Easter Term
[2016] UKSC 21
On appeal from: [2014] EWCA Civ 1033

JUDGMENT

Airtours Holidays Transport Limited (Appellant) *v* Commissioners for Her Majesty's Revenue and Customs (Respondent)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Carnwath
Lord Hodge

JUDGMENT GIVEN ON

11 May 2016

Heard on 25 February 2016

Appellant	*Respondent*
David Scorey QC	Owain Thomas QC
Jonathan Bremner	Matthew Donmall
(Instructed by Forbes Hall LLP)	(Instructed by HMRC Solicitor's Office)

LORD NEUBERGER: (with whom Lord Mance and Lord Hodge agree)

1. The issue on this appeal is whether the appellant, Airtours Holidays Transport Ltd (formerly MyTravel Group plc), is entitled to recover, by way of input tax, Value Added Tax ("VAT") charged by PricewaterhouseCoopers LLP in respect of services provided by PwC and paid for by Airtours.

The factual and procedural background

2. In October 2002, Airtours, which had borrowed money from around 80 financial institutions, and had further liabilities, was in serious financial difficulties, and sought refinancing from the Institutions to enable it to restructure. It was suggested to Airtours that it should commission an accountants' report to satisfy the Banks that its restructuring proposals were viable. The Institutions were agreeable to this, and two firms were approached, and, pursuant to a decision in which both the Institutions and Airtours were involved, PwC were appointed to produce a report ("the Report").

3. The original terms under which PwC were appointed were contained in a letter dated 5 November 2002 ("the Letter"), which was addressed "To the Engaging Institutions", and headed "Silver Group plc [a code name for Airtours] and its subsidiaries …". The Letter contained a number of provisions, including the following:

> Para 1, which confirmed that PwC had "been retained by the Institutions as defined in para [4] to provide … 'the Services'", which were set out in an Appendix to the Letter, and as I shall refer to them. They included items such as "Current trading position", "historic cash utilisation", "Review of accounting policies and issues", and "Budget for year to 30 September 2003".
>
> Para 4, which stated that the Report was "for the sole use of the Institutions who have expressly agreed to this letter … by countersigning below", and that the information and advice given by PwC could be passed to the Institutions, to whom PwC were prepared to "assume a duty of care" if they countersigned the letter.
>
> Para 6, which recorded a request "you" had made that PwC "assist in providing information to the institutions providing facilities to [Airtours]".

Para 7, which referred to the work being carried out in phases, and referred to Airtours' "likely requests for facility extensions"

Para 8, which stated that "Information and advice produced from this engagement is to be addressed to the Engaging Institutions with a copy to the directors of [Airtours], with the exception of any part of the report prepared exclusively or confidentially for the Engaging Institutions".

Paras 9, under which PwC accepted that they had "a duty of care to the Engaging Institutions".

Para 10, under which "[y]ou accept that the aggregate limit referred to in paragraph 9 of our Terms and Conditions applies to our liability to [Airtours] and the Engaging Institutions".

Para 12, which provided that "[y]ou have requested us to undertake a review of [Airtours] as set out below. Our work is required by the Institutions in considering the level of facilities granted to [Airtours]".

Paras 13-18, which described the "scope" of these Services, including the phasing, the limitations, and the extent of the work to be done.

Para 19, which provided that "a draft of our findings will be available for discussion with management" by a specified date, and on a subsequent date "with the Engaging Institutions".

Para 22, which stated that "[Airtours] will be responsible for our fees, expenses and disbursements incurred in carrying out our work ...".

Para 25, which provided that "… [o]ur terms are that a retainer of £200,000 be payable on the commencement of our work and that weekly invoices will be rendered to [Airtours and] … are payable on submission".

Para 26, which stated that "[t]he attached terms and conditions ('the Terms and Conditions') … set out the duties of each party in respect of the Services. The Terms and Conditions provide that among other matters:

i) [Airtours] will indemnify us against claims brought by any third party. For the avoidance of doubt, the reference to "you" in clause 10 of the Terms and Conditions (and only in that clause) refers to [Airtours] and not the Engaging Institutions …

ii) our aggregate liability to [Airtours], the Engaging Institutions and any other third party … will be limited in accordance with clause 9.4 of the Terms and Conditions …

iii) … the Engaging Institutions and [Airtours] both agree to all the terms contained in the Contract.

4. The Letter included countersigning pages for "the Engaging Institutions", which, inter alia, confirmed (i) "that the foregoing properly sets out the arrangements agreed between us, and we agree to the terms contained in this Letter … and the attached Terms and Conditions" and (ii) "that [Airtours] has authorised the Engaging Institutions to disclose to you all relevant matters concerning [its] affairs and its bank accounts". The Letter also contained a countersigning page for Airtours which, inter alia, contained a confirmation in the same form as (i), and also confirmed that PwC would have full access to its books, and that PwC could disclose all aspects of [Airtours'] affairs to the Engaging Institutions.

5. The Terms and Conditions ("the Terms") referred to in the Letter were in a standard form. The Terms started by providing that they applied to the Services, and together with the Letter constituted "the Contract", and I shall adopt that definition. The Terms then stated that "[f]or the avoidance of doubt 'we' and 'our' refers to [PwC], and 'you' and 'your' refers to the entity or entities on whose behalf the [Letter] was acknowledged and accepted". The Terms then included the following provisions:

Clause 2, which required "you" to ensure that all information provided is accurate, that any reports will be based on "information provided by you", and states that "we will not be required to direct your affairs".

Clause 3, under which "you agree to pay our fees promptly …".

Clause 9.4, which limited PwC's liability for "loss or damage … suffered by you", and 9.5, where the Letter is signed by more than one party, this limit will "be allocated" between them.

Clause 10, which provided that "[y]ou agree to indemnify us to the fullest extent permitted by law against all liabilities, losses, claims, demands and expenses arising out of or in connection with your breach of any of the terms of the Contract …".

Clause 12, subclause 1 of which provided that "either of us may terminate the Contract … upon the expiry of 30 days' notice"; the clause contained other provisions for determination, including in subclause 5 a right for PwC to terminate "if we do not receive payment from you of any invoice within 30 days of the due date".

6. PwC carried out work pursuant to the Contract, ie they provided the Services pursuant to the Letter and the Terms, and carried out further, similar, work pursuant to similarly worded contracts, which for present purposes can conveniently be treated as part of the Contract. That work was, according to the First-tier Tribunal "wide ranging and highly technical" and involved "liaising with and making representations to" various parties, and "carrying out a strategic review of [Airtours'] business and … creating what was termed an entity priority model" [2009] UKFTT 256 (TC), para 2. In due course, PwC produced a Report, which satisfied the Institutions.

7. In accordance with para 25 of the Letter, Airtours paid PwC a retainer of £200,000 when the work began, and thereafter PwC invoiced Airtours for their fees, which Airtours then paid. In addition, Airtours paid PwC VAT in the form of output tax on these sums.

8. Airtours then sought to deduct that VAT as input tax in its VAT returns for the relevant periods. The respondents, the Commissioners of HM Revenue and Customs, challenged Airtours' right to do so. While they accepted that the Contract was of commercial benefit to Airtours, they contended that PwC's services under the Contract were not "supplied to" Airtours, and, as a result, Airtours was not entitled to deduct the VAT on PwC's fees as input tax.

9. The First-tier Tribunal found for Airtours, in very summary terms on the basis that all that was required to establish its case was that it had "obtained anything at all that was used for the purpose of his business" and "a supply of a service may consist of a right to have the service supplied to a third party" - [2009] UKFTT 256 (TC), para 26. The Upper Tribunal allowed the Commissioners' appeal, holding that the Contract was one "in which the Engaging Institutions contracted with PwC to supply services which they needed for the purposes of their own businesses, and Airtours contracted with PwC to pay its fees, rather than one in which Airtours

received something of value from PwC to be used for the purpose of its business in return for its payment" - [2010] UKUT 404 (TCC), para 24.

10. By a majority, the Court of Appeal dismissed Airtours' appeal - [2015] STC 61. All members of the Court of Appeal agreed that the issue turned on the interpretation of the Contract. In agreement with the Upper Tribunal, Moore-Bick and Vos LJJ held that the effect of the Contract was that PwC's services thereunder were provided to the Engaging Institutions, and not to Airtours. Dissenting, Gloster LJ concluded at para 46 that "as a matter of construction of the Contract, and on analysis of the economic realities of the surrounding commercial arrangements, the appellant had a contractual right to require that the Services as described in the [Letter]" were provided.

The statutory provisions

11. The law relating to payment and recovery of VAT in the United Kingdom is contained in the Value Added Tax Act 1994, which was intended to reflect the provisions of certain EC Directives, most notably EC Council Directive 67/227 (on the harmonisation of legislation of member states concerning turnover taxes) (the "First Directive") and EC Council Directive 77/388 (on the harmonisation of the laws of the member states relating to turnover taxes - Common system of value added tax: uniform basis of assessment) (the "Sixth Directive"). The current EU provisions relating to VAT and the recovery of input tax are contained in Council Directive 2006/112/EC ("the Principal VAT Directive").

12. Article 1(2) of the Principal VAT Directive (originally as article 2 of the First Directive) describes the basic system of VAT:

> "The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged. On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components. The common system of VAT shall be applied up to and including the retail trade stage."

13. VAT is charged on "supplies" of goods and services for consideration - see article 2(1) of the Principal VAT Directive (formerly article 2 of the Sixth Directive). And, as article 63 of the Principal VAT Directive states, VAT becomes chargeable when a supply takes place.

14. Articles 14(1) and 24 of the Principal VAT Directive (formerly articles 5 and 6 of the Sixth Directive), reflected in section 5 of, and Schedule 4 to, the 1994 Act, define the concepts of "supply of goods" and "supply of services" respectively, in the following terms;

> "'Supply of goods' shall mean the transfer of the right to dispose of tangible property as owner."

> "'Supply of services' shall mean any transaction which does not constitute a supply of goods."

15. Article 73 of the Principal VAT Directive (formerly article 11 of the Sixth Directive), reflected in section 19 of the 1994 Act, defines, so far as relevant, the taxable amount as:

> "in respect of the supply of goods or services … everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, …"

16. Article 168 of the Principal VAT Directive (formerly article 17(2) of the Sixth Directive), reflected in sections 24(1), 24(2), 26(1) and 26(2) of the 1994 Act, allows a taxable person the right, "[i]n so far as the goods and services are used for the purposes of the taxed transactions of a taxable person", to deduct VAT due or paid "in respect of supplies to him of goods or services carried out or to be carried out by another taxable person".

17. So far as the provisions of the 1994 Act are concerned, they must, of course, be interpreted as far as possible so as to comply with the current Directive, and it is accepted that, at least for present purposes, they do so. Whether it is right to decide this appeal by reference to the Principal VAT Directive or the 1994 Act is therefore a wholly academic point. However, the strictly correct approach must be to decide it by reference to the 1994 Act, but only on the basis that that Act cannot be interpreted without reference to the Principal VAT Directive, and must, if at all possible, be interpreted so as to be consistent with that Directive.

18. The centrally relevant provisions of the 1994 Act are in sections 24 to 26. Section 24(1) defines "input tax" as, inter alia, "VAT on the supply to [a taxable person] of any goods or services" which are "used or to be used" for a business "carried on by him". Section 25(2) entitles a taxable person to "deduct" "so much of his input tax as is allowable under" section 26 "from any output tax that is due from him". Section 26(1) and (2) provides that the amount of allowable input tax is that which is "attributable to" … "supplies … made or to be made by the taxable person in the course or furtherance of his business" - [including] taxable supplies.

The issues on this appeal in summary

19. In order for the VAT charged by PWC and paid by Airtours to be reclaimable as input tax, it must be "VAT on the supply to [Airtours] of any goods or services". There is no doubt that there was in this case a supply of services (and no supply of goods), namely the provision by PwC of the Services as defined in the Letter. The issue is whether the supply of such services was to Airtours.

20. The concept of a "supply" is not only fundamental to the VAT system; it is an autonomous concept of the EU-wide VAT system. In the present appeal, the issue whether there has been a supply of services by PwC to Airtours gives rise to two principal questions.

21. The first question is whether, under the terms of the Contract, PwC agreed with Airtours that it would supply services, and in particular to provide the Report. If the answer to that question is yes, then the Commissioners accept that there has been a supply of services to Airtours, and that this appeal must be allowed, subject to a question of apportionment. On the other hand, if the answer to that first question is no, then the Commissioners contend that this appeal must be dismissed, but Airtours contends that its appeal should still succeed, subject, again to a question of apportionment. In effect, on this second point, Airtours argues that, in order to show that it received a supply of services from PwC for the purposes of VAT, it does not have to show that it had a contractual right to require the Services to be provided to the Institutions by PwC.

The first question: was there a contractual obligation to supply?

22. The first question, then, is whether, on the true construction of the Contract, PwC contracted to supply services to Airtours. There is no doubt that the Contract imposes an obligation on PwC to supply services to the Institutions. The issue is whether PwC agreed, in addition, with Airtours that they would supply those services. Thus, it is enough for Airtours' purposes if it can establish that PwC were

under a contractual obligation to Airtours to supply services, such as providing the Report, to the Institutions. Airtours does not have to show that PwC were under a contractual obligation to supply any services directly to Airtours.

23. Not least because the Terms are in a standard form, which has been poorly adapted, and whose provisions are inconsistently drafted, the issue whether PwC had a contractual obligation to Airtours to provide the Services to the Institutions is not entirely easy. Nonetheless, I have reached the clear conclusion that PwC's commitment to provide the services as described in the Contract was a contractual commitment to the "Engaging Institutions", and not to Airtours.

24. First, the Letter is addressed "To the Engaging Institutions", and not to Airtours. Secondly, para 1 states in terms that it is those Institutions who have retained PwC: there is no suggestion that Airtours had done so, or that there was some residual contractual duty to Airtours. Thirdly, para 4 provides that any reports are "for the sole use of [those] institutions" which had countersigned, and again there is nothing about Airtours. Fourthly, para 7, with its reference to "[Airtours'] likely requests for facility extensions" is also more consistent with the Commissioners' case. The reference also highlights the risk of conflict if PwC were contracting with Airtours as well as the Banks, but this point is weakened by the evidence before the FTT to the effect that the current practice of PwC would be to contract with both borrower and lender.

25. Fifthly, para 8 of the Letter states that the Report is to be provided to the Institutions, and not only is Airtours merely to be provided with "a copy", but that copy can be redacted. While none of that is logically inconsistent with PwC's contract being with Airtours, its thrust is more consistent with the opposite. The obligation to provide a copy of any Report to the directors of Airtours is perfectly consistent with PwC's contractual obligations being to the Institutions alone, as they would want to discuss any Report with Airtours, and would therefore not want Airtours to be excluded from seeing the Report pursuant to the terms of para 4.

26. Sixthly, paras 9 and 10 of the Letter recognise a duty of care on the part of PwC to the Institutions, but does not acknowledge one to Airtours, but it is fair to say that the weight to be given to this point is weakened by the terms of para 26(ii). Seventhly, para 11 reinforces this point as it excludes any duty of care or liability to "any other party". If that excludes any duty of care to Airtours, it lies uneasily with the notion that PwC has a contractual obligation to Airtours; if it does not exclude any duty of care to Airtours, then it reinforces the point made in respect of paras 9 and 10. Eighthly, para 12 refers to PwC's work being "required by the Institutions", and no suggestion that it was required by Airtours; while that is not inconsistent with the notion that there is also a contractual obligation to Airtours, it is rather an odd provision if there was.

27. It is true that in para 19 of the Letter PwC agreed to discuss any draft report with Airtours' management, but that is quite consistent with the Contract being with the Institutions alone: a discussion with Airtours before a discussion with the Institutions would obviously be desirable from the Institutions' perspective. Para 22 records the fact that Airtours would pay for PwC's work, but, in so far as such a provision is included in the Letter, it was needed to protect the Institutions as much as PwC, and the same applies to para 26(i) which records that Airtours would indemnify PwC against third party claims. Para 26(ii) referred to PwC's "liability to" Airtours, but there could clearly be tortious liability. Para 26(iii) was plainly not concerned with imposing any liability on PwC beyond what was in the preceding provisions.

28. As for the fact that Airtours countersigned the Letter in the terms that it did, it appears to me that Airtours had to sign in order to be bound by paras 22 (payment of PwC's fees) and 26 (indemnity and limitation of liability), as well as clauses 2, 3, 9 and 10 of the Terms. In any event, I find it hard to accept the suggestion that the fact that Airtours countersigned, and was required by PwC to countersign, the Letter in the terms that it did had the effect of imposing on PwC obligations to Airtours which would not otherwise have arisen from the provisions of the Letter.

29. Turning to the Terms, they were on a standard printed form, and it is therefore unsurprising that they are not always easy to apply to the provisions contained in the Letter. The statement in the opening part of the Terms that "'you' … refers to the entity or entities on whose behalf the Letter … was acknowledged and accepted" is neutral, because, as just explained, by countersigning the Letter, Airtours had agreed to pay PwC's fees and to give PwC an indemnity, and it had also agreed to a cap on any potential liability to it which PwC might have, as set out in the Letter.

30. The provisions of clause 2 of the Terms are such that the reference to "you" more naturally refers to Airtours probably as well as the Institutions. In the light of the provisions of paras 22, 25 and 26(i) of the Letter, there can be no doubt but that the references to "you" in clauses 3 and 10 of the Terms (concerned with the payment of PwC's fees and with an indemnity to PwC) are reference to Airtours alone. The "you" in clause 9 appears to apply to the Institutions and Airtours. Clause 12 of the Terms, which applies to determination and refers to "either of us" being able to determine, appears to envisage two parties to the Contract, and, if that is right, they must be the Institutions and PwC, although "payment from you" in clause 12.5 must mean payment from Airtours.

31. Confining myself for the moment to the express words of the Contract, it appears to me that the Commissioners are correct, and there is no obligation on PwC, as a matter of contract, to Airtours to provide the Services whether to the Institutions or to Airtours. The position appears pretty clear if one confines oneself to the Letter:

PwC's obligation to provide the Services set out in the Appendix is owed solely to the Institutions, and Airtours is only a party for the purpose of agreeing to pay PwC's fees, to provide PwC with an indemnity, and to acknowledge the cap on any damages for which PwC may be liable. The Terms are, without doubt, less clear, but there is nothing in them which supports the notion that they were intended to widen PwC's duties beyond what was in the Letter. In any event, the notion that the Terms can give the meaning of "you" in the Letter any different meaning from that which it naturally has on the face of the Letter is fatally undermined by the fact that the Terms are contained in a standard form, and, even more, by the fact that "you" in the Terms clearly has different meanings in different places.

32. Looking at the matter more broadly, Airtours argues that when one considers the commercial background, it should be accepted that PwC had a contractual duty to Airtours to provide the Institutions with the Services (and in particular the Report). In that connection, Airtours points to the facts that (i) it was plainly in Airtours' interest that the Services were provided, (ii) Airtours was to pay for the Services, (iii) Airtours initiated the idea of having the Report and were involved in the selection of PwC, (iv) Airtours was a party to the Letter through countersigning it, and (v) Airtours took on liabilities to PwC in the Letter.

33. This argument has obvious attraction, but I cannot accept it. I do not consider that these five factors can be successfully invoked either in order to interpret the Contract so as to impose a contractual duty on PwC to Airtours to supply the information to the Institutions, or in order to imply such a duty on PwC.

34. Factors (iv), and (v) are plain from the face of the Letter, and I do not see that they can carry things further, once one has analysed the provisions of the Letter and the Terms. Factor (iii) takes matters little further at least on its own, although it could fairly be said to be supportive of Airtours' case in a general sort of way.

35. By contrast, factor (ii), the fact that Airtours, rather than the Institutions, was to pay PwC for the services, can fairly be said to raise a prima facie expectation in a reader of the Letter that PwC would owe a duty to Airtours to provide those services. However, it is not, at least of itself, a particularly powerful point. So long as the Institutions wanted the services, PwC would have been obliged to them to provide them. And, if the Institutions no longer wanted the services, there is no reason to think that Airtours would still have wanted them, especially as it would have had to pay for them. And it is not as if Airtours was agreeing to pay for work which would not be done: payment was to be in arrears except for the £200,000 "retainer".

36. Lord Carnwath, whose judgment I have seen in draft form, relies in particular on the retainer of £200,000 which Airtours agreed to pay under para 25 of the Letter. While I see how the liability to pay this retainer can be said to be the high point of Airtours' case, it does not cause me to change my view. The liability to pay the initial £200,000 does not seem to me to be different in principle for present purposes from any other payment which Airtours agreed to pay under para 25. Apart from that, the parties would have appreciated that it was very unlikely that PwC would not carry out £200,000's worth of work before any possibility of their ceasing work arose. The Report was being prepared under considerable time pressure, as is clear from the background facts and from para 19, under which the interim report had to be available for the engaging institutions six days after signature, and indeed the Letter was signed three days after it had taken effect. In addition, the termination provisions in clause 12 of the Terms limited the circumstances in which PwC could cease their work.

37. As for factor (i), Airtours' interest in having a Report produced for the Institutions, I accept that it means that one would not be at all surprised if PwC's contractual obligation to supply the Services to the Institutions extended to Airtours, but it does not in any way compel such a conclusion as a matter of commercial sense, logic or law. Like factor (ii), it does no more than raise a prima facie expectation in the reader of the Contract.

38. In these circumstances, I do not consider that the five factors mentioned in para 32 above assist Airtours. So far as interpretation of the Contract is concerned, there is the initial difficulty that it is hard to see how the wording of the Letter and the Terms can give rise to an express contractual duty on the part of PwC to Airtours in the light of the analysis in paras 24 to 31 above. As to the possibility of implying such a duty, I cannot see how the proposed implied term can fairly be said to satisfy either of the two tests recently affirmed in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] 3 WLR 1843, paras 18 and 21, namely that it is necessary for business efficacy or that it is so obvious that it went without saying.

39. Apart from the factors mentioned in para 32 above, it does not seem to me that there is much else which assists on the interpretation of the Contract for present purposes. It is true that the evidence before the FTT supported the notion that, at any rate at the time of the hearing in the FTT, one would have expected an agreement such as the Contract to involve PwC agreeing to provide the Services to Airtours, as well as to the Institutions. However, I do not think that that can be of any, or at any rate of much, weight. First, we are concerned with a contract made in 2002, and the FTT hearing was several years later. Secondly, the evidence did not support a universal practice, or general understanding, let alone a professional duty, for an accountant to contract with the borrower as well as the lender in a case such as this. So, at best from Airtours' point of view, one is left with the possibility that PwC and

Airtours may have believed that the Contract was being made with Airtours as well as the Institutions (although it is fair to emphasise that I do not think that the evidence went nearly as far as that). However, it is very well established that the understandings of the parties themselves at the time they entered into a written contract is wholly inadmissible when the issue is one of interpretation, as opposed to rectification, of the document.

40. Further, I do not consider that this is an appeal where it would be right to give particular weight to the findings of a Tribunal. In the end, we are concerned with the interpretation of a document, and it is well established that that is a matter of law, not fact, in the courts of all parts of the United Kingdom. Of course, when there are relevant findings of primary fact (or even, at least in some cases, of secondary fact) relevant to interpretation, a Tribunal's finding will deserve particular respect, but that does not arise in this case. Furthermore, in any event, my conclusion as to the meaning of the Contract is consistent with the view of the specialist UT, which formed its own view, because it concluded that the FTT (also a specialist tribunal) had erred in law.

41. Accordingly, in agreement with the UT and the majority of the Court of Appeal, I consider that Airtours is wrong on the first question, and, as the Commissioners contend, PwC had no contractual obligation to Airtours to supply the Services to it or to the Institutions. That means that it is necessary to address the second question.

The second question: was there nonetheless a supply?

42. Even if Airtours were not contractually entitled to require PwC to provide the Services to the Institutions, it remains the fact that it was plainly in Airtours' commercial interest that those services be provided. That, it may be said, is evident not merely from the background (namely that the provision of the Services was intended to facilitate the restructuring of Airtours' borrowing) and from the face of the Letter (given that Airtours undertook to pay PwC for providing those services). Indeed, I do not think that Mr Scorey QC exaggerated Airtours' case when he described PwC's work pursuant to the Contract as "important to Airtours' very survival".

43. In those circumstances, it is argued on behalf of Airtours that, even if it was not contractually entitled to have the Services provided to the Institutions, the facts that (i) it had a substantial commercial interest in those services being provided by PwC to the Institutions, and (ii) it not merely countersigned the Contract pursuant to which they were provided, but thereby agreed to pay PwC for the Services, lead

to the conclusion that the Services were "supplied" to Airtours (as well as to the Institutions).

44. Some support for that proposition may arguably be found in the speech of Lord Millett in *Customs and Excise Comrs v Redrow Group Plc* [1999] 1 WLR 408, 418G, where he said "[o]nce the taxpayer has identified the payment the question to be asked is: did he obtain anything - anything at all - used or to be used for the purposes of his business in return for that payment?". If one takes that question at face value, then it can be said with some force that Airtours obtained a substantial benefit from paying PwC's invoices, namely the potential (and, as it turned out, the eventual actual) financial support of the Institutions for its restructuring.

45. However, Lord Millett's observation cannot be taken at face value. As Lord Reed explained in *Revenue and Customs Comrs v Loyalty Management UK Ltd* [2013] STC 784, paras 66-67:

> "66. [T]he speeches in *Redrow* should not be interpreted in a manner which would conflict with the principle, stated by the Court of Justice in the present case, that consideration of economic realities is a fundamental criterion for the application of VAT. … [T]he judgments in *Redrow* cannot have been intended to suggest otherwise. On the contrary, the emphasis placed upon the fact that the estate agents were instructed and paid by Redrow, and had no authority to go beyond Redrow's instructions, and upon the fact that the object of the scheme was to promote Redrow's sales, indicates that the House had the economic reality of the scheme clearly in mind. When, therefore, … Lord Millett asked, 'Did he obtain anything - anything at all - used or to be used for the purposes of his business in return for that payment?', [that question] should be understood as being concerned with a realistic appreciation of the transactions in question.
>
> 67. Reflecting the point just made, it is also necessary to bear in mind that consideration paid in respect of the provision of a supply of goods or services to a third party may sometimes constitute third party consideration for that supply, either in whole or in part. The speeches in *Redrow* should not be understood as excluding that possibility. Economic reality being what it is, commercial businesses do not usually pay suppliers unless they themselves are the recipient of the supply for which they are paying (even if it may involve the provision of goods or services to a third party), but that possibility cannot

> be excluded *a priori*. A business may, for example, meet the cost of a supply of which it cannot realistically be regarded as the recipient in order to discharge an obligation owed to the recipient or to a third party. In such a situation, the correct analysis is likely to be that the payment constitutes third party consideration for the supply."

46. Lord Hope made the same point in para 110 in remarks which are perhaps particularly germane for present purposes:

> "I think that Lord Millett went too far [at p 418G] when he said that the question to be asked is whether the taxpayer obtained 'anything - anything at all' used or to be used for the purposes of his business in return for that payment. Payment for the mere discharge of an obligation owed to a third party will not, as he may be taken to have suggested, give rise to the right to claim a deduction. A case where the taxpayer pays for a service which consists of the supply of goods or services to a third party requires a more careful and sensitive analysis, having regard to the economic realities of the transaction when looked at as a whole."

47. This approach appears to me to reflect the approach of the Supreme Court in the subsequent case of *WHA Ltd v Revenue and Customs Comrs* [2013] UKSC 24; [2013] STC 943 where at para 27, Lord Reed said that "[t]he contractual position is not conclusive of the taxable supplies being made as between the various participants in these arrangements, but it is the most useful starting point". He then went on in paras 30 to 38 to analyse the series of transactions, and in para 39, he explained that the tribunal had concluded that "the reality is quite different" from that which the contractual documentation suggested. Effectively, Lord Reed agreed with this, and assessed the VAT consequences by reference to the reality. In other words, as I said in *Secret Hotels2 Ltd v Revenue and Customs Comrs* [2014] STC 937, para 35, when assessing the VAT consequences of a particular contractual arrangement, the court should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by [any relevant] facts.

48. The same approach was adopted by the Court of Justice in *Revenue and Customs Comrs v Loyalty Management UK Ltd and Baxi Group Ltd* (Joined Cases C-53/09 and C-55/09) [2010] STC 265, paras 39 and 40, where they stated, citing previous judgments, that "consideration of economic realities is a fundamental criterion for the application of the common system of VAT", and added that that issue involved consideration of "the nature of the transactions carried out" in the

particular case. To much the same effect, in *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) [1994] STC 509, para 14, the Court of Justice said that "a supply of services is effected 'for consideration' … only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance", which it explained as meaning "the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient". In the context of the supply of goods, the Court made the same point in *Primback Ltd v Customs and Excise Comrs* (Case C-34/99) [2001] 1 WLR 1693, para 25, where it described "the determining factor" as "the existence of an agreement between the parties for reciprocal performance, the payment received by the one, being the real and effective counter-value for the goods furnished to the other".

49. In *Revenue and Customs Comrs v Newey* (Case C-653/11) [2013] STC 2432, para 40, the Court of Justice again emphasised that "that a supply of services is effected 'for consideration', within the meaning of article 2(1) of [the Sixth] directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient". In para 41, the court went on to explain that "the supply of services is therefore objective in nature and applies without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person". The court then observed in paras 42-43 that "consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT" and that "the contractual position normally reflects the economic and commercial reality of the transactions". An exception to the normal rule that the contractual relationship is central was then identified by the court as being where "those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions" (para 45).

50. From these domestic and Court of Justice judgments, it appears clear that, where the person who pays the supplier is not entitled under the contractual documentation to receive any services from the supplier, then, unless the documentation does not reflect the economic reality, the payer has no right to reclaim by way of input tax the VAT in respect of the payment to the supplier.

51. On this analysis, it appears to me that, subject to considering a further way in which Airtours' case is put, it also fails on the second question. The Contract, consisting of the Letter and the Terms, did reflect the economic reality, and was not in any way an artificial arrangement. It is true that Airtours benefitted from the Contract, but the benefit which it was getting was not so much the Services from PwC, but the enhanced possibility of funding from the Institutions for its

restructuring (a possibility which eventuated into reality thanks, to a substantial extent, to the Report). And it was to improve the prospects of such refinancing that Airtours was prepared to pay for the provision of the Report.

52. On behalf of Airtours, it is suggested that this conclusion is inconsistent with the notion of fiscal neutrality, as the consequence of Airtours' appeal in this case failing is that VAT paid as output tax is not reclaimable as input tax. However, as Advocate General Sharpston observed in *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG* (Case C-44/11) [2012] STC 1951, para 60 in connection with exemptions, fiscal neutrality "is not a fundamental principle or a rule of primary law which can condition the validity of an exemption but a principle of interpretation, to be applied concurrently with - and as a limitation on - the principle of strict interpretation of exemptions".

53. In any event, as Mr Thomas says on behalf of the Commissioners, I would not accept the argument is well founded. It assumes that all output tax should, in principle, be reclaimable as input tax, no matter who was invoiced and who paid it, whereas article 168 (set out in para 17 above) clearly limits such a right to output tax "paid in respect of … supplies to him of services …": therefore, where the services in respect of which he paid VAT were not supplied to the person who paid the VAT, no right to reclaim that output tax can arise. To put the point another way, fiscal neutrality cannot be invoked to invent a supply where there is none. Consistently with this, although the VAT Directives contemplate that the consideration itself may be paid by either the recipient of or a third party to the supply or a combination of the two (see para 15 above and *HMRC v Loyalty Management UK Ltd*, para 67, per Lord Reed), they also contemplate that VAT on a supply will be the subject of an invoice directed to the recipient of the supply (see the Principal VAT Directive, articles 220(1) and 226(5)) and will be potentially deductible by him once paid as input tax (article 168) - although it appears that, in this case, the Institutions, being largely exempt, would not have been able to deduct any input tax which had been invoiced to and paid by them.

54. In this context, Mr Scorey also raised a somewhat wider point, namely that, if contrary to his submission, PwC had contracted to, and did, provide services only to the Institutions, there could be no supply at all by PwC for VAT purposes because there was no reciprocal performance by the Institutions for those services. He contrasted the circumstance in which A contracts with and undertakes to pay B to supply a service to C, where there is reciprocity of obligation between A and B, with a contractual arrangement in which C, while undertaking no obligation to pay B, receives a service from B and procures that A will pay for it. In short, he contended that because the Institutions were under no obligation to pay PwC for the services, there had been no relevant supply.

55. I do not accept this argument, which amounts to an assertion that the reference to third party consideration in article 73 of the Principal VAT Directive is limited to consideration such as a guarantee which exists alongside the liability of the recipient of the goods or services. The Court of Justice has spoken of reciprocal performance as a critical component of the concept of supply, but it has never confined the consideration to that provided by the recipient of the supply. Thus in *Tolsma* at para 14, the court stated:

> "a supply of services is effected 'for consideration' … and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient."

56. This formulation demonstrates the need for a direct link between the service provided and the consideration received which the court had previously articulated in *Staatssecretaris van Financiën v Association Coöperatieve Aardappelenbewaarplaats GA* (Case C-154/80) [1981] ECR 445, para 12, *Apple and Pear Development Council v Customs and Excise Comrs* (Case C-02/86) [1988] STC 221, paras 11 and 12, and *Staatssecretaris van Financiën v Hong Kong Trade Development Council* (Case C-89/91) [1982] ECR 1277, para 10. The Court of Justice's later statements of the test have followed *Tolsma* in not requiring the recipient of the services under the arrangement itself to be the provider of the consideration or to have legal responsibility for its provision - see *Primback Ltd*, para 25 and *Newey*, para 40, and see also *Dixons Retail plc v Revenue and Customs Comrs* (Case C-492/12) [2014] Ch 326, paras 31 and 32.

57. When the Court of Justice speaks of "reciprocal performance" it is looking at the matter from perspective of the supplier of the services and it requires that under the legal arrangement the supplier receives remuneration for the service which it has performed. It is not necessary that the recipient of the service is legally responsible to the supplier for payment of the remuneration; it suffices that the arrangement is for a third party to provide the consideration. Were it otherwise, taxpayers could structure their transactions so as to escape liability to pay VAT, so long as they could meet the economic reality test.

58. When this court has discussed third party consideration in what is now article 73 of the Principal VAT Directive it has similarly not restricted it to consideration provided alongside, or in performance of, a legal obligation of the recipient - see *WHA Ltd*, para 56 per Lord Reed, in which the garage provided a service to the insured car driver but the insurer alone was responsible for remunerating the garage, and *Loyalty Management UK Ltd*, para 67 per Lord Reed.

59. Finally, it is also said that the fact that PwC did not contract with Airtours to provide the Services to the Institutions is a very small point on which the present decision should turn. The answer to that was provided by Lord Reed in *WHA Ltd*, para 26, where he said that "decisions about the application of the VAT system are highly dependent upon the factual situations involved. A small modification of the facts can render the legal solution in one case inapplicable to another."

Conclusion

60. For these reasons, I would dismiss Airtours' appeal.

LORD CLARKE: (dissenting) (with whom Lord Carnwath agrees)

61. I agree with Lord Carnwath that this appeal should be allowed, both for the reasons he gives and, in particular, for the reasons given by Gloster LJ in her dissenting judgment in the Court of Appeal. The principal reason why I have reached a different conclusion from that of Lord Neuberger is that it seems to me that his approach is too narrow in that, while it focuses on the relationship between PwC and the Banks, it gives too little attention to the legal relationship between PwC and Airtours and to the economic realities of that relationship. The same is in my opinion true of the approach of the majority of the Court of Appeal.

62. Gloster LJ set out the relevant principles, in my opinion correctly, in her para 37. It is convenient to set out here the basic principles without repeating the extensive citations of recent authority, including in particular in the Supreme Court. Using Gloster LJ's sub-paragraphs, those principles are these:

> i) Consideration of economic realities is a fundamental criterion for the application of the common system of VAT as regards the identification of the person to whom services are supplied.
>
> ii) Decisions about the application of the VAT system are highly dependent upon the factual situations involved. Thus a small modification of the facts can render the legal solution in one case inapplicable to another.
>
> iii) The case law of the CJEU indicates that, when determining the relevant supply in which a taxable person engages, regard must be had to all the circumstances in which the transaction or combination of transactions takes place. In cases where a scheme operates through a construct of contractual relationships, it is necessary to look at the matter as a whole in

order to determine its economic reality. Thus the relevant contracts have to be understood in the wider context of the totality of the arrangements between the various participants.

iv) The terms of any contract between the parties, whilst an important factor to be taken into account in deciding whether a supply of services has been made, are not necessarily determinative of whether as a matter of "economic reality" taxable supplies are being made as between any particular participants in the arrangements. That may be particularly so where certain contractual terms do not wholly reflect the economic and commercial reality of the transactions. However, the contractual position is generally the most useful starting point for the VAT analysis.

v) There may, as a matter of analysis, be two or more distinct supplies within the same transaction. Moreover, a single course of conduct by one party may constitute two or more supplies to different persons. Once the taxpayer has identified the payment the question to be asked is: did he obtain anything - anything at all - used or to be used for the purposes of his business in return for that payment? This will normally consist of the supply of goods or services to the taxpayer. But it may equally well consist of the right to have goods delivered or services rendered to a third party. The grant of such a right is itself a supply of services. In one case ("Redrow") the taxpayer did not merely derive a benefit from the services which the agents supplied to the householders and for which it paid. It chose the agents and instructed them. In return for the payment of their fees it obtained a contractual right to have the householders' homes valued and marketed, to monitor the agents' performance and maintain pressure for a quick sale, and to override any alteration in the agents' instructions which the householders might be minded to give. Everything which the agents did was done at the taxpayer's request and in accordance with its instructions and, in the events which happened, at its expense. The doing of those acts constituted a supply of services to the taxpayer. … The services obtained by the taxpayer were different. They consisted of the right to have the householder's home valued and marketed in accordance with the taxpayer's instructions. Unless the householder sold his home and completed the purchase of a 'Redrow' home, however, the taxpayer was not liable for the agent's fees and paid no input tax, so there was nothing in respect of which a claim to deduction could be made. What must await events was not the identity of the party to whom the services were rendered, for different services were rendered to each; but which of the parties was liable to pay for the services rendered to him and so bear the burden of the tax in respect of which a claim to deduction might arise.

vi) However, the mere fact that the taxpayer has paid for the service does not necessarily mean that it has been supplied to him. Consideration of

economic realities is a fundamental criterion for the application of VAT. Thus substance and reality remain critical. What is required is a realistic appreciation of the transactions in question. Consideration paid in respect of the provision of a supply of goods or services to a third party may sometimes constitute third party consideration for that supply, either in whole or in part. Economic reality being what it is, commercial businesses do not usually pay suppliers unless they themselves are the recipient of the supply for which they are paying (even if it may involve the provision of goods or services to a third party), but that possibility cannot be excluded *a priori*. A business may, for example, meet the cost of a supply of which it cannot realistically be regarded as the recipient in order to discharge an obligation owed to the recipient or to a third party. In such a situation, the correct analysis is likely to be that the payment constitutes third party consideration for the supply. A case where the taxpayer pays for a service which consists of the supply of goods or services to a third party requires a more careful and sensitive analysis, having regard to the economic realities of the transaction when looked at as a whole. It may lead to the conclusion that it was solely third party consideration, or it may not.

63. Having set out those principles (and the references which support them) Gloster LJ, in my opinion correctly, described the real issue as being whether, on the primary facts found by the FTT, which were in essence not in dispute, the arrangements between the Banks, PwC and Airtours as a matter of law, involved the supply of services to Airtours or merely third party consideration provided by Airtours for services rendered to the Banks alone.

64. In para 41 Gloster LJ expressed the view that this case, like *Customs and Excise Comrs v Redrow Group plc* [1999] 1 WLR 408 ("*Redrow*"), is a case where two distinct supplies of services were being provided by PwC within the same overall transaction. She noted the caveats articulated by Lord Reed and Lord Hope in *Revenue and Customs Comrs v Loyalty Management UK Ltd* [2013] UKSC 15; [2013] STC 784 ("*LMUK (SC)*") and recognized, both that every case has to be approached on its own particular facts, and that it may be dangerous to draw analogies between the facts of two different cases which may appear superficially similar. However, she concluded that, although there are obvious differences between the facts of *Redrow* and those of the present case, the principles identified in *Redrow,* and confirmed in *LMUK (SC)*, support the analysis that in the present case PwC was making two distinct supplies "in both directions" (see per Lord Hope in *LMUK (SC)* at para 89), that is both to the Banks and to Airtours. I agree.

65. I also agree with her description of the two distinct supplies in para 42:

> "i) The supply by PwC to [Airtours] of the service of having PwC, after appropriate liaison with the [Airtours'] directors and senior management, review, monitor, and validate (if appropriate) its financial statements, budgets, financial performance, EPM, arrangements with the CAA etc and report on such matters to the [Banks]. That supply of the service of liaison, review etc, and reporting to the [Banks] was provided to [Airtours] pursuant to the Contract which conferred a contractual right on [Airtours] to have such work carried out for the purposes of PwC reporting to the [Banks]. As Lord Millett pointed out in *Redrow* at 418G, the grant of such a right (ie the right to have services rendered to a third party) is itself a supply of services. The supply of that service, pursuant to the Contract, was for a consideration payable by the appellant.
>
> ii) The supply by PwC to the [Banks] of the service of reporting on, monitoring and advising in relation to [Airtours'] financial statements, budgets, financial performance, EPM, arrangements with the CAA etc - in other words the provision to them of 'the Services' as defined in the Engagement Letters - in order to enable the [Banks] to decide whether to continue their credit facilities to [Airtours]. This supply was also made pursuant to the Contract but it was made in circumstances in which the [Banks] incurred no liability or contractual obligation to PwC to pay for the supply."

66. Gloster LJ went on to analyse first the Contract and then the economic realities and concluded that both led to the same conclusion, namely that to treat the Banks as the only entities supplied with the services of PwC was much too narrow a view. I agree. Airtours was at least as much a beneficiary of the services provided by PwC as were the Banks.

67. The particular factors (all included in Gloster LJ's analysis of the Contract in paras 44-53 and of the wider economic realities in paras 54-55) which have persuaded me that her analysis is correct are these.

68. While I am not sure that I would go so far as saying that the words "you" and "your" as used in the Contract always include Airtours (although it is certainly arguable that they do), that is not to my mind critical. I agree with Gloster LJ (in her para 46) that, "as a matter of construction of the Contract, and on analysis of the economic realities of the surrounding commercial arrangements, the appellant had *a contractual right to require* [her emphasis] that the Services, which were described in the various Engagement Letters and which both the [Banks] and [Airtours] had

agreed, were indeed provided by PwC to the [Banks]". I further agree with Gloster LJ in her para 47 that it is wrong to say that there was no provision in the Contract to support Airtours' assertion that it had a right to require PwC to provide services to the Banks and that Airtours' under the tripartite arrangement was simply to make payment to PwC for the provision of services to the Engaging Institutions. As Gloster LJ put it, that approach disregards the reciprocal obligations entered into on the part of each of Airtours and PwC under the Contract and the commercial reality of the arrangements. Again as she put it, the absence of an express term specifically stating that Airtours had a right to insist on PwC providing the Services to the Banks is irrelevant. The clear and necessary implication from the express terms of the Contract is that Airtours had such a right.

69. I agree with these conclusions in Gloster LJ's para 48:

> "Although it may have been the case that PwC was originally approached by the [Banks] … it is clear from the facts as found by the FTT that [Airtours] not only had positively to consent to the appointment of PwC but also that it had an input into the decision to choose PwC rather than another firm. [Airtours] also had to agree that PwC would have unrestricted access to its books and records and that [Airtours'] directors and senior management would positively co-operate with PwC in the provision of information; see for example the appellant's confirmation of the November 2002 Letter of Engagement and paragraph 2 of the Terms and Conditions. As reflected in both para 6 and para 12 of the November 2002 Letter of Engagement, the commercial reality was that one of the contracting parties requesting PwC to carry out the work was indeed [Airtours] itself. If [Airtours] had not joined in the request and agreed to PwC's appointment, and the scope of its work, the assignment would have taken a very different form since PwC would have had no contractual right to access to [Airtours'] books and records or to cooperation from its directors and senior management. It is also relevant in this context that the evidence showed that at each stage the scope of the work to be carried out by PwC was agreed by all three parties, namely [Airtours], the [Banks] and PwC. Thus although … a distinction can be drawn with the factual scenario in *Redrow* - where the taxpayer itself selected and gave instructions to the estate agents, which could not be countermanded by the house owners - those factors are not sufficient in my judgment to prevent their being two distinctive services in the present case."

70. As Gloster LJ put it in her para 49, while of course the Banks required the provision of the Services (as defined) for the purposes of their business in order to inform their decision as to whether to continue financial facilities to Airtours, Airtours itself also clearly required PwC to provide the Services (as defined) to the Banks for the purposes of Airtours' own business in order to persuade the Banks and other financial institutions to continue the loan facilities to Airtours and to ensure that its bonding arrangements with the CAA were maintained. Unless the Services were provided to the Banks, Airtours had little hope of obtaining any extension of its facilities.

71. A good report by PwC was critical to Airtours' future relationship with the Banks and thus to its future more generally. It is true that PwC's report might have been damaging to Airtours' interests but, as Gloster LJ put it at the end of her para 49, it necessarily had to take that risk. In truth the value of PwC's services was as great to Airtours as it was to the Banks. Hence the part played by Airtours in the selection of PwC and a number of important aspects of the letter of engagement and terms and conditions, which are set out in some detail by Lord Neuberger and Gloster LJ.

72. It is common ground that the Contract was a tripartite agreement. It is true that para 4 of the letter of engagement provided that PwC's report and letters were for the sole use of the Banks and that it expressly provided that PwC would assume a duty of care to the Banks provided that they individually agreed to it. Paragraph 8 provided that information and advice would be information and advice would be addressed to the Banks with a copy to the directors of the Group, with the exception of any part of the report prepared exclusively or confidentially for the Banks. Moreover, it is also true that para 9 expressly provided the PwC had a duty of care to the Banks relating to the contents of the Phase 1 report.

73. I do not however read any of those provisions as negativing a duty of care owed to Airtours. On the contrary, para 4 seems to me to cater only for the Banks and the purpose of making information and advice, other than that prepared exclusively or confidentially for the Banks, available to Airtours can surely only have been to allow Airtours to rely upon it. As I see it, the only purpose of the clause was to exclude specific confidential matter. Paragraph 10 expressly contemplated the possibility of PwC's liability to Airtours because it expressly provided for a limitation of it. There would have been no need for a provision limiting liability if no duty of care was owed to Airtours.

74. Paragraphs 12 to 16 set out the scope of PwC's services, which identified the extensive basis of the contribution to be made by Airtours. Indeed, paras 15 and 16 included express provisions requiring Airtours' management to provide information

and to be responsible in specific respect. Airtours was also of course responsible for PwC's fees.

75. Further, there were these important provisions in paragraph 26 under the heading "Terms and Conditions":

> "26. The attached terms and conditions ("the Terms and Conditions" have been agreed between the parties and set out the duties of each party in respect of the Services. The Terms and Conditions provide among other matters:
>
> i) the Group will indemnify us against claims brought by any third party. For the avoidance of doubt, the reference to 'you' in clause 10 of the Terms and Conditions (and only in that clause) refers to the Group and not the [Banks]; and
>
> ii) our aggregate liability to the Group, the [Banks] and any other third party to whom we later agree to assume a duty of care taken together, whether in contract, negligence or any other tort, will be limited in accordance with clause 9.4 of the Terms and Conditions. For this purpose, our liability in respect of Phase 1 of the Services will in no circumstances exceed £10m. In the event that you request and we agree to provide services beyond Phase 1, the financial limit of our aggregate liability will increase to £25m in respect of the Services and any additional services we provide to you.
>
> iii) The Letter of Engagement and the Terms and Conditions are together referred to as the Contract, and evidence the entire agreement between the parties. For the avoidance of doubt, the [Banks] and the Group both agree to all the terms contained in the Contract."

Those provisions strongly support the conclusion that it was agreed that PwC owed a duty of care both to the Banks and to Airtours, as one would expect in the light of the substantive obligations of PwC in a Contract which was for the benefit of both Airtours and the Banks.

76. These conclusions are essentially the same as those set out by Gloster LJ in her paras 50 to 53. See in particular the first sentence of para 50 and also the last sentence of para 51, where she said that it seemed to her to be inconceivable that Airtours did not have an implied correlative contractual right to insist upon due and proper performance by PwC of its obligations under the contract. I also agree with her conclusion to similar effect in para 52. If this conclusion is correct, as I believe it to be, it follows from HMRC's concession referred to in para 22 of Lord Neuberger's judgment, that there has been a supply of services to by PwC to Airtours as well as to the Banks.

77. Having correctly considered first the contractual position, Gloster LJ turned to the wider economic realities of the situation. For the reasons I have already given, I agree with her that, as she put it in her para 55, as part of the exercise of looking at the economic reality as to whether a supply was made to a taxpayer, it is relevant to see what, if any, value the taxpayer obtained from the alleged supply. I also agree with her that there is no doubt that, on the evidence as accepted by the FTT, PwC's review, monitoring and (in the event) endorsement of the appellant's financial statements, projections and financial position, PwC's liaison with the appellant's directors and senior management and its assistance in securing the consequential continuing financial support of the Engaging Institutions, was intended to play, and did indeed play, a critical role in the maintenance of the appellant's licence with the CAA and therefore the survival of its business. As she says, put another way, Airtours' right to have PwC carry out this work provided real additional value to Airtours in its struggle for financial survival. The presentation to the Banks of Airtours' own figures, without review or validation by an independent third party such as PwC, would have been highly unlikely in the circumstances to have satisfied the Banks and other financial institutions, which were considering the possible continuation of credit facilities. Finally, I agree with Gloster LJ that the arrangements between the parties, affording as they did the undoubted consequential benefits to Airtours, clearly involved the supply of economically valuable services to the appellant by PwC as well as the provision of distinct services to the Banks.

78. For these reasons I would allow the appeal.

LORD CARNWATH: (dissenting) (with whom Lord Clarke agrees)

79. I gratefully adopt Lord Neuberger's exposition of the facts and law. I regret that I am unable to agree with his conclusion. Since I understand that I am in a minority, I will state my reasons briefly, particularly as, like Lord Clarke, I am in general agreement with the much fuller reasoning of Gloster LJ in the Court of Appeal.

80. The issue in short is whether the payments made by Airtours were simply third party consideration for services provided by PwC exclusively to the Banks, or whether they were at the same time consideration for services provided to Airtours itself. As the extracts cited by Lord Neuberger (paras 44-46) make clear, the contractual position is a useful starting-point, but not necessarily conclusive; in the words of Lord Hope in *Revenue and Customs Comrs v Loyalty Management UK Ltd* [2013] STC 784, para 110, such a case "requires a more careful and sensitive analysis, having regard to the economic realities of the transaction when looked at as a whole".

81. To rest on a narrow legalistic approach to the construction of the contract seems particularly inappropriate in a case where the distinction between services to Airtours and services to the Banks is unlikely to have been seen as of any practical significance to the parties, and probably for that reason was not addressed in detail in that contract. Nor was it ever put to the test. Once PwC had been engaged, there was never any question of its not completing its task, with the co-operation of both Airtours and the Banks, and for the benefit of both. A hypothetical analysis of how the contract might have been given effect in circumstances which were never contemplated and never happened, seems a sterile exercise.

82. As Lord Reed points out in the *Loyalty Management* case at para 67, the normal expectation is that a commercial business paying a supplier is paying for a right to something, even if that something is a supply to another party. In the present case, that expectation is reinforced by a number of considerations:

i) In October 2002 Airtours was in serious financial difficulties and needed something done quickly to ensure its own commercial survival. PWC's involvement was essential to the achievement of that objective, and Airtours was willing to pay for it. It was entitled to expect a correlative commitment from PwC, and, had the issue arisen, it is hard to see any reason why it would have been resisted.

ii) The letter of engagement seems to me to acknowledge (as was the fact) that Airtours were party to the "request" to PwC to provide the services. I agree with the First-tier Tribunal and Gloster LJ that "you" in para 6 (request for assistance) and 12 (request to undertake a review) includes Airtours. This is apparent from para 26(i) which limits "you" to the Group in respect of clause 10 of the terms (indemnity), thereby implying that elsewhere it refers to both the Group and the Engaging institutions.

iii) Although the terms of the contract are in some respects equivocal, it is not in dispute that Airtours was a fully contracting party. It is possible, but in

my view artificial, to read that as limited to its obligations to pay and indemnify. The terms of its confirmation letter (taken with para 30 of the principal engagement letter), make clear that it was accepting "the terms of [PwC's] engagement" as set out in that letter. This implies that PwC was "engaged" to Airtours, no less than to the Banks.

83. The strongest pointer in this direction, in my view, lies in the provisions for the timetable (clause 19). It is clear that timing for the initial work was critical and very tight. The first agreement was signed on 5 November 2002, but the commencement of the work was fixed for 2 November, three days earlier. The first draft of findings was to be available for discussion with Airtours management on 15 November, and with the Banks on the 18 November. Timing for later phases were to be "agreed before each phase commences". (That must in my view imply agreement with both Airtours and the Bank, since the co-operation of both would be essential to the fulfilment of any agreed timetable; and I see no reason why any such agreed timetable should not be envisaged as open to enforcement by either party.)

84. The first payment by Airtours, a retainer of £200,000, had to be made on commencement. It is legitimate to ask what would have happened if, having paid its £200,000 on 2 November in the expectation of receiving a draft PwC report 13 days later, Airtours had been faced with a failure by PwC to do anything. On Lord Neuberger's interpretation of the contract it would have had no enforceable right of any kind. I find that impossible to accept, either as a matter of ordinary contractual construction, or still less of economic reality. The timetable in clause 19 was part of the obligations undertaken by PwC under the contract. There is nothing in the contract to suggest that the obligation was not enforceable by Airtours as a party to the contract. Commercial sense clearly dictates that it should be so.

85. For these reasons, in addition to those given by Lord Clarke, I would have allowed the appeal.