[2018] UKUT 0041 (TCC)

Appeal number: UT/2016/0218

VAT – exemption for leasing or letting of immovable property – hotel sector exclusion – Article 135(1) and (2), Principal VAT Directive – VATA, Sch 9, Group 1, Item 1 and 1(d) and Note (9) – whether grants of fractional interests in a property were exempt or standard-rated supplies

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

FORTYSEVEN PARK STREET LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
JUDGE KEVIN POOLE

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 15 – 16 November 2017

Melanie Hall QC, instructed by KPMG LLP, for the Appellant

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

DECISION

1. This is the appeal of the appellant, Fortyseven Park Street Limited ("FPSL"), from the decision of the First-tier Tribunal ("FTT") (Judge Harriet Morgan and Mr John Coles), reported at [2016] UKFTT 569 (TC); [2017] SFTD 35, by which the FTT dismissed FPSL's appeal against a decision of the respondents, HMRC, that value added tax at the standard rate was payable on the consideration received by FPSL in exchange for the grant of certain Fractional Interests[1] in a property at 47 Park Street, Mayfair, London, and that the supplies were not exempt supplies.

2. Put briefly, the FTT determined three core issues:

(1) First, the FTT decided that the supplies of the Fractional Interests fell, in principle, within the exemption from VAT provided for the leasing or letting of immovable property ("the land exemption issue").

(2) Secondly, however, the FTT found that the land exemption was excluded because the grant of the Fractional Interests was the provision of relevant accommodation in a similar establishment to an hotel ("the hotel sector issue").

(3) Finally, the FTT dismissed FPSL's argument that under the principle of fiscal neutrality the supplies of the Fractional Interests should be treated in the same way (in other words as exempt) as more traditional timeshare interests ("the fiscal neutrality issue").

3. FPSL has appealed the FTT's decisions on the hotel sector issue and the fiscal neutrality issue. In their response to FPSL's notice of appeal, amongst other points HMRC contended that the FTT should have decided the land exemption issue in favour of HMRC.

The facts

4. The FTT made substantial findings of fact, which it set out at [6] to [66] of its decision. It did so on the basis of the documents before it and the evidence of Mr Lee Dowling, the senior vice president of Europe and the Middle East for Marriott Vacations Worldwide Corporation ("MVWC"), the ultimate parent company of FPSL and a director of MGRC Management Limited ("MGRC"), the manager of 47 Park Street, which is itself also ultimately owned by MVWC. The FTT also had the benefit of a site visit to 47 Park Street.

5. At the material time, FPSL owned a 60-year lease, expiring on 31 October 2050, on 47 Park Street in Mayfair, a property which had formerly been an hotel. In 2002, FPSL refurbished the property. That created 49 self-contained apartments ("Residences"), divided into five categories based on the number of bedrooms, additional facilities and approximate floor space. Irrespective of category, each Residence includes one or two bedrooms, a living room with dining area, a separate

[1] For explanation of this term, see [13] et seq.

kitchen and one or two bathrooms. At the time of the hearing before the FTT, 617 Fractional Interests in the Residences had been sold out of a total available of 631 (six potential Fractional Interests had been retained for maintenance and other purposes). We were informed that since that time the last such interest had been sold and that, as had been anticipated, the registered legal title to 47 Park Street had been transferred to a trust which holds the property on trust for the owners of the Fractional Interests.

6. The FTT made the following findings with respect to 47 Park Street itself:

> "[14] The building has a pillaried [*sic. We think this should read '**pillared**'*] entrance with no signage indicating that the Property is anything other than residential premises. In the entrance hall, there is a concierge desk and a 24 hour reception desk. The concierge is uniformed and occasionally may stand on the steps outside the building. Mr Dowling stated that the concierge provides services in a manner consistent with other high end residential developments in the area. There are limited public areas. There is a small guest lounge to the right of the entrance, an internet room on the first floor and there are cloakrooms for ladies and gentlemen. Mr Dowling said that the facilities could be described as comparable with those of a small boutique hotel but not in his view with those of a larger style of hotel where, for example, a bar and restaurant would typically be provided.
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> [15] The residences are laid out over seven floors. On floors 1, 2 and 3 and in the basement there are a number of storage areas for members' property. Prior to a member's arrival these personal effects may be left in the residence for the member to unpack or may be unpacked by the housekeeping service as the member chooses. Each residence is accessed by a private door operated with a key card. Members report to reception to collect their key card on arrival; they hold key cards for a residence only during the period of occupancy. Mr Dowling stated that the arrival and departure process for members reflects those that would be experienced in any of the timeshare resorts operated under the Marriott brand.
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> [16] Each residence has a living space with sofas and chairs, a dining area, one or two bedrooms and bathrooms and a small kitchen. The kitchen is equipped with crockery, glasses, cutlery and pans. The housekeeping service stock the kitchen with specified groceries on the request and at the cost of the member. Mr Dowling said that only about 30% of members use the kitchen facilities. Most of the members who eat at the premises use the in-room dining facilities. The decor of the residences is uniform (although the Members Committee has rights to approve changes (see para [53], below as regards the operation of this committee). Inside each residence there is information about the facilities and services available for ease of reference by the members and also for the information of any non-members staying at the Property. There are complimentary toiletries in the residences as well as dressing gowns and slippers."

Membership Agreement

7. The key agreement, under which the Fractional Interests are sold by FPSL, is the Membership Agreement. The FTT made a number of findings in that regard, and the parties addressed us in their submissions on the terms of that agreement. There have been a number of different versions of this agreement, but it was common ground between the parties that the version dated December 2010 ("the Membership Agreement") was representative.

8. Under "A. Constitution of the Plan" (defined to mean the rights and obligations described in the Membership Agreement relating to the use and enjoyment of the Residences and the Additional Plan Benefits[2]), it is recited that by execution of the Membership Agreement and the full payment of the purchase price, the purchaser will acquire personal contractual rights and obligations relating to the use of the Residences and the enjoyment of the Additional Plan Benefits during the term of the Plan. That term was until 31 October 2050.

9. The following are expressed to be in exchange for the purchase price:

> (a) the grant of access to certain occupancy rights (as to which see [12] below) over the Residences, as well as access (as available) to a Resale Programme (see [16] below) and Rental Programme (see [17] below); and
>
> (b) pursuant to arrangements with other companies, the grant of access to exchange programmes that are or may become available under the Plan, including an Interval Exchange Programme (see [18] below) and the Marriott "Rewards" Points Programme (see [15] below).

10. The Membership Agreement also provides for an Annual Residence Fee, in exchange for which the Manager (MGRC – which, however, was not a party to the agreement – or its successors and assigns) was to procure the management and administration of the property itself and the Plan. It was provided that the payment of the Annual Residence Fee entitled the purchaser to exercise the occupancy rights and (subject to relevant fees) the Additional Plan Benefits. MGRC is separately registered for VAT.

11. The rights of a purchaser, or member, are set out in Section III of the Membership Agreement. There it is confirmed that, by execution of the agreement and full payment of the purchase price, the purchaser will acquire rights to occupy a corresponding Residence Type (that is, that one of the five categories for which the purchaser has paid) and to benefit from the Additional Plan Benefits, as available. The continuation of those rights is expressed to be conditional on compliance by the purchaser with its obligations under the Membership Agreement, in particular, first, payment of the Annual Residence Fee and secondly, remaining a member in good standing (broadly, one who is not in default in relation to a number of payment obligations).

12. The Membership Agreement provides for three types of occupancy rights:

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[2] This term is explained at [14] to [18] below.

(a) Primary Use Time. This is a right, for each Fractional Interest owned, to occupy a Residence of the relevant type for 21 days in each Use Year (defined to mean calendar year) subject to no rental fee, in accordance with the reservation rules. Members may designate third parties to use their Primary Use Time. A member can also exercise the Additional Plan Benefits in lieu of occupancy during the Primary Use time. Unused Primary Use Time cannot be carried forward for use in future years.

(b) Extended Occupancy Time. This entitles a member, once he has reserved or used all his Primary Use Time, to occupy a Residence of the relevant type (if available) for up to 14 nights per year, at a per diem rate, again subject to the reservation rules. The per diem rate is expressed to be a discounted rental rate which is set each year by the Manager with the approval of the Members Committee. Unlike the Primary Use Time, Additional Plan Benefits may not be used in lieu of Extended Occupancy Time, and the Extended Occupancy Time is strictly for members' use only; no third party designation is permitted. But as with Primary Use Time, Extended Occupancy Time may not be carried forward for future years.

(c) Space Available Programme. Members who have used or reserved all of their Primary Use Time, and who have joined the Manager's Rental Programme, may at the Manager's discretion occupy a Residence for any number of nights, not exceeding three consecutively, at the per diem rate on a "space available" basis, and subject to the reservation rules. No Additional Plan Benefits may be exercised in lieu, and guests of a member may not occupy in place of the member. This programme ceased on sale of all the Fractional Interests.

13. "Fractional Interest" is itself a defined term, expressed to mean "the right to occupy twenty-one (21) nights of Primary Use Time and up to a maximum of fourteen (14) nights of Extended Occupancy Time and all the rights and obligations deriving therefrom under this Agreement". The sale of Fractional Interests is permitted under the agreement, by means of a surrender in favour of a third party, for which consent of the Manager is required (but which may only be withheld if there is a breach of the agreement or, where a sale is in contemplation, the Manager is exercising a right to re-acquire the member's interest by paying the offer price), and the grant of new rights to the third party. Fractional Interests may also be charged, pledged, assigned, surrendered or otherwise used as security or guarantee for any monies borrowed to pay the purchase price.

14. "Additional Plan Benefit" is also defined to mean, as available, the Membership Marriott "Rewards" Points Programme, the Resale Programme, the Rental Programme and the Interval Exchange Programme affiliation (all as described below).

15. Under the Membership Marriott "Rewards" Points Programme, members are able to trade either seven or fourteen nights, as allocated at the Manager's discretion,

of Primary Use Time for the corresponding amount of "Rewards" points. Those points give a range of possible benefits, including the right to stay at Marriott hotels.

16. The Resale Programme may be established by the Manager once Fractional Interests in 95% of an individual Residence type have been sold. There is no guarantee of a sale. Under such a programme, the Manager or an affiliate would act as listing agent for members wishing to sell their Fractional Interests who participate and would receive a commission based on the sale price. Members can dispose of their Fractional Interests outside the Resale Programme, subject to the restrictions summarised at [13] above.

17. The Rental Programme enables members to list individual nights within the Primary Use Time for rental to other members and members of the public. The rental rates are those applicable at the relevant time, and are not the per diem rates applicable to the Extended Occupancy Time or the Space Available Programme. To avail of this service, a member must enter into a rental listing agreement with the Manager. That constitutes the Manager the member's exclusive rental agent. The Manager does not guarantee any rentals, and a member may choose to occupy for any nights listed for rent under the programme that have not been rented.

18. The Interval Exchange Programme enables members to exchange one or more weeks of Primary Use Time available for each Fractional Interest owned in each year for stays of an equivalent time at timeshare properties affiliated with Interval International, Inc ("Interval"), including other Marriot affiliated properties. Interval is an independent exchange company; neither FPSL nor MGRC are agents for Interval. The Membership Agreement provides that the initial membership of the programme, for the first 12 months, will be provided at FPSL's cost. Thereafter, a member may maintain membership by paying Interval the annual membership fee in accordance with Interval's terms and conditions. An exchange fee is payable.

19. All of the rights to Primary Use Time, Extended Occupancy Time and (when available) the Space Available Programme are subject to the reservation rules. Members who wish to occupy a Residence must make a reservation request designating the desired date of occupancy and must receive confirmation from the Manager prior to occupancy. Reservations for Primary Use Time and Extended Occupancy Time can be made only in respect of the purchased Residence type. For the Primary Use Time, members may reserve or occupy up to two Residences concurrently.

20. Primary Use Time can be booked at any time during the year, but it must be booked in advance, there are limits on the number of concurrent days' occupation, on the total number of days which may be reserved at peak times and on reserving a single night during weekends. There is a waiting list for members who wish to reserve Primary Use Time which is already reserved by other members. Members are entitled to put their names on the waiting list for a maximum of two stays, not exceeding seven nights per stay, up to 180 days in advance of the desired arrival date. The evidence of Mr Dowling, which the FTT accepted, was that in practice there was not an issue in members not being guaranteed to be able to reserve all their Primary

Use Time. It accepted that FPSL was able to satisfy the requirements of members in this respect albeit that members may not always get their first choice of nights and may have to go on the waiting list.

21. Members may also cancel their reserved Primary Use Time up to 14 days prior to the date of arrival. If a member fails to do so, then (unless the member has listed the reserved days for rental under the Rental Programme) the Residence is kept empty for the member's occupancy for the reserved night or nights, and the member loses – or effectively uses up – the applicable Primary Use Time.

22. Section IV A of the Management Agreement recites that MGRC has entered into an agreement with FPSL under which MGRC is responsible for the maintenance, management and administration of 47 Park Street, the allocation of specific Residences for occupancy by members and the establishment of rules and regulations for the use of the property. Members are required to pay the Annual Residence Fee to the Manager in respect of each Fractional Interest owned. The amount of the initial fee is based on an Annual Operating Budget, which is expressed to cover a wide range of expenses, including repair and maintenance, housekeeping, utilities, property taxes, insurance, depreciation, reserve for future capital expenditure and the management fee, which is set at 15% of the Annual Residence Fee. Adjustments are made for actual expenses.

23. Some services are not included within the Annual Operating Budget (and thus are not covered by the Annual Residence Fee), but are available for an extra charge payable to the Manager: room service and grocery deliveries, currency exchange, a laundry and dry cleaning service, an in-house florist, a personal shopping service, a car valet and limousine service and newspaper delivery.

24. The budget is presented to a Members Committee for approval. The committee is made up of seven elected members who meet once a year. It is responsible for representing members' views on the management and operation of the Plan. Its role is primarily consultative and advisory; decisions concerning the management and operation of the property and the Plan are for the discretion of the Manager exercising its reasonable business judgment. However, the Members Committee has the following rights:

(1) To approve the appointment of the auditors of the Property and to receive audited statements of the annual operating expenses.

(2) To be advised by the Manager of the need for a special assessment to be billed to members to cover unforeseen costs such as new taxes or other costs outside the control of the Manager that are deemed necessary or desirable to meet the changing needs of the Property and the members.

(3) To be advised by the Manager of the adequacy of the reserve fund included in the Annual Operating Budget for each year.

(4) To approve or reject by majority vote the Annual Operating Budget proposed by the Manager at the annual meeting. If rejected, the Manager is

required to present a revised budget. If that is rejected the last budget submitted by the Manager goes into effect.

(5) The power, if it cannot agree on the Annual Operating Budget for three years or five out of any seven years, to poll the members on the issue of removing and replacing the Manager. If two-thirds of the members vote to change the Manager, it must retire.

(6) To discuss and approve the Per Diem Rate proposed by the Manager for each year. If the Committee cannot reach agreement with the Manager, the rate for the preceding year remains in place.

(7) The power to replace the Manager in the event it is bankrupt or enters into receivership.

(8) To approve any changes to the reservation rules that may be proposed by the Manager to ensure equitable occupancy rights and to establish priorities to deal with excessive demand periods.

25. Members also have access to a number of services supplied not by FPSL but by third parties and which are not referred to in the Membership Agreement. These, the FTT found, are regarded by FPSL as commercial "tie-ins" which are intended to act as a marketing benefit for both FPSL and the third parties involved. None of them are actively marketed to non-members who stay at 47 Park Street. The FTT set out these services at [64] as follows:

> "These comprise complimentary membership of the Marriott Park Lane Health Club (which includes a gym and indoor pool); a 25% discount on all food and non-alcoholic beverages at the Marriott Park Lane Hotel; access to the nearby Spa Illuminata and discounts on treatments and packages; until December 2013 membership privileges at London Golf Club (there is currently an informal arrangement only); access to Parsley-Tyler, a private club designed for business people and travellers; access to Morton's private members club; and priority booking and tickets at the Royal Opera House."

The law

EU law

26. Article 135(1)(l) of the Principal VAT Directive (Council Directive 2006/112/EC of 28 November 2006) obliges member states to exempt from VAT "the leasing or letting of immovable property". However, by article 135(2), there is excluded from that exemption:

> "(a) the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites"

Article 135(2) also provides that:

> "Member States may apply further exclusions to the scope of the exemption referred to in point (l) of paragraph 1."

Domestic law

27. Section 31(1) of the Value Added Tax Act 1994 ("VATA") provides that a supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 VATA. The relevant group in Schedule 9 is Group 1 which, subject to certain exceptions, describes as an exempt supply in Item 1:

> "The grant of any interest in or right over land or of any licence to occupy land …"

28. Of the exceptions, one is relevant to this appeal, that in Item 1(d):

> "(d) the provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation or of accommodation in rooms which are provided in conjunction with sleeping accommodation or for the purpose of a supply of catering"

29. In this connection, Note (9) to Group 1 of Schedule 9 provides:

> " 'Similar establishment' includes premises in which there is provided furnished sleeping accommodation, whether with or without the provision of board or facilities for the preparation of food, which are used by or held out as being suitable for use by visitors or travellers."

Discussion

A. The land exemption issue

30. It is well-established, and was common ground, that exemptions are to be interpreted strictly, though not restrictively, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. That has been a consistent starting point in any consideration by the Court of Justice (of the European Communities, or ECJ, and of the European Union, or CJEU) of the scope of an exemption. It is equally trite that the exemptions provided for, now in the Principal VAT Directive, have their own autonomous meaning in Community law.

31. Those principles have been summarised in a number of cases before the ECJ and CJEU. One, which is relevant to the land exemption issue in this case, is *Belgian State v Temco Europe SA* (Case C-284/03) [2005] STC 1451, where the ECJ said, at [16] – [17]:

> 16. It should be observed at the outset that according to settled case law the exemptions provided for in art 13 of the Sixth Directive[3] have their own independent meaning in Community law and must therefore

[3] The predecessor provision to Article 135 of the Principal VAT Directive, in substantially the same form.

> be given a Community definition (see *EC Commission v Ireland* (Case C-358/97) [2000] ECR I-6301, para 51; *Maierhofer v Finanzamt Augsburg-Land* (Case C-315/00) [2003] STC 564, [2003] ECR I-563, para 25; and *Sinclair Collis Ltd v Customs and Excise Comrs* (Case C-275/01) [2003] STC 898, [2003] ECR I-5965, para 22).
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> 17. Secondly, the terms used to specify the exemptions provided for by art 13 of the Sixth Directive are to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (see, inter alia, *EC Commission v Ireland* (Case C-358/97) [2000] ECR I-6301, para 52; *Sweden v Stockholm Lindöpark AB* (Case C-150/99) [2001] STC 103, [2001] ECR I-493, para 25; and *Sinclair Collis Ltd v Customs and Excise Comrs* (Case C-275/01) [2003] STC 898, [2003] ECR I-5965, para 23). As the Advocate General rightly states at para 37 of his opinion, the requirement of strict interpretation does not mean, however, that the terms used to specify exemptions should be construed in such a way as to deprive the exemptions of their intended effect."

32. In *Temco*, the question before the ECJ was whether simultaneous grants by a company to three associated companies of contracts allowing those companies to occupy a building without any individual rights over any specific part of the property were exempt supplies in the terms of the land exemption. Rent was payable annually calculated by reference to each company's turnover. Temco was entitled at any time and without notice to require the companies to vacate the premises.

33. One of the arguments for Temco, which was seeking a deduction for VAT incurred in connection with refurbishment of the premises and which accordingly maintained that its supplies to the three companies were standard-rated, was that the contracts did not satisfy the definition of letting under Community law by reason of the absence of an exclusive right to occupation of the property.

34. Whilst reserving to the national court the question whether in all the circumstances pertaining to it the transaction was to be treated as a letting of immoveable property, and the issue whether the contracts, as performed, had as their essential object the making available, in a passive manner, of premises or parts of buildings for a payment linked to the passage of time, or whether they gave rise to the provision of a service capable of being categorised in a different way, the Court answered the question before it in the following way (at [28]):

> "Article 13B(b) of the Sixth Directive [*now Article 135(1)(l) of the Principal VAT Directive*] must be interpreted as meaning that transactions by which one company, through a number of contracts, simultaneously grants associated companies a licence to occupy a single property in return for a payment set essentially on the basis of the area occupied and by which the contracts, as performed, have as their essential object the making available, in a passive manner, of premises or parts of buildings in return for a payment linked to the passage of time, are transactions comprising the 'letting of immovable

> property' within the meaning of that provision and not the provision of a service capable of being categorised in a different way."

35. In reaching that conclusion, the Court first set out, at [19], the established position regarding the concept of the letting of immovable property:

> "In numerous cases, the court has defined the concept of the letting of immovable property within the meaning of art 13B(b) of the Sixth Directive as 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 (see, to that effect, *Goed Wonen*, para 55[4]; *Customs and Excise Comrs v Mirror Group plc* (Case C-409/98) [2001] STC 1453, [2002] QB 546, para 31; *Customs and Excise Comrs v Cantor Fitzgerald International* (Case C-108/99) [2001] STC 1453, [2002] QB 546, para 21; *Seeling v Finanzamt Starnberg* (Case C-269/00) [2003] STC 805, [2003] ECR I-4101, para 49; and *Sinclair Collis Ltd v Customs and Excise Comrs* (Case C-275/01) [2003] STC 898, [2003] ECR I-5965, para 25)."

36. At [20], referring again to *Goed Wonen*, the Court emphasised the need 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, from other activities which are either industrial or commercial in nature (such as the exclusions, including the hotel sector exclusion now in Article 135(2)(a) of the Principal VAT 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. Examples of the latter are the right to use a golf course (*Sweden v Stockholm Lindöpark AB* (Case C-150/99) [2001] STC 103, at [24] to [27]) and the right to install cigarette machines in commercial premises (*Sinclair Collis Ltd v Customs and Excise Commissioners* (Case C-275/01) [2003] STC 898).

37. The Court accordingly held, at [21], that the actual period of letting was not of itself decisive, even though the fact that accommodation is provided for a short period might, as in *Blasi v Finanzamt München I* (Case C-346/95) [1998] STC 336, at [23] and [24], constitute an appropriate basis for distinguishing the provision of hotel accommodation from the letting of dwelling accommodation. It is not essential that the period be fixed at the time the contract is concluded. It is necessary to take into account the reality of the contractual relations (*Blasi*, at [26]).

38. As regards that element of the concept of the letting of immovable property which requires the tenant to have a right of exclusive occupation, the Court clarified that requirement in the following way, at [24] and [25]:

> "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

[4] *Stichting 'Goed Wonen' v Staatssecretaris van Financien* (Case–326/99) [2003] STC 1137

> 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.
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> 25. The presence in the contract of such restrictions on the right to occupy the premises let does not prevent that occupation being exclusive as regards all other persons not permitted by law or by the contract to exercise a right over the property which is the subject of the contract of letting."

39. In *Temco* itself, none of the three companies authorised by the contracts to occupy and use the property had any individual rights over any specific part of the property. That was not regarded by the ECJ as a decisive factor. In the same way, the fact that in this case members obtained Primary Use Rights over a category of Residences, and not one particular Residence, does not in our view prevent the grant from being a letting of immovable property.

40. There are two strands to HMRC's case on the land exemption issue. The first is the argument that by payment of the price on the grant of a Fractional Interest a member does not acquire any right to occupy a Residence as owner and to exclude any other person from enjoyment of such right. It is submitted that all a member actually acquires is access to the Plan; an opportunity to occupy a Residence, but no more. The second strand is the argument that, even if the member acquires an exclusive right to occupy a Residence, the grant of the Fractional Interest is not a passive activity, but a commercial activity with significant added value, having regard for example to the arrangements for management of the property and the administration and the provision of access to the various programmes set out in the Membership Agreement.

(1) No exclusive right to occupy

41. In this case, in accordance with the Membership Agreement, there are two stages to the obtaining by a member of a right of occupation. First, there is the grant by FPSL of the Fractional Interest itself. Secondly, there is the requirement for a member to make a reservation, along with the allocation of a Residence of the relevant type by the Manager. The ability to make a reservation at any particular time (or indeed at all) is not guaranteed.

42. The view taken by the FTT on this issue can be found at [201] and [208] of its decision:

> "[201] In our view, on that approach, it is clear that the members are paying the price in return for the right to occupy a residence under the Primary Use Time and Extended Occupancy Time rights albeit that these rights can be exercised only once a successful reservation is made. It must be the case that, in paying such a substantial sum upfront (ranging from £92,000 to £243,000), a member intends to obtain the right to reserve and occupy a residence of the specified type under these rights. In plain terms, a member pays the price in order to be able to occupy a luxury residence in a desirable location in the heart of

> Mayfair in London for a maximum period of time each year on an ongoing basis over many years."
>
> "[208] We do not consider that the fact the occupation right is not immediate, that occupation has to be reserved and, that the precise period of occupation and particular residence which will be occupied is not known at the outset, means that the appellant is not making a supply of a 'letting of immovable property'. These factors do not, in our view, mean, as HMRC seem to suggest, that the [member] is not paying for the actual use of a residence such that the appellant must be providing only a facilitative service or reservation system in return for the price."

43. Ms McCarthy, for HMRC, submits that in reaching this conclusion the FTT erred in law. She argues that as a matter of interpretation of the Membership Agreement, it is plain that the member cannot be paying for *actual* use, since at the time of supply (it was common ground that the time of supply was the entry into the Membership Agreement and the payment of the purchase price) the member had acquired no rights to actual use. Rather, as Ms McCarthy argues, the member, along with all other members, must take the further additional step of securing a reservation, which reservation is not guaranteed. A failure to make a timely reservation may result in a member not being able to take up the full amount of Primary Use Time, and that cannot be carried forward to a future year.

44. Ms McCarthy submits that the fact that, as the FTT acknowledged, the rights of occupation which are acquired by members at the time of the supply are subject to the making of an advance reservation, removes the supply to the members by FPSL from the land exemption. There is a material distinction, she argues, between actual use, and the right to prospective use subject to reservation. In her submission, all that a member acquires is access to the Plan, an opportunity to occupy a Residence, but no more.

45. In support of that argument, Ms McCarthy referred us to *Revenue and Customs Commissioners v Esporta Ltd* [2014] STC 1548. In *Esporta*, the taxpayer company operated health and fitness clubs. A member was required to sign up for a minimum commitment period of 12 months or longer and pay the fees in advance either for the whole commitment period or by monthly direct debit instalments. Where members defaulted on their monthly instalments, they would be denied access to the clubs, but membership would not be terminated. Steps would ultimately be taken to recover the outstanding membership fees for the remainder of the commitment period or until the expiry of a three-month notice period. The taxpayer company claimed that each monthly payment was consideration for use of the gym facilities for that specific month, and not for the whole commitment period, so that there was no direct and immediate link between an overdue payment for that month and access to the club's facilities, because access was in that event denied. Therefore, they claimed, the late paid fees were damages or compensation for breach of contract and not consideration for any taxable supply.

46. The Court of Appeal accepted HMRC's argument that monthly payments were provided on terms and conditions which included the right to withhold access for non-

payment. Where access was withheld, the overdue payments were still properly to be regarded as being in return for access to the facilities, which members could still obtain as of right provided they paid up their arrears. Lord Justice Vos, with whom Arden LJ and McCombe LJ agreed, having described the issues as being whether, having regard to the economic realities and to all the circumstances in which the transaction took place, the taxpayer company was supplying any services to its members in return for the overdue monthly payments, and if so what was the nature of that supply, said:

> "[26] In my judgment, the starting point is the decision of the Court of Justice of the European Union ('CJEU') in *Kennemer Golf & Country Club v Staatssecretaris van Financiën* (Case C-174/00) [2002] STC 502, [2002] ECR I-3293 where it was held that annual subscription fees paid in advance were consideration for services provided by the club even where those facilities were not used at all. The CJEU referred at para 40 to the services being the 'making available to its members, on a permanent basis, of sports facilities and associated advantages and not by particular services at the members' request'. It is, therefore, clear at least that the club's facilities do not need actually to be used by the member for there to be a supply of services.
>
> …
>
> [30] Esporta's terms and conditions make it clear that the Commitment Period is a core term of the membership. The reason is clearly stated, namely to allow Esporta to invest in proper facilities. The commercial and common sense deal between the member and the club is that it will provide good quality facilities that the member can use during the Commitment Period and thereafter—until three months' notice is given. The *Kennemer Golf* case makes it clear that the service can still be supplied whether or not the member actually uses the facilities.
>
> [31] In these circumstances, I cannot see how, as a matter of principle, and looking at the contract at the time it was made, the default provisions in the contract should affect the underlying analysis of the services that are to be provided in consideration for the fees. The default provisions are just that—steps that are taken when, unexpectedly, the member fails to comply with his payment obligations. They would not be expected to change the nature of the services that are to be supplied in consideration of the payments the member has agreed to make.
>
> …
>
> [34] Looking at the terms of the arrangements agreed between the parties in this case, I think it is clear that the monthly payments are initially made in return for the services to be provided during the whole Commitment Period. The services in question are the membership of the club and the right to access its facilities. But it does not seem logical to me to say, as the UT did, that a late paid fee in respect of month 12 of the Commitment Period can properly be regarded as part consideration for right of access to the club that was granted in, say, months 1 to 3, before the default began. Rather, the late paid monthly

> fees remain consideration for the membership and right of access throughout the Commitment Period.
>
> [35] In my judgment, the contract provides for the member to be allowed access to the facilities in return for the monthly payments during the Commitment Period and thereafter until termination, but that access is conditional on the regular payments being kept up. The exclusion of members on non-payment does not mean that they are being provided with no services at all. They are being provided with the same services as before, namely the right to access to the facilities provided they pay the monthly fees."

47. As well as agreeing with Vos LJ, Arden LJ delivered a short judgment in which, at [45], she expressed the view that the supply by the taxpayer company was the right of access, conditional on payment, and not actual access. There was thus a direct and immediate link between the supply and the monthly payment, even if a member did not exercise the right to make a payment in order to gain actual access to the gym facilities.

48. Far from supporting HMRC's case, we consider that *Esporta* points in the opposite direction. In *Esporta* the conditionality did not prevent the supply being of a right, in that case of access to the gym facilities. *Esporta* does not support Ms McCarthy's submission that the Membership Agreement gave a member no occupancy rights. That, as the FTT found at [209], was what the member was paying for. In *Esporta*, the supply was of the conditional right to use the club premises throughout the period of membership, and not just the period during which the club member could actually enter those premises, notwithstanding that the right had been withdrawn for non-payment for part of the Commitment Period. In this case there is a continuing right, or licence to occupy, subject to the making of a reservation, for which a member has paid in full. In contrast to *Esporta*, and *a fortiori*, the condition that a reservation is made is not an impediment to access or use of a Residence; it is facilitative as a mechanism for exercising the right provided by the licence to occupy.

49. We do not consider that an argument that a member is not paying for actual use can affect the position. The exemption is not predicated on actual use, but on a right to use or occupy, which right can, as we have found above, be conditional on the making of a reservation. The member would have that right whether or not he chose to exercise it, in the same way that the club member in *Esporta* would have had the right if he had chosen to fulfil the condition of continued payment in order to gain access. In this case, as in any ordinary case of a letting or licence of property, it is immaterial whether the member actually occupies a residence. Even if a reservation is made, there is no requirement for actual use; but even absent actual use in those circumstances the allocated residence remains available for the exclusive use of the member for the period of the reservation.

50. Nor do we consider that the fact of conditionality can affect the analysis of the nature or character of the supply itself. The character of the supply remains that of the ultimate supply; it is not a supply of some inchoate right separate from the underlying supply. In *Kennemer Golf*, which formed the starting point for the analysis of Vos LJ in *Esporta*, the questions considered by the ECJ concerned golf

club subscription fees. One question was whether those fees could constitute the consideration for the services provided by the club, even though the members who did not use or regularly use the club's facilities still had to pay their annual subscription fee. It was held, at [40], that the services provided by the club were constituted by the making available to its members, on a permanent basis, of sports facilities and the associated advantages, whether or not a member actually used the facilities. There was no separate supply of an antecedent right to use the facilities, followed by a further supply of the facilities themselves if and when a member availed himself or herself of them.

51. It is not difficult to envisage that in a golf or sports club members would be required to make reservations in order to avail themselves of the sports facilities to which their club membership gives them a right of access. But the need in such a case for a reservation to be made in order to exercise that right would not detract from the essential nature or characterisation of the supply made in exchange for the members' subscriptions. As in this case, any such reservation system would be seen as facilitative of the right of access.

52. In *RCI Europe v Revenue and Customs Commissioners* (Case C-37/08) [2009] STC 2407, the taxpayer company, RCI, was engaged in the business of facilitating and organising the exchange of timeshare usage rights held by its members in holiday accommodation outside the UK. A question arose as to the place of supply of the services for which the members paid enrolment fees, annual subscription fees and exchange fees. The place of supply turned on whether there was a "sufficiently direct connection" between the supply of services and immovable property (in accordance with Article 9(2)(a) of the Sixth VAT Directive (EC Council Directive 77/388)). The Court held that the place of supply, in respect of each of the fees, was where the property in which the member concerned held timeshare usage rights was situated.

53. In its examination of the nature of the supply, the ECJ said this (at [33] – [35]):

> "33. In a similar situation, the court had occasion to state that the fact that an annual subscription fee is a fixed sum which cannot be related to each case of use does not alter the fact that there is reciprocal performance between the members and the supplier of services (see, to that effect, *Kennemer Golf* (para 40)). The annual subscription fees of members of an association can constitute consideration for the services provided by the association, even though members who do not use or do not regularly use the association's services must still pay their annual subscription fees (see, to that effect, *Kennemer Golf* (para 42)).
>
> 34. In that light it follows that the enrolment and annual subscription fees must be regarded as constituting consideration for participation in a system originally conceived to enable each member of RCI Europe to exchange his timeshare usage right. The service supplied by RCI Europe consists in facilitating the exchange and the enrolment and annual subscription fees represent the consideration paid by members for that service.
>
> 35. Secondly, as far as concerns the exchange fee, it should be noted that the supply of services in return for which members of RCI Europe

> pay enrolment fees [*sic. This must be intended to be a reference to the exchange fees*] is the exchange itself, or the possibility of participating in such an exchange in the future, which is the main objective of each member, access to the accommodation exchange pool and the information relating to it being only ancillary to that aim."

54. In *RCI*, therefore, the Court did not describe the supply by RCI in terms of a mere right, disassociated from the provision of the underlying services; it regarded the supply as being of those underlying services, namely the facilitation of the exchange, irrespective of whether members actually used those services. That, in our view, demonstrates the taking of an economic view of the nature of a supply, rather than what appears to being urged by HMRC in this case, an essentially legalistic view in seeking to differentiate something described as access to a plan, or an inchoate right, from the true underlying supply that a consumer is paying for. Viewed objectively, in this case that true underlying supply is of a licence to occupy, which a member can exercise by means of the reservation system.

55. We regard that as the true analysis on an objective basis. Ms McCarthy was disposed to criticise the FTT where it had referred, at [199], to the relevance of the intentions of the recipients of the services as regards "what they considered they were acquiring in return for the payments made". We do not consider that criticism is justified, nor that it demonstrates any error of law on the part of the FTT. What the FTT was referring to was the relevance, in establishing the relationship between the supplier and the recipient of the service, of the purpose of the relationship. That was not to apply a subjective approach; indeed, at [199], the FTT expressly, and correctly, identified the objective nature of the enquiry. Although we accept that the FTT made, at [200], an unfortunate reference to "looking at the underlying intention of the members", viewed in context we do not consider this led the FTT into a subjective analysis. We consider that the exercise the FTT was engaged in properly respected the objective nature of the enquiry, following established principles such as those illustrated in *RCI*, at [37], and *Esporta*, per Arden LJ, at [44]. There is, in our view, a clear resonance between the FTT's finding, at [201], that "it must be the case that, in paying such a substantial sum upfront … a member intends to obtain the right to occupy a residence of the specified type …" and the remarks of Arden LJ, in *Esporta* at [44], that:

> "… in my judgment, it is improbable that a member would agree to make late payment of a monthly instalment for which she or he obtained absolutely nothing … It was hardly likely that [Esporta] would have offered nothing in return for the promise to make monthly payments."

In neither case was there any recourse to the subjective intentions of either the recipient of the supply or the supplier. The enquiry undertaken by the FTT was an objective enquiry which properly had regard to the contractual arrangements set out in the Membership Agreement and the economic and commercial reality of the transaction.

56. The FTT considered it necessary to distinguish *RCI* on the basis that in that case the ECJ had decided that the supply made for the enrolment and annual subscription

fees was of an exchange facility service, and that the provision of a market and facility service was a service which was independent from the provision of an actual exchange (FTT, at [210] – [211]). In our judgment, there was no need for *RCI* to be distinguished on this basis. We do not consider that the FTT was correct to characterise the ECJ's decision in the way it did. Although it was argued for the UK government in *RCI* that the service supplied was of access to a type of market in which members might exchange their timeshare usage rights (*RCI*, at [27]), that argument was rejected by the Court. As we have explained above, the service was not the provision of a market or facility for exchange, it was expressed by the ECJ, at [34], as "facilitating the exchange". The enrolment and subscription fees were paid for the services provided, or to be provided, by RCI in order to facilitate the exchange (*RCI*, at [32]). In this case, consistently with all of *Kennemer Golf*, *RCI* and *Esporta*, we consider that the supply by FPSL is not of access to a plan, or some form of inchoate right or opportunity, it is of a licence to occupy a Residence, accessible by means of the facility of the reservation system.

57. That analysis also finds support, in our view, from the judgment of the CJEU in *Macdonald Resorts Ltd v Revenue and Customs Commissioners* (Case C-270/09) [2011] STC 412, although because of its very different facts and circumstances, that case cannot be compared directly with this. In *Macdonald Resorts*, the CJEU's guidance was sought on the classification and place of supply of the services of the taxpayer company. The company ran an options scheme under which customers could obtain points rights which could be redeemed for various benefits which included the provision of temporary accommodation in holiday resorts provided by the taxpayer or hotel accommodation provided by third parties or other services. It was argued for HMRC that the sale by the taxpayer of the points rights was to be treated as the taxable supply of benefits derived from membership of a club, in other words distinct from the services available on conversion of the points.

58. The CJEU referred, at [22], to the essential criterion of the members' ultimate intention when paying for the services. That was not a reference to any subjective intention; that is clearly expressed by the CJEU at [46], when it referred to the decisive factor being the objective character of the transaction, irrespective of how that transaction is classified by the parties. Objectively assessed, the option rights were purchased with the intention of using those rights in order to convert them into services under the options scheme. It was held, therefore, at [24], that the purchase of the points rights was not an aim in itself for the customer. The acquisition of the rights and the conversion of the rights fell to be regarded as preliminary transactions in order to be able to exercise the right to temporarily use a property or to stay in an hotel or to use another service.

59. Even in a case where a separate right, in the form of the points rights, was capable of being identified as having been granted under the contract between the taxpayer company and its customers, the CJEU took the view that this was not capable of being treated as a separate supply of a mere right, or the mere benefit of membership of a club. In that case, given the circumstances, the CJEU found that the service was not fully supplied until the points were converted, and it was only at that point that the type of service could be ascertained. In this case it is common ground

that the supply takes place on the grant of a Fractional Interest in return for payment. But what *Macdonald Resorts* demonstrates is that, where it cannot be said that, viewed objectively, the essential aim of the customer is to obtain an unexercised right, the supply cannot be analysed as the provision of that mere right, but as the ultimate service provided on exercise of that right. That is, in our judgment, consistent with all the authorities to which we have referred.

60. Ms McCarthy sought to draw a distinction between a case where, as in a typical conventional timeshare arrangement, the timeshare owner has an immediate right to exclusive occupation, and would thus have a legitimate complaint against the grantor if the property were occupied by someone else in the relevant period, and this case, where there could be no legitimate complaint if all the residences have been booked at the time the member seeks to make a reservation. That, Ms McCarthy argued, was because the payment of the purchase price does not confer the right to occupy any given Residence on prescribed dates and to exclude others from enjoyment of such rights.

61. In support of this submission, Ms McCarthy referred us to the opinion of Lord Scott of Foscote in the House of Lords in *Customs and Excise Commissioners v Sinclair Collis Ltd* [2001] STC 989, where in considering a question whether an agreement for the positioning of cigarette vending machines in certain premises comprised a grant of a licence to occupy land, Lord Scott gave the following example, at [71]:

> "A contract for parking space might entitle the grantee to the exclusive use of a specified parking space. Or it might do no more than entitle him, together with others to whom a similar right had been granted, to enter upon a piece of land and park wherever he could find space to do so. The former might constitute a 'letting'. The latter arrangement could not possibly be held to do so."

62. Ms McCarthy submitted that in this example, the first contract envisaged by Lord Scott might be considered analogous to the "traditional" or conventional timeshare arrangement, and that the second contract was analogous to FPSL's supplies under the Membership Agreement, save that entering upon a piece of land and parking wherever the grantee could find space would be aligned with the grantee telephoning the Manager and making a reservation for whatever Residence was available for whichever dates that had not already been reserved.

63. Beguiling though Ms McCarthy's analogy might appear, it is in our judgment a false one. The supply by FPSL is more than the grant of a right to enter 47 Park Street and to occupy a Residence if one is found to be available. It is the grant of a right to occupy which can be exercised by the making of a reservation. There is no sense that, in Lord Scott's first example, once the grantee had exercised his right to enter upon the land and had found a parking space, the grant was one of exclusive possession of that space for a defined period, whether or not the grantee was actually parked on it. There is, we consider, a crucial distinction between that and the grant by FPSL in this case. Here the grant is of a right to exclusive occupation of a particular Residence, subject only to reservation and allocation by the Manager. That right to

exclusive occupation endures for the given period whether or not the member is in the Residence for the time being.

64. The car parking example given by Lord Scott in *Sinclair Collis* must be understood in the context of the observation by him that the existence of exclusions from the land exemption did not mean that a transaction falling within an exclusion would necessarily, but for the exclusion, fall within the exemption. Referring, again at [71], to the specific case of the hotel sector exclusion, Lord Scott was at pains to make the point that a contract for the use of an hotel room might or might not be the letting of immovable property. The answer would depend on the facts. The car parking example was designed to illustrate that point, and to do so it had to provide a clear contrast and be free of nuance. It could not describe the range of facts and circumstances that might occur in car parking arrangements themselves, let alone be applied by analogy to the very different circumstances of this case.

65. For these reasons we conclude that the grant of the Fractional Interest was the grant of a right to occupy a Residence and to exclude others from enjoying such a right, and was thus within the concept of the "letting of immovable property" as described in *Temco*. That is subject to the question whether that grant was a passive activity or whether it is outside the land exemption by reason of FPSL having added significant value to the supply because of the additional facilities, services and benefits available to members. It is to that question that we now turn.

(2) Significant added value

66. We have earlier referred to the distinction drawn in the ECJ authorities between what is usually a relatively passive activity linked simply to the passage of time and not generating any significant added value (*Goed Wonen*, at [52], cited in *Temco*, at [20]), and other activities which are either industrial and commercial in nature, such as the exclusions from the exemption which are contained in Article 135(2)(a) – (d) of the Principal VAT Directive, or are best understood as the provision of a service rather than simply the making available of property.

67. The distinction is well-illustrated by the case of *Régie communale autonome du stade Luc Varenne v Belgium* (Case C-55/14) [2015] STC 922. In that case, the taxpayer company ran a football stadium. It entered into an agreement with a football club under which the club used, for a consideration, the stadium facilities. In a case concerning the right to deduct input tax incurred on the purchase of the stadium, the question arose as to whether part of the supply was a letting of immovable property and thus exempt, so restricting the right to input tax recovery.

68. At [26], the CJEU referred to *Swedish Lindöpark*, at [26], and the finding of the Court in that case that the activity of running a golf course entails not only the passive activity of making the course available but also a large number of commercial activities, such as supervision, management and continuing maintenance by the service-provider and the provision of other facilities, and that accordingly letting out a golf course could not, in the absence of quite exceptional circumstances, constitute the main service supplied. Having then, at [27], noted the differences between the

circumstances in *Luc Varenne* and *Swedish Lindöpark*, and (at [24]) the role of the national courts in establishing the essential characteristics of the transaction to enable it to be classified for VAT purposes, the Court said this:

> "29. In the circumstances of the main proceedings, what seems to be involved is the supply, by the corporation, of a more complicated service consisting of provision of access to sporting facilities, where the corporation takes charge of the supervision, management, maintenance and cleaning of those facilities.
>
> 30. As regards, first, supervision, namely the rights of access to the sporting facilities and the control of that access conferred on the corporation, it is true that those rights cannot, in themselves, preclude the classification of the transaction at issue in the main proceedings as a letting within the meaning of art 13B(b) of the Sixth Directive. Such rights may be justified in order to ensure that the use of those facilities by the lessees is not disturbed by third parties. The court has previously stated that the presence of restrictions on the right to occupy the premises let does not prevent that occupation being exclusive as regards all other persons not permitted by law or by the contract to exercise a right over the property which is the subject of the letting contract (judgment in *Belgian State v Temco Europe SA* (Case C-284/03) [2005] STC 1451, [2004] ECR I-11237, para 25).
>
> 31. In the circumstances at issue in the main proceedings, the rights of access to the sporting facilities and the control of that access seem none the less to have the effect, by means of a caretaking service, that representatives of the corporation are permanently present at those facilities, which could be evidence to support the view that the role of the corporation is more active than that which would arise from a letting of immovable property within the meaning of art 13B(b) of the Sixth Directive.
>
> 32. As regards, secondly, the various services of management, maintenance and cleaning, it appears that they are, for the most part, actually necessary to ensure that the facilities in question are suitable for the use for which they are intended, in other words sporting events and, more specifically, football matches in accordance with the applicable sporting regulations.
>
> 33. It must therefore be held that the facilities required for that purpose are, by means of the offered services of repair and upgrading, made available to RFCT in a condition which permits their use for the agreed purposes and that the provision of access to those facilities for that specific end constitutes the supply which is characteristic of the transaction at issue in the main proceedings (see inter alia, by analogy, the judgments in *Ministero dell'Economia e delle Finanze v Part Service Srl* (Case C-425/06) [2008] STC 3132, [2008] ECR I-897, paras 51 and 52; *Field Fisher Waterhouse LLP v Revenue and Customs Comrs* (Case C-392/11) [2013] STC 136, para 23; and *Minister Finansow v RR Donnelley Global Turnkey Solutions Poland sp z oo* (Case C-155/12) [2014] STC 131, para 22).

> 34. In that regard, the economic value of the various services supplied, those representing, according to the order for reference, 80% of the charge which is agreed in the contract to be payable, also constitutes evidence which supports the classification of the transaction at issue in the main proceedings, considered as a whole, as a supply of services rather than as a letting of immovable property within the meaning of art 13B(b) of the Sixth Directive."

69. That is a lengthy citation, but it is helpful as a practical example of the distinguishing features between a passive activity of letting of immovable property and the active exploitation of property to add significant value to the supply.

70. HMRC's case, put shortly, is that the Membership Agreement, properly understood, imposes obligations and responsibilities on FPSL of such a nature that its supply cannot be regarded as a mere passive letting activity, but must be found to be active exploitation of the Residences which add significant value to the supply. In this regard, HMRC refer to the arrangements for the management and administration of 47 Park Street by the Manager, and the provisions for access to the various programmes under the Plan as described in the Membership Agreement: the Rental Programme, the Resale Programme, the Interval Exchange Programme and the Marriott "Rewards" Points Programme.

71. In considering what was the actual supply made by FPSL, the FTT found, at [201], that it was clear that the members were paying the price in return for the right to occupy a Residence under the Primary Use Time and Extended Occupancy Time. The FTT rejected, at [206] and [207], the argument that any part of the purchase price had been paid in order to obtain the benefit of the programmes. The relevant services in respect of the programmes were not provided by FPSL, but by separate parties, for payment of separate fees (acknowledging that the cost of the first year of the Interval Exchange Programme was borne by FPSL). The FTT found that the benefits of the additional programmes flowed from, and could be exercised only as a result of, the member obtaining occupation rights.

72. The provision by the Manager of the management services in connection with the Residences does not, in our view, affect the nature of the supply made by FPSL. Ms McCarthy referred in this connection to the findings of the FTT in respect of the hotel sector issue and the fiscal neutrality issue. In relation to the hotel sector issue, at [292], the FTT considered that the commercial reality of the arrangements for management and administration and the provision of relevant hotel services was that of a sub-contract by FPSL to the Manager, under which the payment of the Annual Residence Fee would be paid direct to the Manager, which would be the actual provider of the services. At [293], the FTT expressed the view that, although FPSL's own supply was confined to the provision of the occupancy rights, that did not preclude it from being involved in the commercial exploitation of the property as an establishment similar to an hotel. As regards fiscal neutrality, at [302], the FTT referred to its decision that the supplies fell within the hotel sector exclusion as entailing the conclusion that:

> "… the supplies are not within the objective of the land exemption 'as a comparatively passive activity not entailing significant added value' but rather within the exclusion on the basis that they 'entail more active exploitation of the immovable property'."

On the basis of those findings, submitted Ms McCarthy, the only conclusion open to the FTT, properly instructing itself as to the law, was that the supplies by FPSL were outside the exemption for the leasing and letting of immovable property, without recourse to the hotel sector exclusion.

73. We do not consider that the FTT's findings in those respects lead to that conclusion. In determining whether in this case the supplies of the Fractional Interests are within the meaning of the leasing or letting of immovable property, the focus must be on the supply made by FPSL and not any supplies made by others. It is clear that separate supplies are not to be treated as a single supply because the suppliers are related parties (but not part of a VAT group) and the supplies are linked. That proposition, referred to by Ms Hall as "the *Telewest* principle", derives from *Telewest Communications v Customs and Excise Commissioners* [2005] STC 481, a case concerning, amongst other things, whether a supply by one related party could be ancillary to a main supply by another related party and thus have to take the same VAT treatment as the main supply. It is, however, equally applicable to the classification of a supply: in *Luc Varenne*, at [26], for example, the Court makes clear that what must be ascertained is what constitutes the "main service supplied" and what is relevant is the activity of the "service-provider", and in *Luc Varenne* itself, the more complicated service identified by the Court was supplied by the taxpayer corporation (see [29]). Indeed, as far back as *Customs and Excise Commissioners v Wellington Private Hospital Ltd* [1997] STC 445, Millett LJ was making the point, at p462g, that where supplies are made by different suppliers "they cannot be fused together to make a single supply".

74. It is true that the Membership Agreement provides access to additional benefits, including the services provided by the Manager. Even if the correct legal analysis is that FPSL procures, by sub-contract, the Manager's services for the benefit of members, such procurement is in our view itself a relatively passive activity as far as FPSL is concerned and, in view of the fact that the Manager's services are separately paid for by the members through the Annual Residence Fee, it adds no significant value to FPSL's supply. There is no evidence, as there was in *Luc Varenne* (see [34]) of the economic value of the individual elements of FPSL's composite supply, but there is no reason to conclude that the provision by FPSL of access to the Additional Plan Benefits can have attributed to it any material proportion of the overall economic value of the Fractional Interest supplied under the Membership Agreement. Nor was the grant of any such right, either in relation to the management of the property or of access to the Additional Plan Benefits, the active exploitation by FPSL of the property: all relevant services were supplied by others, with FPSL's role remaining passive at all times.

75. We have reached this conclusion even on the assumption that the FTT was right to characterise the arrangements for the provision of the Manager's services as sub-contract arrangements. We do not consider, however, that such an analysis is correct.

This is not a case, and the FTT evidently found that it was not the case, where FPSL is itself liable to supply to members the management and administration services for consideration and sub-contracts or outsources those obligations to the Manager for which it pays consideration under the sub-contract. There is no sense in the FTT's decision that FPSL made such a supply. The Membership Agreement itself recited (at IV A) that the Manager had entered into an agreement with FPSL whereby the Manager was "responsible for the maintenance, management and administration of the Property …, the allocation of specific Residences for occupancy by Members and the establishment of rules and regulations for the use of the Property" and this statement is not in our view consistent with the suggestion that the management services were supplied by the Manager to FPSL for onward supply to the members. In short, the supply of management and administration services was by the Manager to the members in return for the Annual Residence Fee, which was paid by members directly to the Manager.

76. These arrangements, it seems to us, have more in common with those in *Telewest* than with any sub-contract. In *Telewest* there were questions of novation of an existing contract which are not relevant here. But there was a contract between the customer and the relevant regional company for the provision, amongst other things, of television services by the regional company. In that context the agreement included provision for a magazine, Cable Guide Magazine, to be provided by a separate company, Telewest Communications (Publications) Limited ("Publications"), payment for which was due to Publications and collected by the regional company as agent for Publications. Publications was not a party to the agreement, and there was no separate contract between Publications and the customer. Nonetheless, it was held by the Court of Appeal that contractual obligations were imposed between Publications and the customer with regard to the magazine (acquiesced in by the customers making payment in accordance with the agreement), and that Publications and not the regional company was the supplier of the magazine. In our judgment, that analysis is equally applicable in this case, which has the added feature that members make payment to the Manager and there is no agency role for FPSL in that respect.

77. We can see the force of Ms McCarthy's argument with respect to what the FTT said at [302] on the question of fiscal neutrality:

> "… The Directive provides for the 'leasing and letting of immovable property' to be exempt from VAT but provides for certain exclusions from that including for supplies of accommodation in the 'hotel sector' or in 'sectors with a similar function'. We have decided that the supplies in question fall within that exclusion as enacted in the UK. This entails the conclusion that the supplies are not within the objective of the land exemption 'as a comparatively passive activity not entailing significant added value' but rather within the exclusion on the basis that they 'entail more active exploitation of the immovable property'…"

Taken at face value, those remarks would suggest that the FTT ought to have found that FPSL's supply was not one of the leasing or letting of immovable property,

without recourse to the hotel sector exclusion. However, in our judgment, the FTT failed to reflect its own reasoning in this paragraph. It is clear, having regard to its decision as a whole, that it had decided that, absent the hotel sector exclusion, the supply would have satisfied all the *Temco* conditions, including that the supply should be a comparatively passive activity not entailing significant added value and that it did not entail more active exploitation of the property by FPSL. The FTT appears to have thought that, having decided that the hotel sector exclusion applied, that necessarily meant that those conditions were not met. But that is not the case. As Lord Scott observed in *Sinclair Collis*, the existence of exclusions from the land exemption does not mean that a transaction falling within an exclusion would necessarily, but for the exclusion, fall within the exemption; by the same token, if a transaction is within an exclusion, that does not have the necessary consequence that the transaction would fall outside the land exemption absent the exclusion. The comments of the FTT at [302] cannot therefore assist HMRC's case on the land exemption itself.

78. Nor is HMRC's case in this respect assisted by reference to the decision of this Tribunal in *Blue Chip Hotels Limited v Revenue and Customs Commissioners* [2017] UKUT 204 (TCC). In that case, the Tribunal held that there was active exploitation by the supplier in respect of the supply of a room in an hotel for marriage and civil partnership ceremonies. Significant value was held to have been added by the obtaining of the necessary approval under the applicable regulations and performing all the required activities to maintain such approval. Although Ms McCarthy sought to argue that *Blue Chip Hotels* showed how few additional services were required in order that the land exemption would not apply, and submitted that the additional services made under the Membership Agreement should lead to the same conclusion, we do not accept that submission. First, *Blue Chip Hotels* was a case on its own particular facts, and did not establish any principle as to the level of added value which might be regarded as significant. But secondly, and importantly, in *Blue Chip Hotels* the activity which was regarded as more active than that which would arise from a mere letting of immovable property was that of the supplier itself and not a third party.

79. For these reasons, therefore, as regards the land exemption issue, we conclude, agreeing with the conclusion reached by the FTT in that respect, that subject to the application of the hotel sector exclusion, the supply by FPSL of the grant of the Fractional Interests was exempt as the leasing or letting of immovable property.

B. The hotel sector issue

80. We turn therefore to the hotel sector issue. On that issue it is FPSL which challenges the finding of the FTT that the hotel sector exclusion in Article 135(2)(a) of the Principal VAT Directive, as applied by paragraph 1(d) of Group 1, Schedule 9 VATA, applied to the transactions in question, with the result that the land exemption otherwise applicable was disapplied.

81. In contrast to the exemption itself to which, as we have described earlier, a strict construction is to be applied, an exclusion from an exemption, such as the hotel sector

exclusion, is to be broadly construed. That was common ground, and accords with authority: see, for example, *Blasi v Finanzamt München I* (Case C-346/95) [1998] STC 336, at [19] – [20].

82. The leading case on the hotel sector exclusion is *Blasi*. In that case, the question before the ECJ concerned the manner in which German law had sought to introduce appropriate criteria to distinguish between the taxable provision of accommodation in the hotel and similar sectors and the exempted transactions of leasing and letting of immovable property. Under German law, "lettings for the short-term accommodation of guests" were excluded from exemption. By case law, this was interpreted as referring to the lessor's intention, and any letting to emigrants or asylum seekers and guaranteed by public authorities for a contractual term of less than six months was deemed to be "short term". The facts of *Blasi* were that Mrs Blasi had let out property in Munich for the accommodation of refugee families referred to her by the city social services department. The accommodation costs were paid by the department by reference to extendable certificates issued to Mrs Blasi. The letting agreements were for a period of less than six months, but in letters to the City of Munich Mrs Blasi had indicated that she only wished to let to tenants who would stay for at least six months; and the average actual length of lettings was 14 months.

83. The Court observed, at [21], that in defining the classes of accommodation which were to be taxed by derogation from the exemption for the leasing or letting of immovable property, member states enjoyed a margin of discretion, albeit one that was circumscribed by the purpose of the hotel sector derogation, namely to distinguish the taxable provision of accommodation in the hotel sector or in sectors with a similar function from the exempted transactions. It was accordingly for the member states, when transposing the hotel sector exclusion, to introduce those criteria which seem to them appropriate in order to draw that distinction (judgment, at [22]).

84. The Court determined, at [23] – [24], that the duration of the accommodation was an appropriate criterion of distinction, since one of the ways in which hotel accommodation specifically differs from the letting of dwelling accommodation is the duration of the stay. In general, the Court observed, a stay in an hotel tends to be rather short, and that in a rented flat fairly long. Accordingly, the use of the criterion of the provision of short-term accommodation, being less than six months, appeared to be a reasonable means by which to ensure that the transactions of taxable persons whose business is similar to the essential function performed by an hotel, namely the provision of temporary accommodation on a commercial basis, are subject to tax (and not exempt).

85. The relevant German provision, construed by reference to the definition of "short-term" as a matter of German domestic law, required proof of intention in respect of the relevant letting period to be by reference to a letting agreement or other contract. The Court accepted, at [25], that this was a criterion that was easily applied and that it was appropriate to attain the objective of what was then Article 13B of the Sixth Directive, namely to ensure a correct and straightforward application of the exemptions. But the Court was also careful to reflect a caveat on that criterion, to the extent that clauses in the letting agreement, including as to duration, did not fully

reflect the reality of the contractual relations. In those circumstances, the Court found that it would be for the national court to determine whether it was appropriate to take into account the actual total duration of the accommodation rather than that specified in the letting agreement.

86. The FTT identified the relevant question in this appeal as being "whether the grant of a right, which endures for many years, but which gives an entitlement to occupy for a relatively short period only in each of those years, is an exempt 'letting of immovable property' or a taxable supply of accommodation in the 'hotel sector' or in any 'sector with a similar function'" (FTT, at [254]). The FTT reasoned, at [256], that the ECJ was focussing on the duration of the *period for which the accommodation is provided* (FTT's emphasis). The FTT noted that, in *Blasi* at [23], the Court had identified one of the specific differences between a letting of hotel as opposed to domestic accommodation as being the duration of the stay.

87. On this basis, at [257], the FTT rejected the submission for FPSL that *Blasi* provided support for the proposition that an interest which, although enduring for a long period, confers the right to stay for short periods only in each year, those stays being likely to take place on an intermittent basis in that year, is not within the hotel sector exclusion. To the contrary, the FTT, at [258], found that it is the duration of the stay which is the key factor and not the duration of the agreement under which the right to short term stays is conferred.

88. In relation to how *Blasi* is to be properly understood, we agree with the FTT to this extent: *Blasi* does not provide support for a general proposition of EU law that it is the duration of the agreement which is decisive. We agree with the FTT that the ECJ's focus was on the compatibility of the German domestic provisions with the hotel sector exclusion in the Directive. It was in the context of the domestic interpretive case law which determined the material length of the letting period by reference to the letting agreement that the ECJ accepted that, to the extent it reflected the reality, recourse to the term of the agreement was an appropriate means of distinguishing an exempt letting from a short term non-exempt supply in the hotel sector.

89. That is as true for the opinion of the Advocate General (Jacobs) in *Blasi* as it is for the judgment of the Court. The Advocate General's focus was equally on the German domestic case law, and on the question whether a test based on the intention of the supplier, evidenced by a lease or other agreement, as to the minimum letting period could properly distinguish between exempt supplies and non-exempt supplies similar to those in the hotel sector. Where the grant consists of a stay, it is appropriate to draw a distinction between a longer term letting of residential property and a stay of an inherently temporary nature where what is at issue is the short-term commercial exploitation of property which can be equated with taxable accommodation in an hotel (see Advocate General's opinion, at [23]).

90. In the same way as in *Blasi* it was the application of the German domestic provision that was at issue, so too in this case is it the domestic provision in Item 1(d) and Note (9) of Group 1 of Schedule 9 VATA that must be applied, consistently with

EU law. In determining whether a particular supply either falls within the exemption for the leasing or letting of immovable property, that supply will do so if it answers to that description (as we have held it does in this case) unless the supply is of the description set out in Item 1(d), as construed with Note (9). It is the nature of the supply itself which must be considered, not simply individual attributes of the supply.

91. There is no doubt, indeed it was common ground, first that one of the elements of the Fractional Interest obtained by a member is a right, subject to reservation, to occupy accommodation which is, or includes, sleeping accommodation. Secondly, and also a matter on which there was no dispute, the setting of the accommodation was of the nature of a small boutique hotel, with many of the services associated with high-class hotel accommodation. In our judgment it is clear that 47 Park Street is a "similar establishment" to an hotel, irrespective of the application of Note (9). But in any event, the position is made clear by Note (9); 47 Park Street is premises in which furnished sleeping accommodation is both used and held out for use by visitors or travellers (whether they be members or non-members).

92. Those are, however, only individual attributes of the supply made by FPSL, and do not determine the nature of that supply considered as a whole. In our judgment, it is the essential nature of the supply that remains the key question.

93. The FTT concluded, at [286], that the provision of the residences to members under their Fractional Interests fell within the hotel sector exclusion. The FTT's reasoning is essentially found at [287] – [289]:

> "[287] It seems to us that the essential characteristic of occupation of accommodation in the 'hotel sector' is the flexible and relatively short-term nature of a stay in premises provided with the attendant facilities and services that can be expected for such short-term and/or occasional stays and the resulting required greater supervision and management. In that context, in our view it is the duration of the stays rather than the length of time through which such short stays may be enjoyed that is the key factor. In our view this accords with the decision in *Blasi* as set out in full above.
>
> [288] In this case members occupy residences for short periods of time in each year, under a relatively flexible reservation system, whereby they may occupy for a single night or more at a time at any point during the year up to a permitted maximum of nights (albeit subject to restrictions, such as in peak periods and at weekends). The occupation is provided in premises which are similar to a boutique hotel with many of the attendant facilities and services which can be expected in a hotel. The purchase price a member pays for those stays is linked to the duration of the short-term stays in the residence in each year rather than to the duration of the agreement itself. Mr Dowling explained that essentially the pricing of the transaction with members gives members a discounted rate for their stays compared with non-members.
>
> [289] The commercial reality is that a member pre-pays for the flexibility to enjoy short stays of a stated maximum amount each year, in an environment similar to a hotel and with the services which can be

> expected in a hotel, repeatedly over a number of years. It is difficult to see that, as a matter of principle, such stays change their character because, in effect, the member has an on-going right to enjoy such short stays for which he pre-pays at the start."

94. We consider that, in the context of the supply made by FPSL, the FTT erred in law in focusing on the duration of the individual stays that could be made by a member by virtue of the Fractional Interest which the member acquired from FPSL. That, in our judgment, failed to have proper regard to the nature of the supply made by FPSL. That supply was not of a series of individual short-term stays; it was a supply of a long-term right to occupy a reserved Residence during the relevant periods. It is not in our view permissible to apply Item 1(d) by reference to the individual, and short-term, stays which may be enjoyed as a consequence of the exercise of the long-term right acquired. Nor can the supply or supplies be characterised by the way in which the price for the supply has been set, or the fact that, when judged against the pricing for non-members, it can be calculated that members receive an effective discounted rate for the stays which can be reserved by virtue of their Fractional Interests.

95. In our judgment it was not open to the FTT to find that the commercial reality of the transaction was a pre-payment for a number of short stays in each year. Whilst it may be the case that such short-term stays would not change their character if they were enjoyed as the result of an ongoing right, it is not the character of the stays that is material, but the character of the supply. The supply is of the ongoing right. It is a right which comprises more than something in the nature of short-term accommodation in the hotel sector. The member obtains a right which not only endures, but which can be sold (whether as part of the Resale Programme or independently), used as security or as a guarantee for a loan to fund the purchase of the Fractional Interest or turned to account through the optional Rental Programme. Moreover, as Ms Hall submitted, the supply of a Fractional Interest carries with it financial obligations and risks that are alien to supplies of accommodation in the hotel sector. In order to preserve their rights, Members are required to pay an Annual Residence Fee to the Manager to cover maintenance, management and administration, and, through the Members' Committee, they have a wider involvement in how the property is run.

96. That, in our judgment, is the supply of an interest which goes well beyond the provision of accommodation in the hotel sector. It does not correspond to any supply which would typically be expected to be made in that sector. It is not in our view relevant to enquire whether as a matter of fact such a supply could compete with any supplies made in the hotel sector; that is not the statutory question which is posed by Item 1(d). In any event, it does not appear that the supply of a Fractional Interest does compete with supplies that would be made in the hotel sector. It is not material that a member acquiring a Fractional Interest might otherwise have occupied an hotel room in a particular city or district. The same person might equally have taken a lease of an apartment, or purchased a second home. The acquisition of a Fractional Interest is no more than one example of the alternative ways in which a person might choose to meet his or her accommodation needs. Those alternatives are not in competition with the provision of short-term accommodation in the hotel sector merely because they

enable such a person to be accommodated for a short term otherwise than in an hotel. Nor is it relevant that the price a hotel guest other than a member might pay for a room has been calculated so as to include some element of amortisation. That does not, by any analysis of economic equivalence such as that undertaken by the FTT at [296], result in the supply of the Fractional Interests being capable of being equated with the supply of an hotel room to a paying guest.

97. Ms McCarthy referred to the observations of the ECJ itself in the judgment (at [23]), that:

> "… one of the ways in which hotel accommodation specifically differs from the letting of dwelling accommodation is the duration of the stay. In general, a stay in a hotel tends to be rather short and that in a rented flat fairly long".

She submitted that this showed the length of the stay to be the key issue we should focus on, and since the effective maximum stay at 47 Park Street was 21 consecutive days, the supply of those stays should clearly be outside the exemption on the basis of the observations in *Blasi*. We consider this misses the point of *Blasi*, which was simply to ascertain whether the German provisions, which focused on the length of the stay, were compliant with EU law. The UK legislation has no such focus, but in any event the case before us is fundamentally different from *Blasi*, where the supply was undeniably of a simple stay in accommodation, with the duration of the stay being the key issue; as identified above, the supply we are concerned with in this case is a very different supply from a simple supply of accommodation.

98. Ms McCarthy also referred us to the observation of the Advocate General in Blasi, at [20], to the effect that it is not unknown for persons to stay for long periods in hotels (a circumstance that was not contemplated by the German legislation at issue in that case). She argued that it was clear from this that the Advocate General considered that, in principle, long hotel stays should fall within the hotel sector exclusion. If the suggestion is that on this basis the same exclusion should also apply to the overall long-term supply in this case, that seems to us to be affording greater weight to that passage of the Advocate General's opinion than it can properly bear. The Advocate General's remark was aimed at testing the appropriateness of the German domestic provision, which focused solely on the short-term nature of a stay; of its nature it could not apply to a long term stay in an hotel, even if the supply was otherwise of a kind that could be within the hotel sector exclusion. We accept that there may be circumstances in which such a stay might, depending on the relevant domestic provision, be found to be subject to that exclusion. But we do not consider that it is right to extract any general principle from the Advocate General's observation, still less to seek to apply it to the facts of the present case. In our view, whether a stay in relevant accommodation will be excluded from exemption or not will depend on the nature of the supply which gives rise to the right to stay in the relevant accommodation. When regard is had to the nature of the supply by FPSL of a Fractional Interest, that supply, for the reasons we have explained, cannot be equated to the provision of accommodation in the hotel sector.

99. The FTT took the view, at [291] to [293], that FPSL was involved in the commercial exploitation of 47 Park Street, having regard to the arrangements it had made with the Manager to provide property management and administration and relevant hotel services. It found, at [293], that the "essential nature of the business sector within which [a] party operates is not changed by the fact that a party has a more limited role directly to perform itself within that sector through contractual arrangements with other parties".

100. We have set out earlier the reasons why we disagree with the FTT's characterisation of the arrangements for management and administration of 47 Park Street as one of sub-contracting. But in any event, the FTT's reliance on the involvement of FPSL in the provision of hotel services is, in our judgment, misplaced. It emphasises once again the physical setting in which the supply is made by FPSL – which is admittedly one in which 47 Park Street provides hotel-like accommodation which is held out as being suitable for use by visitors and travellers – and fails to have regard to the nature of the supply itself. The involvement of FPSL in facilitating the management and administration of the property does not convert the wider but essentially passive supply made by FPSL itself into a more active, but narrower, supply of sleeping or other accommodation in the hotel sector.

101. In reaching these conclusions, we accept, as Ms McCarthy submitted, that the determination whether a supply falls within or outside the hotel sector exclusion involves a multi-factorial assessment. We do not accept, however, the submission that the exercise is confined to consideration of "what functions or characteristics hotels, inns and boarding houses have, and do not have, and comparing those functions (or characteristics) with those possessed by the establishment in question", without taking account of the contractual rights and obligations under the Membership Agreement.

102. That test was derived from the decision of the VAT and Duties Tribunal in *Geoffrey Ross Holding and June Monica Holding v Revenue and Customs Commissioners* [2006] VAT Decision 19573. That was a case where it was argued for the taxpayers, Mr and Mrs Holding, that accommodation provided by them to persons in a bungalow in the grounds of their home did fall within the hotel sector exclusion, in order that they could be registered for VAT and make a repayment claim for input tax recovery. The bungalow was not an hotel, an inn or a boarding house, and so the question for the tribunal was whether it was a "similar establishment". That question naturally addressed the attributes or, as the tribunal put it, the functions of the establishment in which the accommodation was provided.

103. In reaching its conclusion – that the supplies made by Mr and Mrs Holding were not within the hotel sector exclusion – the tribunal did not neglect the nature of the supplies that were made. Indeed, at [53], the tribunal made clear that in evaluating the nature of the provision made by the establishment it was having regard to the arrangements with those guests to whom the principal supplies of accommodation had been made in the relevant period. The tribunal regarded the question whether what was provided was temporary accommodation on a commercial basis (following the distinction drawn in *Blasi*) as the most important distinguishing feature. There were,

the tribunal noted, certain features (including provision and changing of bed linen and cleaning services) which tended towards a conclusion that Mr and Mrs Holding were more actively involved in the exploitation of property than a landlord of a typical longer term letting, but on balance the tribunal concluded that Mr and Mrs Holding did not compete with the hotel sector and that the function of their establishment in the relevant period was the provision of longer term letting.

104. In this case, as in *Holding*, the nature of the supplies made by the supplier, here FPSL, falls to be considered. It cannot in our view sensibly be argued that the nature of those supplies can be considered solely by reference to the functions and characteristics of 47 Park Street and without regard to the contractual rights and obligations arising under the Membership Agreement.

105. It is clear that 47 Park Street is a similar establishment to a small boutique hotel. That question does not fall to be addressed in this case. In this case, therefore, consideration of the nature of the supply is paramount. In other cases, of which *Holding* was one, there may arise the additional question of the comparison between the establishment at issue and establishments in the hotel sector. But in each case the question of the nature of the supply must be addressed.

106. It is not necessary to consider in this case whether Note (9) is, as the FTT found at [241], merely part of the enactment by the UK of Article 135(2) of the Principal VAT Directive, with its reference to "sectors with a similar function" or, as was the view taken by the tribunal in *Holding*, at [31](iii), a further exclusion to the scope of the exemption as permitted by the final sentence of what is now Article 135(2). We would only say that we agree on this point with the FTT, and not with the tribunal in *Holding*, for the reasons given by the FTT. We would add only that it would, to say the least, be surprising if a further exclusion were to have been adopted, not by the inclusion of a distinct exclusion in Group 1 of Schedule 9 VATA, but by means of a note which on its face refers directly to the meaning of a term only used in Group 1 by reference to the hotel sector exclusion in Item 1(d).

107. It is well-established that an appeal court or tribunal should be slow to interfere with a multi-factorial assessment based on a number of primary facts. That said, we do not accept Ms McCarthy's submission that the decision of the FTT on the hotel sector issue is effectively unappealable because the FTT based its findings on the evidence, and that evidence included a site visit. We accept the findings of the FTT as to the nature of 47 Park Street and that it is a similar establishment to that of a small boutique hotel. That does not, however, resolve the question whether the supply by FPSL was the provision of sleeping or other relevant accommodation so as to fall within Item 1(d). It is equally well-established that a multi-factorial assessment may be susceptible to appeal on a question of law if the tribunal below has made an error of principle, has failed to take into account something relevant or has given weight to something irrelevant.

108. That, in our judgment, is the position in this case. We have concluded that, by having regard in the circumstances of this case to the length and characteristics of the individual stays to which a member was entitled by virtue of the Fractional Interest

acquired, and not to the nature of the supplies of the Fractional Interests made by FPSL to the members, with their accompanying rights and obligations under the Membership Agreement, the FTT made an error of principle. That was an error of law, and the decision of the FTT on the hotel sector issue must be set aside. We therefore re-make that decision and, for the reasons we have given, decide that the supply made by FPSL was not a supply of relevant accommodation for the purpose of Item 1(d) of Group 1 of Schedule 9 VATA, notwithstanding that 47 Park Street is a similar establishment to an hotel within the meaning of Item 1(d) and Note (9) of Group 1.

C. Fiscal neutrality

109. In light of our conclusion on the hotel sector issue, it is not necessary for us to address the fiscal neutrality issue. However, we are clear that, had we determined the hotel sector issue against FPSL, we would have rejected FPSL's submissions on fiscal neutrality. There is no basis, in our judgment, for assimilating different types of supply on the basis that they take place in the same broad economic sector. The fact that the provision of traditional timeshare interests may have been determined to be within the land exemption (and not excluded from exemption by the hotel sector exclusion) can only be explained by the nature of the particular supplies in those cases, and not by the mere fact that they are made in the timeshare sector. There is no such sectoral exemption in the Directive.

110. Within any sector, different types of supply may be made. The characterisation of each type of supply will depend on the application of the applicable law to the nature of the particular supply, as properly analysed. The position has been made clear in *Customs and Excise Commissioners v Cantor Fitzgerald International* (Case C-108/99) [2001] STC 1453, at [33]:

> "33. An approach of that kind would be contrary to the VAT system's objectives of ensuring legal certainty and a correct and coherent application of the exemptions provided for in art 13 of the Sixth Directive. The court observes in that connection that, to facilitate the application of VAT, it is necessary to have regard, save in exceptional cases, to the objective character of the transaction in question (see *BLP Group plc v Customs and Excise Comrs* (Case C-4/94) [1995] STC 424 at 437, [1996] 1 WLR 174 at 199, para 24). A taxable person who, for the purposes of achieving a particular economic goal, has a choice between exempt transactions and taxable transactions must therefore, in his own interest, duly take his decision while bearing in mind the neutral system of VAT (see, to that effect, *BLP Group* [1995] STC 424 at 437–438, [1996] 1 WLR 174 at 199, paras 25 and 26). The principle of the neutrality of VAT does not mean that a taxable person with a choice between two transactions may choose one of them and avail himself of the effects of the other."

111. In our view, therefore, the tax treatment of FPSL's supplies in this case fall to be determined according to the legislative conditions for exemption and exclusion from exemption as set out in EU and domestic law. There is no room for any argument based on fiscal neutrality in this case.

Decision

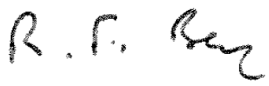
112. We have decided:

(1) agreeing with the FTT on the land exemption issue, that subject to the application of the hotel sector exclusion, the supply by FPSL of the grant of the Fractional Interests was exempt as the leasing or letting of immovable property; and

(2) disagreeing with the FTT on the hotel sector exclusion, that the supply made by FPSL was not a supply of relevant accommodation for the purpose of Item 1(d) of Group 1 of Schedule 9 VATA.

113. We set aside the decision of the FTT on the hotel sector issue, and re-make the decision. We determine that the supplies of FPSL in question were exempt supplies of land within the meaning of Item 1 of Group 1 of Sch 9 VATA.

114. Accordingly, we allow FPSL's appeal.



UPPER TRIBUNAL JUDGE ROGER BERNER

UPPER TRIBUNAL JUDGE KEVIN POOLE

RELEASE DATE: 12 February 2018