[2015] UKFTT 0605 (TC)

# TC04749

**Appeal numbers: TC/2012/07011**
**TC/2013/06425**
**TC/2014/05013**

***VAT – Development of a "holiday village" – Whether a single supply of zero rated construction services or taxable composite supply of construction services and procuring transfer of leasehold interest in completed lodge – Appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**FAIRWAY LAKES LIMITED** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JOHN BROOKS**
**JOHN COLES**

**Sitting in public at the Royal Courts of Justice, London on 28 and 29 October 2015**

**Michael Collins, Counsel, instructed by IVC (VAT Consultants) LLP, for the Appellant**

**Brendan McGurk, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. Fairway Lakes Limited ("Fairway") appeals against a decision of HM Revenue and Customs ("HMRC") made on 27 March 2012 and upheld on 6 July 2012 in connection with the development of Fairway Lakes Village, a number of holiday lodges constructed on plots in the grounds of Caldecott Hall, Fritton, Norfolk. In essence the issue that arises is whether Fairway made a zero rated supply of construction services to a customer (as it contends) or (as HMRC contend) a composite taxable supply of construction services and procuring the landowners to grant a lease of the plot of land to the customer.

2. Fairway was represented by Mr Michael Collins and Mr Brendan McGurk appeared for HMRC.

### Evidence and Facts

3. In addition to being provided with several bundles of documentary evidence, including correspondence between the parties, we had the benefit of hearing the oral evidence of Mr Laurence Gage who designed the development at Fairway Lakes Village and who had agreed the number of plots, their size and location with the Planning Authority.

4. Although there was not a statement or schedule of agreed facts the underlying facts were not disputed.

*Background*

5. Sunningdale Investment Limited ("SIL") which was incorporated on 21 October 1991 owns and operates an 18 hole golf course, driving range and hotel/conference centre under the trading name of Caldecott Golf and Country Club. It also owns the freehold of 11 plots of land at Fairway Lakes Village on which holiday lodges are sited (or will be sited). The directors and shareholders of SIL are Mr Gage (0.39% shareholding), his sister Mrs Judith Collen (0.40% shareholding) and their mother Mrs Doris Gage (99.19% shareholding) who although a director is not longer active in SIL.

6. A partnership between Mr Gage and Mrs Collen (the "Partnership") owns the freehold of 31 plots at Fairway Lakes Village on which the holiday lodges are (or will be) sited.

7. Fairway, which was incorporated of 3 March 2005, is responsible for the construction of lodges and infrastructure at Fairway Lakes Village. It owns the freehold of plots 2, 3 and 5 and has granted leasehold interests on these plots. It is also a party to leases granted by SIL and the Partnership as "the Management Company". Mr Gage and Mrs Collen are the directors of Fairway and each hold 50% of the shares.

8. The freehold of the Fairway Lakes Village development site was purchased by SIL in the spring of 1996 and is currently held by either SIL or the Partnership and is registered at the Land Registry. A lease, with a term of 125 years or expiring on 31 May 2130 in respect of each designated plot is also registered at the Land Registry.

9. On 13 November 1996 an application for planning permission was made to the Borough of Great Yarmouth. This was granted to Caldecott Golf and Country Club (the trading name of SIL) on 22 October 1997 and permitted the construction of holiday lodges subject to certain conditions.

10. For present purposes it is only necessary to set out Conditions 2 and 5:

> 2. Prior to the commencement of the development details of the holiday units and their layout shall be submitted to and approved in writing by, the Local Planning Authority…
>
> The reason for the condition is:
>
> These details have not been formally agreed within the scope of the planning application hereby allowed.
>
> …
>
> 5. None of the residential units within the Lodge park shall be occupied as the sole or main residence of any individual or family
>
> The reason for this condition is:
>
> The application site is within an area of the Borough where the Local Planning Authority intend that new dwellings whether a permanent or a temporary nature will only be used for holiday accommodation.

11. The Chief Planning Officer attended the development site before the work commenced and advised that, provided elevations and floor plans were submitted and particular external facings and roof tiles were used, building control regulations would be sufficient to comply with the terms of the planning permission. On 22 September 2006 the Head of Planning and Development confirmed that the development that had taken place to date complied with the terms of the planning approval. On 13 June 2007 a drawing was submitted by the architect to the planning department for approval of the layout for the entire development of 45 units

12. The infrastructure of the development, including roads, drainage, power and water was constructed by Fairway which met the costs from its own funds. Under the terms of an agreement contained in a letter dated 12 October 2005 from Fairway to SIL and the Partnership absolute ownership of the infrastructure passes to the freeholder from the date of installation in consideration for permitting Fairway to install it on their land.

13. Fairway, in its role as the Management Company specified in the leases granted by SIL and the Partnership, makes an annual maintenance charge to tenants for the upkeep of the infrastructure of the site including roadways, parking bays, lighting, bin areas, gardens and grounds.

14. In 2005, at the commencement of the development, two show lodges were erected on the site, the 'Randolph' style on plot 1 and the 'Belfort' style on plot 2. The 'Belfort' lodge kit was supplied to Fairway under a written agreement dated 24 March 2005 with KDM International Limited ("KDM") under which Fairway was obliged to erect the lodge on plot 2 and grant KDM a lease over the plot.

15. The lease between Fairway and KDM was executed on 24 January 2006 and was for a term of 125 years from 1 June 2005 at a premium of £120,000. The agreement between KDM and Fairway provided that KDM would permit shared use of the 'Belfort' show lodge by Fairway for three years. Fairway and KDM also entered into an oral agreement that KDM would supply further kits to the same specification as the show lodges.

16. The construction of a lodge takes approximately four months from the date the kit is received from the manufacturer. The kit consists of the outer and inner walls, floor and roof. It is erected by a combination of three carpenters employed by Fairway, subcontracted building/erection service provided by SIL and outsourced subcontractors as needed. To date all of the lodges have been constructed with kits provided by KDM. Fairway has access to the land in order to undertake the construction of the lodges by virtue of an oral agreement with the landowner.

17. In an article about the Fairway Lakes Village development, in the April 2007 edition of the *Golf Course Architecture* magazine, Mr Gage wrote:

> At Caldecott Hall in Norfolk, we're developing a site for 48 Svenskabin Swedish timber homes from KDM International Plc ("KDM"). Each chalet will be painted in bright colours and we're expecting the development to be popular and profitable

He continued:

> Also I think concept is important. Our development is intended to have a certain Scandinavian charm

18. Howards Estate Agents were engaged to market the lodges under an agreement signed by Mrs Collen on behalf of the landowners (SIL and the Partnership). The marketing material indicates that the lodges are held out for sale at a single price with a specific price shown for each lodge.

19. Under the arrangements in place for plots 2, 3 and 5 the freehold title was transferred to Fairway which subsequently granted a lease to a customer. We are not concerned in this appeal with these arrangements but those which came into effect during 2007 when there was a change in the sales procedure that applies to plots 4, 6 and subsequent plots (the "New Arrangements"). Under the New Arrangements the landowner (either SIL or the Partnership) grants a lease to the customer who also enters into an agreement (the "Agreement") with Fairway and it is this Agreement that is central to this case.

*The Agreement*

20. The parties to the Agreement are described as 'the Seller' (Fairway) and 'the Buyer' (the customer).

21. Insofar as they are material for the purposes of this case the terms and conditions of the Agreement provide as follows:

> **1.1'The Basic Cost of the Lodge'** means [£…]
>
> **'The Reservation Deposit'** means [£…]
>
> **1.2** The 'Basic Cost of the Lodge' (together with VAT (if any) chargeable thereon) shall be paid by the Buyer at the following stages and in the following amounts

| No of Stage | Stage of Constriction | Amount payable £ |
|---|---|---|
| 1 | On ordering the Lodge from the Manufacturer | The Reservation Deposit |
| 2 | On the date of this Agreement | [£ …] |
| 3 | Completion of the erection and fitting out of the Lodge | [£ …] |

> **2.1 Particulars and Definitions**
>
> In this Agreement:
>
> **'the Plot'** means the plot numbered […] on the Fairway Lakes development at Caldecott Hall New Road Fritton Great Yarmouth Norfolk
>
> …
>
> **'Completion Date'** [specific date] or 10 working days after the date on which the Seller's Solicitors shall give written notice to the Buyer's Solicitors that the Lodge is ready for reinspection.
>
> **'the Balance Purchase Monies'** means the total of:-
>
> a) …
>
> b) …
>
> c) The Seller's Legal Costs [ a specified amount]
>
> d) …
>
> Less: the Reservation Deposit, all stage payments received by the Seller under condition 1.2 and any other monies paid by the Buyer to the Seller on account of the Balance Purchase Monies prior to actual Completion
>
> …
>
> **'the Contract Rate'** means the Law Society's Rate
>
> **'the Lease'** means a lease of the Plot in favour of the Buyer
>
> **'the Lodge'** means the Lodge to be erected on the Plot of the type specified in the Schedule

…

**3. Reservation Deposit**

Before the signing of this Agreement the Buyer has paid to the Seller or the Seller's Solicitors as agent for the Seller the Reservation Deposit

**4. Construction of the Lodge**:

The Seller shall build or cause to be built the Lodge on the Plot in a thorough and workmanlike manner and in accordance with the plans and general specifications which have been produced to the Buyer on or before the signing hereof, the terms of any applicable planning permission and building regulations but subject to the right of the Seller to make such minor variations thereto as may be expedient (provided that such variations shall not substantially affect the value appearance or plan of the Lodge or represent a breach of planning permission or building regulations).

**5. Provisions relating to the Price and Completion**

5.1 If any stage payment (including the final stage) provided for in condition 1.2 shall not be paid within 10 Working Days of such notification having been sent by the Seller the Buyer shall pay interest at the Contract Rate on the stage payment or the outstanding amount of such stage payment from the date of actual completion of that stage until the stage payment is received by the Seller

**6. Delays beyond the Seller's control**

The erection and completion of the Lodge shall be carried out by the Seller as quickly as possible but in any of the cases specified below where delay is caused in the delivery erection or completion of the Lodge or any other matter relating to it the Seller shall not be liable to the Buyer for any loss or inconvenience however occasioned by nor shall the Buyer be entitled to receive any compensation for any delay by reason of:-

6.1 strikes lockouts combinations and scarcity of labour

6.2 shortage of and delay in obtaining materials

6.3 hostilities and acts of the Queen's enemies

6.4 riot, insurrection or civil disturbances

6.5 force majeure, restrictions and controls imposed by Government

6.6 fire, storm, tempest, explosion, flood, lightning or bad weather

6.7 procedures required for obtaining all necessary permissions for or appertaining to the erection of the Lodge and all necessary expenses

6.8 compliance with all legislation, statutory rules, orders regulations or directions

6.9 accidents in the works for which the Seller is not responsible

6.10 other causes beyond the direct control of the Seller

…

**8, Payment of Rent and Service Charge**:

8.1 In addition to the Balance of Purchases Monies on completion of the sale of the Lodge the Seller in its capacity as the Management

Company shall Be entitled to collect from the Buyer and the Buyer shall pay to the Seller:-

the Tenant's Proportion of the amount estimated by the Management Company (or its managing agents) as the Maintenance Expenses …TOGETHER WITH The Initial Yearly Rent … which is to be paid to the Seller as agent for and on behalf of the Landlord Under the Lease

8.2 The expressions in this condition shall have the meanings set out in the Lease

**9. Completion**

9.1 The sale of the Lodge shall be completed at the offices of the Seller's Solicitors on the Completion Date

…

9.4 At Completion the Buyer's Solicitors shall pay to the Seller's Solicitors the Balance Purchase Monies and on receipt of the Balance Purchase Monies (as defined in condition 1) in full the Buyer shall be given vacant possession of the Lodge

**10. General Conditions**

10.1 This Agreement incorporates the Standard Conditions of Sale (4th Edn) so far as they are not varied by or inconsistent with its express terms and where there is any conflict between those conditions and this Agreement, this Agreement prevails and terms used or defined in this Agreement have the same meaning when used in the conditions

10.2 the General Conditions shall be amended as follows:

10.2.1Standard Conditions 2.2, 2.3, 3.2.2, 3.2.3, 3.4.6, 4.3, 5.1.1, 5.1.2, 6.1.1, 6.3, 6.8.3, 7.2a, 7.3.1, 7.3.4, 9 and 10 shall not apply to this Agreement

10.2.2 The words "at the Buyer's expense" shall be substituted for the "pay for" in Standard Condition 4.3.2

**11. Agreements and Declarations**

…

11.2 No Assignment or benefit of this Agreement

The Buyer must not assign, sublet, charge or otherwise deal with all or part of this Agreement, and the Seller need not complete the sale of the Unit to any person other than the Buyer

**12. Exclusion of Liability**

The Buyer acknowledges that save as to such (if any) of the written statements of the Seller's Solicitors in answer to enquiries made prior to the making of this Agreement as were not susceptible of independent verification by inspection and survey of the Plot, sear and enquiry of the local or other public authority or inspection of documents disclosed to the Buyer or the Buyer's Solicitors (and whether or not such inspections survey search and enquiry have been made and have been relied on by the Buyer) he has not entered into

this Agreement in reliance wholly or partly on any statement or representation (whether written or oral) made to him

22. Of the Standard Conditions of Sale, which are incorporated into the Agreement by virtue of Clause 10.1, those that are material to the present case provide:

**4.1 Proof of Title**

4.1.1 Without cost to the buyer, the seller is to provide the buyer with proof of the title to the property and of his ability to transfer it, or to procure its transfer.

4.1.2 Where the property has a registered title the proof is to include official copies of the items referred to in rules 134(1)(a) and (b) and 135(1)(a) of the Land Registration Rules 2003, so far as they are not to be discharged or

overridden at or before completion.

4.1.3 Where the property has an unregistered title, the proof is to include:

(a) an abstract of title or an epitome of title with photocopies of the documents, and

(b) production of every document or an abstract, epitome or copy of it with an original marking by a conveyancer either against the original or an examined abstract or an examined copy.

**4.6 Transfer**

4.6.1 The buyer does not prejudice his right to raise requisitions, or to require replies to any raised, by taking any steps in relation to preparing or agreeing the transfer.

4.6.2 Subject to condition 4.6.3, the seller is to transfer the property with full title guarantee.

**6.8 Notice to complete**

6.8.1 At any time on or after completion date, a party who is ready, able and willing to complete may give the other a notice to complete.

6.8.2 The parties are to complete the contract within ten working days of giving a notice to complete, excluding the day on which the notice is given. For this purpose, time is of the essence of the contract.

**8.2 New leases**

8.2.1 The following provisions apply to a contract to grant a new lease.

8.2.2 The conditions apply so that:

'seller' means the proposed landlord,

'buyer' means the proposed tenant,

'purchase price' means the premium to be paid on the grant of a lease.

8.2.3 The lease is to be in the form of the draft attached to the contract.

8.2.4 If the term of the new lease will exceed seven years, the seller is to deduce a title which will enable the buyer to register the lease at the Land Registry with an absolute title.

> 8.2.5 The seller is to engross the lease and a counterpart of it and is to send the counterpart to the buyer at least five working days before completion date.
>
> 8.2.6 The buyer is to execute the counterpart and deliver it to the seller on completion.

23. Mr Gage explained that the Agreement, which was drafted by Fairway's solicitors used the terminology that had been used under the previous sale arrangements (when title was transferred to Fairway), eg "buyer" and "seller", because the solicitors had decided to modify the old agreement rather than start from scratch with a new document. He also told us that he had relied on the solicitors to draft the Agreement and was not aware until recently that it had incorporated the Standard Conditions of Sale.

*Sales Procedure under the New Arrangements*

24. Mr Gage explained the procedure adopted under the New Arrangements using the sale of Plot 13 as an example.

25. Potential customers who were shown round the Show Lodge by Howards wanted more information about the lodges to take the matter further. The estate agent therefore contacted Mr Gage who attended the site to meet the prospective customers. He explained that it was first necessary to decide on the style and specification of the lodge. Once this had been done Mr Gage, in his role as director of Fairway, then explained that once a price had been agreed for the construction of the Lodge (by Fairway) the customers would have to secure a lease from the Partnership and enter into what he described as a building agreement (in the terms of the Agreement, above) with Fairway.

26. After the customers had provided their required specification to him Mr Gage was able, after a couple of days, to give them a quotation to supply the kit and constructions services. As they wished to proceed with the acquisition of the lodge the customers paid Mr Gage a £5,000 deposit, which he described as "non-returnable". Mr Gage exchanged solicitors details and informed Howards of the sale for their commission purposes. Although Mr Gage said that he received the deposit in his role as a partner in the Partnership it is apparent from the 'Completion Statement' provided to Fairway from its solicitors that payment for the lodge, including the deposit, is made to Fairway which is responsible for the payment of commission to the estate agent and the solicitors fees.

27. Following payment of the deposit a draft lease on behalf of the Partnership and a draft copy of the Agreement on behalf of Fairway is sent to the customer's solicitors by the solicitors which act for both the Partnership and Fairway. After responding to any queries raised by the customers solicitors and once the lease is ready to exchange the Agreement is then approved by the solicitors for both parties.

28. The next stage in the process is apparent from a letter of 24 July 2007 from solicitors acting for Fairway to solicitors acting for the customers of Plot 8 which states:

> Further to our telephone conversation today when Contracts were exchanged under Law Society Formula B we enclose herewith our clients part of the Building Agreement together with the original Lease and look forward to receiving your clients part of the Agreement together with the counterpart Lease duly executed.
>
> Perhaps you should kindly telephone us prior to sending the balance of fund shown the Completion Statement tomorrow.

29. Mr Gage told us that "we always insist on the lease being in place" before the Agreement is signed and referred to an instance where a prospective customer's solicitor had wanted it the other way around stating, in an email to Fairway's solicitors that:

> … under the Agreement to purchase the Property there was no obligation to grant the lease … It seems to me that the Agreement should be entered into first with an obligation to grant the lease contained within it (in addition to building obligations), As currently presented this could potentially leave the purchaser with a lease of a plot but no structure on it given that, at the time of the grant of the lease their would be no obligation on the developer to construct the building to be located on the Property because at completion of the lease, the Agreement would not have been entered into.

But when told that the completion of the lease before the Agreement is the "correct way round" the sale did not proceed.

30. In 11 of the 15 plots sold the lease was granted and Agreement was signed on the same day although there is nothing to indicate which took place first. In the remaining four cases the lease was granted after the Agreement had been signed. The lease for Plot 6 was granted on 19 April 2007 a day after the Agreement which had been signed on 18 April 2007; the lease for Plot 7 was granted on 4 June 2007 and the Agreement signed on 31 May 2007; the lease for Plot 13 was granted on 1 April 2008 and the Agreement signed on 10 January 2008; and the lease for Plot 30 was granted on 14 August 2008 and the Agreement signed on 12 August 2008.

31. Mr Gage suggested that the disparity between dates of the lease and Agreement was because of a clerical error by the solicitors. While there was evidence of this in respect of Plot 13 this was not the case for the other plots where the Agreement pre-dates the lease.

32. Although the lease for Plot 13 is dated 1 April 2008 and the Agreement was signed on 10 January 2008, a letter from the solicitors to Fairway dated 10 January 2008 confirms that the Agreement and Lease "in connection with Plot 13 has been exchanged." A letter from the same solicitors, dated 20 March 2015 refers to a "lease premium" being paid to Mr Gage and Mrs Collen by cheque which sent to them on 10 January 2008 and suggests that the letter of 10 January 2008 should have referred to the lease being "completed" rather than exchanged.

**Law**

33. Section 30(2) of the Value Added Tax Act 1994 ("VATA") provides:

> A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified.

34. Insofar as it applies to the present case Item 2 of Group 5 (Constructions of Buildings etc.) to Schedule 8 VATA provides:

> The supply in the course of the construction of—
>
> (a) a building designed as a dwelling or number of dwellings …;
>
> of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity.

35. It is not disputed that the proper approach to the construction of an agreement for VAT purposes, is that of Lewison J (as he then was) in *A1 Lofts Ltd v HMRC* [2010] STC 214. This was approved by the Supreme Court in *HMRC v Secret Hotels2 Ltd* [2014] STC 937 in which Lord Neuberger, said:

> "31. Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham.
>
> 32. When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and may often be of little weight. As Lewison J said in *A1 Lofts Ltd v Revenue and Customs Commissioners* [2010] STC 214, para 40, in a passage cited by Morgan J:
>
> > "The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in *Street v Mountford* [1985] AC 809); or as a fixed or floating charge (as in *Agnew v IRC* [2001] 2 AC 710), or as a consumer hire agreement (as in *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd* [2009] 1 WLR 1375). In all these cases the starting point

> is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them."”

36. The general principles by which contractual documents, such as the Agreement, should be interpreted were considered by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912-913 where he made the following “general remarks about the principles by which contractual documents are nowadays construed”:

> “I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 WLR. 1381, 1384-1386 and *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 WLR 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows:
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] 2 WLR 945

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera S.A. v. Salen Rederierna A.B.* [1985] 1 AC 191, 201:

> ". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

37. We were also referred to the following passages from Chitty on Contracts (31st Ed) in relation to other principles of construction as being relevant to the present case:

> **12-056: Badly Drafted Contracts**
>
> In *Mitsui Construction Co Ltd v Att-Gen of Hong Kong* Lord Bridge said (of a building contract) that the fact that the contract was badly drafted:
>
> > " … affords no reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language they have used interpreted in the light of the relevant factual situation in which the contract was made. But the poorer the quality of the drafting, the less willing any court should be to be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention, if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis."
>
> **12-078: Inconsistent or Repugnant Clauses**
>
> Where the different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect the purpose of the contract as gathered from the instrument as a whole and the available background, and that part which would defeat it must be rejected. The old rule was, in such a case, that the earlier clause was to be received and the later rejected; but this rule was a mere rule of thumb, totally unscientific, and out of keeping with the modern construction of documents. To be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses. A term may also be rejected if it is repugnant to the remainder of the contract. However, an effort should be made to give effect to every clause in the agreement and not to reject a clause unless it is manifestly inconsistent with or repugnant to the rest of the agreement. Thus, if there is a personal covenant and a proviso that the covenantor shall not be personally liable under the covenant, the

> proviso is inconsistent and void. But if a clause merely limits or qualifies without destroying altogether the obligation created by another clause, the two are to be read together and effect is to be given to the contract as disclosed by the instrument as a whole.
>
> **12-079: Clauses Incorporated By Reference**
>
> If clauses are incorporated by reference into a written agreement, and those clauses conflict with the clauses of the agreement, then, in the ordinary way, the clauses of the written agreement will prevail. Moreover, the incorporating provision may be so general or wide as to have the effect of incorporating more than can make any sense in the context of the agreement, in which case the surplus may be rejected as insensible or inconsistent, or disregarded as "mere surplusage". A term in a proposal for insurance which conflicts with a term of the policy will be overridden by the term of the policy.

38. Finally, in relation to deposits, we were referred to *Wright v Newton* (1835) 2 C.M. & R 124 as authority that a deposit may be recovered in the event of the failure to perform a condition of a contract and *Chillingworth v Esche* [1924] 1 Ch 97 where it was held that a deposit which was paid during negotiations for a contract which was not subsequently concluded "ought to be repaid".

*Discussion and Conclusion*

39. There is no suggestion in the present case that the Agreement was a sham. Therefore, as Lord Neuberger observed in *Secret Hotels2 Ltd* it is necessary to consider its terms, which are clearly intended to govern the relationship between Fairway and its customer, in order to identify whether Fairway undertook to provide solely construction services or more than that, namely the procurement of a lease for its customer.

40. It is accepted that if it is the latter then such a supply is subject to VAT at the standard rate. It is also accepted that the Agreement should be construed in accordance with Lord Hoffman's principles adumbrated in *Investment Compensation Scheme Ltd v West Bromwich Building Society* under which we are required to ascertain the meaning which the Agreement would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. Although previous negotiations are excluded, the background, or matrix of fact, includes absolutely anything else which would have affected the way in which the language of the document would have been understood by a reasonable man.

41. For Fairway, Mr Collins submits that the following are key background facts to which we should have regard in interpreting the Agreement:

(1) That in dealing with a customer or prospective customer Mr Gage represented the landowner (either SIL or the Partnership) in addition to representing Fairway;

(2) A customer would be told by Mr Gage that it was necessary to enter into a lease with the landowner **and** a building contract (the Agreement) with Fairway;

(3) After a customer had paid a deposit to Mr Gage draft copies of the lease and Agreement would be sent to the customer's solicitors who would not therefore look at the Agreement in isolation.

(4) It was clear that in respect of 11 out of the 15 Lodges the lease and Agreement were signed on the same day and that there was evidence (referred to in paragraph 29, above) that the lease was required to be signed first. Where the Agreement had been signed before the grant of a lease there was evidence in relation to Plot 13 (see paragraph 32, above) that the date shown on the lease was incorrect due to a clerical error. However, there was no evidence to explain the disparity in relation to the remaining three.

(5) Lodges are not conventional buildings but are delivered in kit form from a Swedish manufacturer and assembled by Fairway

42. Mr Collins reminds us that the evidence of Mr Gage was that the Agreement was adapted from an earlier contract that had been used before the adoption of the New Arrangements which could explain some of its language and the expressions used. However, he submits that notwithstanding the language used, the expressions used in the Agreement, such as Buyer and Seller, are consistent with the sale and purchase of a kit for the construction of a lodge noting that although there is a reference to a lodge in the Agreement it does not refer to a plot. He says there was no evidence that a plot was procured from a landowner.

43. He also sought support from the decision of the Court of Appeal in *Telewest Communications plc v HMRC* [2005] STC 481 and the Tax and Chancery Chamber of the Upper Tribunal in *Lower Mill Estate Limited v HMRC* [2011] STC 636 which applied *Telewest.* Both cases concerned supplies to a customer by different entities under separate contracts and although the facts of *Lower Mill* are remarkably similar to the present appeal it can be distinguished.

44. In *Lower Mill* HMRC unsuccessfully argued that the supply of land by a freeholder and supply of construction services by a different company under separate contracts should be combined and treated as a single supply whereas, in the present case, HMRC does not seek to aggregate the grant of the lease by the landowner with the supply by Fairway under the Agreement but contends that the supply under the Agreement is broader than that submitted by Fairway. As the present case concerns a single contract, the Agreement, between two parties, described in the Agreement as the buyer and seller we consider that little, if any, assistance can be derived from either *Telewest* or *Lower Mill*.

45. Mr McGurk, for HMRC, accepts that the terms of the Agreement are consistent with it being a construction agreement but submits that they are not inconsistent with it being a contract to complete the building and ensure that the landowner grants a lease on a plot. He raises the question of what protection would exist for a customer if the Agreement was for construction services only and for whatever reason the landowner did not or was unable to grant the lease. In such circumstances, he submits,

a customer would not have a remedy against the landowner or Fairway and advances this as a reason for the existence of the obligation to procure a lease under the Agreement.

46. We accept Mr McGurk's submission that it did not matter that draft agreements had been exchanged when the deposit was paid as until these were executed they could not take effect.

47. In addition to the Agreement, under which he contends Fairway is required to build a lodge and procure a lease from the Landowner, Mr McGurk relies on, what he describes as one of two key pieces of evidence, namely the payment of the deposit by a customer (the other key evidence being the Agreement itself). He submits this is paid to Fairway on the understanding that the landowner will act in tandem with it and grant a lease to the customer and if not, relying on *Wright v Newton* and *Chillingworth v Esche*, the customer would be entitled to have the deposit refunded.

48. Turning to the Agreement and clause 10 in particular, which incorporates the Standard Conditions of Sale, Mr Collins relies on the terms of the clause itself – which provides that in the case of conflict between the conditions in the Agreement and the incorporated terms, the terms in the Agreement prevail – and the similar statement contained in paragraph 12-078 of Chitty quoted in paragraph 37, above. However, when asked by the Tribunal he could not identify any conflict between the express terms of the Agreement and those incorporated by virtue of clause 10.

49. Mr Collins also sought to rely on paragraph 12-056 of Chitty (also quoted at paragraph 37, above) in respect of badly drafted contracts. However, we agree with Mr McGurk who submits that just because the Agreement does not achieve what Fairway now contends it does not follow that it was badly drafted.

50. Mr Gage said that he, and Fairway, had relied on its solicitor to draft the Agreement and he did not question them. However, there can be no doubt that as a professionally drafted document the solicitor intended the Standard of Conditions of Sale, which are designed for use in residential conveyancing transactions, to be incorporated into the Agreement.

51. In our judgment it is clear from clauses 4.1.1 and 6.8 of the Standard Conditions of Sale (which are set out in full in paragraph 22, above) that, as Mr McGurk submits, the supply under the Agreement extends beyond the provision of construction services. Clause 4.1.1 requires Fairway to provide a customer with proof of the title to the property and its ability "to procure its transfer" and clause 6.8 entitles a customer to issue "a notice to complete" within ten days which would require Fairway to ensure the grant of a lease by the landowner.

52. We find further support for our conclusion from the fact that the Agreement refers to the parties as "Buyer" and "Seller", provides for the payment of rent and service charge to Fairway (clause 8) and requires Fairway to give the Buyer "vacant possession" on "completion" (clause 9). Also that Fairway is responsible for payment of conveyancy and estate agents fees.

53. Therefore, for the above reasons, we find that under the Agreement Fairway, in addition to providing construction services to a customer, also undertook to procure the landowners to grant a lease of the plot of land to that customer and dismiss its appeal accordingly.

*Right to apply for Permission to Appeal*

54. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**JOHN BROOKS**

**TRIBUNAL JUDGE**
**RELEASE DATE: 09 NOVEMBER 2015**