back-to-back indemnity to H4U. In these cases, H4U did undertake the risk of personal liability to the travel agents and agents do not normally undertake personal risk. Having said that, it is clear that the indemnities were given as a result of commercial pressure from travel agents in the wake of the Corfu tragedy and that H4U entered into the agreements in order to preserve its goodwill and reassure those through whom it obtained 85% of its business. Just as undertaking obligations to travellers to try and obtain alternative accommodation or to pay compensation for the defaults of the hotelier is not inherently incompatible with the status of agent, I find that the indemnities given by H4U to travel agents do not affect its fundamental status as the agent of the hotelier.

180. *Deposits and commitment payments*

181. H4U engaged in forward buying and made commitment payments to accommodation providers taking on the risk that it would not sell sufficient rooms to cover this.

182. There were two kinds of payments; deposits and commitment payments. A deposit was an amount which H4U paid "up front" at the beginning of the season giving the hotel a cash flow advantage. In return, H4U would obtain additional discounts for its customers. As rooms were sold, the cost would be offset against the deposit. If any of the deposit remained at the end of the season, the balance would either be repaid to H4U or rolled over to the next season. The contract would generally specify what was to happen. Sometimes the contract was silent, but any balance of the deposit would be rolled over as a matter of practice. Similar payments were made in SH2 and the Supreme Court commented as follows:

"it seems to me that there is nothing inconsistent in terms of logic or law in Med reserving a hotel room in its own name in anticipation of subsequently offering it on the market, on the basis that a customer who booked the room would not contract with Med, but would contract through Med with the hotelier. The purpose of Med reserving rooms in this way is obvious, namely to maximise its opportunity to earn commission and to maintain or improve its goodwill with potential customers. The fact that Med had to pay for the rooms it reserved is 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. Of course, Med ran a risk of losing its money, but that fact does not undermine the notion that Med acted as an agent."

183. Commitment payments were different and were not present in SH2. Where H4U made a commitment payment to a hotel, the cost of rooms sold was again set off against the lump sum payment, but any balance remaining at the end of the season because H4U had not sold sufficient rooms was *not* returned or rolled over. Commitment payments were entered into with a small number of hotels only, at least one of which was on a non-standard contract. In one of the contracts, the benefit which H4U obtained for the payment was exclusivity. The level of commitment payments was substantial; increasing from over £7m in the 2008 season to nearly £12m in the 2013 season, totalling approximately £56m in the relevant period. Profits were made in two of the years, but the losses on these payments in other years totalled over £3m. Although commitment payments carried the risk of loss and, indeed, gave rise to substantial actual losses, I consider that the principles contained in the SH2 decision in relation to deposits applies equally here. H4U's purpose in making the commitment payments was to maximise its opportunity to gain commission (by being able to offer discounts or being the exclusive supplier of that accommodation) and to improve goodwill with customers. In fact the agreements proved to be commercially unviable and H4U no longer makes such payments. Despite the risk undertaken by H4U, I do not consider that the commitment payments of themselves undermine the relationship of agency.

184. HMRC asserted that the travellers were informed of the hotel they will be staying at but "not the legal entity with which they are purportedly contracting.". Ms Sloane said that was not correct and directed us to a retail sales invoice which showed the name of the hotel, being Royal Beach Hotel, but then stated "*Hotels4u.com are acting as agent for H Top Hotels…*". She said that this showed that where there was a material difference between the name of the hotel and the principal, the retail sales invoice sets out the name of the contracting party. She said that, in any event, HMRC had not shown there was a requirement to disclose the full legal name of the principal as opposed to identifying it.

185. In the volume of Halsbury's Laws of England dealing with Agency, it is stated at paragraph 157:

"Where an agent in making a contract discloses the existence, but not the name, of a principal on whose behalf he is acting, he is not made liable by the mere fact of not

disclosing the name, for that is only a relevant factor in deciding whether the agent contracted personally or not¨ The issue of liability depends upon the terms in which the agent contracted, and the fact of non-disclosure of the identity of the principal will not be conclusive either way[3].”

186. I am content to accept this as a statement of the law, and so attach little weight to the fact that the traveller may not always have known the correct legal entity with which he was contracting, if indeed this was the case.

187. HMRC also pointed out that where the amount of a hotel's remittance request was less than the cost on the Appellant's system, the Appellant would pay over the lower amount to the detriment of the hotelier and in apparent breach of its duty of good faith as agent. This is also covered by Lord Neuberger's comments in SH2:

“these sums would have been payable to the hotelier, but the fact that they were not so paid represents a breach of the agency arrangement on the part of Med or an accepted variation of the Accommodation Agreement, either of which 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.”

188. So again, whilst H4U's actions were not what one might expect of an agent, they were not sufficient to vitiate the agency relationship between it and the accommodation providers.

189. HMRC placed great emphasis on the fact that the invoicing arrangements were not consistent with the relationship of agency, indeed HMRC argued they were consistent only with the relationship of buyer and seller, and that the invoices would not have enabled the accommodation providers to meet their VAT obligations in their home countries resulting in a VAT loss overall. It will be helpful to consider what the correct VAT invoicing alternatives were.

190. If H4U is acting as agent and the accommodation provider's contract is with the traveller, then the hotelier should have issued an invoice to the traveller for the full price paid by the traveller and this should have included VAT, or the local equivalent, on the full amount. H4U should have invoiced the accommodation provider for its services as agent, i.e. its commission and should have charged VAT on that. The Appellant would not, however, have accounted for VAT in the UK because of the “reverse charge scheme” under which the member state of the business which is providing a service to a business in another member state receives all the VAT.

191. By way of example, say a hotel in Spain charged £100 for a room and H4U's commission was £20. The hotel should issue an invoice to the traveller for £120 plus local VAT and account in Spain for the VAT. H4U should issue an invoice for £20 plus VAT to the hotel. The hotel should also account in Spain for VAT on the £20 commission, but would be entitled to claim a deduction for input tax in respect of the VAT on the commission. So the end result is that the traveller has paid £120 plus

VAT The Spanish authorities have received VAT on the full price of £120. The hotel has accounted for H4U's VAT, but has received a corresponding deduction so it is not out of pocket and H4U has charged VAT on its commission , but this has gone to the Spanish authorities, not HMRC.

192. If H4U were acting as principal and was within the TOMS, then the hotel would have invoiced H4U for £100 plus VAT and accounted to the Spanish authorities for VAT on that. H4U would have accounted to HMRC under the TOMS for VAT on its margin, i.e. the £20 commission, but would not have been entitled to deduct the VAT it paid to the hotelier on the supply of the room. So, again, overall, VAT would have been paid on £120, but this time divided between the two member states.

193. What in fact seems to have happened is that the hotel invoiced H4U for £100 plus VAT, and accounted for the VAT to the Spanish authorities. It did not, at any time invoice the traveller. H4U charged the traveller the aggregate of the amount it paid the hotelier (£100 plus VAT) plus its commission, £20, but did not account for VAT to anyone on that amount and did not issue any invoice to the hotelier. The hotelier never asked H4U for an invoice for its services. So VAT was only paid on the £100 charged by the hotelier for the room. The result was that less VAT was paid overall than should have been paid whether H4U was acting as agent or as principal. This procedure was replicated thousands of times across different bookings with different hotels in different countries in different years. So far as I am aware, none of the parties involved queried whether the treatment was correct.

194. In the majority of cases, where bookings were made through a travel agent, neither H4U nor the accommodation provider were in a position to know what the ultimate cost to the traveller was, so that it was impossible for the hotelier to account for VAT correctly as a principal selling through an agent. The system was set up in that way and Ms Mitraphanous sought to use that to distinguish the present case from SH2.

195. It is clear that the invoicing arrangements were not consistent with H4U being either a principal or an agent for VAT purposes. Essentially, everyone got it wrong. I infer that these arrangements were common across the UK travel industry at the time and I suspect that if anyone had challenged them, they would have been met by the comment "but this is how everyone does it". The fact that everyone does it does not, necessarily, make it right, but it does make it understandable that the parties continued to operate in this way.

196. This point also was dealt with, and rejected, in the SH2 case and the Supreme Court commented that whilst the invoicing was incorrect from the VAT point of view, it reflected the economic relationships which actually existed.

197. Specifically, these issues were factors (5) and (7) relied on by HMRC and discussed by the Court of Appeal in SH2:

"(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 Principal VAT Directive…(7) hoteliers would invoice Med for the net sum in respect of each customer at the end of the relevant holiday."

198. The Supreme Court's response was set out in paragraphs 47 and 48 of its judgement:

"As to factor (5), it is quite true that Med failed to provide the hoteliers with the information necessary to enable them to provide proper VAT returns, and that it failed to account for VAT as it should have done if it had been the hoteliers' agent as it contends. It is also true that this can be said to represent some sort of indication that the arrangements were not as the contractual documentation suggests. However, 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.

[48]*…As to factor (7), 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, and the fact that they were for the net sums is consistent with the Commissioners' analysis. However, the invoices are not financially inconsistent with the contractual arrangements contended for by Med, as the hotelier would expect Med to pay the net sum, not the gross sum. In any event, at least on their own, such invoices cannot change the nature of the contractual arrangements between Med, the customer and the hotelier, given that (i) they post-date not merely the contracts but their performance, and (ii) the customer was not aware of the invoices, so it is hard to see how they could affect her contractual rights or obligations."*

199. Whilst, on the face of it, the Supreme Court's comments would seem to determine the matter in this case also, Ms Mitrophanous, had several additional submissions. She pointed out that Lord Neuberger had said that the invoicing arrangements were an *indication* that the true position was not as the contractual documentation suggested. Further, the Supreme Court said in paragraph 48 of the judgement that it was significant that the traveller was not aware of the invoices, but, as noted, it said later in the judgement *"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 none the less be treated as the supplier as principal (in English law) … if, as between the*

hotelier and Med, the hotel room was supplied to Med" so the knowledge, or lack of it, of the traveller is not determinative.

200. The Supreme Court said that the invoices "*at least on their own*" were insufficient to displace the clear position under the contracts. Ms Mitrophanous argued that in the present case, the invoicing was not "on its own" and there were two further issues which had not been present/considered in SH2.

201. First, the Appellant had made substantial 8th Directive claims on the basis of the hotel invoices which involved claiming that it had received the supplies for its business

202. Secondly, by failing to issue invoices it had failed to conduct itself as an agent and that the conduct of the parties through their invoicing or failure to invoice or to inform of the final price or to ask the final price amounted to a variation of the contract. I will consider these in turn.

203. *The Eighth Directive Claims*

204. The Eighth VAT Directive enables a business in one member state to claim back VAT paid on supplies received from a supplier in another member state from the authorities in the latter member state. A tour operator within the TOMS is specifically prohibited from making such a claim.

205. By Article 2 of the 8th Directive, a refund is due to a taxable person where "any Value Added Tax [is] charged in respect of *services supplied to him* by other taxable persons…" (emphasis added). The supplies must also have been used in the claimant's business. Article 7, which deals with the refunds procedure, provides that the application for a refund "shall relate to *invoiced purchases* of goods or services…" (emphasis added).

206. So an 8th Directive claim can only be made where a taxable person receives supplies for use in its business (unless it is within the TOMS). That is to say, a claim can only be made by a principal receiving services from another principal.

207. HMRC argue that by making these claims, in addition to the invoicing arrangements, the Appellant and the hotels were making a common assumption that the Appellant was not an agent, but was purchasing rooms as principal.

208. It is common ground that the Appellant did indeed make 8th Directive claims. Claims were made to Spain each year from 2005 to 2007 for a total of Euros 4,313,619. The Spanish authorities rejected the claims and in 2005 and 2006 H4U appealed the decisions. The Appellant also made claims to Portugal each year from 2006 to 2009 totalling Euros 766,598. The Appellant received refunds of Euros 542,660 but in March 2012 the Portuguese authorities issued a repayment demand and the money was repaid in December 2013. No claims were made to countries other than Spain and Portugal.

209. The bundles contined examples of the application form submitted to the Spanish authorities, signed on behalf of the Appellant, which declared "*that the goods or services specified in this application were used for his/her/its business*...". Invoices from hotels were attached, so, on the face of the form, the Appellant stated it was buying the rooms for itself.

210. The Spanish authorities rejected the claim on the basis that the applicant was within the special regime for travel agencies (TOMS) and so could not make the claim and also "*from the list of invoices submitted, it is deduced that the company contracts hotels on behalf of third parties; such activity is classified objectively under the said special regime*" which suggests they consider H4U was an agent. Grant Thornton, who were the Appellant's accountants at the time appealed against this decision on the basis that "the hotel is seen to be acting as a principal …while H4U acts as agent". So the claim was made on the express basis that H4U was an agent. It has to be said that in later correspondence with the Portuguese authorities, the same Manager at Grant Thornton wrote "*As the supply of hotel accommodation was made to Hotels4u, I hope you will accept that the invoices are relevant to this claim.*", which is the opposite of the Appellant's case.

211. The correspondence was contradictory and the Tribunal did not have the opportunity to question those concerned with the claim. Accordingly, we place little weight upon it.

212. We heard witness evidence from several employees of Thomas Cook, but none of them had been employed by the company at the time of the claims and could not shed any light on them. The company had been through some well-publicised upheavals and there were not, unfortunately, any senior people now at the company who could give an explanation from first-hand knowledge.

213. However, I found a letter from Thomas Cook's head of UK Taxation, Mr Lister, to HMRC dated 30 May 2014 to be of great assistance in explaining the background to the claims. It must be recognised, that over the last ten years attitudes to corporate tax mitigation have changed enormously. As Mr Lister put it "…*I do not feel that my predecessors or the business acted inappropriately and professional advice has been taken throughout, but some of the judgements made and decisions taken historically do differ from those that I think I and my team would have reached*."

214. Having reviewed their own archives and paperwork obtained from Grant Thornton, Mr Lister discussed the matter with Deloitte "*who have some knowledge of the wider market approach to these claims in the period in question*." The letter went on to say:

"I understand that around 2005 there was a recognised anomaly in the travel sector with respect to the approach of these two member states [Spain and Portugal] to 8th Directive claims concerning hotel accommodation. It was apparently common practice that 8th Directive claims would be accepted and paid by these member states provided the claimant business was not subject to TOMS. As a consequence a number of bed banks and agents were filing claims and being refunded….a disclosed agent is

not entitled to input tax recovery…because it is not the recipient of the supply., but there was uncertainty at the time as to whether the Spanish and Portuguese authorities had implemented this aspect of the law correctly. I understand that… there was a viable filing position and that a claim made by a disclosed agent would be accepted and paid."

215. The letter indicates that both PwC and Grant Thornton approached Hotels4u in respect of the "opportunity". Thomas Cook subsequently took further advice which confirmed that a disclosed agent did not have an 8th Directive filing position. As noted above, the Spanish claims were dropped and in Portugal the money refunded was repaid.

216. I recognise that this is simply a letter from Thomas Cook to HMRC and that I did not have the benefit of any witness evidence on the point to test it. However, it is consistent with at least some of the correspondence and it is unsurprising that the correspondence itself was not always consistent when the advisors were putting forward a claim based on a contradiction. I find that the letter provides a convincing explanation of the reason for the 8th Directive claims and why claims were made only to Spain and Portugal although the Appellant operated in many other EU states. Despite the wording on the application forms, the claims were expressly made on the basis that the Appellant was a disclosed agent.

217. It is also important that the claims were a unilateral act by the Appellant. The hotels were not involved at all and the claims cannot form the basis of an argument that there was a common assumption by the Appellant and the hotels that the Appellant was receiving the supplies as principal.

218. For these reasons I do not consider that the 8th Directive claims, even coupled with the invoicing arrangements, vitiate the relationship of agent and principal established on the face of the documentation.

219. *Variation of the contract*

220. Ms Mitraphanous argued further that even if the standard contracts did create the relationship of agency, the conduct of the parties in relation to invoicing, that is the hotel's invoicing of the net price, the Appellant's failure to invoice for commission, the failure by H4U to inform the hotels of the final price and the failure of the hotels to ask for it, coupled with the 8th Directive claims amounted to a variation of the contract, so that H4U began to act as principle rather than agent. The Respondents pointed out that the Supreme Court in SH2 had said that even if the documentation between Med Hotels (in that case) and the travellers had been that of agent and customer, "*Med should none the less be treated as the supplier as principal (in English law)…if, as between the hotelier and Med, the hotel room was supplied to Med.*" Although it was not clear how this would work, the Respondents said that this illustrated that it did not matter that the traveller was not a party to any variation of the agreement between the hoteliers and the Appellant.

221. Ms Mitraphanous took us to the case *of (1) Globe Motors Inc. (2) Globe Motors Portugal-Materiel Electrico Para A Industria Automvel LDA (3) Safran USA Inc. v (1) TRW Lucas Varity Electric Steering Limited (2) TRW Limited*. [2014] EWHC 3718 (Comm) (the "Globe case"). This was a complex commercial case. Globe Motors Inc. ("Globe") entered into agreements with the defendants ("TRW") under which it was to supply electric motors to the defendants. Initially production was in the US, but the Agreement required manufacturing to be moved to Europe and TRW understood that Globe might incorporate a Portuguese company for this purpose. Globe did so and from 2002, the Portuguese company ("Porto") manufactured the motors and supplied them to TRW. The Agreement between Globe and TRW was not amended and there was no new agreement between Porto and TRW. A dispute arose and Globe and Porto sued TRW. Among the many issues which arose in the case, the one which is relevant for our purposes is the question whether Porto had any right of action against TRW. HHJ Mackie QC said, at paragraph 468 et seq:

"The issue is…in substance whether the Agreement was varied so that Porto became a party to it. … Globe says that Porto became a party to the Agreement from the last quarter of 2002 when manufacture was transferred from Alabama to Portugal with the consequence that TRW is liable for losses allegedly suffered by Porto …. TRW says there was no variation or other process by which Porto became a party to the Agreement and could not be because of art 6.3 which provided that the Agreement could only be amended by a written document.

[469] *Globe says that the Agreement was varied. Article 6.3 was varied or waived by the parties' conduct in that they operated under the Agreement as if Porto was a party, ….*

[470] *The law is common ground. For a contract to be varied, the court must be satisfied on the balance of 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."*

222. Globe said that the consensus was established by conduct as demonstrated by a series of actions including the following:

- TRW ordered products from Porto in accordance with the specifications and prices in the Agreement
- Porto invoiced TRW for the supply and TRW paid Porto in accordance with the invoices

- TRW submitted warranty claims under the Agreement to Porto rather than to Globe.
- TRW submitted its volume forecasts of products required to Porto not Globe.

223. There was no evidence of any discussion or communication on the question whether Porto had become a party. If there was a variation, it was made entirely by conduct.

224. The Court overcame that fact that the Agreement included a term that it could not be varied, except in writing, and the judge set out his decision in paragraph 488 as follows:

"The court is concerned not with a claim that the obligations have changed but with one that there is an additional party. I agree with Mr Lowenstein when he says this:

"The court has been shown that the Defendants (or their nominees) engaged in a series of open, obvious and consistent dealings which constituted a variation to the basis of dealings provided for in the Agreement. There is no other commercially realistic explanation for what happened: ie the evidence of conduct unequivocally demonstrates an intention to add Porto to the contract (and, so, the fact of variation). In these circumstances, to find that Porto had not become a party to the Agreement would ignore the weight of all the relevant evidence."

225. The case was appealed and the Court of Appeal's judgement was recently published at [2016] EWCA Civ 396. Globe/Porto succeeded on grounds other than the variation point, so the Court's comments were obiter, but in addressing the variation issue, the court said:

"The judge found that the Agreement, including art 6.3, was in fact varied or waived by the parties' conduct because in their dealings under the Agreement over a long period they operated as if Porto was a party: judgment, [468] – [489]. He summarised both parties' cases and the evidence (judgment, [472] – [476]), recognised the ambiguities in some of the documents (judgment, [475]) but concluded (judgment, [477]) that it was "overwhelmingly clear" on the facts and material deployed by Globe that TRW Lucas treated Porto as a contracting party. In reaching his conclusion, he took into account: (a) Globe's reliance on TRW Lucas and TRW Limited (or their nominees) ordering products from Porto under the Agreement in accordance with the contractual specifications and prices from 8 January 2003; (b) the supply and invoicing of those products to TRW Lucas and TRW Limited (or their nominees) by Porto in accordance with the contractual specifications and prices; (c)…"

226. Then at paragraph 114:

"*Was it open to the judge to find that the conduct of the parties means that the Agreement was varied by making Porto a party? …. In my judgment there was ample evidence to justify his conclusion. This included the fact that TRW Lucas's position meant that Porto would have been entitled to ignore warranty claims on the ground there was no contract (which it had not). I do not consider that the ambiguities in some of the documents and the evidence, which the judge recognised, precluded him from making the finding that Porto was treated as a party to the Agreement. In my judgment he was entitled to conclude that, on the basis of "open, obvious and consistent" dealings over a long period, there was no other explanation but that the parties intended to add Porto as a party to the Agreement. Accordingly, Porto has a right of action against TRW Lucas."*

227. HMRC rely on Globe as authority for the proposition that a contract can be varied by a course of dealing without any discussion or communication at all, but purely relying on conduct. They apply Globe in the present case by arguing that, even if the contracts constituted H4U as agent of the hotelier, the parties, by their subsequent conduct and extended course of dealing varied the contract so as to make H4U a principal, buying rooms from the hotelier in its own right. HMRC argue that the variation is evidenced by the consistent invoicing by the hotels and transfer providers on a net price basis to the Appellant and the failure by the Appellant ever to invoice the hotels for commission, coupled with the substantial 8th Directive claims which could only be made by someone using the supplies in its business (a factor not present in SH2).

228. In response to the Supreme Court's comment 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"* Ms Mitrophanous argued that at some stage in the course of dealings the variation occurred which affected the *next* supply to the *next* traveller. So the variation did not apply to a contract which had already been performed, but once it had occurred, it applied to the performance of contracts with subsequent travellers from that point. Ms Mitrophanous was unable to pinpoint when such a variation might have occurred but submitted that it must have happened "quickly", in the case of each hotel, maybe after only two or three travellers, as the arrangements were confirmed by their continuation throughout the rest of the year. Even though the traveller would still not be aware of the invoicing arrangements between the hotel and H4U, the Supreme Court contemplated that it might be possible for the contract between the traveller and H4U to be that of customer and agent, even if the contract between H4U and the hotel was that of principal and supplier.

229. Ms Sloane submitted that the Supreme Court has already addressed the question of variation in connection with contracts which were virtually identical to the contracts in the present case, where the invoicing was also the same as in the present case. The Supreme Court held that all the factors put forward by HMRC (which also apply here) even when taken together were not inconsistent with and, therefore, could not undermine the existence and nature of the agency arrangements.

230. I have dealt with the 8th Directive claims above and have concluded they do not affect the contracts between the parties. I accept the principle in the Globe case that it is possible to vary a contract by a course of dealing without the parties actually discussing the matter and it must follow from that that initial dealings are not affected by the change, but that a consistent course of dealings which is sufficient to vary a contract must trigger a change at some point in time and after that, the varied contract will apply to future dealings.

231. The argument that the relationship between the parties was varied, of necessity, implies a change in the common intention of the parties, even if that intention is not expressed and has to inferred from conduct. HHJ Mackie's second requirement is "*consensus between the parties as to the manner in which the Agreement was to be varied"*. In the Globe case, A and B entered into a contract and later C began to perform the contract with B and B accepted that performance. There was a clear and obvious change in the way the contract was being performed. The fundamental difficulty with arguing that there was a variation in the present case is that there was no change in the way the contracts were performed. I have found that the standard allotment contracts expressly appointed the Appellants as agent of the hoteliers and that none of the terms of the contract, alone or collectively, were sufficient to undermine that status. The invoicing and lack of invoicing between the parties was consistent from the outset. It was consistently wrong, at least from the VAT perspective, even though it accurately reflected the payment flows between the parties. It is apparent that this is how the parties intended to do things from the outset and I infer that this was common practice throughout the industry (although that has not influenced my decision in this case). There is nothing in the parties' course of dealing to suggest a mutual intention to change the terms of the contract they had agreed. It is, in any event difficult to see how there could be a "consensus" between the parties when H4U, over a period of years continued to issue documentation on the customer side on the basis that it was the hotel's agent. Accordingly, I find that there was no variation of the contracts between the hoteliers and the Appellant.

232. *Estoppel by Convention*

233. On the last day of the five day hearing, the Respondent raised an argument based on estoppel by convention. Ms Sloane strongly objected to this on the basis that it was an unpleaded argument. Ms Mitrophanous admitted that the Respondent's Statement of Case did not refer to estoppel but said that the Statement of Case referred to the standard agreement being changed by "variation or otherwise". In fact, it only referred to "variation or rescission and replacement with a new contract". I allowed Ms Mitrophanous to make her point but on reflection, I do not consider that it was appropriate for her to do so. The argument had not been pleaded; it would be difficult to say it was included in "variation or otherwise" and it certainly was not included in "variation and rescission or replacement with a new contract". Ms Sloane very properly objected to the raising of the point and I have decided to exclude consideration of it. I did not, and do not, give leave to amend the Respondent's Statement of Case. I do not consider the question of estoppel by convention further.

234. *Decision on the signed standard allotment agreements*

235. The standard allotment contracts and the standard booking conditions expressly establish the Appellant as a disclosed agent of the accommodation providers. Many of the seemingly anomalous terms of the standard allotment contracts can be explained in terms of the Appellant's dominant bargaining position and its commercial need to safeguard its reputation and goodwill. I follow, as I am bound to do, the Supreme Court in SH2, in finding that none of the various "factors" highlighted by the Court of Appeal and discussed above, including the invoicing arrangements, were inconsistent with the relationship of agency and so they did not vitiate that relationship. I do not consider that the additional factor of the 8th Directive claims in the present case affect the position. Nor do I find that there was any variation of the contracts after they had been entered into. Accordingly, I find that in the case of the signed standard allotment contracts, the Appellant was the disclosed agent of the accommodation providers.

236. *The unsigned contracts*

237. In SH2, there was a single form of contract between accommodation providers and Med Hotels, in all cases governed by English law and a single set of booking conditions. In this case there are a series of permutations on the standard situation. I now start to venture beyond the realms of SH2 and the first variation I consider is that 20% of the contracts were not signed. That is to say, in these cases there was a rate sheet together with the standard terms and conditions, but neither party had signed them.

238. The Appellant argued that a contract does not need to be signed in order to be a binding contract. Ms Sloane took us to the recent case of *Reveille Independent LLC v Anotech International (UK) Limited* [2015] EWHC726 (Comm). In this case, the parties negotiated a "Deal Memorandum" which provided it was not to be binding until signed by both parties. It was signed by the Defendant, but it was uncertain if it was signed by the Claimant.

239. The judge stated that *"The signature of the parties to a written contract is not a precondition to the existence of contractual relations, as a contract can equally be accepted by conduct".*

240. He later *said "In order to decide whether there was acceptance by conduct I have to consider what the Claimant actually did, mainly as regards carrying out the alleged contract with the Defendant."* He then stated his conclusions as follows *"The negotiation of the long form agreements was envisaged by the Deal Memo. It does not follow that negotiation of those terms (which were of course never entered into) was a step inconsistent with acceptance by conduct of the Deal Memo. The pattern of activity continued over the summer as did the acknowledgement and assertion by the Defendant that it had a licence. Most significantly the Defendant through Mr Stevens acknowledged the existence of a binding commitment by agreeing to get paid invoices on the basis of the Deal Memo. It is true that there is ambiguity in one of Mr Stevens' emails but his other communications are clear. As I see it the Claimant communicated its acceptance by conduct in early March and thereafter as the Defendant recognised when acknowledging its obligation to pay. What more powerful evidence of the fact*

that the Defendant had received notice of acceptance and, like the Claimant, had performed the contract could there be?"

241. So in *Reveille*, the parties had acted on the basis that the contract was in force and, importantly, the Defendant undertook to pay invoices on the basis of the unsigned contract.

242. Ms Sloane argued that in the present case, the terms agreed between the parties, being the standard terms and conditions, were performed; the hotels provided accommodation and honoured bookings and sent invoices which were paid by the Appellant. Accordingly, the contracts, though unsigned, had been accepted by both parties by their conduct.

243. HMRC agreed that it was not necessary for a contract to be signed for it to be binding and recognised that there was *a* contract between H4U and the hoteliers. HMRC argued that if the contract was not signed, there was no evidence that the accommodation providers had accepted the standard terms, including the appointment of the Appellant as agent, and that it would have been perfectly possible to perform a contract on the basis of the rate sheet alone. Ms Mitrophanous contended that the burden was on the Appellant to prove, on the balance of probabilities, that the contract was on the standard terms. I was shown a number of contracts, some signed, some unsigned. The rate sheets did not, in general, describe the parties as "principal" and "agent". They used terms such as "hotelier", "tour operator" and "contractor".

244. The other document which would have been seen by the hotelier was the Accommodation Voucher which the traveller would have presented to the hotel on arrival. The Vouchers contained the statement "Hotels4u are acting as a retail agent for [X] with whom your accommodation is booked". In some cases "X" was the name of the hotel, but it others, it was the local agent or a "bedbank". Ms Mitrophanous submitted that there was an ambiguity about who was doing the booking, but I consider that, in the context of the statement that Hotels4u is acting as agent, it is clear that the reference is to the traveller's booking with the provider of the accommodation. Where the Accommodation Voucher states the name of the hotel, it provides some evidence that the hotel accepted H4U was its agent as it would have seen such a document each time a traveller came to take up his booked room although on its own it is not conclusive. Where the Voucher refers to someone else, it cannot be regarded as such evidence.

245. Ms Sloane took us to the case of *Perenco v HMRC* [2015] UKFTT 65 (TC) which, as a First Tier Tribunal case is persuasive but not binding on us. This case concerned a claim for repayment of VAT where the original documents were not available. In relation to the burden of proof, the Tribunal said:

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

[103] *We also accept Ms McCarthy's submission that the principle of effectiveness does not require perfect accuracy in relation to the underlying facts"*

246. We heard witness evidence about the contracting process from Mr Tilby-Baxter, Thomas Cook's Hotel Head of Contracting for Region 1 (Spain and Portugal) and from Mr Smith, who was a contract manager for the Thomas Cook Group. Mr Tilby-Baxter has substantial experience of the travel industry but had only worked for Thomas Cook from December 2013, that is to say, only for the last few months of the claim period. Mr Smith had worked for Thomas Cook since 2007, but had only been a contracts manager in the Group from January 2011 and had only worked for the Hotels4u part of the business since July 2012. Although both witnesses were entirely straightforward, they could only speak, from their own experience, for the latter part of the claim. Mr Tilby-Baxter told us that he had indirect knowledge of the earlier part of the claim period through employees who had been employed by H4U or Med Hotels as contracting managers and from his own observations as, in previous roles, when he had been at hotels when contract managers from H4U were also there. I must, however, treat their evidence with some caution, at least in relation to the early part of the claim period.

247. In summary, both witnesses emphasised that the starting point for negotiations with the hotels was the standard allotment contract. The contract managers had authority to negotiate on matters such as number and type of rooms, price, deposits and other operational matters, but could not deviate from the standard terms and conditions. In most cases the standard terms were accepted. Most of the hotels that H4U dealt with were individual hotels or small groups who were anxious to have access to the UK market through the "shop window" provided by H4U's website and the balance of power was very much in H4U's favour. It was only the bigger hotel chains who tended to insist on contracting on their own standard terms. The contract managers had no authority to vary the standard allotment contract. If a hotel wanted to contract on different terms, it had to be referred to the Group's legal department who would then deal with the negotiations.

248. Mr Tilby-Baxter said that a hotel's rooms cannot go on sale on the H4U website until the hotel has signed the contract. He said that in some cases there may have been some other form of express acceptance of the contracts such as an email, but I did not see any such emails.

249. Once the contract had been signed, the H4U team in the UK would upload the details on to the H4U contracts system which, since about 2013 had been operated by a team in Slovakia who check the details and then release the rooms to the public on the H4U website. Mr Tilby-Baxter said *"As part of this process the contract manager sends an electronic pdf of the contract to the Slovakian team. It is sometimes the case that the automatically generated version that has been printed before signature may be sent, but a signed copy (or other indication of contractual agreement) is always obtained by the contracts manager. As far as I am aware there are no exceptions to this approach and all contract managers are fully aware of it."*

250. This was corroborated by Mr Smith's evidence about his own experience. He stated that *"I will follow the Hotels4U and Thomas Cook procedure, which is, I will only allow a contract to be set as live, which means sold,…once I have received a signed copy [of the contract] back from the hotelier which I have also countersigned. I will then ensure it is sent on to the loading team as well so they can see I have a signed copy…"*

251. It was suggested to Mr Tilby-Baxter that, in the case of the unsigned contracts, it would be possible for an hotel to agree to the rate sheet, which set out all the key terms relevant to the hotel, without entering into the standard terms and conditions. Mr Tilby-Baxter denied this would be possible. If an hotel did not agree to the terms and conditions, their rooms could not be sold (unless a different contract was agreed by the legal department in which case there would have been a different document). He said *"It wouldn't be the case that this hotel agreed to send us the rate sheets without having agreed to the terms and conditions of the contracts. They are part and parcel of the same agreement."*

252. The bundles contained several examples of both signed and unsigned standard allotment contracts. In only one case (on a signed contract) was there a specific reference on a rate sheet (which varied in format from hotel to hotel) to an agreement to "abide by the terms and conditions overleaf". However, every such contract that I saw was headed, on each page with the name of the hotel and its star rating, its location, an internal reference and the date of the contract. That information was set out not only on the rate sheet, but also on the copy of the standard terms and conditions that was attached to the rate sheet.

253. There are two possibilities in relation to the unsigned contracts: first that there was always a signed version of the contract, but sometimes only the unsigned copy was loaded on the system and secondly, that there were contracts which were not signed but which were agreed on the standard terms, acceptance being evidenced by performance.

254. On the basis of the evidence of Mr Tilby-Baxter and Mr Smith, I think it more likely than not that where there were unsigned contracts on standard terms, there were in fact signed contracts on those terms in existence. It seems unlikely, given the strict company policy and procedures, that 20% of the contracts could have "slipped through the net" and been set to "live" without the contract manager having obtained a signed copy.

255. However, I can only give full weight to that evidence in relation to the latter part of the claim period when the witnesses had personal knowledge of how things worked.

256. In relation to the earlier periods, the evidence of the witnesses is of some help but not conclusive Mr Tilby-Baxter remarked on the upheavals the company had undergone and it may have been that procedures were not as rigorous in the earlier period. Even so, it is clear that in the earlier period, where contracts were unsigned there was still *a* contract between the hotelier and H4U. Even though there was not

generally a link, on the face of the rate sheet , to the terms and conditions behind it, I consider it is clear from the fact that the terms and conditions are attached to the rate sheet and the identifying information including the date of the contract appears on all pages including the terms and conditions, that the rate sheet and the standard terms were part of a single document. They were all "part and parcel of the same agreement". It is common ground that a contract does not need to be signed to be binding and that acceptance can be evidenced by conduct, by what the parties did.

257. Looking at what the parties did, we see that the agreement consisting of the rate sheet and the standard terms was performed; travellers went to the hotels, the bookings were honoured and payment was made in accordance with the invoices rendered. I consider that in these cases, on the balance of probabilities, there was in existence a contract on the standard terms. At the very least, the Appellant has made out a prima facie case which has not been rebutted by the Respondents, so on the reasoning of *Perenco*, the Appellant must win.

258. *Decision on the unsigned contracts on standard terms*

259. In the case of the unsigned contracts on standard terms, I find that on the balance of probabilities there were, in many cases, in fact signed versions of the contracts in existence. Even in those cases where there were no signed contracts I find that the unsigned contracts consisted of both the rate sheet and the standard allotment terms and these were accepted by the parties by conduct. Accordingly, in these case, I find that the Appellant was appointed as the agent of the accommodation providers under the standard terms and conditions.

260. *The missing contracts*

261. In a proportion of cases, the Appellant has not been able to produce any written contract for all or part of the period in question. It is clear that there was some contract between the parties; travellers have paid for rooms, arrived and stayed in the hotels and invoices have been sent by the hotel to H4U and paid. It is likely that there were express agreements but over the long time period involved, some have been lost.

262. HMRC's case is simply that the burden of proof is on the Appellant to show that the hotels authorised H4U to act as agent in cases where there is no written contract and this they have been unable to do.

263. It is common ground that agency can be implied from conduct or a course of dealing-see the *Globe* case above. Ms Sloane argues that as the overwhelming majority of the written contracts are on the standard terms, on the balance of probabilities, the missing contracts are also on those terms, not as a matter of statistics, but on the basis of the evidence of H4U's business practice. The majority of missing contracts are with individual hotels where the balance of power meant H4U could impose its own terms. Ms Sloane submitted that a course of dealing was established on the basis that:

- H4U's contract negotiators always sought to contract on its standard terms

- The H4U website and the terms and conditions available on it make its status as agent clear
- The Accommodation Vouchers, which would be presented to a hotel by a traveller on arrival state in terms that H4U is the agent of the hotel.
- The hotel accepted and invoiced for the booking.

264. I do not consider that these factors are sufficient to establish that the hotels authorised H4U to act as their agent. We know that there were non-standard contracts. Without other evidence, I cannot assume that a missing contract was a standard one. The relationship between the traveller and H4U is not, as we have seen, necessarily conclusive of the relationship between the hotel and the Appellant. Whilst Accommodation Vouchers could provide useful evidence, the Vouchers do not always state the name of the hotel on them. As noted above the invoicing is inconclusive as it is not consistent with H4U being a principal or an agent.

265. The Appellant has not discharged the burden of proving that the missing contracts appoint it as agent of the hoteliers.

266. Having said that, the parties also wish me to make findings of principle which may assist them in reaching agreement on quantum by applying these principles to particular cases.

267. Article 3(1)(a) of the 20th edition of Bowstead & Reynolds on Agency (Bowstead) states *"The relationship of agency may be constituted by the conferring of authority by the principal on the agent, which may be express or implied from the conduct or situation of the parties".*

268. Where the Appellant can produce written contracts (signed or unsigned) with a particular hotel on the standard allotment terms and conditions (or indeed on other terms which establish agency) for some periods in the claim before and after a period when no contracts were available, I would consider that the Appellant had discharged the burden of proving that there was a course of dealing on terms appointing the Appellant as the hotel's agent. The Appellant would also need to produce some evidence that it used the hotel during the periods when there were no written contracts and that the arrangements were the same as in the periods for which there were written contracts. For example, it should be able to produce at least some Accommodation Vouchers and invoices or statements from the hotel. If it were able to do this, I would be able to conclude that it was more likely than not that the hotel had continued to authorise the Appellant to act as its agent in the periods for which no written contracts are available.

269. Ms Sloane also submitted that intragroup supplies were a special category where agency ought to be implied. Companies in the Thomas Cook Group owned hotels as principal in their own right and used the H4U website to obtain customers. There were no written contracts between the Thomas Cook entities and H4U. These were separate legal entities and strictly, there should have been contracts between them. It is surprising that in a concern as substantial as the Thomas Cook Group there were none. Ms Sloane argues that, as these were intragroup supplies, Thomas Cook

will have known the capacity in which H4U was acting and it can reasonably be implied that authority to act as agent was granted.

270. The Appellant presented no evidence from witnesses or otherwise that Thomas Cook appointed H4U as its agent to sell its hotels through the website. There is merely the assertion in a report by the Appellant's advisors, Deloitte, that "*Thomas Cook will have known the capacity in which H4U was acting when it purchased or sold product. I have therefore treated these as supporting the agency position.*"

271. Whilst it might well be the case that one can impute corporate knowledge of H4U's business model to Thomas Cook, it does not necessarily follow that the arrangements between the companies were in accordance with that model. It is equally likely that, as the companies were in the same group, some other special arrangement applied. It boils down to the evidence. I have not seen or heard any which would establish what the relationship was and I cannot infer agency merely from the fact that the companies belonged to the same group.

272. *Decision on the missing contracts*

273. The Appellant has not discharged the burden of proving, on the balance of probabilities, that it was appointed as agent in the case of any particular hotels where contracts are missing. However it is open to the Appellant, when negotiating issues of quantum, to establish that agency can be implied from a course of dealing in particular cases by providing evidence, as set out above.

274. *THE NON-STANDARD CONTRACTS*

275. *Introduction*

276. By non-standard contracts I mean contracts for services for travellers which were not on the Appellant's standard terms and conditions set out in the standard allotment contract. Not all of the non-standard contracts were with hotels.

277. I have already noted the comments in Bowstead on how agency may be formed and that there may be an implied appointment, which is particularly relevant in relation to the non-standard contracts. Article 8 of Bowstead states *"Agreement between principal and agent may be implied in a case where one party has conducted himself towards another in such a way that it is reasonable for that other to infer from that conduct assent to an agency relationship… Assent of the principal may be implied where he places another in such a situation that, according to ordinary usage, that person would understand himself to have the principal's authority to act on his behalf….But where one person purports to act on behalf of another, the assent of the other will not be presumed merely from his silence, unless there is further indication that he acquiesces in the agency...each case must ultimately be decided on its facts"* The point is also made that the labels attached by the parties are not determinative.

278. The approach I apply to the non-standard contracts is first to construe the terms of the written contract. Where there is an express appointment of the Appellant as

agent, that is not the end of the matter. I have to consider whether the terms of the agreement as a whole create an agency relationship. Where there is no express appointment of H4U as agent I must consider whether the terms of the contract in fact create that relationship through the rights and obligations it grants and imposes on the parties. Where the words of the contract are not decisive, I must consider whether agency may be implied from the conduct of the parties and their course of dealing. H4U's statement in its booking conditions that it acts as agent is not sufficient to imply the hotelier's assent-silence will not do; there must be some "further indication that he acquiesces in the agency". In coming to my conclusion I must look at all the facts and circumstances of the case.

279. If I find that there has been a *prima facie* grant of authority to act as agent, we have seen from SH2 that the parties are free to negotiate and agree whatever other terms they wish. So, for example, the parties can agree that the agent can set its own commission and can retain monies which ought properly to be transmitted to the principal, and this will not undermine the agency. The important point is that one first has to establish the relationship of agency before one considers whether any particular term or terms of the agreement is inconsistent with that relationship.

280. *Foreign law contracts*

281. Less than 2% of the contracts were governed by foreign law, but they accounted for over 20% of H4U's EU turnover. This may well be because the contracts governed by foreign law were mostly those used by the bigger hotel chains which were in a sufficiently strong bargaining position that they could impose their own contracts on H4U.

282. Ms Sloane took us to Morgan J's comments on jurisdiction in paragraph 110 of the Upper Tribunal's decision, where he said:

"The transactions in the present case are governed by English law. (There is an exception in the case of one contract between Med and a travel agent where the contract was governed by Irish law. No one submitted, much less led any evidence, that the Irish law of contract was materially different and I was not asked to treat that contract in any way different from the other contracts.) Accordingly, I must apply English law principles to the construction of the written contracts. When I have construed the written contracts in that way, I will be able to identify the supplier of hotel accommodation under those contracts. I will then apply the provisions as to VAT which refer to the concept of a supply of goods and services."

283. On the basis that Morgan J as a matter of principle, applied domestic law to the contracts, Ms Sloane invited us to make rulings of principle on categories of documents applying English law. She argued that it would then be for HMRC to argue that the law was different in different Member States, if it wished to do so, when the parties come to work out the implications of this decision in their negotiations on quantum.

284. Ms Mitraphanous drew our attention to the passages before and after Morgan J's remarks quoted above:

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

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

285. In SH2, all the contracts (with the immaterial exception mentioned) were governed by English law, so naturally Morgan J applied principles of English law to determine the relationship between the parties. It was unnecessary to consider any other law.

286. The correct approach was set out in paragraph 23 of the Supreme Court's judgement on SH2 where Lord Neuberger said:

"However, in so far as the provisions of art 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, and, in so far as the subsequent conduct of the parties is said to affect that nature and character, the effect must also be assessed by reference to the proper law of the contract or contracts."

Although his comments were made in the context of article 306 of the Principal VAT Directive, that statement must be correct generally; if a court or tribunal is considering the effect of a contract, the effect must be determined in accordance with the law which governs the contract.

287. I am unable to accept Ms Sloane's invitation to make findings of principle on the basis of English law. I do not think this would be either practical or useful, where *ex hypothesi*, we are dealing with agreements governed by some other law.

288. I was not provided with any evidence as to the principles of the applicable foreign laws. I recognise that the provision of such evidence would have been a major undertaking as H4U's business operated in a number of countries within the EU. Unfortunately, there is no shortcut. The burden of proof lies on the Appellant to show that the relationship between the hotelier or other supplier and H4U is that of principal and agent and the relationship can only be analysed by applying the law which governs that relationship.

289. *Decision as to contracts governed by foreign law*

290. Each contract must be construed in accordance with its governing law. Where that law is not English law it is not appropriate to apply English law principles to determine the relationship established by the contract and as no evidence of foreign law was presented, the Appellant has not made out its case.

291. I emphasise that whilst I am unable to find that the Appellant was appointed as agent by the foreign law contracts; I have *not* found that the Appellant was not appointed as agent. My decision on foreign law does not prevent the Appellant providing evidence of the position under the relevant law to HMRC in the future and should not prejudice those future negotiations between the parties. In order to assist the parties, I have also commented on those provisions in foreign law contracts which I consider will be relevant in determining the parties' relationship.

292. Having established the approach to the non-standard contracts, I now come to consider the different categories.

293. *Non-standard contracts with express appointment as agent*

294. There was only one example of such a contract in the bundles. This was a contract between H4U and a French company called Accor which operated a chain of

hotels itself and through franchisees. On the face of it, the contract is helpful to the Appellant. The recitals state that H4U *"is in the business of facilitating sales as agent of Accor and the Participating Hotels via the internet…but also through retail agents and UK travel agents.."*

295. Clause 2.1 *provides "For each booking in a Participating Hotel…Accor or the Participating Property as applicable, instructs Hotels4u.com to act as a facilitator of such booking on behalf of the relevant Participating Property"*. This certainly looks like an appointment of H4U as agent. Clause 2.3.1 deals with internet connectivity and *states "Hotels4u.com will be allowed to facilitate sales as agent of Accor and the Participating Hotels the Internet [sic] through its websites…"* Clause 4.2.1 states *"By making a reservation through the Sales Channels a direct contract (and therefore a legal relationship) is created between the Participating Hotel and the Guest ("the Guest Reservations")…Accor hereby empowers and grants Hotels4u.com explicit authorisation to conclude Guest Reservations on the behalf of its Participating Hotels…".*

296. I would have had little hesitation in deciding that this particular contract constitutes an appointment of H4U as agent of the hotelier were it not for Article 11 which provides that the contract is to be governed by and construed in accordance with the laws of France. As set out above, it is not appropriate for me to make any finding as to the nature of the relationship between the parties where that relationship is not governed by English law. Whilst this particular contract *seems* clear, I do not know, for example, as Morgan J points out in the passage from SH2 cited above, whether another jurisdiction would take a different approach to analysing the relationship in the light of pre- or post- contractual conduct. Nor do I know how another jurisdiction might approach such matters as H4U's ability to set its own commission or the disparity in cancellation terms or the invoicing arrangements. The Supreme Court's decision in SH2 might be binding on this Tribunal, but it is not binding on the courts of France.

297. If there are other non-standard contracts which were not in the bundles which are governed by English law and which expressly appoint the Appellant as agent, they must be construed according to their terms and in accordance with the principles applicable to the standard contracts discussed above.

298. *Non-Standard contracts with no express appointment as agent*

299. Ms Sloane has an even more difficult hurdle to clear in these cases. I was taken to a number of contracts with hotels and hotel groups in various countries including Spain and Greece. None of the contracts contained an express appointment of H4U as agent of the hotel or group. Various labels were applied to the Appellant including "tour operator" , "contract partner" , "intermediary" and "tour operator or travel agency". Where there is a description of the agreement, I saw references to "Commercial Agreement", "Rappel Agreement" and "Co-operation Agreement". Some of the contracts contained commission arrangements. One group of contracts with a Spanish hotel group called Mitsis Hotels gave H4U the "right to sell the above rooms via internet…".

300. Some of the contracts appeared to have been translated into English from another language, or drafted by someone who was not a native English speaker. It is particularly difficult to construe these contracts as they do not expressly appoint the Appellant as agent and in construing the terms actually used, it is more than likely that "something has been lost in the translation".

301. We do not think it is useful to go through all the contracts in detail. It is common ground that there is no express appointment of H4U as agent. Ms Sloane submits that one therefore has to look to the general principles governing the formation of agency as set out in Bowstead and consider whether the terms of the contract, the conduct of the parties and the surrounding circumstances enable agency to be implied.

302. Ms Sloane considered in particular the Mitsis contracts, though her points apply to the other agreements in this category, and submitted that one can imply authority for H4U to act as agent from the absence of inconsistency in the contracts with the status of agency coupled with the following factors:

- H4U's known business model is that it is, and presents itself as, a "shop window".
- The contracts grant H4U the right to market the properties on its website where it publicly presents itself as a disclosed agent.
- The Accommodation Vouchers presented by travellers to the hotel state that H4U acts as agent and (at least in some cases) states that the traveller's accommodation is booked with the hotel.
- The hotel accepted the bookings, performed them, and by that conduct showed it accepted H4U's conduct in acting as agent.

303. Where there is no express appointment of H4U as agent, I accept as a general principle of English law that one can consider whether agency is implied on the basis set out above. However, with respect Ms Sloane starts from the wrong place. She must first establish the existence of agency before she can rely on the fact that there are no factors inconsistent with it. Although I accept bullet points one and two, H4U has accepted, in making adjustments to its claims, that there are cases where it has acted as principal and those bullet points would have been equally applicable in those cases. The Accommodation Vouchers are helpful as far as they go, but they are a standard form document and there was no evidence that they are different in those cases where the Appellant accepts it acted as principal. Also, not all the Accommodation Vouchers make it clear that the contract is intended to be between the traveller and the hotel. The last bullet point is consistent with either status.

304. Conspicuous by its absence was any evidence from the hoteliers about what they thought the relationship was.

305. In short, even if I could apply English law, I have not been presented with convincing evidence to show that, on the balance of probabilities, I could imply a relationship of agency in this case.

306. A greater obstacle to Ms Sloane's case is that all the non-standard contracts without an express appointment of agency contained in the bundles were governed by a law other than English law. I cannot therefore make findings as to whether any particular contract appointed the Appellant as agent or even as to the principles to be applied as these will be the principles of the particular foreign law. To the extent that there are in fact any contracts in this category governed by English law each would have to be construed on its own terms applying the above principles to determine whether agency could be implied. Subject to the specific terms of any such contract, I do not consider that the factors identified by Ms Sloane would be sufficient on their own to justify an inference that H4U was the agent of the hotelier.

307. *BEDBANKS*

308. Mr Tilby-Baxter explained that "bedbanks" is a term for businesses similar to H4U who have contracted with hotels to make rooms available through their own platforms including websites. H4U enters into a contract with the bedbank so that the bedbank passes on some of the available rooms to H4U at an agreed price and H4U then makes those rooms available to travellers via its own website. H4U does not have a direct contract with the hotel but contracts with the bedbank so the standard allotment contract is not used.

309. H4U itself acts as a bedbank on some occasions, passing on some of its stock of rooms to other providers.

310. Mr Tilby-Baxter indicated that H4U in these cases became another link in the negotiation chain. In effect, it became a sub-agent of the bedbank or when it acted as a bedbank itself, the other party became its sub-agent. In all cases, the hotelier sold the rooms to travellers, albeit through a chain of agent and sub-agent.

311. The bedbank contracting was dealt with by a team separate from the contracting team but the bedbank team has now been dissolved.

312. Some of the bedbank contracts were subject to English law, others were not.

313. HMRC's position is that none of the bedbank contracts appointed H4U as agent of the supplier. The Appellant contends, rightly, that the bedbank agreement does not in terms have to say "I appoint you as my agent", it is a question of construing the contract and considering the other circumstances and seeing whether there is an express or implied appointment of H4U as agent. The percentage of sales sourced from bedbanks increased from 3.11% in 2011 to 5.87% in 2013. As with other non-standard contracts, the parties are not expecting the Tribunal to rule on every single contract but to lay down principles regarding the approach to be taken which the parties can then apply when they come to negotiate on quantum.

314. Ms Sloane first took the Tribunal to a bedbank contract between Somewhere2stay Limited (S2S)and H4U. This contract was governed by English law. S2S is a UK company, but is within the claim. The first question, as to whether the supply is within the TOMS is still relevant, but where the supply is made in the UK, UK VAT would be due and an adjustment has been made to take account of this.

315. The agreement *recites "H4U trades as an accommodation agent and wishes to have access to a supply of hotel beds to offer Clients. The Supplier [S2S] is willing to provide H4U with access to the Products as agent to the accommodation providers…"* So S2S is stated to be an agent of the hoteliers.

316. "Bed Bank" is defined as "*the stock of accommodation in various countries worldwide displayed and bookable via the Supplier's website".*

317. H4U is required to develop an interface which essentially, enables it to "plug into" the Supplier's website via its own website in order to display the bedbank rooms in its own "shop window".

318. "Client" is defined as " any customer (or their agent) introduced by H4U. " The word "introduced" suggests agency but is far from conclusive. The "Products" are the hotel rooms.

319. The "Interface" through which the website is to be accessed is *"the application to be developed by Hotels4U to interface with the API [application program interface which enables Hotels4U to access the Bed Bank] using XML [extensible mark-up language] to enable access to the Bed Bank."* So the mutual intention and understanding of the parties is that the contract will enable H4U to "plug into" the bedbank's website and display its rooms with H4U branding. The traveller or travel agent who looks at H4U's website will see the bedbank's accommodation along with the other hotels offered by H4U subject to its booking conditions which make it clear that H4U is an agent and the traveller's contract is with the hotelier.

320. The Agreement is a long one and imposes a number of obligations on each party. For our purposes, the important provision are the following.

321. Clause 5 requires H4U to ensure that Clients are aware of the Supplier's booking conditions before a booking is made and that the Client understands and acknowledges the Supplier's agency status. Most importantly, clause 5.4 provides that H4U warrants and agrees ***"to ensure that all Clients are aware of the Supplier's agency status*** *before any booking is made* ***and that the Clients' contracts are with the relevant Product provider"*** (emphasis added). This is a very clear indication of the parties' joint recognition that H4U is merely another link in the agency chain.

322. Clause 8 requires the Supplier to carry out health and safety audits and to remove from the Bed Bank any hotels which do not meet health and safety standards.

323. By Clause 9.1 the Supplier must use reasonable endeavours to ensure that the hoteliers maintain public liability insurance and by 9.3 must itself maintain insurance cover in respect of liabilities "for which the Supplier may be liable under this agreement as an agent for the Product Providers".

324. As with the standard contracts, such provisions can be readily explained by H4U's need to safeguard its brand and goodwill.

325. Clause 10 relates to complaints and H4U undertakes to advise Clients to report complaints direct to the hotel management at the time they arise so that, where possible, they can be resolved in resort. The Supplier undertakes to deal promptly with any Client Complaints that are notified to it by H4U.

326. By clause 13.1 the Supplier gives H4U a licence to reproduce photos and descriptions of the hotels (Product Content) in order to display it on its own website and to access and connect to the API and to access the bedbank through the API, in all cases for the sole purpose of "*promoting and allowing Clients to search for Products*". If a Client buys a hotel room from the H4U website, it is bound by H4U's booking conditions which expressly state that it is agent of the hotel.

327. In clause 15, the Supplier indemnifies H4U against liability it suffers as a result of injury or loss suffered by a Client arising from the Supplier's negligence.

328. Clause 16 provides that all monies received by H4U from any Client will be held by H4U on express trust for the Supplier. Clause 16.6 "… the Supplier will only issue vouchers on behalf of the Product providers after receipt… of the full amount due to them".

329. Clause 17.1 provides that H4U *"is responsible for the collection of all deposits …and other monies of any description due to the Supplier from any Client in respect of any booking."* Clause 17.3 makes H4U personally liable to the Supplier for monies it should have, but failed, to collect from Clients in certain circumstances. This would be unnecessary if H4U were buying the rooms for onward sale as principal.

330. Clause 18 provides for H4U to be entitled to receive a commission. Clause 18.7 expressly authorises H4U *"to apply and collect a booking fee from Clients and to retain the same without accounting for it to the Supplier or the Product providers providing…[it is] on all documentation clearly and separately identified as an amount due to Hotels4u."* Again, this would be unnecessary if H4U were selling as principal as all monies would be due to it and there would be no duty to account.

331. Ms Mitrophanous made the point that we had not been provided with copies of the contracts with the hotels and the Appellant had not established that the bedbank was agent of the hotelier. I do not consider that we need to see such contracts. In clause 4 the Supplier warrants that the use by H4U of the bedbank, the API and the Product Content (photos and descriptions of hotels) will not infringe any third party's intellectual property rights and further that *"it has acquired and shall continue to hold throughout the term of this Agreement all rights consents and licences necessary for access to and use of the Bed Bank in accordance with the terms of this Agreement."* I consider that this constitutes a warranty of authority which is sufficient for present purposes. Assuming S2S is indeed agent of the hoteliers, as the contract states,, it warrants that it has been authorised by them to appoint H4U as sub-agent in accordance with the contract. Even if S2S was itself acting as principal H4U would still be its agent, to sell rooms to customers and not purchasing as principal.

332. We also note clause 4.3 by which the Supplier warrants *"that it will use its reasonable endeavours to ensure Product Content is correct and up-to-date at all times including essential and extra information such as that regarding Product renovations and withdrawal of any facilities or amenities."* This reinforces the concept that H4U is simply accessing the Supplier's website rather than wanting information to update its own website about hotels it is selling to travellers as principal.

333. When one looks at the terms of this contract, and in particular, the provisions relating to the interface and access to the bedbank, and clauses 5, 13.1, 16, 17 and 18.7 and considers them in the commercial context of the industry understanding of what a bedbank is, it is clear that H4U is merely a conduit, another link in the chain of supply, by which a traveller or his travel agent can find a hotel online and make a booking with the hotel via H4U's website.

334. In the case of the standard allotment contract, the hotel appoints the Appellant as agent to sell its rooms, but it is of no concern to the hotel how the Appellant makes those sales. It may authorise the Appellant to market the rooms on its website, but this is not fundamental to the arrangements. In this bedbank contract, it is the essence of the relationship that both parties understand and intend that the traveller will see the bedbank rooms and other H4U rooms without distinction on H4U's website and can book any room on terms that the booking is direct with the hotel. Although the bedbank does not expressly appoint the Appellant as its agent, it is of necessity implied that this is its intended status. As Bowstead puts it:

"Agreement between principal and agent may be implied in a case where one party has conducted himself towards another in such a way that it is reasonable for that other to infer from that conduct assent to an agency relationship… Assent of the principal may be implied where he places another in such a situation that, according to ordinary usage, that person would understand himself to have the principal's authority to act on his behalf…".

The arrangements provided for in the bedbank contract place H4U in such a situation that it would understand itself to have the bedbank's/hotelier's authority to act on their behalf as agent and the bedbenk has assented to that relationship by entering into the contract and providing access to its website.

335. In the case of this contract, I find there is an implied appointment by the hotelier's agent of H4U as sub-agent to sell rooms, on behalf of the hotelier to travellers.

336. To this extent I find that it is *possible* for H4U to be an agent rather than a principal in the case of bedbank contracts.

337. The S2S contract was dated 2013. I was also taken to a four other bedbank contracts dated between 2010 and 2013 which contained many of the provisions of the S2S contract, although they did not include an equivalent to clause 5. These four contracts were all in similar terms. All the contracts were governed by English law.

The first was made in 2010 with Jacob Online Limited, a UK company, the second in 2011 with Hortusa, a Spanish Company, the next was in 2012 with Lowcostbeds.com Limited with its Swiss branch and the other was with Restel Limited, another Spanish company in 2013. Each contract contained the following provisions, which I take from the Hortusa contract.

338. "*1 OVERVIEW: Hotels4U trades as an accommodation agent and wishes to have access to a supply of hotel beds to offer clients. The Supplier [Hortusa] is willing to provide Hotels4U with access to its hotel stock…".* So no reference as in S2S to Hortusa acting as agent of the hoteliers.

339. The definition of "Bed Bank" is slightly different from that in *S2S "the Supplier's website via which accommodation can be booked at hotels in various countries worldwide".*

340. The definition of "Client" is the same as is the definition of "Interface".

341. The contract provides *"The Supplier shall be responsible for ensuring that the management of the properties featured in the Bed Bank undertakes a comprehensive health and safety audit…".* In S2S, the Supplier was responsible for the audit. There is an equivalent provision to S2S's obligation to remove hotels from the Bed Bank if they do not meet health and safety standards.

342. There are similar provisions to Clause 9 (insurance) except that the Supplier is now responsible for obtaining confirmation from the hotelier that he has public liability insurance and in 9.3 there is no reference to the Supplier being the agent of the hotelier.

343. There are equivalent provisions to clauses 10 (complaints) and 13 (intellectual property) in the S2S contract. The Supplier accepts liability for accommodation featured on the Bed Bank and agrees to indemnify H4U against *any* claims brought against it arising from injury or loss suffered by a Client staying in the accommodation.

344. Clause 5 contains Supplier warranties similar to clause 4 in the S2S contract.

345. The Hortusa Agreement and the others on similar terms do not contains provisions equivalent to clauses 5.4, 16,17 or 18.7 in S2S. Even so, there is sufficient in the Overview, the Supplier warranties, the insurance and complaints provisions, the intellectual property rights granted and in particular the arrangements by which H4U "plugs into" the Supplier's website so that it can display the Supplier's hotels to travellers, taken in the commercial context of the industry's understanding of what a bedbank is to enable me to conclude that H4U is again a conduit for the sale of rooms to travellers by the hotels. That is, I can imply the grant of authority by the Supplier to H4U to sell the hotel rooms on H4U's website as sub-agent of the hotels.

346. Having established the relationship of sub-agency, and applying the same principles as for the standard contracts, there is nothing in these bedbank agreements which is inconsistent with that status.

347. Mr Tilby-Baxter informed us that "ground handlers" were also involved in the provision of accommodation. "Ground Handler" is a term used for local agents. They are also known as "destination management companies" or "incoming agents". He told us that where there is a ground handler in the resort, H4U does not deal directly with the hotel, but deals with the ground handler who deals with the hotel. He said that the ground handler was simply another party in the negotiation chain, but maintained that the final contract was between the hotel and the traveller. I consider ground handler contracts generally in more detail below, but in the present context I was taken to a different form of bedbank contract headed "Ground Handling/Bed Bank Contract" made between the Appellant and OVEST-destination Italie, which was defined as ""the Ground Handler" or bed bank provider".

348. Clause 20 of that agreement provides that any dispute is subject to the jurisdiction of the English courts, but that the agreement is to be governed and construed according to the laws of the country in which the Ground Handler is situated. In this case, the contract is governed by Italian law as to which we had no evidence, so I cannot reach a conclusion on whether or not H4U is an agent of the bedbank/ground handler.. Having said that, I highlight a number of points:

- There is no express appointment of H4U (which is simply described as "the company") as agent nor is there any express conferring of authority to act on the Ground Handler's behalf. This is not of course fatal if agency can be implied from the other terms.
- Nor is there any description of H4U as an "accommodation agent" or any reference to it wishing to have access to hotel rooms for its clients. Again, this is not fatal, but it contrasts with the form of bed bank agreement discussed above.
- The preamble states "*the Ground Handler provides non-exclusive services which includes providing contracted accommodation to the company (emphasis added). The company does not have its own employees situated in the destination and wishes to use the services provided by the Ground Handler to ensure that the clients are given all possible help and assistance*".
- The services the Ground Handler is to provide is to "deal with all aspects of the client's reservation and the resolution of potential problems faced in resort".
- The company is to make payments to the Ground Handler in consideration for its services. The Ground Handler is to receive a fee of "*2% of net turnover of hotels provided by Ovest*". In the first year there was to be no "marketing contribution" by the Ground Handler.
- The Ground Handler is to send an invoice each month for services provided in the month and is responsible for all payments to sub-contracted agencies.
- Clause 4(a) provides "*Each reservation… **made by the company** is automatically sent from the company via email to the Ground Handling agent or hotelier directly*" (emphasis added). Clause 4 (b) provides that "*A booking will be automatically accepted by the Ground Handler who will gain confirmation from the relevant hotel that the booking has been accepted…*".

- By clause 8(a) if a "*company client*" is overbooked or the hotel refuses to accept the booking, it is the *company's* responsibility to find the clients a similar property.

- Clause 9 required the Ground Handler to assist in resolving a holidaymaker's complaint about the facilities or services of the hotel and to inform the company in the event of a company client having an accident, requiring hospital treatment or dying. Clause 9(d) provides "*The Ground Handler is authorised to take any such steps as may be necessary to seek to resolve any problems with the hotel save that, if any expense or cost…is involved, the Ground Handler must first receive the approval of the company's Overseas Operations Department, to such cost or expense being incurred unless the health and safety of the holidaymaker is involved in which case the Ground Handler has full discretion to act as appropriate*". So here it is the Ground Handler who is being authorised to act by the Appellant.

- Clause 10 dealt with excursions which could be offered locally by the Ground Handler. The company would not claim commission on excursions arranged locally.
- Clause 15 (a) states "*It is expressly agreed…that this contract confers on the company's (sic) exclusive right of sole distribution and sale of the hotel accommodation provided by the Ground Handler…"* and (c) says "*It is a condition of this contract that the prices paid to the Ground Handler by the company…*" must not be more than the price paid by any other British travel company.
- Clause 16 deals with liability and indemnity. H4U will not be liable for any loss or injury caused by the performance by the Ground Handler of any of the services provided at H4U's request. The Ground Handler agrees to indemnify H4U against any liabilities or claims made against H4U arising out of any actions or omissions by the Ground Handler or breach by it of the agreement.
- The Ground Handler was also to provide other services such as providing a 24 hour emergency phone contact for the company's clients, to place the company's notice boards and information books in hotels, to visit clients at the hotels and deal with complaints and assisting with overbookings.

349. I observe that far from appointing H4U as sub agent of the Ground Handler, the contract appears to appoint the Ground Handler as agent of H4U. The Ground Handler provides services and H4U pays for them. There is no mention of H4U being entitled to any commission or mark-up. There is no positive indication that H4U is intended to be the agent or sub-agent of the hotel. It may be that the Ground Handler is the agent of the hoteliers, but the tenor of this agreement is that the hotel, through the auspices of the Ground Handler is selling rooms to H4U. If this contract were governed by English law, I would find that the Appellant had failed to discharge the burden of showing that it had impliedly been appointed as sub-agent (of the hotel via the Ground Handler) to sell accommodation on behalf of the hotel. This would, of course, create a conflict, in the event of a dispute, between the terms on which the

traveller thinks he is booking on the basis of the standard booking conditions (direct with the hotel) and the basis on which the hotel thought it was selling the room (to the Appellant). The consequences would depend on who were the parties to the dispute and we, fortunately, do not need to resolve that impasse here.

350. We were also taken to a document relating to a company called NT Incoming which was a ground handler operating in Spain. The document (in Spanish with an English translation) described itself as an "annex to the collaboration agreement between Hotels4U and NT Incoming" and set out a list of hotels. There was, presumable, a "collaboration agreement" but Mr Tilby-Baxter had never seen it and from the annex, it is impossible to say what the nature of the relationship between the parties was.

351. The final category of bedbank contracts I considered were a group of "one off" contracts.

352. The 2010 Agreement with Fastbooking was similar to, but not identical with, the Hortusa type agreements. However, it is governed by French law and so I cannot conclude whether or not the agreement constitutes a contract of agency under that law.

353. The 2008 agreement with Mark International appears to by governed by US law. There was also an agreement governed by Spanish law, and another, with a company called "Pierre & Vacances" governed by French law. This last was described as a "trade partner contract". It defined H4U as "the Agent" and recited that the parties were negotiating a "possible collaboration which would consist in the marketing by the agent of tourism products managed by Pierre & Vacances" which suggest agency. But the agreement then provides that "the Agent acknowledges that P&V shall be its exclusive supplier for the *purchase* of… tourism product". It continues "The Agent is entitle to *sell* or transfer all or part of these P&V tourism products to any other third party…" which suggests H4U acquires the "products" as principal. In any event, this agreement is governed by a foreign law so I cannot reach any conclusion on the relationship created by it.

354. *Decision on the bedbank contracts*

355. A bedbank contract is capable of appointing the Appellant as a sub-agent of the bedbank which is itself the agent of the hotelier and allowing the Appellant to market rooms to travellers, who book accommodation with the hotel through the chain of intermediaries.

356. Whether that is the case depends on the terms of the agreement and the surrounding circumstances including the commercial context and the commercial understanding of the role played by bedbanks. In accordance with general principles, there is no need for an express appointment of the Appellant as agent; the agency can be implied. Each contract or set of contracts must be considered on their own terms.

Where the contract is governed by a foreign law, the question of agency must be determined in accordance with that law.

357. I find that the S2S contract and other contracts in this form or in the form of the Hortusa contract which are governed by English law expressly or impliedly appoint H4U as the agent/sub-agent of the bedbank/accommodation providers for the purpose of concluding contracts between travellers and the hotels.

358. *GROUND HANDLERS AND TRANSFER PROVIDERS*

359. *Introduction*

360. H4U's website enabled travellers to book transfers between their destination airport and their accommodation, as well as the accommodation itself. These services were branded as "Transfers4U" and I now consider the capacity in which the Appellant provided transfer services to its customers.

361. As noted in paragraph 49 above, the Appellant's standard booking terms applied to transfers as well as hotels. Those booking conditions expressly state that, as in the case of hotels, H4U is acting as agent only and the traveller's contract is with the transport provider as principal.

362. *Transfers before 2012*

363. From 2012, transfers were provided by a single provider, but before then, the Appellant used a number of providers. I was taken to several agreements described as "Ground Handling Contract" or "Transfer Supplier Contract" in use before 2012. There was also a rate sheet without any terms attached which related to Jersey and Guernsey (which are outside the EU and therefore the claim). There may have been other forms of transfer agreement, but I was not shown any.

364. As discussed, in the previous section, in some cases "ground handlers" dealt with the provision of accommodation. The Ground Handling/Transfer Supplier Contracts which I considered were all in similar form (and were similar to the Ground Handling/Bed Bank Contract with OVEST-destination Iralie (the "Ovest contract") discussed above) but these contracts dealt with transfers and other services rather than reservations. The Transfer Supplier Contract dealt only with transport services but was otherwise similar to the other contracts.

365. We were taken to a contract was with a company called SMS Group based in Malta. As with the Ovest contract. the English courts had jurisdiction over disputes, but the contract is governed and construed according to the law where the ground handler is located, in this case, Maltese law. As the contracts are governed by foreign law I again cannot reach a conclusion as to the Appellant's status, but I will set out what I consider to be the relevant contract terms.

366. The preamble states "*The Ground Handler provides services which include meeting holidaymakers upon arrival at the airport, arranging holidaymakers' transport to their holiday accommodation (where applicable), the provision of 24*

hour assistance for holidaymakers throughout the duration of their holidays and transport to their point of departure at the end of their holidays (where applicable)…Hotels4U.com/Medhotels.com does not have its own employees situated in the destination and wishes to use the services provided by the Ground Handler to ensure that the holidaymakers are given all possible help and assistance in making sure all their expectations and standards are achieved whilst they are on holiday". So the Ground Handler was not simply providing transfers (and would only be providing transfers if the traveller had booked a transfer); they were providing a whole package of services, effectively acting as H4U's "rep" in the resort.

367. The "General Services" to be provided were to "*deal with all aspects of the holidaymakers' arrival in the destination and transport to their accommodation (where applicable) ,the resolution of problems faced in resort and all aspects of their departure.*"

368. The contract went on "*In consideration for the services detailed in this Agreement by the Ground Handler, Hotels4U.com/Medhotels.com will make payments to the Ground Handler in accordance with…the Appendix*…". So the Ground Handler provided services and the Appellant paid for them.

369. The Ground Handler was to provide office space and facilities for the Appellant and hold appropriate insurance cover (clause 1)

370. By clause 2 it was to supply dedicated staff to manage a 24 hour emergency phone line for the Appellant's holidaymakers and staff, to assist with the placement of notice boards, to carry out health and safety checks and to visit holidaymakers on emergency callouts. An employee of the Ground Handler dealing with H4U "*must be clearly identified as H4U recommended supplier/agent with T-shirts, badges, logo, motto, or slogan relating to H4U. An employee of the Ground Handler "when acting on behalf of H4U must identify him/herself as representing H4U*". The employees were also required to conform to certain standards of behaviour.

371. Clause 4, headed "Reservations" was in similar terms to clause 4 of the Ovest contract and clause 7 contains similar provisions on overbooking, clause 8 similar provisions about complaints and clause 9 similar provisions about excursions. Clause 14 set out H4U's exclusive rights of sole distribution and sale of the hotel accommodation and transfers provided by the Ground Handlers similar to those in clause 15 of the Ovest contract and clause 16 of the SMS contract contained similar liability and indemnity provisions to those in clause 16 of *the Ovest Agreement.*

372. Clause 10, headed *"Arrivals and Transfers"* states *"The Ground Handler shall arrange for the transfer (where applicable) , upon the arrival to the accommodation to be by private car, mini bus or coach…"*. There were also provisions about maximum wait times and a general obligation to ensure the transfer was carried out *"safely, smoothly and efficiently"*. The agreement required an employee of the Ground Handler to be at the point of arrival and to *"hold a name plaque or clipboard clearly identifying them as the local Hotels4U.com/Medhoteld.com/Transfers4U.com Representative and must take all possible steps to identify themselves to*

holidaymakers as soon as possible upon their arrival". Clause 10 e) required the Ground Handler to give each holidaymaker an arrival pack. "*The Arrival Pack will include a …letter of greeting* ***on behalf of*** *Hotels4U.com/Medhotels.com…general information on sightseeing and details of how to contact the Ground Handler's Resort Representative, acting on behalf of Hotels4U.com/Medhotels.com 24 hours of the day, should assistance of any nature be required*" (emphasis added).

373. Clause 11 provided that "*The Ground Handler will make all arrangements for the transfer of holidaymakers (where applicable) from their accommodation to the point of departure at the time of departure in sufficient time for them to embark upon their return transport*".

374. After the signatures of both parties, but before the Appendix were two statements:

- "*Handling fee-3 Euro per person,,,"* (it was unclear who was to pay this to whom but I infer from the terms of other ground handling contracts that this was a payment to be made by the ground handler to T4U)
- "*Transfers-Transfers will be agreed with the commercial department [presumably of H4U or Transfers4U] and adjusted to market conditions to be competitive in the market*."

375. The Appendix, which was not completed, contained spaces for the insertion of the Ground Handler's fee and the net transfer rates as well as various contact details and bank details for the Ground Handler. Under "Payments" it stated "*The Ground Handler will send an invoice in Euro at the end of each month for services undertaken in that month*". Mrs Brown had confirmed in her witness evidence that Ground Handlers would sent a statement to H4U for payment in the same way that hoteliers would. It also provided for the Ground Handler to be responsible for all payments made to sub contracted agencies.

376. The Appendix also contained an addendum setting out that the Ground Handler would pay a signing on fee, each year from 2011 to 2016 of 50,000 Euro.

377. We were taken to a further agreement in the same form with a Cypriot Ground Handler, so this contract was governed by Cypriot law.

378. The Appendix in this contract had been completed and provided for the Ground Handler's fee to be 1.75% of the net value of each Cyprus hotel booking excluding transfers. Under the heading "Marketing" the Ground Handler agreed to pay a sign on fee of 1,200,000 Euro which was to be paid as to 275,000 on signature of the agreement and as to the balance by deduction of 3 Euro per person per stay from the amounts invoiced by the Ground Handler. I.e., these were payments to H4U. The Appendix also set out a schedule of transfer rates.

379. The final contract was the "Transfer Supplier Contract" with Tour Azur, a French company. So this agreement was governed by French law. This contract was similar to the Ground Handling contracts except that the services were limited to

those relating to the holidaymakers' arrival and departure and the provision of a 24 hour emergency phone contact.

380. The contract provided, as in the case of the other contracts for H4U to pay the "the Transfer Supplier" for its services. The Appendix contained Tour Azur's contact details and details of its bank account, but did not set out the amounts of the fees. The payment procedure was as for the Ovest contract.

381. As with the Ovest contract, I cannot make a decision on the Ground Handler/Transfer Supplier agreements so far as they relate to the provision on transfers between a traveller's accommodation and the airport as they are governed by various foreign laws. However, they appear to be standard form documents drafted by Hotels4U/Medhotels and to have been prepared in English. The starting point for the Appellant remains the same, the burden lies on them to make a prima facie case that the Appellant was the agent of the Ground Handler to facilitate contracts between the end customer and the underlying transfer provider or, at least, the Ground Handler itself.

382. There is no express appointment of the Appellant as agent or wording indicating that is supposed to be its status. On the contrary, all the language points to the Ground Handlers acting as agents of the Appellant. They are to provide services to the Appellant in return for a fee. The services benefit the holidaymakers, which benefits the Appellant's business and goodwill, but the contracts make it quite clear that the services are provided to the Appellant itself. A number of the provisions referred to above state that the Ground Handler is acting "on behalf of" the Appellant or is representing the Appellant. They must identify themselves as representing the Appellant with branded t-shirts etc when dealing with holidaymakers. One of the services provided to the Appellant for the benefit of its holidaymakers is transfers to and from their accommodation, where the holidaymaker books them.

383. In two of the contracts, payments were made both ways. The Appellant paid the Ground Handler a fee and the Ground Handler paid the Appellant a "signing on fee"/"marketing contribution". In the Cyprus contract, the Ground Handler effectively paid the Appellant 3 Euro per person as a sign on fee. This looks rather like a commission although it is not specifically linked to the provision of hotels or transfers. The per passenger and lump sum sign on fees could equally be regarded, as they are described in the heading, as a marketing fee or payment by the Ground Handler for the opportunity to access the UK market via a major travel company.

384. There is no indication that these contracts established the relationship of agency, and in any event, that is a question to be decided according to the relevant foreign law and is not a matter which this Tribunal can determine.

385. *Transfers from 2012*

386. The provision of transfers changed in 2012 when H4U (trading as Transfers4U.com ("T4U")) entered into an agreement dated 24 September 2012 with Airport to Hotel (UK) Limited, trading as HolidayTaxis.com ("HTX"). The

Agreement is described as a "Passenger transfer supply agreement" and is to last five years. It is governed by English law.

387. Clause 2 provides that "*HTX will, as agent, arrange passenger transfers (return and one way) for T4U.*" This could mean that HTX is agent of T4U or agent of the supplier. Ms Sloane submitted that, when looked at in context, it was clear HTX was agent of the supplier.

388. Clause 3 provides for T4U to provide a guaranteed volume of passengers of at least 800,000 a year. Clause 3.2 provides that HTX will be the exclusive supplier of passenger transfers for H4U. in contrast with the previous practice of having different suppliers in each resort.

389. Claus 3.3 provides *"T4U will move all of its relevant transfer supplier agreements to HTX as soon as practicable"*. Importantly, *"once this has been achieved the Transfers4U.com website will be changed to a white label version of HolidayTaxis.com to capture all of T4U's website bookings"*.

390. No fees are to be paid by T4U to HTX, but HTX is to pay to T4U a signing fee of £1,000,000. Annual fees of £1,000,000 are to be paid by HTX to T4U throughout the term.

391. Clause 6 provides for HTX to invoice T4U for the passenger transfers after the departure of the guests. T4U is to pay the invoiced amounts. I.e. T4U is to pay the cost of the transfers provided to the holidaymakers to HTX. Under its booking conditions, the travellers must pay the transfer costs to T4U for onward transmission.

392. HTX is, in addition, to pay to T4U a per passenger charge dependant on the volume of passengers. The greater the number of passengers, the greater the per passenger fee up to a maximum of £1.50 per passenger. These fees may be deducted by T4U when paying the invoiced amount of the transfer charges.

393. Clause 6.5 indicates that HTX sets the prices for the transfers but it must *"endeavour to ensure that transfer pricing is reasonably competitive within the market with a view to growing passenger volumes to acceptable levels for both parties*."

394. Clause 7 deals with force majeure and liability and states "*HTX will be acting as agent in arranging passenger transfers*.". Again, it is not specified for whom it is acting as agent.

395. T4U must inform HTX before any change in its booking terms and conditions is made. Ms Sloane submitted this was important as T4U's website states that it is a disclosed agent for the principals (the underlying transfer providers) and HTX would want to know about any change to this.

396. This agreement on its own is inconclusive. It is not clear who's agent HTX is and there is no express appointment of T4U as agent or subagent of HTX or a

transport provider and nothing which confers authority on T4U to enter into transfer contracts with passengers on anyone else's behalf.

397. However, the supply contract is only half the story. I must also look at the HTX website and its booking conditions. A 2016 version of this was exhibited to Mrs Brown's witness statement and it was not argued that there were material differences in earlier versions.

398. The terms and conditions start by saying *"Airport to Hotel (UK) Limited t/a Holiday Taxis…acts as a disclosed agent for third party transport providers (the "Supplier"). The contract for the provision of transport services is between you and the Supplier."* All this begins to look rather familiar!

399. Clause 1.2 provides: *"By ordering any services from our websites, you are entering into a contract with the Supplier for the supply of Services and not HolidayTaxis Group Ltd. You agree to be legally bound by these terms and conditions of use as they apply to your order."*

400. Clause 3 deals with payment and clause 3.5 states: *"If you are booking via a Travel Agent, they are acting as a sub-agent on behalf of the Supplier. You do not have a contract with the Supplier for the supply of Services until full payment has been received by the Supplier. The Supplier will not accept any liability in respect of any confirmed Services until full payment has been received by the Supplier. Once we have received the payment from the Travel Agent, we will be able to place your booking with the Supplier".*

401. Clauses 6 and 7 deal with the liability (or lack of it) of HTX:

*"**6 Changes and Cancellations by the Supplier***

We will inform you as soon as reasonably possible if the Supplier needs to make a significant change to your confirmed Services or to cancel them. We will also use all reasonable efforts to find alternative suitable Services for you at no extra cost , but we will have no further liability to you.

7. Our Responsibility

7.1 We act as a booking agent. As such, we accept no responsibility for the actual provision of services. Our responsibilities are limited to publishing information on our website about the Services the Suppliers supply; passing on reservation information to Suppliers and informing you of any enforced changes to the terms of your booking. We accept no responsibility for any information about the transfers that we pass on to you in good faith. We accept no liability for any illness, injury, death or loss of any kind. This includes loss, damage or theft of any luggage or personal belongings you or your party may be carrying. Any claim for loss, injury, illness or death should be pursued with the Supplier directly or may be covered under the terms

of your insurance. We only accept liability to you for claims which arise solely as a result of our own negligence. "

402. The holidaymaker would not know who the transfer provider was at the time of booking. As stated in paragraph 185, it does not affect the relationship created by the contract if the customer does not know the identity of the disclosed principal for whom the agent is agent.

403. The transfer provider would be identified on the voucher provided to the holidaymaker. I saw an example from 2013 which stated "*Hotels4U.com are acting as a retail agent for United Blue-Dalaman (transfer) with whom your client's Transfer is booked*". This was presumably a booking made through a travel agent.

404. Ms Mitraphanous submitted that even if HTX was the agent of the transport provider, it did not follow that the Appellant was the transport provider's sub agent. The contract does not appoint the Appellant as an agent with a power to bind a purported principal , whether that purported principal is HTX or some party further up the chain.

405. The HTX arrangements are very different from the pre-2012 arrangements. Whilst it is not clear on the face of the contract between HTX and T4U for whom HTX is acting as agent, there are none of the provision of the earlier contracts which indicate that HTX is agent of H4U. There are no fees flowing to HTX; it only receives the price it charges for the transfers. HTX makes payments to T4U-lump sum payments for the opportunity presented by being the exclusive supplier of services for the clients of a major holiday company and a per passenger fee. This is not described as a commission. So the contract is consistent with agency, but does not positively establish it.

406. The critical provision is clause 3.3: *"once this* [moving the transfer supplier agreements to HTX] *has been achieved the Transfers4U.com website will be changed to a white label version of HolidayTaxis.com to capture all of T4U's website bookings".* In other words, when a holidaymaker goes to the Transfers4U website, they will see the HolidayTaxis website and all the transfer options available from it, but the website will be branded as Transfers4U. the T4U booking terms and conditions sets out the basis on which a passenger contracts: they contract with the end transport provider through the agency of T4U (and, unbeknownst to them, HTX). Hence the provision in clause 9.6 requiring T4U to notify HTX in advance of any change in its booking conditions. This is rather like the situation with the S2S form of bed bank agreement discussed above. T4U is able to "plug into" the transfer services provided by HTX as agent of the supplier in the same way that the bed bank agreements enable H4U to "plug into" the supply of hotels on a bed bank's website.

407. I consider that this provides the link between the transfer supplier at one end and the passenger at the other end through the agency and sub-agency of HTX, T4U and, where relevant, the travel agent. The contract expressly contemplates that T4U will use the HTX website the terms and conditions on which make HTX's status as agent of the supplier clear and it expressly contemplates that end passengers will book

transfers provided by HTX through the T4U website whose terms and conditions also make it clear that T4U is agent of a disclosed principal. Each party is aware of the booking terms which apply to the website of the other. So although the agreement between HTX and T4U does not on its face appoint T4U as HTX's agent (and the principal's sub agent), the mutual intention that T4U will plug into the HTX website and brand it as its own on the basis of the terms and conditions applicable to each website is, as in the case of the bedbanks, sufficient to amount to an implied grant of authority by HTX to T4U to act as agent in facilitating the provision of transfer services by the ultimate providers to the end traveller.

408. *Decision on the Ground Handler and Transfer Agreements*

409. I am unable to make decisions in relation to the Ground Handler contracts as these are governed by foreign law. The Appellant has provided no evidence of foreign law and so it has not discharged the burden of proving its case on the balance of probabilities. I have highlighted the provisions of those contracts that appear to be relevant and I observe that those provisions do not appear, on their face, to constitute the Appellant as agent of the Ground Handlers.

410. I have decided that the 2012 contract with HTX does constitute H4U (through its Trasfers4U brand) as the sub agent of the transfer suppliers in the provision of transfer services to travellers.

411. *CONCLUSION AND SUMMARY OF DECISIONS*

412. The claim by the Appellant relates to many tens of thousands of individual contracts. I have considered the standard form allocation agreements with hotels and I have considered a sample of other contracts falling into various categories. I have not considered, and it would not be practicable for me to consider all seventy-odd thousand contracts. The findings made in relation to the non-standard agreements are intended to form the basis on negotiations on quantum.

413. In summary, for the reasons set out above I have decided as follows:

- The signed standard allocation contracts constitute the Appellant as agent of the hotels and the contracts for the provision of accommodation are between the hotelier as principal and the holidaymaker
- I reach the same conclusion in relation to the unsigned standard allotment contracts
- In the case of missing contracts, the Appellant has not discharged the burden of proving agency, however it may be possible for it to establish agency through a course of dealing where the Appellant can produce written contracts for the relevant hotels which appoint the Appellant as agent and which applied both before and after the time when there are no contracts. Where the available contracts are on similar terms it may be inferred that the missing contracts were on the same terms. The Appellant would also need to provide evidence that the hotel continued to provide accommodation to H4U's customers during the periods when the contracts were missing.

- We cannot make a decision on contracts governed by foreign law. The Appellant did not provide any evidence as to foreign law and so, in these cases, has failed to discharge the burden of proof.
- Non-standard contracts where the Appellant is clearly defined as agent may be effective on that basis, but the only example I saw was a foreign law contract so the comments above apply.
- Non-standard contracts where the Appellant is not explicitly appointed as agent must be construed according to their individual terms and in accordance with their governing law. The contracts in this category I saw were all governed by foreign law in any event.
- Bed bank contracts are capable of appointing the Appellant as agent. I found that the contracts in the form of the S2S/Hortusa contracts which were governed by English law did in fact do so. The remaining contracts, including the Ground Handler/Bed Bank contract were governed by foreign law and must be construed in accordance with their terms and in accordance with the relevant law,.
- The standard form (SMS type) Ground Handler and transfer contracts in place before 2012 were governed by foreign law and must be construed in accordance with their terms and the relevant law. I observed that the terms seemed, on the face of it, to constitute the Ground Handlers as the agents of the Appellant. There was insufficient evidence of the terms of some of the contracts e.g. that with NT incoming, so the Appellant has not made out its case in relation to those contracts.
- The HotelTaxis Transfer Supply Contract in place from September 2012 did constitute the Appellant as agent/sub-agent in relation to the transfers.

414. I therefore allow the appeal in relation to signed and unsigned standard allotment contracts, bedbank agreements in the form of the S2S or Hortusa contracts (assuming they are governed by English law) and transfers provided under the 2012 Transfer Supply Contract with HotelTaxis. This decision is without prejudice to the ability of the parties to apply the principles of this decision in negotiating the quantum of the claim in relation to the other types of contract.

415. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATE: 24 OCTOBER 2016