[2012]UKUT 240(TCC)
Appeal number FTC/31/2011

VALUE ADDED TAX – option to tax – whether rent payable in respect of tenancies of public houses attributable in part to residential parts of the premises

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

ENTERPRISE INNS PLC &
UNIQUE PUB PROPERTIES LIMITED **Appellants**

- and -

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

TRIBUNAL: MR JUSTICE NEWEY

Sitting in public in London on 21 May 2012

Andrew Hitchmough and Jonathan Bremner, instructed by Ernst & Young LLP, for the Appellants

Raymond Hill, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This case relates to rent which the Appellants, Enterprise Inns plc and Unique Pub Properties Limited, receive in respect of public houses they own. The pubs in question contain both commercial and residential accommodation, and HM Revenue and Customs ("HMRC") maintain that the rent relates in part to the residential areas. The Appellants, on the other hand, argue that the rent is derived exclusively from the commercial parts of the pubs. The issue for the First-tier Tribunal (Judge Michael Tildesley OBE and Mr Roland Presho FCMA) was thus whether any part of the rent was attributable to the residential areas. The Tribunal concluded that it was, but the Appellants appeal against that decision ("the Decision").

VAT on rent: the statutory context

2. The question whether any of the rent that the Appellants receive is attributable to the residential areas of their pubs arises because the Appellants have exercised the option to tax for which schedule 10 to the Value Added Tax Act 1994 ("the VATA") provides.

3. Transactions involving the leasing or letting of immovable property generally fall within group 1 of schedule 9 to the VATA and so are potentially exempt from VAT. Schedule 10 to the VATA allows a landowner to waive exemption by opting to tax his land. The option is not, however, available in relation to residential property. The version of schedule 10 that was in force up to 31 May 2008 precluded an election to waive exemption being made where a lease related to "a building or part of a building intended for use as a dwelling or number of dwellings" (paragraph 2(2)(a) of the schedule). Similarly, the current form of schedule 10 provides (in paragraph 5(1)):

> "An option to tax has no effect in relation to any grant in relation to a building or part of a building if the building or part of the building is designed or adapted, and is intended, for use – (a) as a dwelling or number of dwellings …".

4. Where a building is partly residential but not exclusively so, note 10 to group 5 of schedule 8 to the VATA is in point by virtue of what is now paragraph 32 of schedule 10. Note 10 states:

> "Where–
> (a) part of a building that is constructed is designed as a dwelling or number of dwellings … (and part is not); …
> then in the case of–
> …

(iii) any other grant or supply relating to, or any part of, the building (or its site), an apportionment shall be made to determine the extent to which it is to be so treated".

5. The result, as the Tribunal noted in paragraph 40 of the Decision, is that:

> "[T]he portion of rent attributable to the residential element of a single supply of mixed commercial and residential premises is excluded from the scope of the option to tax. This in turn preserves the exemption from VAT for the portion of rent attributable to the residential part and splits the single supply between exemption from VAT for the residential part and standard VAT rating for the commercial part".

6. The extent, if any, to which rent is attributed to residential accommodation has a bearing on how far landlords can recover input tax. In the present case, the Appellants' skeleton argument explains that the relevance to them of the apportionment of rent between commercial and residential areas lies in its effect on their ability to recover VAT on their property-related and overhead costs.

Basic facts

7. The Appellants are companies in the same group. Between them, they own a very large number of British pubs. These are operated on a leased and tenanted basis. This means that a pub is leased to a tenant who agrees both to pay rent and to buy certain products from the pub's owner. The Appellants derive about half of their income from rent and the remainder from the wholesale profit from beer and wine sales (sometimes referred to as "dry rent" and "wet rent" respectively).

8. As at July 2009, the Appellants' estate comprised some 7,500 pubs. A small number (viz. 151) did not include any residential accommodation, but the overwhelming majority did. This was generally occupied by the tenants and their families.

9. The agreements under which pubs were let would describe the relevant premises in such a way as to encompass any residential areas as well as the commercial ones. Rent was expressed as a single sum. Nothing was said about whether the rent was attributable exclusively to the commercial areas or, if not, how it was to be split between commercial and residential areas.

10. The position can be illustrated by reference to one of the standard forms of agreement used by the Appellants, the "Retail Partnership Agreement". This provided for the "Premises" to be let to the tenant, subject to the tenant paying, among other things, the "Rent". The "Premises" were defined to comprise "the whole of the land and buildings (or any part of it) described in the Summary", and the "Summary" would describe the "Premises" by reference to the title

number(s) for the pub in question. As regards "Rent", the agreement provided for a specified sum to be paid as "initial rent" and for this to be subject to review by reference to the retail prices index.

11. Until 2008, the Appellants proceeded on the basis that 10% of the rent they received related to the residential areas of their pubs and therefore accounted for VAT on 90% of the rent. As the Tribunal noted (in paragraph 2 of the Decision), the 90:10 split "was in accordance with standard practice in the brewing sector which was based on a suggestion by the Brewers' Society at the time the option to tax was introduced in 1989".

12. The Appellants would invoice tenants for rent in accordance with the 90:10 apportionment. This was the case regardless of whether the relevant pub in fact contained residential accommodation. The Tribunal said this about the invoicing arrangements (in paragraph 52(11) of the Decision):

> "The invoices for the supplies of the tenancies in the public houses apportioned the rent between the commercial and residential parts of the premises on a 90/10 ratio. The Tribunal was not convinced with the Appellants' assertion that the invoices were wrong. The Appellants had applied the 90/10 apportionment in their invoices without question for almost 20 years. During that time the Appellants accepted that no tenant had challenged the correctness of the invoices. The Appellants placed weight on the fact that the invoices applied a 90/10 apportionment to public houses without residential accommodation. This error applied to an insignificant proportion (two per cent) of the Appellants' estate, which suggested that the Appellants tolerated the error because the 90/10 apportionment accurately reflected the rental position for the overwhelming majority of public houses in the estate".

13. In April 2008, the Appellants challenged the correctness of the 90:10 apportionment. They informed HMRC that they had concluded following a review of their agreements with tenants that all the rent should be subject to VAT. Since HMRC continued to adhere to the view that rent fell to be apportioned, the Appellants appealed to the Tribunal.

14. The Appellants' case before the Tribunal was to the effect that the rent for the pubs at issue was based solely on the profit that it was anticipated that the pubs could generate. The residential accommodation was, the Appellants maintained, provided free of charge.

15. The Tribunal, however, dismissed the appeal. It summarised its conclusions in these terms in paragraph 54 of the Decision:

> "(1) The Appellants made a single grant of tenancy over the entire premises of a public house which included the commercial and

residential areas, and … a single supply existed for VAT purposes.

(2) The rent payable under the terms of the tenancy was for the commercial and residential parts of the public house.

(3) The Appellants opted to tax the supply of the grant of tenancy which meant that two different rates of VAT applied to the single supply where the tenancy included residential accommodation. The supply in respect of the commercial part was standard rated for VAT purposes, whilst the supply for the residential part was exempt for VAT.

(4) The rent payable for the tenancy of a public house which included residential accommodation was required to be apportioned to reflect the standard rated and exempt elements of the single supply. The parties agreed that the existing rate of apportionment of 90:10 (standard rated: exempt) should remain".

16. The essence of the Tribunal's reasoning appears from paragraph 53 of the Decision:

> "The Tribunal concludes from its findings of fact that terms of the various tenancy agreements and the Appellants' invoices represented the most reliable evidence of what the Appellants and tenants had agreed in relation to the rent for public houses. This evidence demonstrated that the rent related to the whole of the premises and that an element of the rent was directly attributable to the residential accommodation if provided within the public house. The Appellants' evidence of the method for valuing rents of public houses highlighted the factors that played a part in the rent negotiations but was several steps removed from the actual agreement reached by the Appellants and their tenants. The profits test method constituted the Appellants' opening gambit which was refined and developed by the negotiations with the tenants. The Appellants adduced no convincing evidence of the tenants' perspective in the rent negotiations. The Appellants' assertion that the residential accommodation within public houses was provided free of charge to tenants was not corroborated by documentation issued to tenants. The Appellants' evidence did not undermine the clear wording of the various tenancy agreements and the Appellants' invoices that the rent payable was for the whole premises which included the commercial and residential areas of public houses".

"Consideration" in the context of VAT

17. It is convenient to consider the law relating to "consideration" in the context of VAT in general terms before addressing particular contentions of the parties.

18. The concept of "consideration" is fundamental to VAT. A "supply" will not include "anything done otherwise than for a consideration" (section 5(2)(a) of the VATA). The value of a supply is, moreover, calculated by reference to the consideration. If a supply is for a consideration in money, its value is to be taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration (section 19(2) of the VATA). If a supply is for a consideration that does not wholly consist of money, its value is to be taken to be such amount of money as, with the addition of the VAT chargeable, is equivalent to the consideration (section 19(3) of the VATA).

19. Guidance as to what constitutes "consideration" is to be found in *Staatssecretaris van Financiën v Coöperative Aardappelenbewaarplaats GA* (Case 154/80) [1981] ECR 445 (often referred to as the "Dutch Potato Case"). The European Court of Justice there explained (in paragraphs 12 and 13 of its judgment) that "there must … be a direct link between the service provided and the consideration received", that "the consideration for the provision of a service must be capable of being expressed in money" and that consideration "is a subjective value since the basis of assessment for the provision of services is the consideration actually received and not a value assessed according to objective criteria".[1]

20. That consideration is "a subjective value" highlights the value that the parties have themselves placed on the goods or services in question. If goods or services are supplied at a particular price, it is irrelevant that the market value might be said to be different. On the other hand, it would be a mistake to assume that "subjective value" is "more vague, labile and difficult to ascertain than one determined by objective criteria": see Lord Walker in *Lex Services plc v Customs and Excise Commissioners* [2003] UKHL 67, [2004] STC 73, at paragraph 18. Lord Walker went on to explain (at paragraph 18):

> "In a straightforward case the 'subjective value' of non-monetary consideration means the value overtly agreed and adopted by the parties to the transaction in question, just as the price overtly agreed and adopted by the parties is (in most cases) conclusive as to the quantum of monetary consideration".

21. "Subjective value" must, moreover, be distinguished from the parties' subjective reasons for entering into a contract. This can be seen from *Tesco plc v Customs and Excise Comrs* [2003] EWCA Civ 1367, [2003] STC 1561, in which there was an issue as to whether vouchers and points awarded by Tesco were "granted for a consideration". Outlining the approach that should be taken, Jonathan Parker LJ said this (in paragraph 159):

[1] See also e.g. *Campsa Estaciones de Servicio SA v Administración del Estado* (Case C-285/10) [2011] STC 1603, at paragraphs 25 and 28 of the judgment.

"3. The terms contractually agreed may not be determinative as to the true nature and effect of the scheme …: it is necessary to go behind the strictly contractual position and to consider what is the economic purpose of the scheme, that is to say 'the precise way in which performance satisfies the interests of the parties' (see the Advocate General's opinion in [*Customs and Excise Comrs v Mirror Group plc; Customs and Excise Comrs v Cantor Fitzgerald International* (Cases C-409/98 and C-108/99) [2001] STC 1453], para 27 …). 4. Economic *purpose* is not the same as economic *effect*. The fact that two transactions have the same economic *effect* does not necessarily mean that they are to be treated in the same way for VAT purposes …. 5. Equally, the economic *purpose* of a contract (what the Advocate General in *Mirror Group* called the 'cause' of a contract: see para 27 of his opinion …) is not to be confused with the subjective reasons which may have led the parties to enter into it (in so far as those subjective reasons are not obviously evident from its terms) (see *Mirror Group* para 28 …). The Advocate General went on to observe …:

> '… failure to distinguish between the cause of a contract and the motivation of the parties has been the source of misunderstandings, … and has complicated the task of categorising the contracts at issue.'"

22. *Kuwait Petroleum (GB) Ltd v Customs and Excise Comrs* [2001] STC 62 indicates that, when deciding whether consideration was given for goods or services, it can sometimes be appropriate to consider what the parties should be taken to have agreed in the light of the surrounding circumstances. The *Kuwait Petroleum* case concerned a sales promotion scheme under which customers buying fuel ("premium goods") at service stations were offered vouchers which they were entitled to exchange for goods listed in a catalogue ("redemption goods"). The price of the fuel was the same whether or not a customer accepted the vouchers, and customers were told that redemption goods were gifts as a reward for their loyalty. A Value Added Tax Tribunal held that the vouchers were supplied otherwise than for consideration, and Laddie J dismissed an appeal, describing the Tribunal's decision as "entirely correct" (paragraph 35).

23. Laddie J discussed how the matter was to be approached in paragraphs 23 and 24 of his judgment. He said this:

> "23. … What has to be determined is whether, at the time of purchasing the premium goods, the customers and Kuwait Petroleum had agreed, directly or indirectly, that part of the price paid for the premium goods, whether identifiable or not, would constitute the value given in return for the redemption vouchers or the redemption goods. It would be insufficient to prove that Kuwait Petroleum alone

> thought that the redemption vouchers and redemption goods were being paid for by the customer through the price paid for the premium goods
>
> 24. If the existence of such a consensus is the express and acknowledged view of the contracting parties, then the goods are not disposed of 'free of charge' and art 5(6) [of EC Council Directive 77/388 ('the Sixth Directive')] does not apply. However, here there was no such express and acknowledged view of the contracting parties. Both [counsel] agree that in those circumstances the inquiry is to be answered objectively. That is to say the fact-finding tribunal has to determine what the ordinary customer (the driver of the Clapham Ford Sierra) and Kuwait Petroleum should be taken to have agreed to at the time the premium goods were being purchased. That determination depends upon the inferences to be drawn from all the circumstances surrounding the transactions on the forecourt of the petrol stations …".

24. Lewison J discussed the significance of the parties' contractual obligations to VAT issues in *A1 Lofts Ltd v Revenue and Customs Comrs* [2009] EWHC 2694 (Ch), [2010] STC 214. After referring to the decision of Laws J in *Customs and Excise Comrs v Reed Personnel Services Ltd* [1995] STC 588, Lewison J said this (in paragraph 40):

> "What I understand Laws J to be saying is that the *identification* of the parties' obligations is a matter of contract. But once their obligations have been identified, the *nature* or *classification* of those obligations, and in particular whether they answer a particular statutory description, is not necessarily concluded by the contract. It may well be, even in a tripartite situation, that they do; but it is not inevitable. Read in this way, it seems to me that *Reed* exemplifies a common method of reasoning. 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."

Summarising his conclusions in paragraph 47, Lewison J said this:

> "vii) Having identified the true rights and obligations of the parties, it will then be necessary to decide how those rights and obligations should be classified for the purposes of VAT …;
>
> viii) Sometimes this will be concluded by the terms of the contract themselves; but it may not be …. If it is not then the classification of the parties' rights and obligations for the purposes of VAT may involve the application of particular deeming provisions of the VATA …; or deciding whether the nature of the supply falls within a particular description …; whether there is one contract or more than one …; or in some cases deciding whether on the true construction of a single contract there is one supply or more than one …".

Are the contracts decisive?

25. Mr Raymond Hill, who appeared for HMRC, argued that it is not necessary to look beyond the relevant contractual arrangements in the present case. Mr Hill's argument on this aspect was on the following lines. The contracts between the Appellants and tenants provided for each tenant to pay a single amount of rent for the whole of the relevant pub. That being so, the rent for the pub must have related to the residential areas as well as the commercial ones unless there was an implied term attributing it to just the commercial parts. No such implied term was argued for or existed. Rent thus related at least partly to the residential areas.

26. I am not convinced by this argument. The question in this case is whether part of the rent paid in respect of each pub was attributable to its residential areas. To my mind, that question cannot necessarily be answered by merely construing the contracts between the Appellants and their tenants. It is apparent from their contracts with the Appellants that tenants would pay rent in respect of the *whole* of a pub. In my view, however, it does not inevitably follow that rent is to be attributed to every *part* of a pub.

27. As already mentioned (in paragraph 1 above), the issue before the Tribunal was whether *any* of the rent was attributable to the residential areas of the pubs. The Tribunal did not need to consider *how much* rent was to be attributed to the residential areas because it was common ground that, if some rent was attributable to the residential areas, the 90:10 split was appropriate. Had there, though, been an issue as to apportionment, the Tribunal would have had to consider the extent to which rent was attributable to residential areas. The contracts not having so stated, there could, as it seems to me, have been no question of every square foot of a pub automatically being treated as of equal value. (In fact, I would guess that that the 90:10 apportionment implies that commercial parts of a pub have a higher value per square foot than residential parts.) If areas can differ in value, I can see no reason why, in an appropriate case, an area might be considered not to have any value at all.

28. It is possible to conceive of a lease being granted of premises including an area that was universally recognised to be a burden rather than a benefit (say, because a large financial liability attached to it for some reason). The overall rent could then be expected to be lower than would have been the case had the particular area been omitted from the lease. On Mr Hill's case, rent would nonetheless be attributable to the area in question unless (which would seem improbable) the lease incorporated a term to contrary effect. I do not think that can be right.

29. Had the agreements between the Appellants and the tenants, on their true construction, attributed some of the rent to the residential areas, that might well have been determinative of itself. I do not think, however, that they did so. The contracts were, as it seems to me, silent on the point.

The Appellants' criticisms of the Decision

30. Mr Andrew Hitchmough, who appeared for the Appellants with Mr Jonathan Bremner, argued that the Decision is deficient in more than one respect. One of the specific grounds of appeal was to the effect that the Tribunal wrongly took into account the absence of evidence as to the tenants' perspective and failed to take into account evidence that no charge was made for residential accommodation. Another ground of appeal was that the Tribunal erred in its approach to the Appellants' invoicing arrangements. Mr Hitchmough further submitted that the Tribunal's approach to the contracts between the Appellants and their tenants was misconceived.

The Upper Tribunal's role

31. When considering the criticisms of the Decision that the Appellants put forward, it is important to have in mind the limited circumstances in which it is appropriate for the Upper Tribunal to interfere with factual and evaluative decisions.

32. Guidance as to the grounds on which factual findings can be challenged on appeal is to be found in *Edwards v Bairstow* [1956] AC 14. Viscount Simonds there said (at 29) that a finding of fact should be set aside if it appeared that the finding had been made "without any evidence or upon a view of the facts which could not reasonably be entertained". Lord Radcliffe (at 35) quoted a passage from a judgment of Lord Normand in which the latter had said that an appellate Court could intervene if the lower tribunal had "misunderstood the statutory language" or had "made a finding for which there is no evidence or which is inconsistent with the evidence and contradictory of it". Lord Radcliffe went on to say this (at 36) about the position where "the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal":

> "I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

33. The decision of the Court of Appeal in *Procter & Gamble UK v Revenue and Customs Commissioners* [2009] STC 1990, where the question was whether "Pringles" were standard-rated rather than zero-rated because they fell within Item 5 of the "Excepted items" in Group 1, indicates other limits on the circumstances in which an appellate Court should intervene. Jacob LJ said (in paragraph 9):

> "Often a statutory test will require a multi-factorial assessment based on a number of primary facts. Where that it so, an appeal court (whether first or second) should be slow to interfere with that overall assessment—what is commonly called a value-judgment."

Further, Jacob LJ (like Mummery and Toulson LJJ – see paragraphs 48 and 73) drew attention to the fact that the appeal before the Court was from a specialist tribunal. Jacob LJ observed (in paragraph 11):

> "It is also important to bear in mind that this case is concerned with an appeal from a specialist tribunal. Particular deference is to be given to such tribunals for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker; see per Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* …."

Jacob LJ described the issue for an appellate Court in these terms (in paragraph 22):

> "So one can put the test for an appeal court considering this sort of classification exercise as simply this: has the fact finding and evaluating tribunal reached a conclusion which is so unreasonable that no reasonable tribunal, properly construing the statute, could reach?"

For his part, Mummery LJ said (in paragraph 74):

> "I cannot emphasise too strongly that the issue on an appeal from the tribunal is not whether the appellate body agrees with its conclusions.

It is this: *as a matter of law, was the tribunal entitled to reach its conclusions?*"

The Tribunal's approach to the contracts

34. Mr Hitchmough submitted that the Tribunal's approach to the contracts between the Appellants and tenants was fundamentally flawed. The Tribunal assumed, Mr Hitchmough argued, that the contracts were all-important when they were in fact of no assistance. The Tribunal needed to focus on the circumstances surrounding the transactions rather than on the contracts themselves.

35. It follows from what I have said above (in paragraphs 25-29) that, in my view, the contracts between the Appellants and tenants were not inevitably decisive; I agree with Mr Hitchmough that the Tribunal had to be prepared to look at a wider picture. As I read the Decision, however, the Tribunal did not limit itself to considering the contracts. It regarded the contracts as affording evidence that rent was attributable to residential accommodation, but it also referred to other matters (e.g. rent negotiations, documentation issued to tenants and invoices).

36. Further, it seems to me that, in the context, the Tribunal was entitled to regard the contracts as significant. Where a tenancy extends to both residential and commercial accommodation, the rent can ordinarily be expected to relate to the residential areas as well as the commercial ones. Moreover, this was not a case in which the residential areas were inherently valueless. It is noteworthy in this context that evidence was given to the Trade and Industry Select Committee in 2004 to the effect that "the saving to the tenants for not having to pay for accommodation" was worth £8,000. In addition, the Appellants' tenants were said to be making £37,000 or £40,000 "equivalent income" per annum on the strength of the "non-cash accommodation benefit".

37. Mr Hitchmough pointed out that the tenants were required by their contracts to live in the pubs. As the Tribunal noted (in paragraph 52 of the Decision):

> "The agreements except the Tenancy at Will required the tenant and his family to live in the residential part of the public house if provided unless the Appellants dispensed with this requirement in writing"

and

> "The Appellants had the authority under the agreements to forfeit the tenancy if the tenant … did not comply with his obligations under the agreement which included the requirement to live at the public house".

It would, Mr Hitchmough said, be odd to regard tenants as paying for something in respect of which obligations were imposed on them.

38. As, however, Mr Hill observed, obligations are imposed on tenants even in connection with the commercial parts of pubs. Thus, a tenant must, for instance, use the pub only for the "Permitted Use", conduct the business "in an efficient, orderly and polite manner, in such a way as to maximise the trading potential of the Premises" and "keep the Premises open for business during the Agreed Opening Hours". In any event, the fact that tenants were bound to occupy the residential accommodation did not obviously negate its value. A tenant would still be relieved of the need to obtain alternative accommodation.

The Tribunal's approach to the tenants' perspective

39. The Tribunal referred more than once to the absence of evidence as to the tenants' perspective. In paragraph 53 of the Decision, the Tribunal observed that the Appellants had "adduced no convincing evidence of the tenants' perspective in the rent negotiations". In the preceding paragraph, the Tribunal had recorded:

> "The Appellants adduced no evidence that the tenants shared their assertion that the rent for a public house did not include an element for residential accommodation. The tenant's perspective was distinctly absent from the evidence relied upon by the Appellants".

40. Mr Hitchmough argued that the Tribunal's approach in this respect was erroneous. The parties' subjective intentions were irrelevant. The Tribunal (so Mr Hitchmough argued) had to consider what the parties should be taken to have agreed. Evidence from tenants as to what they in fact intended would not have helped. Matters had to be judged objectively.

41. For my part, I agree with Mr Hitchmough that evidence as to tenants' subjective intentions would not have been important. As noted earlier, "subjective value" has to be distinguished from the parties' subjective reasons for entering into a contract. That, however, does not mean that the "tenants' perspective" was not significant. If, as is my view, the contracts between the Appellants and tenants did not of themselves automatically determine whether rent was attributable to residential areas, it was relevant to consider what both sides, and not merely the Appellants, would be likely to have intended. It was thus appropriate for the Tribunal to observe that the "Appellants' evidence of the method for valuing rents of public houses … was several steps removed from the actual agreement reached by the Appellants and their tenants" and that the "profits test method constituted the Appellants' opening gambit which was refined and developed by the negotiations with the tenants". It also makes sense that the Tribunal should have highlighted that the "Appellants' assertion that the residential accommodation within public houses was provided free of charge to tenants was not corroborated by documentation issued to tenants". The extent to which intentions are communicated is of obvious significance in the context of an objective inquiry.

42. Mr Hitchmough set great store by evidence indicating that rents were fixed by reference to profitability. The Tribunal referred to such evidence in paragraphs 19-36 of the Decision. For example, Mr David George, the chief financial officer of Enterprise Inns plc, explained that the Appellants' rent assessment process took no account of the residential accommodation within a pub and that the eventual rent agreed was often at or near to the Appellants' target. Mr Peter Constantine, a chartered surveyor who is responsible for the management of the pubs team within Humberts Leisure, said that the rent for a pub was a function purely of the fair maintainable profit achievable at the premises. In evidence to the Trade and Industry Select Committee, Enterprise Inns plc had similarly maintained that the rent assessment "does not take into account the value of free living accommodation".

43. To say, however, that rent is fixed by reference to profitability is not necessarily to say that the value of residential accommodation is ignored. A prospective tenant considering what share of anticipated profits he would be willing to pay in rent could be expected to take into account the fact that he would receive living accommodation. In the course of cross-examination, Mr George himself accepted that some prospective tenants might put a value on the residential accommodation. That the availability of residential accommodation might have a bearing on rents is also perhaps suggested by data showing that, on average, a tenant of a pub with domestic accommodation was left with a profit some £8,000 less than that of tenants of pubs without such accommodation.

44. In short, I do not think that the Decision can be impugned by reference to the Tribunal's approach to the tenants' perspective.

The Tribunal's approach to invoicing

45. As mentioned above (paragraph 12), invoices to tenants apportioned rent between the commercial and residential areas on a 90:10 basis. The Tribunal considered that the invoices provided evidence of what had been agreed in relation to the rent.

46. Mr Hitchmough criticised the Tribunal's reliance on the invoicing arrangements. He pointed out that the Appellants' practice in relation to invoicing had been flawed on any view since the 90:10 split was adopted regardless of whether a pub in fact contained residential accommodation. He argued too that, while only a small proportion of the Appellants' overall estate lacked residential areas, the number (viz. 151) was still significant in absolute terms.

47. To my mind, however, it was open to the Tribunal to attach weight to the invoices. The Tribunal's view was, as it seems to me, a reasonable one.

Conclusion

48. The Tribunal was, in my view, entitled to arrive at the conclusion that rent was attributable to the residential parts of the pubs. I have not been persuaded that the Tribunal's conclusion was one for which there was no evidence or that it was otherwise unreasonable.

49. The appeal will be dismissed.

Mr Justice Newey

RELEASE DATE: 6 July 2012