Hilary Term
[2014] UKSC 16
On appeal from: [2012] EWCA Civ 1571

JUDGMENT

The Commissioners for Her Majesty's Revenue and Customs (Respondent) *v* Secret Hotels2 Limited (formerly Med Hotels Limited) (Appellant)

before

Lord Neuberger, President
Lord Sumption
Lord Reed
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

5 March 2014

Heard on 29 and 30 January 2014

Appellant
David Milne QC
Nicola Shaw QC
(Instructed by Pinsent Masons LLP)

Respondent
Sam Grodzinski QC
Eleni Mitrophanous
Hanif Mussa
(Instructed by General Counsel for HM Revenue & Customs)

LORD NEUBERGER (with whom Lord Sumption, Lord Reed, Lord Hughes and Lord Hodge agree)

1. This appeal concerns the liability for Value Added Tax ("VAT") of a company which markets and arranges holiday accommodation through an on-line website. The outcome turns on the appropriate characterisation of the relationship between the company, the operators of the hotels, and the holiday-makers or their travel agents (which is an English law issue), and the impact of certain provisions of the relevant EU Directive on that relationship once it has been characterised (which is an EU law issue).

The basic facts

2. The appellant, Secret Hotels2 Ltd (formerly called Med Hotels Ltd, and known as "Med"), marketed holiday accommodation, consisting of around 2,500 resort hotels, villas, and apartments in the Mediterranean and the Caribbean, through a website, www.medhotels.com ("the website"). In these proceedings, everyone has focussed on hotel rooms, and has ignored villas and apartments, and I shall do the same. Around 94% of the sales of hotel rooms from the website were made to travel agents who no doubt sold them on to holiday-makers; the remainder of the sales were directly to holiday-makers.

3. An hotelier who wished his hotel to be marketed by Med had to enter into a written agreement with Med headed "global hotels – Terms and Conditions for allotment contracts", which I will call "the Accommodation Agreement". Once an hotelier had signed up to the Accommodation Agreement, his hotel would normally be included among those shown on the website.

4. When a potential customer (be it travel agent or holiday-maker) logged onto the website, she would see some "Terms of Use". If, after considering what was available, she identified a hotel at which she (or a client) wished to stay, she would book a holiday through a form on the website, which set out standard "Booking Conditions", which included, of course, terms as to payment. The customer had to pay the whole of the sum which she had agreed with Med to pay for the holiday (which I will call "the gross sum") before the holiday-maker arrived at the hotel. However, Med only paid the hotel a lower sum (which I will call "the net sum") in respect of the holiday concerned, pursuant to an invoice which was rendered by the hotelier when the holiday had ended.

The relevant VAT law

5. These proceedings concern Med's liability to VAT in respect of the supply of hotel accommodation through the medium of the website between the period between December 2004 and May 2007 ("the relevant period"). VAT is, of course, an EU tax, which is levied on the supply of goods or services. For the majority of the relevant period, the primary source of law on VAT was contained in Directive 77/388/EEC ("the Sixth Directive"), but on 1 January 2007 it was replaced by Directive 2006/112/EC ("the Principal VAT Directive"). As the two Directives contain effectively identical, although somewhat differently worded, provisions for present purposes, I will limit my references to the current one, and all references to articles are to articles of that Directive, unless stated otherwise.

6. By article 2.1(c), VAT is liable to be levied on "the supply of goods for consideration within the territory of a Member State by a taxable person acting as such". By virtue of article 135(2)(a), while leasing of property is exempt from VAT, "the provision of accommodation … in the hotel sector or in sectors with a similar function" is not. Article 45 states that "The place of the supply of services connected with immovable property … shall be the place where the property is located …".

7. The application of article 45 to travel agents could often result in their having to be registered in many member states, which could be inconvenient both for travel agents and for member states' taxing authorities. Accordingly, articles 306-310 contain a special scheme relating to travel agents. Article 306, which is the crucial provision for present purposes, is in these terms (albeit adding sub-paragraphs to para 1):

> "Article 306
>
> 1. [(a)] Member States shall apply a special VAT scheme, in accordance with this Chapter, to transactions carried out by travel agents who deal with customers in their own name and use supplies of goods or services provided by other taxable persons, in the provision of travel facilities.
>
> [(b)] This special scheme shall not apply to travel agents where they act solely as intermediaries and to whom point (c) of the first paragraph of Article 79 applies for the purposes of calculating the taxable amount.

2. For the purposes of this Chapter, tour operators shall be regarded as travel agents."

Article 79(c) excludes from liability to VAT the "amounts received by a taxable person from the customer, as repayment of expenditure … entered in his books in a suspense account."

8. Articles 307 and 308 are also of some relevance, and (with the paragraph numbering added to article 307) they provide as follows:

"Article 307

1. Transactions made, in accordance with the conditions laid down in Article 306, by the travel agent in respect of a journey shall be regarded as a single service supplied by the travel agent to the traveller.

2. The single service shall be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which the travel agent has carried out the supply of services.

Article 308

The taxable amount and the price exclusive of VAT, within the meaning of point (8) of Article 226, in respect of the single service provided by the travel agent shall be the travel agent's margin, that is to say, the difference between the total amount, exclusive of VAT, to be paid by the traveller and the actual cost to the travel agent of supplies of goods or services provided by other taxable persons, where those transactions are for the direct benefit of the traveller."

9. Provisions equivalent to articles 306-310 were contained in article 26 of the Sixth Directive (which was slightly different in both wording and layout, but identical in its central provisions and effect). They were given effect in the United Kingdom through the Tour Operators Margin Scheme (known as "TOMS"), which was promulgated in the Value Added Tax (Tour Operators) Order 1987 (SI 1987/1806). It is unnecessary to set out the provisions of TOMS as it has never been suggested that they have any different effect from articles 306-310.

The contentions of the parties in summary

10. HM Commissioners for Revenue and Customs ("the Commissioners") assessed Med for VAT in respect of the relevant period on the basis that TOMS applied. The Commissioners justified this on the ground that Med was a "travel agent" within the meaning of article 306, which "deal[t] with customers [namely travel agents and, less frequently, holiday-makers directly] in [its] own name and use[d] the services of other taxable persons [namely the hoteliers] in the provision of travel facilities". In effect, the Commissioners' analysis was that Med booked a room in a hotel for the net sum, which it paid to the hotelier when the holiday had ended, and Med supplied the room to its customer in return for the gross sum, which it received in advance of the holiday.

11. On that basis, it is agreed that Med would be a "travel agent" whose "operations" fell within article 306.1(a), and it would therefore be liable for VAT in accordance with article 307.1, namely on the gross sum paid by the customer to Med. Further, by virtue of article 307.2, the VAT would be levied in the UK, as that was Med's place of business. On the Commissioners' approach, therefore, where a customer had booked and paid for a holiday in Greece, by virtue of articles 306 and 307, as enacted through TOMS, Med would be liable to the Commissioners for VAT on the margin.

12. Med challenged this assessment on the ground that the nature of its business was such that it did not fall within article 306.1(a), but within article 306.1(b). This was on the basis that it was, during the relevant period, a "travel agent" which was "act[ing] solely as [an] intermediar[y]". (Although article 306.1(b) also contains a requirement that "point (c) of the first paragraph of article 79" must "appl[y] for the purposes of calculating the taxable amount", it is common ground that it would so apply if Med was "act[ing] solely as [an] intermediar[y]".) Med's analysis of the position was that, through Med's agency, the hotelier supplied a hotel room to a customer for the gross sum, and that Med was entitled to the difference between the gross sum and the net sum as a commission from the hotelier for acting as his agent.

13. On Med's approach, TOMS would not apply, and it is agreed that the difference between the gross sum and the net sum would be Med's commission for providing services to the hotelier, who was entitled to the gross sum from the customer. On that basis, the *prima facie* position would be as follows: (i) Med would have to register for VAT in Greece, (ii) it would have to pay VAT to the Greek taxation authorities on its commission, (iii) the hotelier would have to account for VAT on the gross sum, but (iv) the hotelier would be able to set off against its liability for that VAT, the input tax on the commission. However, by virtue of regulation 14(2) of the Value Added Tax Regulations 1995 (SI 1995/2518), there was an alternative way of accounting for VAT if Med's analysis was correct and

TOMS did not apply, namely the so-called "reverse charge procedure". Under this procedure, provided for in article 194, the hotelier would account for the VAT on the gross sum to the Greek authorities, so that Med would not have to pay any VAT.

The procedural history

14. The Commissioners' analysis based on TOMS resulted in their assessing Med to liability for VAT in respect of the relevant period in the sum of £5,643,736. Med challenged this assessment, but its challenge was rejected by the First-Tier Tribunal ("FTT", Miss J C Gort and Mr A McLoughlin) after a four-day hearing in a carefully reasoned judgment – [2010] UKFTT 120 (TC). The FTT identified the main issue as being:

> "Does [Med] act as a principal, as the Commissioners allege, or as an agent, as [Med] contends, when making the supplies of hotel accommodation? It is common ground that if the Commissioners are correct then [Med] is in principle required to account for output tax under the TOMS and if [Med] is correct then the supplies are treated as taking place in the jurisdiction in which the hotel belongs (and are, therefore, outside the scope of UK VAT)".

15. The FTT answered that question in favour of the Commissioners. In arriving at this conclusion, they took into account both the contractual documentation and the way in which Med's business was conducted. They considered that "the principal document for our consideration is the contract between [Med] and the hotel". After taking into account the way in which Med conducted its business, the FTT concluded that "the document as a whole" was not "consistent with" the notion that Med was "the agent and the hotel … the principal". Accordingly, the FTT dismissed Med's appeal.

16. Med appealed against that decision to the Upper Tribunal, where its appeal was allowed by Morgan J – [2011] UKUT 308 (TCC). He made the point that the agreed issue as identified by the FTT (see para 14 above) was not entirely satisfactory, as a result of which the issue was reformulated in these terms by the parties:

> "whether the [FTT] was entitled to find (as a matter of law and fact) that [Med] was supplying accommodation services as principal, in which case it was required to account for VAT in the United Kingdom, or whether it should have found that [Med] was acting as agent for a disclosed principal, in which case the supplies of accommodation

> services fell to be treated as made in the jurisdiction in which the hotel was situated and so do not give rise to any liability to VAT in the United Kingdom."

17. Morgan J considered that the FTT should not have addressed the issue by simply considering only part of the contractual documentation together with the way in which Med conducted its business. Rather, they should have started by assessing the effect of the totality of the contractual documentation, and only then asked themselves whether their assessment was altered by the way in which Med conducted its business. He approached the issue on that basis, and first decided that (i) the contractual arrangements between Med and the customers established that Med was contracting as agent for the hotelier, and (ii) the contractual arrangements between Med and the hoteliers were consistent with that conclusion. He then turned to various factors which impressed the FTT as to the way in which Med carried on business, and decided that none of those facts justified rejecting the view that Med was an agent acting for a disclosed principal.

18. Morgan J's decision was appealed by the Commissioners to the Court of Appeal, who allowed their appeal for reasons given in a judgment by Sir John Chadwick, with which Ward and McFarlane LJJ agreed – [2012] EWCA Civ 1571. They held that Morgan J was wrong to criticise the FTT for looking at "the whole facts of the case" as opposed to concentrating on the contractual documentation. They also held that the FTT was "plainly entitled" to reach the conclusion that they did, in the light of the contractual documentation and the way in which Med conducted its business. At the end of his judgment, Sir John identified a number of aspects of the way in which Med conducted its business which he regarded as being "of particular weight" in justifying the conclusion that it was a principal rather than an agent in terms of supplying hotel rooms to customers.

19. Med now appeals to this Court.

Overview of the issues

20. The outcome of this appeal ultimately turns on the question whether Med's activities in relation to the provision of hotel rooms to customers fell within article 306.1(a) or article 306.1(b). That question must be decided by the proper application of the provisions of article 306 to the circumstances of this case. Once the appropriate tribunal has identified and applied the relevant legal principles, it is ultimately a question of fact for that tribunal whether a travel agent falls within para 306.1(a) or para 306.1(b).

21. Accordingly, as the Court of Appeal held, it would only have been open to Morgan J to reverse the FTT's decision if (i) they had wrongly analysed the law, ie if they had been wrong in their view as to legal effect of the contractual relations and subsequent facts, or had wrongly interpreted or applied article 306, or (ii) the FTT had reached a conclusion which no reasonable tribunal could have reached.

22. So far as the law is concerned, what article 306 means and how it is to be applied is a matter of EU law, a topic on which the decisions of the Court of Justice of the European Community, the CJEU, are binding on national courts – see eg *Customs and Excise Commissioners v Madgett and Baldwin* (Joined cases C-308/96 and C-94/97) [1998] STC 1189. That case decided that the predecessor of article 306 applied not just to travel agents, but to all "traders who habitually arrange travel or tours and, in order to supply the services generally associated with activities of that kind, have recourse to other taxable persons" – see para AG33.

23. However, in so far as the provisions of article 306 depend upon the precise nature and character of the contractual relationship between two or more parties, that issue must be determined by reference to the proper law of the contract or contracts concerned, and, in so far as the subsequent conduct of the parties is said to affect that nature and character, the effect must also be assessed by reference to the proper law of the contract or contracts.

24. In that connection, it is worth referring to the observation of the CJEU in *Revenue and Customs Commissioners v RBS Deutschland Holdings GmbH* (Case C-277/09) [2011] STC 345, para 53, that "taxable persons are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purposes of limiting their tax burdens", albeit that this is subject to an exception for "abusive transactions" as discussed in *Halifax plc v Customs and Excise Commissioners* (Case C-255/02) [2006] Ch 387.

The correct approach to article 306

25. Article 306.1 postulates two categories of travel agent, namely (a) those "who deal with customers in their own name and use supplies of goods or services provided by other taxable persons, in the provision of travel facilities", and (b) those who "act solely as intermediaries". The parties were agreed that the two categories were mutually exclusive, but also that, taken together, they were comprehensive in the sense that a travel agent arranging accommodation for a customer must fall within one of the two categories. It may be that the proper analysis is that advanced by Lord Sumption during the hearing, namely that a travel agent can only be within article 306 if it falls within category (a), but it would be taken out of the article if it

also falls within category (b). However, it is unnecessary to decide whether that is right, at least for present purposes.

26. So far as the meaning of "in their own name" is concerned, some useful guidance was given by the CJEU in relation to the expression in a case concerned with the provisions in the Sixth Directive relating to an "operator" who received bets, arguably on behalf of a bookmaker. In *Belgium v Henfling* (Case C-464/10) [2011] STC 1851, para 33, the CJEU said that "involvement in his own name means that … a legal relationship is brought about not directly between the better and the undertaking on behalf of which the operator involved acts, but between that operator and the better, on the one hand, and between that operator and that undertaking, on the other".

27. There appears to be no case in the CJEU where the meaning of the word "intermediaries" has been considered. However, it would seem at any rate in most cases to be the equivalent of agents in English law, although both parties were (rightly in my view) inclined to accept that it had a wider meaning than "agents". In particular, it was not suggested to be a term of art.

28. The CJEU has given guidance as to the proper approach to be adopted in a case such as the present. In *Beheersmaatschappij Van Ginkel Waddinxveen BV v Inspecteur der Omzetbelasting, Utrecht* (Case C-163/91) [1996] STC 825, para 21, the court said that the predecessor of article 306.1(a) in the Sixth Directive:

> "makes the application of that article subject to the condition that the travel agent shall deal with customers in his own name and not as an intermediary. It is for the national court before which a dispute concerning the application of these provisions is brought to inquire, having regard to all the details of the case, and in particular the nature of the travel agent's contractual obligations towards the traveller, whether or not that condition is met."

29. The point was taken a little further in *Revenue and Customs Commissioners v Newey* (Case C-653/11) [2013] STC 2432, where the CJEU said this, reflecting what it had said in a number of earlier decisions:

> "42. As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case law of the court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT … .

> 43. Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction within the meaning of articles 2(1) and 6(1) of the Sixth Directive have to be identified.
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> 44. It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.
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> 45. That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions."

30. Where the question at issue involves more than one contractual arrangement between different parties, this Court has emphasised that, when assessing the issue of who supplies what services to whom for VAT purposes, "regard must be had to all the circumstances in which the transaction or combination of transactions takes place" – per Lord Reed in *Revenue and Customs Commissioners v Aimia Coalition Loyalty UK Ltd* [2013] 2 All ER 719, para 38. As he went on to explain, this requires the whole of the relationships between the various parties being considered.

The correct approach in domestic law

31. Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham.

32. When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and may often be of little weight. As Lewison J said in *A1 Lofts Ltd v Revenue and Customs Commissioners* [2010] STC 214, para 40, in a passage cited by Morgan J:

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

33. In English law it is not permissible to take into account the subsequent behaviour or statements of the parties as an aid to interpreting their written agreement – see *FL Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235. The subsequent behaviour or statements of the parties can, however, be relevant, for a number of other reasons. First, they may be invoked to support the contention that the written agreement was a sham – ie that it was not in fact intended to govern the parties' relationship at all. Secondly, they may be invoked in support of a claim for rectification of the written agreement. Thirdly, they may be relied on to support a claim that the written agreement was subsequently varied, or rescinded and replaced by a subsequent contract (agreed by words or conduct). Fourthly, they may be relied on to establish that the written agreement represented only part of the totality of the parties' contractual relationship.

34. In the present proceedings, it has never been suggested that the written agreements between Med and hoteliers, namely the Accommodation Agreements, were a sham or liable to rectification. Nor has it been suggested that the terms contained on the website ("the website terms"), which governed the relationship between Med and the customers, namely the Terms of Use and the Booking Conditions, were a sham or liable to rectification. In these circumstances, it appears to me that (i) the right starting point is to characterise the nature of the relationship between Med, the customer, and the hotel, in the light of the Accommodation Agreement and the website terms ("the contractual documentation"), (ii) one must next consider whether that characterisation can be said to represent the economic reality of the relationship in the light of any relevant facts, and (iii) if so, the final issue is the result of this characterisation so far as article 306 is concerned.

35. This is a slightly more sophisticated analysis than the single issue as it has been agreed between the parties, as set out in para 16 above, but, as will become apparent, at least in the circumstances of this case, it amounts to the same thing. In

order to decide whether the FTT was entitled to reach the conclusion that it did, one must identify the nature of the relationship between Med, the hotelier, and the customer, and, in order to do that, one must first consider the effect of the contractual documentation, and then see whether any conclusion is vitiated by the facts relied on by either party.

The effect of the documentation

36. The provisions of the contractual documentation were set out extensively in the Tribunal decisions below – see paras 27-36 of the FTT's decision, and paras 10-40 of Morgan J's decision. In my view, both the Accommodation Agreement and the website terms make it clear that, both as between Med and the hotelier, and as between Med and the customer, the hotel room is provided by the hotelier to the customer through the agency of Med, and the customer pays the gross sum to the hotelier, on the basis that the amount by which it exceeds the net sum is to be Med's commission as agent.

37. Turning first to the Accommodation Agreement, it begins by identifying the hotelier as "the Principal" and Med as "the Agent", and goes on to provide that, for a specified season, certain types (and sometimes certain numbers) of rooms in the hotel will be available at certain rates (which are what I have called the net sums), as set out in an attached "rate sheet".

38. The Accommodation Agreement then states that the Principal "hereby appoints the Agent as its selling agent and the Agent agrees to act as such". It immediately goes on to provide that the Agent agrees "to deal accurately with the requests for accommodation bookings and relay all monies which it receives from the Principal's Clients ('Clients') which are due to the Principal". The Agreement also states that it is to be construed in accordance with English law and that the English courts have exclusive jurisdiction. Subject to the other provisions of the Accommodation Agreement showing otherwise, the nature of the intended relationship appears to be quite clear. Med is to be the hotelier's agent for the purpose of marketing rooms in the hotel, and "Clients", or customers as I have called them, will book rooms through the agency of Med directly with the hotelier.

39. The Commissioners rely on four aspects of the Accommodation Agreement to justify the contention that it is not in fact an agency arrangement, but that, in truth, it envisages that Med will book rooms itself, with a view to sub-booking them on to customers. First, there is the basic financial arrangement under which Med was entitled "to receive a commission … calculated as any sum charged to a Client by the Agent which is over and above the prices set out in the rate sheet". Secondly, some of the financial provisions are said to be inconsistent with agency relationship.

Thirdly, it is said that the terms of the Accommodation Agreement include provisions which indicate that Med's interest is wider than that of a mere agent – such as covenants by the hotelier to honour customers' bookings, to insure the hotel against a number of risks, to keep the hotel clean, and to permit Med's representative to inspect the hotel. Fourthly, the Accommodation Agreement was very one-sided, in that it contained no express obligations on Med beyond those in the opening provision quoted in para 38 above, not even an obligation to promote the hotel, whereas there were many obligations imposed on the hotelier.

40. I am unimpressed with these points. They all stem from, and reflect, the fact that Med had a substantial business based on the website (as is evidenced by Med's turnover, the number of hotels for which it had an exclusive agency, and the fact that it was a member of a large group of companies including lastminute.com). This in turn means that it had built up a substantial goodwill in the holiday-making market which it wished to protect, and that it was in a much more powerful negotiating position than the hoteliers with which it was contracting.

41. More specifically, there is no reason why an agent should not be able to fix its own commission. It is common for agents acting in the sale of financial products, eg many types of insurance policies, to do so, and it has been specifically held to be an arrangement which is consistent with agency – see *Mercantile International Group plc v Chuan Soon Huat Industrial Group Ltd* [2002] 1 All ER (Comm) 788. As to the other financial terms, it is true that the hotelier was obliged to compensate Med for its losses (including loss of commission) if it did not provide the accommodation it had agreed to provide to a customer, and that Med was entitled "to retain the equivalent of the last 100 bed-overnights as a guarantee to cover marketing costs for the next season". I do not see why such provisions are inconsistent with a principal-and-agent relationship: all they did was to reflect the relative negotiating positions of the parties. The fact that the hotelier agreed to do things which would be of benefit to people staying in the hotel is easily explained by the point that Med was anxious to maintain its goodwill among holiday-makers and travel agents, and was in a strong enough bargaining position to impose such terms on the hotelier.

42. Turning to the website terms, the Terms of Use explained that Med "provides information concerning the price and availability of hotels" and that "[a]ny reservations you make on this site will be directly with the company whose hotel services you are booking". They also emphasised that Med "acts as agent only for each of the hotels to provide you with information on the hotels and an on-line reservation service". As for the Booking Conditions, they began by stating that Med "act[s] as booking agents on behalf of all the hotels … featured on this website and your contract will be made with these accommodation providers". They also stated that "[o]nce the contract is made, the accommodation provider is responsible to you to provide you with what you have booked and you are responsible to pay for it…".

The Booking Conditions also explained that "[b]ecause [Med is] acting only as a booking agent", it has "no liability for any of the accommodation arrangements". The Booking Conditions also provide that they are governed by English law and that any dispute is to be determined by the English courts.

43. The Commissioners point to one or two provisions of the Booking Conditions which, they say, are inconsistent with the notion that Med was only acting as the hotelier's agent rather than as a principal. First, if a customer (i) made a change to a booking or (ii) cancelled a booking, she was liable to pay to Med (i) an administration charge of £15, or (ii) a cancellation charge, whose quantum depended on how late the cancellation occurred, and in neither case did it appear that the charge was passed on to the hotelier. Secondly, if the hotelier was unable to provide the room as booked, Med agreed to "try to provide [the customer] with similar accommodation of equal standard", but if this was not possible, Med would allow a cancellation free of charge.

44. I do not consider that either of these points undermine the conclusion that Med was acting as the hotelier's agent. The failure to account for the administration charge is irrelevant; there is no reason to think that it did not reflect the genuine cost to Med. The failure to account for the cancellation charge, the "no show forfeit", and the interest on the deposits is more striking. As a matter of law, these sums would have been payable to the hotelier, but the fact that they were not so paid represents a breach of the agency arrangement on the part of Med or an accepted variation of the Accommodation Agreement, either of which would merely have reflected the relative bargaining positions of Med and the hotelier, and did not alter the nature of the relationship of the arrangement between Med, the hotelier and the customer. As to Med's obligation to "try to provide" alternative accommodation, it is clear, as a matter of interpretation, that the obligation could, and no doubt in practice would, have involved Med procuring the provision of accommodation by another hotelier; in any event, the obligation was clearly included to protect Med's goodwill.

The factors relied on by the FTT and the Court of Appeal

45. Having decided that the effect of the contractual documentation between hoteliers, Med, and customers is that Med marketed and sold hotel accommodation to customers as the agent of the hoteliers, I turn to consider the characteristics of the way in which Med conducted its business which persuaded the FTT and the Court of Appeal that Med in fact marketed and sold the hotel accommodation to customers as a principal. At the end of his judgment, Sir John Chadwick summarised the main factors as follows (with the addition of subparagraphs and adaptations to reflect the terminology adopted in this judgment):

"(1) Med dealt with customers in its own name (a) in respect of the use of its website and (b) in the services of its local handling agents.

(2) Med dealt with customers in its own name (and not as intermediary) in those cases where the hotel operator was unable to provide accommodation as booked and the customer rejected the alternative accommodation offered.

(3) Med dealt with matters of complaint and compensation in its own name and without reference to the hotelier.

(4) Med used the services of other taxable persons (the hoteliers) in the provision of the travel facilities marketed through its website.

(5) In relation to VAT, Med dealt with hoteliers in other Member States in a manner inconsistent with the relationship of principal and agent. In particular, Med did not provide the hoteliers with invoices in respect of its commission (nor even notify the hoteliers of the amount of that commission); so making it impossible for the hoteliers to comply with their obligations to account to the tax authorities of that Member State in accordance with the Principal VAT Directive.

(6)(a) Med treated deposits and other monies which it received from customers and their agents as its own monies. It did not account to the hoteliers for those monies. (b) It did not enter those monies in a suspense account so as to take advantage of article 79(c); and so cannot rely on the exclusion from the scope of article 306.1(b)."

The Commissioners also rely on the points that (7) hoteliers would invoice Med for the net sum in respect of each customer at the end of the relevant holiday, and (8) Med reserved a number of rooms, and sometimes specific rooms, in many hotels for which it paid the net sum in advance.

46. There is nothing in factor (1)(a): until a customer selected a particular hotel on the website, Med had to deal with the customer in its own name, but that does nothing to undermine the point that, once a hotel was selected, Med acted as the hotelier's agent. As to factor 1(b), it is true that Med appointed its own local agents to look after holiday-makers, but that was not inconsistent with its status as an agent of the hotelier, and is easily explicable by reference to Med's need to maintain goodwill in the holidaymaking market. The Commissioners relied on some of the terms of Med's standard form Handling Agency Agreement, but they take matters

no further. Factor (2) is of no assistance: I have already discussed it at para 44 above. Factor (3) is correct, and can be said to be contrary to one of the terms of the contractual documentation, which envisage a customer sorting out complaints with the hotelier. However, particularly given that (i) Med recovered from the hotelier any compensation which it negotiated and paid to a holiday-maker and (ii) Med's activities in this connection were not inherently inconsistent with its status as the hotelier's agent (albeit an agent in a strong bargaining position), the departure from the contractual terms was not of significance for present purposes. Factor (4) takes matters no further either.

47. As to factor (5), it is quite true that Med failed to provide the hoteliers with the information necessary to enable them to provide proper VAT returns, and that it failed to account for VAT as it should have done if it had been the hoteliers' agent as it contends. It is also true that this can be said to represent some sort of indication that the arrangements were not as the contractual documentation suggests. However, not only is it not a very strong point in itself, but, as Morgan J said, while "Med did not account for VAT in accordance with its contentions as to the legal position", it did not "account for VAT in accordance with the Commissioners' contentions as to the legal position" either.

48. Factor (6)(a) is of no assistance, and my remarks about the cancellation charge in para 44 above apply. Factor (6)(b) is merely an aspect of factor (5). As to factor (7), if Med was an agent as it contends, one would have expected the hotelier's invoices to have been for the gross sums with a deduction for Med's commission, and the fact that they were for the net sums is consistent with the Commissioners' analysis. However, the invoices are not financially inconsistent with the contractual arrangements contended for by Med, as the hotelier would expect Med to pay the net sum, not the gross sum. In any event, at least on their own, such invoices cannot change the nature of the contractual arrangements between Med, the customer and the hotelier, given that (i) they post-date not merely the contracts but their performance, and (ii) the customer was not aware of the invoices, so it is hard to see how they could affect her contractual rights or obligations.

49. As to factor (8), it seems to me that there is nothing inconsistent in terms of logic or law in Med reserving a hotel room in its own name in anticipation of subsequently offering it on the market, on the basis that a customer who booked the room would not contract with Med, but would contract through Med with the hotelier. The purpose of Med reserving rooms in this way is obvious, namely to maximise its opportunity to earn commission and to maintain or improve its goodwill with potential customers. The fact that Med had to pay for the rooms it reserved is unsurprising, but such payments were always recoverable, in that, if there were insufficient bookings by customers at the hotel for the season in question, the amount paid by Med was carried forward to the next season. Of course, Med ran a

risk of losing its money, but that fact does not undermine the notion that Med acted as an agent.

50. The Commissioners contend that the factors identified in para 45 above justify the conclusion that the agency arrangement was somehow varied by the parties' conduct, and in particular the conduct of Med, as the commercially dominant party, so that it became the person providing the customers with hotel rooms, as opposed to the agent of the hoteliers who provided the rooms. It is unnecessary to address the question of how such a contention might be analysed in legal terms, because, for the reasons given in paras 46-49 above, those factors, even taken together, are not inconsistent with, and therefore cannot undermine, the existence and nature of the agency arrangement.

The decisions below

51. The decision of the FTT cannot stand, as they appear to have held that, after taking into account the way in which Med conducted its business, the true effect of the written contractual arrangements between Med and the hoteliers was not that Med was an agent through whom the hotelier provided the customer with a room, but that the hotelier provided Med with a room which Med then provided on to the customer. For the reasons I have given, that analysis is unsustainable. The decision of Morgan J to the contrary effect was right, and I shall consider his conclusion further in the next section of this judgment. Given that the FTT was wrong in its legal analysis of the relationship between Med, hoteliers and customers, the Court of Appeal's decision, which was based on the conclusion that the FTT adopted a permissible approach, cannot stand.

52. In these circumstances, as Morgan J was right to reverse the FTT's decision, and analysed the legal relationship between Med, the hoteliers and customers correctly, we should uphold his conclusion, unless we consider that he then went wrong in relation to the question of the application of article 306 to the facts of this case, an issue to which I now turn. If he did go wrong, then we should, if possible, resolve that question ourselves.

The application of article 306 to the facts of this case

53. Given that I have concluded "[Med] was acting as agent for a disclosed principal", the consequence according to the agreed reformulated issue (set out in para 16 above) would appear to be that "the supplies of accommodation services fell to be treated as made in the jurisdiction in which the hotel was situated and so do not give rise to any liability to VAT in the United Kingdom". However, as a matter

of principle, it is necessary to address the question whether, as a matter of EU law, the fact that Med was acting as an agent does justify that conclusion. As explained above, the characterisation of the relationship between Med, customers, and hoteliers is a matter of English law, but the ultimate issue on this appeal is an issue of EU law, namely whether, in the light of that characterisation, Med is liable for VAT as the Commissioners allege, and that issue must be resolved by applying article 306 to the facts of this case, which include the fact that Med is an agent as it contends.

54. The reformulated issue effectively assumes the correctness of the proposition that, once it is concluded as a matter of English law, that the effect of the contractual documentation and the way in which the parties conducted their relationship was that Med was an agent for the hotelier with whom a customer booked accommodation, as opposed to a principal who booked accommodation with the hotelier and then booked it on to a customer, Med fell within article 306.1(b), rather than article 306.1(a). That is not an assumption which can safely be made in every case, but it seems to me that in the general run of cases, such a proposition will be correct.

55. It seems to me clear from the guidance given by the CJEU in *Henfling* (quoted in para 26 above) that the concepts of an "intermediary" and an agent are similar, as are the concepts of a person dealing "in his own name" and a principal. Furthermore, the CJEU's suggested approach as to how the issue should be determined seems very similar to that of the English court. I have in mind what was said in *Van Ginkel* and *Newey* (quoted in paras 28 and 29 above), namely that "the travel agent's contractual obligations towards the traveller" are of particular importance in deciding whether article 306.1(a) or article 306.1(b) applies, but it is also necessary to "hav[e] regard to all the details of the case", and, in that connection, the "economic and commercial realities" represent "a fundamental criterion". A contract which does not reflect "economic reality" and a "purely artificial arrangement" are similar to the shams, rectifiable agreements and other arrangements considered in para 33 above.

56. Thus, in deciding whether article 306.1(a) or article 306.1(b) applies, the approach laid down by the CJEU in order to decide whether a person such as Med is an intermediary is very similar to the approach which is applied in English law in order to determine whether Med was an agent, ie the very exercise undertaken in paras 31-50 above. One starts with the written contract between Med and the customer, as it is the customer to whom the ultimate supply is made. However, one must also consider the written contract between Med and the hotelier, as there would be a strong case for saying that, even if Med was the hotelier's agent as between it and the customer, Med should nonetheless be treated as the supplier as principal (in English law) or "in its own name" (in EU law) if, as between the hotelier and Med, the hotel room was supplied to Med.

57. For the reasons set out in paras 36-44 above, I consider that the contractual documentation supports the notion that Med was an intermediary, and, in the light of the discussion in paras 45-50 above, it seems to me that "economic reality" does not assist a contrary view. Further, one aspect of economic reality is that it is the hotelier, not Med, who owns the accommodation and it is the customer, not Med, to whom it is ultimately supplied: that does not, of course, prevent the hotelier supplying the accommodation to Med for supply on to the customer, but it makes it hard to argue that Med's analysis that it is no more than an agent is contrary to economic reality. Further, one must be careful before stigmatising the contractual documentation as being "artificial", bearing in mind that EU law, like English law, treats parties as free to arrange or structure their relationship so as to maximise its commercial attraction, including the incidence of taxation – see *RBS Deutschland*, cited in para 24 above.

58. As is realistically, if impliedly, acknowledged by the Commissioners (and indeed by Med) in the reformulated agreed issue on this appeal (as set out in para 16 above), once it has been decided that Med was, as it contends, the hotelier's agent in relation to the supply of accommodation to customers as a matter of English law, it follows, at least on the facts of this case, that it was an intermediary for the purpose of article 306.1, and accordingly this appeal must succeed. It may be that Morgan J was wrong not to go on to consider the EU law issue, but it is scarcely surprising that he did not do so in the light of the agreed formulation of the issue before him. Indeed, as appears from the discussion in paras 53-57 above, EU law and English law in this case seem to travel along effectively the same lines, and accordingly I consider that Morgan J reached the right conclusion for substantially the right reasons.

Conclusion

59. I would accordingly allow Med's appeal, discharge the order of the Court of Appeal, and restore the order of Morgan J in the Upper Tribunal.