[2016] UKUT 433 (TCC)

Appeal number: UT/2015/0119

VALUE ADDED TAX – Exemptions – Leasing or letting of immovable property – Whether grant of right to use a stall or pitch at a craft fair exempt

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and -

KATI ZOMBORY-MOLDOVAN (trading as CRAFT CARNIVAL)

Respondent

TRIBUNAL: MR JUSTICE NEWEY
JUDGE JOHN CLARK

Sitting in public in London on 4 and 5 July 2016
Further written submissions: 14 and 20 July 2016

Miss Hui Ling McCarthy, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Mr Owain Thomas QC, instructed by Cubism Law, for the Respondent

DECISION

Introduction

1. This case concerns the treatment for VAT purposes of fees paid for stalls and pitches at events that Craft Carnival (the trading name of Mrs Kati Zombory-Moldovan) organises. HM Revenue and Customs ("HMRC") contend that the fees are subject to VAT. However, the First-tier Tribunal ("the FTT") (Judge John Brooks and Mr John Robinson) decided otherwise on the basis that the relevant supplies are exempt supplies of licences to occupy land. HMRC now appeal against the FTT's decision ("the Decision").

Basic facts

2. Craft Carnival organises craft fairs in and around Dorset. In a typical year, five or six such fairs will be held. Each of them will take place over a weekend and last either two days or three (in the case of a Bank Holiday weekend). In most cases, the venue will be close to a stately home or historic property.

3. Craft Carnival has a website the "Welcome" page of which explains:

> "Craft Carnival organise major craft and garden shows at unique and beautiful venues in and around Dorset.
>
> Each of our events showcases a tempting range of the best traditional and contemporary crafts, where you can see and meet craftspeople in action and choose from a wide variety of handmade items – or commission something special….
>
> All of our shows take place in and around spacious marquees, with a separate refreshments tent. The marquees at our Christmas event at Kingston Lacy are heated. Even if the weather is unpredictable, there is always plenty to see and do under cover!"

As the FTT explained (in paragraph 8 of the Decision), the page appears to be directed at the general public, but the website provides a link for "Exhibitors" to provide their details to enable them to receive information about booking stalls.

4. The FTT said this (in paragraph 9 of the Decision) about work that Craft Carnival undertakes for a fair:

> "In addition to the erection of marquees, which are hired for the duration of a fair, Mrs Zombory-Moldovan arranges for the provision of other necessary temporary facilities including portable toilets, electrical generators and security fencing. She also employs between five and seven members of staff to act as ticket sellers and car park

marshals. Before the fair takes place Mrs Zombory-Moldovan would have issued a press release and advertised the event in local newspapers and on Craft Carnival's website and booked a children's entertainer, such as a magician, to encourage families to attend."

5. Craft Carnival has two sources of income: stallholders and visitors. A fair can attract between 40 and 110 stalls and be attended by between 1,200 and 3,500 paying visitors.

6. A brochure listing the fairs for the coming year is sent out on an annual basis to some 4,000 craft workers and gardening goods suppliers. The first page states:

> "We have pleasure in inviting you to sell and demonstrate your work at the best fairs in the region.
>
> Our 27 years of experience as organisers – above all, listening to what you, the exhibitor, and your customers, the visiting public have to say – go into every Craft Carnival event.
>
> Prestigious settings; quality products; extensive advertising and publicity; caring about the little things that create a friendly and relaxed atmosphere on the day, so that visitors are ready to buy from you – together, these are the things that make our shows unique.
>
> Our affordable stall prices and reasonable entrance charges ensure that you reap the financial rewards you deserve at a Craft Carnival fair. Everything we do is designed to make your experience of our events pleasurable and stress-free, as well as profitable. Your comments and suggestions are always welcome and, as ever, we will do our best to accommodate any special requirements you may have."

7. The brochure contains some basic information about each of the forthcoming fairs. For example, the brochure for 2014 said this about the "Easter Craft and Garden Fair at Somerley" that was to take place between 19 and 21 April 2014:

> "Our show occupies the elegant parkland which looks onto Lord Somerton's graceful stately home. Marquee and outside stall spaces are available. There is easy setting up on the level ground and plenty of parking for exhibitors next to the showground. Friday setting up and fee caravan spaces are available."

The fee for a stall or pitch was then specified as £180.

8. Booking forms are sent with the brochures. Someone wishing to take a stall must complete the front of the form. Craft Carnival's terms and conditions are set out on the reverse of the form.

9. Each booking form is headed with the title of the relevant event. That for the fair at Somerley, for instance, was headed "Easter Craft and Garden Fair at Somerley". The form goes on to ask, among other things, for the applicant's "type of craft", whether he would like his stall to be "in marquee" or "outside", whether he requires an electric point and whether he will be demonstrating. A space for the applicant's signature follows an acknowledgment that he has read and agrees to Craft Carnival's terms and conditions.

10. The terms and conditions provide as follows:

> "1 These Terms and Conditions and the details overleaf are the entire terms upon which the person signing the booking form overleaf, or on whose behalf it is signed, of the address given overleaf ('the Exhibitor') offers to enter into a contract ('the Agreement') with Kati Zombory-Moldovan … , trading as Craft Carnival, successors in business and assigns ('the Organiser') for a licence to use a stall or pitch at the event specified overleaf ('the Show') to offer certain goods for sale.
>
> …
>
> 3 It is a condition of the Agreement that all goods displayed or offered for sale at the Show by or on behalf of the Exhibitor conform to the description of the Type of Craft given overleaf, and to other information given by the Exhibitor to the Organiser including as to origin, materials, means of manufacture and identity of maker.
>
> 4 The Organiser will endeavour to accommodate any Special Requirements specified by the Exhibitor overleaf insofar as reasonable and practicable, but neither these nor their satisfaction constitute a term of the Agreement.
>
> 5 The Organiser reserves the right to cancel the Show, in which case the Agreement shall be discharged and the Organiser shall repay to the Exhibitor any deposit and stall fee paid under the Agreement, which the Exhibitor agrees to accept in full and final settlement of any claim against the Organiser arising from such cancellation. In the event of cancellation of the Show after its commencement, the Organiser shall repay to the Exhibitor, and the Exhibitor shall accept on the said terms, a pro rata portion of the stall fee in respect of the unexpired portion of the Show, but all indemnities and exclusions and limitations of liability herein shall continue in force.

…

7 The Exhibitor agrees as a condition of the Agreement, before, during, and at the setting up and taking down of the Show, to abide by, and to cause his servants and agents to abide by, such directions for its safe, lawful, proper, orderly and convenient conduct as the Organiser may at his sole discretion determine.

…

9 The Organiser shall license the Exhibitor, his servants, agents and members of his party, subject to their lawful, safe and proper conduct at all times, to enter and remain upon the site of the Show during the hours that it is open to the public, and for reasonable periods for setting up and taking down, for purposes related to the proper conduct of the Show. This licence is subject to the condition (which is also a condition of the Agreement) that the Exhibitor, his servants, agents and members of his party enter, remain upon, leave, bring property to, keep property at and remove property from the site of the Show entirely at their own risk. So far as the law allows, the Organiser shall not be liable to the Exhibitor, his servants, agents or members of his party in respect of loss of or damage to the Exhibitor's property, that of his servants, agents or members of his party, economic loss, or personal injury to or death of the Exhibitor, his servants, agents or members of his party, occasioned (however indirectly) by their presence at the Show, its taking up or setting down, whether in the exercise of this licence or otherwise, under the Occupiers' Liability Acts 1957 and 1984 or otherwise, and caused by any negligent act or omission or breach of statutory duty or contractual term, express or implied, in statute or common law, of the Organiser, his servants or agents, or any third party. The Exhibitor warrants that he will not cause, permit or suffer any agent, servant or member of his party to enter or remain upon the site of the Show except on the terms of this conditional licence and having notified them of its provisions beforehand, and agrees to indemnify the Organiser against any liability of the Organiser arising wholly or in part (however indirectly) from any breach of this warranty.

…

11 The total liability of the Organiser to the Exhibitor for any and all loss or damage, direct or consequential, arising from breach by the Organiser of any term or warranty, express or implied, in statute or common law, of or collateral to the Agreement, and not otherwise excluded, shall be limited to a sum equal to ten times the amount paid by way of stall fee by the Exhibitor to the Organiser under the Agreement.

…

14 The Exhibitor warrants that, in entering into the Agreement, he is not acting in reliance upon any other representation or warranty, express or implied, made by the Organiser, his servants or agents. No purported variation or waiver of any term of, or amendment of or addition to, the Agreement shall bind or avail either party unless made in writing and signed by both parties."

11. The FTT said this in the Decision about what Craft Carnival provides to stallholders:

"16. An indoor pitch, which is selected by approximately 60% of stallholders, is generally inside a marquee or occasionally a building and consists of an area ten feet by six feet. It is demarcated by a trestle table which is made available with two folding chairs to each stallholder. However, a stallholder is not required to have the trestle table and chairs and may choose to use their own display fittings and furniture within the space provided. Stallholders are also given an option of having an electricity supply point at a fixed cost of £30 to enable them to light their displays and approximately 20% of them take up this offer.

17. A scale plan indicating the allocation of the indoor pitches is attached to a board outside the marquee and an A4 sheet of paper with the stallholders name is placed on the trestle table marking the space allocated to the stallholder as shown on the plan. The allocation of spaces is at the sole discretion of Mrs Zombory-Moldovan although she does, where possible accommodate any requests for a particular location within the marquee.

18. Nothing is provided to the stallholders who take an outdoor pitch. This consists of a 20 foot square patch of ground demarcated by posts with a sign stating the name of the stallholder who is free to erect a tent or gazebo and arrange their items for display. Although it is possible on some occasions to provide electric power points to outdoor pitches this is very much the exception and generally these are not offered.

19. At some venues on site overnight camping in caravans or campervans is offered to stallholders free of charge with the agreement of the landowner provided prior notice is given to Mrs Zombory-Moldovan. She explained that this was to help stallholders from further afield who had to travel to the fair and was offered on a 'first come first served' basis without the provision of any additional services. If

this was offered Mrs Zombory-Moldovan would typically expect 10 to 15 stallholders to stay on site."

12. As the FTT explained in paragraph 20 of the Decision:

> "A few weeks before the fair 'setting-up' instructions are sent to the stallholder often together with fliers advertising the fair and two complimentary tickets for the stallholder to distribute to favoured customers. The allocation of the pitches for each stallholder is decided by Mrs Zombory-Moldovan a few days before the fair."

13. With regard to admission to a fair for a stallholder and his party, the FTT said this (in paragraph 27 of the Decision):

> "Mrs Zombory-Moldovan explained that in general the stallholder and his or her partner would be admitted to the fair without payment but that any additional people accompanying him or her, who did not make use of the two complimentary tickets provided to the stallholder, would be charged for admission as a member of the general public.

The legal framework

The exemption for leasing and letting of immovable property

14. Article 135 of the Principal VAT Directive (2006/112/EC) stipulates that Member States are to exempt from VAT "the leasing or letting of immovable property". The requirement has been implemented in the United Kingdom by schedule 9 to the Value Added Tax Act 1994, which provides for the "grant of any interest in or right over land or of any licence to occupy land" to be an exempt supply.

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

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

    (b) The exemption is to be interpreted strictly since it constitutes an exception to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person, but this does not mean that the exemption should be construed in such a way as to

deprive it of its intended effect (*Temco*, at paragraph 17 of the judgment);

(c) The concept is "essentially the conferring by a landlord on a tenant, for an agreed period and in return for payment, of the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right" (*Temco*, at paragraph 19 of the judgment; also Case C-150/99 *Swedish State v Stockholm Lindöpark AB* [2001] STC 103, at paragraph 38 of the Advocate General's opinion; *Sinclair Collis*, at paragraph 25 of the judgment; Case C-451/06 *Walderdorff v Finanzamt Waldviertel* [2008] STC 3079, at paragraph 20 of the judgment; and Case C-55/14 *Régie communale autonome du stade Luc Varenne v Belgium* [2015] STC 922, at paragraphs 21 and 22 of the judgment).

16. The CJEU explained as follows in *Temco*:

"20. While the court has stressed the importance of the period of the letting … , it has done so in order to distinguish a transaction comprising the letting of immovable property, which is usually a relatively passive activity linked simply to the passage of time and not generating any significant added value (see, to that effect, *Stichting 'Goed Wonen' v Staatssecretaris van Financien* (Case–326/99) [2003] STC 1137, [2001] ECR I-6831, para 52), from other activities which are either industrial and commercial in nature, such as the exemptions referred to in art 13B(b)(1) to (4) of the Sixth Directive, or have as their subject matter something which is best understood as the provision of a service rather than simply the making available of property, such as the right to use a golf course (*Sweden v Stockholm Lindöpark AB* (Case C-150/99) [2001] STC 103, [2001] ECR I-493, paras 24 to 27), the right to use a bridge in consideration of payment of a toll (*EC Commission v Ireland* (Case C-358/97) [2000] ECR I-6301) or the right to install cigarette machines in commercial premises (*Sinclair Collis Ltd v Customs and Excise Comrs* (Case C-275/01) [2003] STC 898, [2003] ECR I-5965, paras 27 to 30).

21. The actual period of the letting is thus not, of itself, the decisive factor in determining whether a contract is one for the letting of immovable property under Community law, even if the fact that accommodation is provided for a brief period only may constitute an appropriate basis for distinguishing the provision of hotel accommodation from the letting of dwelling accommodation (*Blasi v Finanzamt München I* (Case C-346/95) [1998] STC 336, [1998] ECR I-481, paras 23 and 24).

…

> 24. Lastly, as regards the tenant's right of exclusive occupation of the property, it must be pointed out that this can be restricted in the contract concluded with the landlord and only relates to the property as it is defined in that contract. Thus, the landlord may reserve the right regularly to visit the property let. Furthermore, a contract of letting may relate to certain parts of a property which must be used in common with other occupiers."

17. In *Sinclair Collis* and *Walderdorff*, the CJEU held that the transactions at issue were not exempt. Taking the latter case first, the CJEU concluded in *Walderdorff* that a contract granting fishing rights to an angling club did not fall within the exemption as it did "not confer on the angling club the right to occupy the immovable property concerned and to exclude any other person from it" (paragraph 22 of the judgment). The club "only [had] the right to fish in the bodies of water concerned" and did "not have any right to exclude any other person from use either of the waters owned by Ms Walderdorff or of the publicly owned waters where she has fishing rights registered in the Fisheries register" (paragraph 21 of the judgment).

18. *Sinclair Collis* concerned agreements by which the owners of pubs, clubs and hotels granted a tobacco company the right to install and operate cigarette vending machines. The agreements provided for the tobacco company to have access to the machines at all reasonable times and for them to be positioned by the owners of the pubs, clubs and hotels in the sites most likely to generate the maximum sales, subject to the proviso that they were not unreasonably to refuse consent if the company preferred different sites. The CJEU held (in paragraph 30 of the judgment) that:

> "the occupation of an area or space at the commercial premises is, under the terms of the agreement, merely the means of effecting the supply which is the subject matter of the agreement, namely the guarantee of exercise of the exclusive right to sell cigarettes at the premises by installing and operating automatic vending machines, in return for a percentage of the profits".

In the preceding paragraphs of the judgment, the CJEU had said:

> "27. According to the information supplied by the national court, the subject matter of the agreement is not the passive provision of an area or space, together with the grant to the other party of a right to occupy it as though he were the owner and to exclude all other persons from the enjoyment of that right.
>
> 28. That finding is supported, first of all, by the fact that the agreement does not prescribe any precisely defined area or space for the installation of the vending machines at the premises. Contrary to the position in relation to the characteristics of a letting, the location of

> the machine is material only in so far as it enables the maximum possible number of sales to be generated. Subject to that criterion, under the agreement there is nothing to prevent the machines from being moved about, to a degree, as the site owner wishes.
>
> 29. Secondly, the agreement does not confer on SC [i.e. the tobacco company] the right to control or restrict access to the area where the machines are placed. Whilst it is true that under the agreement SC retains an exclusive right of access to the machines to maintain them, keep them stocked with cigarettes and remove the cash inside, that right concerns only access to the machine itself, in particular its inner mechanism, and not access to that part of the premises where the machine is situated. In any event, according to the information provided by SC at the hearing, the right is restricted to the opening hours of the commercial establishment and cannot be exercised without the site owner's consent. Furthermore, third parties have access to the machines within such practical parameters as are imposed by the site owner, in particular during the opening hours of the establishment, and not according to limits determined by SC."

19. The exemption can include arrangements that English law would categorise as licences rather than leases (see e.g. *Customs and Excise Commissioners v Sinclair Collis Ltd* [2001] UKHL 30, [2001] STC 989, at paragraph 35).

20. It is also relevant to note the recent decision of the FTT (Judge Peter Kempster and Mr John Coles) in *International Antiques and Collectors Fairs Ltd v Revenue and Customs Commissioners* [2015] UKFTT 0354 (TC). That case concerned fees charged to exhibitors who booked spaces at antiques and collectors fairs organised by the taxpayer. The FTT held that the fees were not exempt. It was common ground between the parties that the fees were received for a single composite supply rather than several independent supplies (see paragraph 69 of the decision) and the FTT decided (in paragraph 75) that:

> "the over-arching single supply by the Company is not to be treated as a supply of a licence to occupy land, but rather a supply of participation as a seller at an expertly organised and expertly run antiques and collectors fair, one element of which is the provision of the pitch".

21. Miss Hui Ling McCarthy, who appeared for HMRC, attached a good deal of significance to the *International Antiques and Collectors Fairs* decision. Its importance is limited by the fact that the parties' arguments were rather different from those advanced in the present case and, doubtless for that reason, the FTT did not describe the relevant contractual terms in any detail (see paragraph 22 of the decision). The FTT's explanation of why it did not consider the supply at issue to be exempt is nevertheless noteworthy. As to that, the FTT said this:

"71. Our conclusion is that assessing the supply from the perspective of a typical Exhibitor, the economic and social reality is that the booking fees are payment for participation as a seller at one of the largest antiques fairs in Europe, attended by plentiful trade and public buyers. That is the opportunity provided by the Company and for which the Exhibitor pays the fees.

72. The description in the Booking Pack, and also on those parts of the Company's website that are aimed at Exhibitors, of what an Exhibitor gets for its money is the opportunity to sell to plentiful buyers at a successful fair organised and run by the Company. The typical Exhibitor is relying on the extensive marketing and organisation undertaken before the fair by the Company, and the Company's proven expertise in running well-attended multi-day fairs. For example (from the Booking Pack), 'Keen to ensure we continue to deliver to you a high footfall of custom, we will once again be keeping the current entry price for buyers. And through investing in engaging marketing initiatives, clever editorials and the effective use of the very latest in social media, we aim to reach out to and encourage a new generation of buyer to our fairs. We thank you for your continued support and for helping to maintain the truly global reputation of our fairs.' [Counsel for the taxpayer] invited us to take that mainly as advertising 'puff' but even if we make some allowance for the detailed attendance figures and other particulars stated on the website, the general picture remains as we have characterised it above.

73. We do not accept [counsel for the taxpayer's] submission that the Company's supply to an Exhibitor is 'a relatively passive activity linked simply to the passage of time and not generating any significant added value' (*Temco* [2005] STC 1451, [2004] ECR I-11237 at para 20). On the contrary, the Company's activities in organising and running the fair do generate significant added value; they are, we conclude, exactly what the ECJ described as 'other activities which are … commercial in nature, … or have as their subject matter something which is best understood as the provision of a service rather than simply the making available of property' (para 20). Our response to the ECJ's question (at para 27), 'whether the contracts, as performed, have as their essential object the making available, in a passive manner, of premises or parts of buildings in exchange for a payment linked to the passage of time, or whether they give rise to the provision of a service capable of being categorised in a different way' is that the contracts between the Company and the Exhibitors are for the provision of a service of participation as a seller at an expertly organised and expertly run antiques and collectors fair.

74. We are led to the same conclusion as Warren J reached in relation to the contracts for rooms in a massage parlour in *Byrom* [2006] STC 992:

> '[70] … it is then necessary to categorise the resulting single supply viewed as a complex of elements (the provision of the licence and of the various services). In my judgment, the over-arching single supply is not to be treated as a supply of a licence to occupy land. The description which reflects economic and social reality is a supply of massage parlour services, one element of which is the provision of the room. That, in my judgment, is the correct conclusion even if, which for my part I think probably is the case, the provision of the room was, to the masseuse, the single most important element of the overall supply and, indeed, one predominating over the other elements taken together. This is a case where the tax treatment of the supply is self-evident once it is established that the other service elements are not ancillary to the provision of the licence.'"

Identifying and characterising supplies

22. When determining the nature of a supply, regard must be had to the economic realities. In Joined Cases C-53/09 and C-55/09 *Revenue and Customs Commissioners v Loyalty Management UK Ltd* [2010] STC 2651, the CJEU noted (at paragraph 39 of the judgment) that "consideration of economic realities is a fundamental criterion for the application of the common system of VAT" (see also Case C-653/11 *Revenue and Customs Commissioners v Newey* [2013] STC, at paragraph 42 of the judgment).

23. The contractual position may not always fully reflect the economic reality (compare *Newey*, at paragraphs 44 and 45 of the judgment). It is likely, however, to be the most useful starting point (see *WHA Ltd v Revenue and Customs Commissioners* [2013] UKSC 24, [2013] STC 943, at paragraph 27). As Lord Neuberger explained in *Airtours Holiday Transport Ltd v Revenue and Customs Comrs* [2016] UKSC 21, [2016] 4 WLR 87 (at paragraph 47):

> "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".

24. Lord Hoffmann summarised the principles by which contractual documents are construed in these terms in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (at 912-913):

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact,' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191, 201:

> 'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts

> business commonsense, it must be made to yield to business commonsense.'"

25. More recently, Lord Neuberger (with whom Lords Sumption and Hughes agreed) said this in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 (in paragraph 15):

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

26. It is also relevant to note the guidance that the Supreme Court recently gave on the circumstances in which terms will be implied into contracts. In *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, Lord Neuberger (with whom Lords Sumption and Hodge agreed) noted (in paragraph 18) that in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, Lord Simon of Glaisdale had said (at 282-283) that:

> "for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

Having expressed the view that these (and other) observations represented a "clear, consistent and principled approach", Lord Neuberger added six comments (in paragraph 21):

> "First, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was 'not critically dependent on proof of an actual intention of the parties' when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly

concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is 'vital to formulate the question to be posed by [him] with the utmost care', to quote from *Lewison, The Interpretation of Contracts* 5th ed (2011), p 300, para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of 'absolute necessity', not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

Single and multiple supplies

27. Where a transaction involves the provision of more than one element, it may be necessary to decide whether, for VAT purposes, there is, on the one hand, a single supply or, on the other, two or more distinct supplies. If the former, a further question may arise as to whether the single supply, taken as a whole, is exempt.

28. Roth J summarised the relevant principles helpfully in *Revenue and Customs Commissioners v Bryce (trading as The Barn)* [2010] UKUT 26 (TCC), [2011] STC 903. He explained (in paragraph 23):

> "(a) Every supply of a service must normally be regarded as distinct and independent. However, a transaction which forms a single supply from an economic point of view should not artificially be split into separate supplies: *Card Protection Plan Ltd v Customs and Excise Comrs* (Case C-349/96) [1999] STC 270, [1999] ECR I-973, para 29.

(b) For this purpose, regard must be had to all the circumstances in which the transaction takes place: *Card Protection Plan*, para 28.

(c) There is a single supply where one or more elements are to be regarded as constituting the principal supply, whilst one or more elements are to be regarded by contrast as ancillary to that principal supply: *Card Protection Plan*, para 30.

(d) However, the fact that one element in a package supplied cannot be described as ancillary to another element does not mean that it is to be regarded as a separate supply for tax purposes. The question is whether those separate elements are to be treated as separate supplies or merely as elements in some over-arching single supply: *College of Estate Management v Customs and Excise Comrs* [2005] UKHL 62 at [12], [2005] STC 1597 at [12], [2005] 1 WLR 3351, per Lord Rodger of Earlsferry.

(e) In that regard, the test is whether the various elements supplied to the customer are so closely linked that they form, objectively, a single indivisible economic supply, which it would be artificial to split: *Levob Verzekeringen BV v Staatssecretaris van Financiën* (Case C-41/04) [2006] STC 766, [2005] ECR I-9433, para 22.

(f) It is important to take an overall view at the level of generality that corresponds with social and economic reality, without over-zealous dissection: *Dr Beynon* [2005] STC 55 at [31], [2005] 1 WLR 86 per Lord Hoffmann; *Card Protection Plan Ltd v Customs and Excise Comrs* [2001] UKHL 4 at [22], [2001] STC 174 at [22], [2002] 1 AC 202, per Lord Slynn of Hadley.

(g) The assessment should be made from the perspective of the customer, as a typical consumer, not the supplier: *Levob*, para 22; *Weight Watchers* [2008] STC 2313 at [17].

(h) The fact that a single price is charged for two or more elements is a relevant factor pointing to single supply but it is not decisive: *Card Protection Plan* (in ECJ), [1999] STC 270, [1999] ECR I-973, para 31. Similarly, the fact that separate prices are stipulated for various elements is not decisive where the two elements have an objective close link such that they form part of a single economic transaction: *Levob*, para 25.

(i) The fact that the same or similar goods or services could be supplied separately from different sources is irrelevant to the question whether in the particular transaction under consideration their combination produces a different economic result: *Baxendale* [2009]

STC 2578 at [24], following *Ministero dell'Economia e delle Finanze v Part Service Srl* (Case C-425/06) [2008] STC 3132, [2008] ECR I-897.

(j) The test is not whether the different elements in the services provided by the taxpayer to its customers have value and utility in their own right: *Baxendale* [2009] STC 2578 at [39]."

29. *Bryce* concerned a children's party business. A customer would have the use of a large hall referred to as the "play barn" and refreshments would afterwards be provided in a neighbouring café room. The taxpayer would generally provide a member of staff who would greet the customer and guests and then prepare the refreshments. The taxpayer was not involved in supplying any entertainment for the parties, but the play barn contained play equipment appropriate for the use of very young children.

30. Roth J concluded that there was a single, taxable supply. He said (at paragraph 37 of his decision):

> "From the perspective of the customer, the supply being received was, in my judgment, a single supply comprising various elements that enabled the holding of a two-hour play party, and it would be artificial and involve an 'over-zealous dissection' to characterise that for VAT purposes as two separate supplies."

Jurisdiction

31. An appeal to the Upper Tribunal can be brought only on a point of law: see section 11(1) of the Tribunals, Courts and Enforcement Act 2007. However, Mr Owain Thomas QC, who appeared for Craft Carnival, (rightly) accepted that misconstruction of the contract between Craft Carnival and a stallholder (such as HMRC allege) would involve an error of law (compare *Bahamas International Trust Co Ltd v Threadgold* [1974] 1 WLR 1514, at 1525H).

The Decision

32. The FTT held "the supply of the space to stallholders by Mrs Zombory-Moldovan to be an exempt supply of a licence to occupy land" (paragraph 64 of the Decision).

33. In arriving at this conclusion, the FTT rejected submissions on behalf of HMRC to the effect that Craft Carnival was contractually obliged to organise craft and garden shows. The FTT said:

> "54. The reference to the show or event in the T&C [i.e. terms and conditions] does not, in our view, impose any organisational requirements on Mrs Zombory-Moldovan but merely sets out the context of the agreement, i.e. there will be a craft fair. Similarly the restrictions imposed as to the type of goods that may be sold at the

craft fair does not materially affect the nature of the supply, e.g. a retail licence to sell calendars in a shopping centre would, no doubt, include a restrictions to prevent inappropriate pictures being displayed in a public place. We also consider that cl 5 of the T&C should be read as making provisions regarding frustration of the agreement rather than suggesting an obligation on Mrs Zombory-Moldovan to organise a craft fair.

55. Accordingly, despite the force of [counsel for HMRC's] submissions in relation to the organisation of a fair, given the absence of any reference to this in the T&C, it must follow that the purpose, and therefore the effect and economic reality, of the arrangement between Mrs Zombory-Moldovan and a stallholder is that she grants the stallholder a licence to offer for sale specific types of goods at the craft and garden fair on the dates specified in the booking form."

34. The FTT went on to express the following views:

(a) The present case is distinguishable from *Sinclair Collis* (as to which, see paragraph 18 above) since in that case "the cigarette machines could be placed anywhere within the public house" whereas "each stallholder is allocated a pitch by Mrs Zombory-Moldovan for the duration of the craft fair" (paragraph 59 of the Decision);

(b) The present case is also different from *Walderdorff* (as to which, see paragraph 17 above) as, while Mrs Walderdorff "could fish in the same waters as the angling club to which she had leased the fishing rights", "it would not be open under the T&C for Mrs Zombory-Moldovan, or indeed any other stallholder, to sell their crafts from a pitch she had supplied to a particular stallholder" (paragraph 60 of the Decision);

(c) In all the circumstances, "a stallholder occupies the pitch at a craft fair, allocated and supplied to him or her by Mrs Zombory-Moldovan, as owner to the exclusion of any other person" (paragraph 61 of the Decision); and

(d) The "supply to the stallholders in the present case cannot … fall within the categories of activities envisaged by the ECJ [in *Temco*] as being industrial or commercial in nature" (paragraph 64 of the Decision).

The contract

35. At the heart of the FTT's reasoning is the proposition that Craft Carnival has no contractual obligation to organise fairs. It is therefore convenient to address that at the outset.

36. Miss McCarthy took issue with the FTT's interpretation of the contractual position. Thus, she said in her skeleton argument:

> "[I]n circumstances where (as here) the FtT held that the contractual terms oblige Craft Carnival to provide a licence to sell goods at a stall or pitch *at a craft and garden fair* which it is understood by both parties that Craft Carnival, not the exhibitor, is responsible for organising, as a matter of commercial common sense and consistent with ordinary principles of contract law, the agreement can only be interpreted as obliging Craft Carnival to provide (i.e. organise) the fair itself and <u>not</u> just 10ft x 6ft or 20ft x 20ft plots of land."

37. In contrast, Mr Thomas maintained that the FTT was entitled to find that Craft Carnival had not assumed any obligation to stallholders to organise fairs. While the purpose of the supply of the licence from the point of view of a stallholder might be to offer goods for sale at an event attended by the general public, that represented no more than commercial context. To impose an obligation to organise a fair would, so it was said, involve a fundamental re-writing of the contract contrary to its express terms. There is, Mr Thomas submitted, nothing in Craft Carnival's terms and conditions to oblige it to organise the "Show" and the untrammelled right of cancellation of a Show conferred by clause 5 is inconsistent with an obligation to organise one. In effect, Mr Thomas argued, clause 5 provides contractual remedies for total or partial frustration of the contract.

38. We prefer Miss McCarthy's submissions. It seems to us that Craft Carnival agrees to provide a stallholder with a licence, not merely to use a plot of land for a particular period, but to use a stall or pitch "at the event specified overleaf" in order to "offer certain goods for sale". If, therefore, no event corresponding to the relevant description at which the stallholder could offer his goods for sale were held, Craft Carnival would not have fulfilled its contractual obligations. Were Craft Carnival neither to organise the fair nor to cancel it pursuant to clause 5 of the terms and conditions, it would be liable to find that it had both to return any money already paid by the stallholder and to compensate the stallholder for any further loss. By cancelling under clause 5, however, it could limit its exposure to repayment of "any deposit and stall fee paid under the Agreement".

39. Our reasons for these conclusions include these:

    (a) Clause 1 of the terms and conditions provides in terms for Craft Carnival to license the stallholder "to use a stall or pitch at the event specified overleaf ('the Show') to offer certain goods for sale". In the case of, say, the booking form mentioned in paragraph 9 above, the "event specified overleaf" was "Easter Craft and Garden Fair at Somerley". That of itself indicates that Craft Carnival could not fulfil its side of the bargain unless an "Easter Craft and Garden Fair at Somerley" were in fact held. We do not agree with Mr Thomas that

clause 1 is to be seen as just "preamble, imposing neither rights nor obligations on either party";

(b) That a stallholder's stall or pitch is to be at a fair is borne out by other parts of the terms and conditions and booking form. For example, the terms and conditions describe the stallholder as the "Exhibitor", clause 3 refers to goods "displayed or offered for sale at the Show" and clause 9 licenses a stallholder to enter and remain "upon the site of the Show" for "purposes related to the proper conduct of the Show". In fact, were there no "Show", it would seem that there could be neither "purposes related to the Show" nor a "site of the Show" and, hence, no right to enter or remain conferred on the stallholder. Further, there would have been no point in asking the stallholder about his "type of craft" or whether he would be demonstrating unless a fair were to be held;

(c) Clause 5 of the terms and conditions is perhaps of particular significance. This states that Craft Carnival "reserves the right to cancel the Show". The natural inference is that Craft Carnival would otherwise be obliged to provide the "Show". Why else would there be any need for Craft Carnival to reserve its rights in this way? Why else would Craft Carnival ever exercise the right to cancel a Show? Absent an obligation to provide the Show, its better course would be to disavow any responsibility for the absence of the Show and keep the stall fees;

(d) While the FTT regarded clause 5 of the terms and conditions as making provision for frustration of the contract between Craft Carnival and the stallholder (see paragraph 54 of the Decision), our own view is that it has little to do with frustration. In the first place, a stallholder is, on the face of it, to be released from his obligations only if and when Craft Carnival chooses to cancel the "Show", not as and when a frustrating event occurs (contrast in this respect *J. Lauritzen AS v Wijsmuller BV (The "Super Servant Two")* [1990] 1 Lloyd's Rep 1, where Bingham LJ said, at 9, "Frustration brings the contract to an end forthwith, without more and automatically"). Secondly, clause 5 allows Craft Carnival to cancel the Show even where there cannot be said to have been any frustrating event. Thirdly, frustration is essentially concerned with events outside the parties' control and which are not attributable to any fault or default of a party (see e.g. Chitty on Contracts, 32nd ed., at paragraph 23-061), yet clause 5 is not expressed to be limited to cases in which there is a need to cancel as a result of something outside Craft Carnival's control or for which it bears no responsibility. One of the reasons why *Krell v Henry* [1903] 2 KB 740, to which Mr Thomas made reference, differs from the present case is that the parties there had no control over whether the event on the basis of which the relevant contract was entered into (viz. the coronation of King Edward VII) happened whereas Craft Carnival would seem to be entitled to

invoke clause 5 where it is itself to blame for any need to cancel the Show;

(e) That Craft Carnival is responsible for organising the "Shows" is brought home by its description in the terms and conditions as "the Organiser" and, for good measure, the brochure accompanying the booking form and material on Craft Carnival's website (which would appear to be admissible as background). For example, the brochure referred to the Somerley event as "Our show" and speaks of Craft Carnival's "27 years of experience as organisers … go[ing] into every Craft Carnival event" and the website explains that Craft Carnival "organise major craft and garden shows";

(f) It is fair to say (as Mr Thomas did) that the booking form does not spell out what a "Show" is to comprise and, hence, that there could be a good deal of room for argument as to precisely what it must involve. We do not think, however, that the imprecision is such as to prevent there from being a requirement for an event corresponding to the description in the booking form; and

(g) Commercial common sense weighs heavily against Mr Thomas' submissions.

40. In the circumstances, it seems to us that, on the true construction of the contract between Craft Carnival and a stallholder, Craft Carnival is obliged to provide a stallholder with a stall or pitch *at the relevant fair*. The reference to the "Show" in the terms and conditions does not, as the FTT thought, merely set out the context of the agreement. To echo Lord Hoffmann in the *Investors Compensation Scheme* case (as to which, see paragraph 24 above), the booking form and terms and conditions would "convey to a reasonable person having all the background knowledge which would have been available to the parties in the situation in which they were at the time of the contract" that Craft Carnival was promising that there would be a fair of the relevant description. That, moreover, was the economic reality.

A single taxable supply?

41. If, as we have concluded, it is incumbent on Craft Carnival to ensure that there is a fair, does it follow that VAT is payable on the fees charged for stalls and pitches?

42. The first question must be whether there is a single supply or multiple supplies. Miss McCarthy contended for a single supply and we did not understand Mr Thomas to argue to the contrary. In our view, Miss McCarthy must be correct. Here, as in *Bryce* (as to which, see paragraphs 28-30 above), it would "be artificial and involve an 'over-zealous dissection'" to attempt to split what was provided to a stallholder into more than one supply. As a matter

of "social and economic reality", there was a single indivisible supply to a stallholder.

43. Mr Thomas submitted, however, that the (single) supply is exempt. He said that, even if Craft Carnival can be said to promise that there will be a fair, the main thrust of the agreement with a stallholder is to the effect that the stallholder will be permitted to occupy a stall or pitch. In the circumstances, Mr Thomas contended, the licence to occupy is the essential feature of the supply or principal element in any single composite supply.

44. In this connection, Mr Thomas suggested that what Craft Carnival is required to supply to stallholders (beyond the bare stall or pitch) is not sufficiently defined for the objective characteristics of a supply for VAT purposes to be present. We do not, however, accept this. It seems to us that such doubt as there may be as to the exact limits of Craft Carnival's obligations no more negates the fact of a supply than it does the existence of a contractual obligation.

45. Mr Thomas also advanced an argument in these terms:

> "[T]he lack of any real definition of what a fair amounts to is reflective of the fact that the reality is that the fair is something which is made up of the stallholders together as a sort of collective unit all meeting together and offering their craftwares to those who attend. It is not something which [Craft Carnival] provides to each or any stallholder."

46. Miss McCarthy accepted that such an analysis might be apposite in the case of, say, an informal car boot sale where buyers and sellers turn up on the day without booking in advance, but disputed its applicability to the fairs that Craft Carnival organises. She argued that the fee that a stallholder pays to Craft Carnival is payment for participation as a seller in a high-quality, expertly-organised and run craft and garden fair, one element of which is the provision of a pitch. She pointed out that Craft Carnival's own website says, "Ours are not 'village hall' events with a smattering of stalls".

47. We agree with Miss McCarthy. On the view we take of the correct interpretation of the contract between Craft Carnival and a stallholder, the transaction does not involve a "relatively passive activity linked simply to the passage of time and not generating any significant added value" (to quote from *Temco*, as to which see paragraph 16 above). Craft Carnival has very real and significant responsibilities beyond the bare provision of an appropriately-sized plot with, potentially, a table and chairs. In the *International Antiques and Collectors Fairs* case, the FTT considered that the contracts with which it was concerned were for "the provision of a service of participation as a seller at an expertly organised and expertly run antiques and collectors fair" (see paragraph 21 above). We take a similar view in the present case and do not

therefore consider Craft Carnival's supplies to stallholders to fall within the land exemption.

Conclusion

48. We shall allow the appeal. In our view, the land exemption does not apply to the relevant supplies and the fees paid for stalls and pitches are, accordingly, subject to VAT. It necessarily follows that we must remake the FTT's decision, and that Craft Carnival's appeal against the decision contained in a letter from HMRC dated 15 May 2013 must stand dismissed.

Mr Justice Newey **Judge John Clark**

RELEASE DATE: 7 October 2016