TC05318

Appeal number: TC/2013/01511

VAT – whether supplies relating to fractional ownership interests in a property are exempt from VAT - as the grant of an interest in land under item 1 of group 1 of schedule 9 VATA – or standard rated - as supplies of membership of a plan or of accommodation in a hotel, inn or boarding house or similar establishment under item 1(d) of group 1- appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

FORTYSEVEN PARK STREET LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE HARRIET MORGAN
MEMBER JOHN COLES

Sitting in public at the Royal Courts of Justice, Strand, London on 22 and 23 October 2015

Ms Melanie Hall QC, as instructed by KPMG, as Counsel for the Appellant

Ms Hui Ling McCarthy, as instructed by the General Counsel and Solicitor to HM Revenue and Customs, as Counsel for the Respondents ("HMRC")

DECISION

1. The appellant has appealed against HMRC's decision of 13 August 2012, as upheld on review on 31 January 2013, that supplies it makes to individuals in relation to the use of residences at 47 Park Street, Mayfair, London (the "**Property**") and the provision of access to certain related benefits are taxable supplies of services which are subject to VAT at the standard rate. The appeal is made on the basis that the supplies are exempt supplies of land within the meaning of item 1 of group 1 of schedule 9 to the Value Added Tax Act 1994 ("**VATA**") (the "**land exemption**").

2. The appellant's business is the sale of "fractional interests" in residences at the Property. In return for a substantial upfront price, a purchaser acquires the ability to occupy a residence at the Property of a specified category for a maximum number of nights in each year until 31 October 2050 and to access a range of related benefits during that period. These include the option for the purchaser in effect to exchange stays at the Property for stays in other properties and to realise rental income in respect of a residence of the specified type. The terms of the arrangement are governed by a membership agreement (and we refer to those who purchase a fractional interest under that agreement as a "**member**"). Essentially the arrangements form a type of flexible timeshare plan.

3. In outline, the appellant argues that the only supply it makes to a member in return for the purchase price is the grant of a licence to occupy land, which falls within the land exemption, such that no VAT is due. The supply is not, in its view, excluded from that exemption as the provision of "accommodation" in a "hotel, inn, boarding house or similar establishment" (under para 1(d) of group 1 of schedule 9 VATA ("**item 1(d)**") or as the provision of "holiday accommodation" (under para 1(e) of group 1 ("**item 1(e)**").

4. HMRC's position is that the appellant does not provide members with any interest in land capable of falling within the land exemption but rather provides a taxable service of the right to participate in a plan, comprising a bundle of benefits, which includes the provision of merely an opportunity for a member to occupy a residence. In any event, if the appellant is held to make a supply of an interest in land it would be excluded from the land exemption under item 1(d).

Facts and evidence

5. We have based our findings of fact on the bundle of documents produced and the evidence of Mr Lee Dowling who appeared as a witness on behalf of the appellant and our visit to the Property which took place on 21 October 2015. Mr Dowling has been an employee of Marriott Vacations Worldwide Corporation ("**MVWC**") since 2001 and is currently the senior vice president of Europe and the Middle East. He is also a director of the appellant and of MGRC Management Limited ("**MGRC**") which acts as the manager of the Property. He has worked in the timeshare industry for 14 years. He is a qualified accountant and in 2015 was appointed to the board of the

ICAEW Tourism and Hospitality Special Interest Group. We found him to be a knowledgeable witness.

Background

6. The appellant is a subsidiary of MVW International Holding Company S.a.r.l which is ultimately owned by MVWC. Under licence from Marriott International Inc, MVWC is the exclusive worldwide developer, marketer, seller and manager of vacation ownership and related products under Marriott Vacation Club and Grand Residences by Marriott brands and the Ritz-Carlton Destination Club brand. MGRC is also ultimately owned by MVWC.

7. The appellant owns a 60 year leasehold interest in the Property (under leasehold title number NGL676100) which commenced on 1 November 1990 and expires on 31 October 2050. Clause 4.10 of the lease contains a restrictive covenant limiting the use of the Property to either serviced flats or self-contained private residential flats.

8. The appellant refurbished the Property in 2002. Following this it comprises 49 self-contained residences divided into 5 categories according to the number of rooms, additional facilities and floorspace. The appellant's principal activity is described as the sale of fractional interests in these residences. Essentially, as explained in further detail below, the appellant grants individuals, who sign up to a membership agreement on paying a substantial price, the right to occupy a reserved residence of the specified category for a maximum number of nights in each year until 31 October 2050 (subject to reservation and other conditions) plus access to a number of benefits. In the year ended 31 December 2013 the appellant had turnover from this business of almost £4.8 million. The appellant has sold 617 such interests to date out of a total available of 631. In effect 6 interests are retained by the appellant to allow time for the maintenance of residences to be carried out and to ensure it can satisfy the occupation requirements of the members. The intention is that once all fractional interests have been sold, title to the Property will be transferred into a trust to be held for the benefit of the members.

9. As regards the operation of this business, the appellant is subject to the Consumer Protections, Timeshare, Holiday Products, Resale and Exchange Contract Regulations 2010 (SI 2010/2960) (the "**Timeshare Regulations**"). With effect from 25 February 2013, these Regulations implement Directive 2008/112/EC on the protection of consumers in respect of certain aspects of timeshare, long term holiday products and exchange contracts.

10. The terms of the membership agreement have been subject to change over the years but the parties have both looked to the agreement of 2010 as representative of the applicable terms (and changes since that time are not material). Unless stated otherwise all references below to an agreement are to that agreement and all references to defined terms are to terms used in that agreement.

11. The purchase price for a fractional interest currently ranges from £92,000 to £243,000 depending on the type of residence in relation to which rights are acquired. Mr Dowling gave evidence that in effect the pricing gives members around a 35% discount overall on the commercial rate which non-members pay for occupying the residences (taking into account the time value of money on a net present value calculation basis).

12. Non-members can stay in the residences, when not in use by members, on paying a commercial daily rate. It is not disputed that VAT is due on charges made to non-members which the appellant accounts for under the Tour Operators Margin Scheme. Mr Dowling gave evidence that room rates for stays at the commercial rack rate currently range from £439 to £939. Rates are set by looking at the average rates for the last 12 months and occupancy achieved at those rates, comparisons of rates for the next 12 months with those charged by properties of comparable quality and price (including Marriott JW Grosvenor House, Marriott Grosvenor Square, Park Lane Marriott, Claridges, 45 Park Lane, 51 Buckingham Gate and The Dorchester) and a review of the expected mix of availability for occupancy on this basis and by members over the next 12 to 18 months.

13. Non-members can make reservations through the Marriott website in the same way as for any other hotel reservation, with the customer providing their name and other requested details, and then checking in with the concierge on arrival at the Property. Reservations can also be made on other websites such as Booking.com Travelocity and Expedia (subject to the terms and conditions listed on those websites).

14. The building has a pillaried 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.

15. The residences are laid out over 7 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.

16. Each residence has a living space with sofas and chairs, a dining area, 1 or 2 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 53 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.

17. The agreement provides for the Property and members' rights to be managed by a Manager, which is MGRC. MGRC's principal activity is the "provision of management support services to the Home Owner's Association of members of the Fortyseven Park Street by Marriott Grand Residence Club and the operation of club activities catering for the needs of both Club members and the transient rental market" (as set out in MGRC's annual accounts for the year ending on 31 December 2013). MGRC's main source of income is a fee it receives as part of an Annual Residence Fee which is due from members (see 46 to 52) and rental income in respect of unsold fractional interests.

Marketing and press coverage

18. Mr Dowling gave evidence that the target market for the sale of fractional interests are persons seeking a cost and time effective alternative to home ownership in London. This is supported by the website for the Property which states:

> "London's first FRACTIONAL OWNERSHIP luxury property to offer an intelligent accommodation option for those who require a flexible cost and time effective alternative to second home ownership in central London. Membership offers convenient access to a selection of one and two bedroomed apartments in Mayfair at a fraction of the cost of whole ownership……offering optimum flexibility and convenience, membership gives you the right to use your apartment for a select number of nights each year until 2050 - enjoy your apartment for a night, two nights, a week or longer."

19. There are a number of member testimonials on the website which indicate some members view the residences as a home away from home. For example, there is one from a Madrid based member who says: "You can have all the benefits of home ownership without the hassle and at a fraction of the cost. It is perfect for me also because I only need the house just for a couple of weeks every year". She also speaks of the benefits of not having to worry about setting up the suite, notes that the fridge is full when she arrives with what she has asked for and that "the Butler Service is amazing". She refers to the benefit of arriving at the Property to find "pictures of my sons in their frames on the wall".

20. The current sales brochure includes descriptions of the features of fractional interest ownership, of the different residence types and of the services provided at the Property. It contains similar statements to those on the website regarding the attraction of ownership as an "alternative to tying up a large amount of capital in a second home" and that ownership is "an opportunity to enjoy the use of a luxurious apartment until 2050, at a fraction of the cost."

21. A theme of other advertising and press coverage is similar being that the Property "is an innovative concept in residential club membership" which gives members "a luxurious Mayfair residence at a fraction of the cost of second home ownership". Some of the articles in the press recognise the benefit of members being able to leave their personal belongings between stays which can be unpacked before they arrive (for example, in an article in a publication named Fine and Country).

22. The documents produced to the tribunal also contain examples of the Property being compared to a hotel in certain respects and statements indicating that, in some instances, members view occupation of a residence as an alternative to hotel stays rather than as second home ownership. For example, a sales brochure for the Property quotes an article in the Irish Independent in September 2007 which states:

> "each of the 49 residences is an individual one or two bedroom apartment, yet the entire property is run like a five star hotel to international service levels but with the comfort and privacy of a boutique hotel."

23. In some of the press coverage members interviewed refer to having stayed in hotels or clubs before becoming members although some refer to viewing membership as an alternative to buying a property in London. HMRC point to newspaper articles in which the appellant's former managers are quoted as drawing a comparison to hotel stays. HMRC also note that a temporary sign outside the Property stated the following: "A distinctive and intelligent lifestyle option offering a flexible, cost and time effective alternative to second home ownership or traditional hotel stays".

24. The bundles contain copies of a number of statements taken from the websites of third parties (such as Booking.com, laterooms.com, Tripadvisor, Skoosh, Hotel.com, Londontown.com and London Services Apartments) which refer to the Property as a hotel and which show it is marketed on those websites alongside other 5 star London hotels. There are also copies of statements from the on-line reviews of individuals who have stayed at the Property referring to the Property as a hotel.

25. Mr Dowling said that he thought many members had bought their fractional interests as an alternative to purchasing a second home in London. However, he recognised that fractional interest ownership was also stated by the appellant in some marketing materials to be an alternative to staying in a hotel. He could not say how many members thought of the residences as an alternative to second home ownership or as alternative to staying in a hotel. He considered that the overall aim of the marketing is to appeal to as broad a spectrum of people as possible within what is a fairly narrow market given the high end nature of the residences and the pricing which

reflects that. When questioned he agreed that, on the whole, members were more likely to be people who had previously stayed in hotels or private clubs in London than those who had residential accommodation in the area which they had sold to take up rights in the Property.

26. From this we conclude no more than that the appellant aims sales at both those who may otherwise consider the purchase of a fractional interest as an alternative to second home ownership and those who consider it as an alternative to a hotel stay.

27. HMRC noted to Mr Dowling that in a licence application submitted in 2005 to Westminster Council the appellant had described the Property as a hotel. Mr Dowling said that this was because fractional ownership of this type was not a familiar thing in the London market and the description was used for ease of comprehension by the Council. We accept his explanation.

Terms of the Agreement

28. The agreement is divided into five sections the main terms of which are as set out below together with explanations of how the arrangements work in practice taken from Mr Dowling's evidence and the other documentary evidence.

Section I of the Agreement

29. "Under "A. Constitution of Plan" there is a description of what a member acquires by entering into the agreement on payment of the purchase price as follows:

> "By execution of this Agreement and full payment of the Purchase Price, Purchaser acquires 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."

30. Additional Plan Benefits are the Membership Marriott Rewards Points Programme (the "**Marriott Programme**"), the Resale Programme, the Rental Programme and the Interval Exchange Programme (the "**Interval Programme**"). Each of these programmes is further explained in Section III. The Plan is defined as the rights and obligations described in the agreement relating to the use and enjoyment of the residences and the Additional Plan Benefits.

31. It is stated that, in exchange for the Annual Residence Fee (a fee to cover the running costs of the Property and other services as explained in 46 to 52), the Manager will procure the management and administration of the Property and the Plan. The payment of that fee in every Use Year (every calendar year during the term) is stated to entitle the member to exercise the rights of occupancy and (subject to administration or programme fees charged by the respective operator) rights of exchange year on year throughout the Plan.

32. The rights which a member obtains are then expanded upon as follows:

> "In exchange for the Purchase Price:

(i) Pursuant to the Lease Seller hereby grants the Purchaser access to the occupancy rights over the Residences described in III(B). Seller also grants to Purchaser access (as available) to the Resale Programme and Rental Programme described respectively in Sections III(E) and (F).

(ii) Pursuant to arrangements with other companies, Seller grants to Purchaser access to all exchange programmes available or that may become available under the Plan, including the Interval Exchange Programme and the Membership Marriott Rewards Points Programme described respectively in Section III(C) and (D)."

Section II – Description of the Residence

33. Section II provides a description of the residences which, as set out above, are categorised in 5 types depending on size and facilities. The appellant agrees to provide the residences fully furnished and with services such as electricity provided:

"Throughout the duration of the Plan (barring periods required for capital repairs or maintenance) the Residences shall be operational with respect to electricity, water and telephone connections, furnished and ready for occupancy. The furnishings and fittings at the Residences shall be replaced over time by Manager in line with Grand Residences by Marriot standards and the changing needs of the Members and the Residence."

Section III – Rights of Members

34. Section A sets out the "General Description" of what a member receives on entering into the agreement and paying the price which essentially repeats the description in Section I (see 29 and 32). The continuation of the rights is expressed to be conditional upon the member complying with his obligations under the agreement including as regards payment of the Annual Residence Fee and remaining in Good Standing (which refers to a member's financial good standing).

35. This clause also notes that a member will be required to enter into Particular Terms with the appellant (which are stated to form part of the agreement) which specify the residence type, the number of fractional interests purchased, the first applicable Use Year, the Annual Residence Fee for the residence type and the apportioned rights for the first Use Year according to the portion of the calendar year that has expired at the time of purchase.

36. Under B headed "Occupancy Rights" it is provided that the member receives 3 types of occupancy right for each Use Year as follows:

"(i) The Primary Use Time

For each Fractional Interest owned, Member may occupy a Residence of the purchased Residence Type for twenty-one (21) nights each Use Year subject to no rental fee, in accordance with the reservation rules….

(ii) The Extended Occupancy Time

For each Fractional Interest owned, Member may occupy a Residence of the purchased Residence Type (if available) for up to a maximum of fourteen (14) nights at the Per Diem Rate and subject to the reservation rules. The Per Diem Rate shall be set by the Manager each Use Year with the approval of the Members of the Committee.

(iii) The 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 Manager's discretion) occupy a Residence for any number of nights, though not exceeding three (3) consecutive nights at any one time, at the Per Diem Rate on a space available basis and subject to the reservations rules...The Per Diem Rates shall be set by Manager each Use Year with the approval of the Members Committee."

37. For the purposes of the above provisions, the terms "Primary Use Time", "Extended Occupancy Time" and "Fractional Interest" are defined as follows

"Primary Use Time shall mean the twenty one (21) nights per Fractional Interest owned during which Member is entitled to occupy a Residence of the purchased Residence Type as described in Section III(B)(i) or exercise Additional Plan benefits in lieu of occupancy. Save where the context otherwise requires, general references to the reservation or use of Primary Use Time shall refer to both the rights of occupancy and the Additional Plan Benefits which may be exercised in lieu thereof.

Extended Occupancy Time shall mean up to a maximum of fourteen (14) nights during which Member may occupy a Residence of the purchased Residence Type (if available) at the Per Diem Rate. The Extended Occupancy Time is only available once the Member has reserved or used all of the Primary Use Time. It is described in more detail in Section III(B)(ii).

Fractional Interest shall 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."

38. As set out above, members may exercise the Additional Plan Benefits in lieu of occupancy under the Primary Use Time rights but not in respect of the Extended Occupancy Time. Extended Occupancy Time is available for use only once all the

Primary Use Time has been used or reserved. Neither Primary Use Time nor Extended Occupancy Time can be carried forward for use in future years.

39. In practice the Space Available Programme is available only where occupancy of the Property is below 90%. As noted members can access the Space Available Programme only if they have used or reserved all of their Primary Use Time and joined the Manger's Rental Programme. This programme does not entitle a member to occupy any nights that another member has listed for rent under the Rental Programme or which in effect he has exchanged for other benefits under the Interval or Marriott Programmes (see 41 and 42). The Space Available Programme will cease to operate once all fractional interests in the Property have been sold.

40. The current Per Diem Rates payable to occupy a residence under this programme or as Extended Occupancy Time range from £119 to £191 depending on the residence type. The Per Diem Rate is to cover variable housekeeping costs, such as cleaning and laundry, which are not otherwise covered in the Annual Residence Fee. Mr Dowling gave evidence that that fee is based on covering costs of running the Property on the assumption that the Property is occupied as to 75% of its capacity. In effect that means that the costs attributable to occupancy under the Primary Use Time rights are recovered under that fee. The Per Diem Rate covers only incremental costs in excess of that threshold. The appellant accepts that the Per Diem Rate is subject to VAT.

41. The Interval 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 Marriott affiliated properties. This is an independent exchange company and neither the appellant nor MGRC are agents for this company. The appellant agrees to arrange the initial 12 months of each member's membership of the programme at the appellant's cost but, after that, it is the member's responsibility to maintain and pay for their membership of the programme directly with Interval if he chooses to do so by paying an annual subscription fee with an exchange fee due if an exchange takes place.

42. Under the Marriott Programme members in Good Standing have the option to trade a maximum of two weeks of Primary Use Time for a Use Year for a corresponding number of reward points. These points give a range of benefits including the right to stay at Marriott hotels.

43. Section E provides that the Manager will set up a Rental Programme whereby nights within Primary Use Time may be listed for rental to both members and non-members subject to a rental fee and the deduction of any taxes. The rental rates are the commercial rack rates prevailing at the Property at the time of rental. Nights listed for rent under this programme are not available for occupancy by other members as Primary Use Time or Extended Occupancy Time. As noted a member must enter into a rental agreement with the Manager to participate and must be in Good Standing. Entering into this is optional but, once a member has enlisted, the Manager is his exclusive rental agent. The Manager does not guarantee the rental of

nights listed and the member can choose at any time to occupy for any nights that are not rented.

44. A member is able to sell his interest acquired under the agreement. Section F provides that the Manager may at its discretion establish a Resale Programme to assist members to sell their interests once the Manager has sold more than 95% of the interests in the same residence type. There is no guarantee of a sale. If such a programme is set up, the Manager or an affiliate would act as listing agent for members who participate and would receive a commission based on the sale price.

Section IV – Administration of the Plan and the Annual Residence Fee

45. Section A notes that the Manager has entered into an agreement with the appellant whereby it is 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.

46. Under B it is provided that the Manager will collect the price, prepare an Annual Operating Budget, collect the Annual Residence Fee, administer the relationship with the entities which provide benefits, keep a register of members, operate the reservation system, provide insurance and the replacement of fixtures, furniture and equipment and administer the Rental Programme and Resale Programme and manage dealings with the Members Committee.

47. Under Section C the Manager is required to prepare an Annual Operating Budget prior to each year with the objective of fairly allocating the operating and capital expenses and costs of the Plan to the members which is then charged to them annually as the Annual Residence Fee.

48. The items covered in the Budget are: costs of the 24 hour concierge service, front office, housekeeping, room service, maintenance (and maintenance fee collection charges) administration, accounting, human resources, audit fees, directors' expenses, insurance, legal and professional fees, postage and printing, property taxes, taxes and licenses (such as TV and liquor licenses), trustee expenses, utilities, depreciation/amortisation of pre-opening costs, loss prevention, a provision for bad debt and reserve for placement and the Management Fee.

49. 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 calculated based on this Annual Operating Budget, which is presented by the Manager to the Members Committee for approval, as adjusted for actual expenses and as varied by residence type. The Management Fee is set at 15% of the Annual Residence Fee. The Annual Residence Fee currently ranges from £6,095 to £6,925 depending on the category of residence.

50. It is noted that the Manager intends that the Annual Residence Fee for each year will not increase beyond the variation in the average earnings index applicable to hotel and restaurants in the 12 month period before the fee is calculated unless unforeseen costs arise such as new taxes, insurance premium increases, utilities rate

increases or other costs that are outside the control of the Manager or are deemed necessary or desirable to meet the needs of the members.

51. Members receive a full breakdown of the amounts included in the Annual Operating Budget**.** The fee is collected for the benefit of the members in that the amounts collected are restricted in terms of allocation to the costs outlined in the Annual Operating Budget. The monies are held in a separate, restricted bank account and, if there is an over collection of funds in any year, this is carried forward for offset against costs of the next year or refunded to members.

52. Under Section F the exercise of a member's rights is expressed to be conditional on timely payment of the Annual Residence Fee and of all other payments required for a member to be in Good Standing. The Manager has the right to prohibit members who do not rectify any default on payment from exercising their rights under the agreement until full payment is made and to terminate the agreement. The Manager may thereafter use or rent and, in the case of termination, sell or otherwise dispose of the fractional interest and use the cash received to meet the sum due. Interest or fees for late payment collected accrue for the benefit of the members. Rentals collected reduce the outstanding fee and the bad debt expenses of other members who have the risk to cover the costs of members who do not pay the fee.

53. Under Section G the Members Committee is stated to be responsible for representing members' views on the management and operation of the Property and the Plan and to be entitled to certain notification from the Manager. The Committee is made up of 7 elected members who meet once a year. Its role is described as "primarily consultative and advisory". It is stated that all decisions concerning the management and operation of the Property and the Plan belong to the Manager who must exercise its reasonable business judgement so as to promote the overall benefit and enjoyment of members. 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 3 years or 5 out of any 7 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 Manger to ensure equitable occupancy rights and to establish priorities to deal with excessive demand periods.

54. Mr Dowling noted that, as regards the special assessment referred to in 53(2) above, there had been one when the Property had had an electrical wiring fault such that it had had to be rewired.

Section V Reservation Rules and Exhibit E - Reservation Procedures

55. Members who want 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. Requests are processed in the order of receipt:

(1) Reservations can only be made for the purchased residence type as regards both Primary Use Time and Extended Occupancy Time.

(2) Primary Use Time can be booked for any time during the year but it must be booked in advance, there are limits on concurrent days, on the total number of days which may be reserved in peak times and on reserving a single night during weekends.

(3) The ability to reserve up to a further 14 nights per year under the Extended Occupancy Time rights is subject to availability and on giving at least 3 and no more than 30 days notice.

(4) Reservations under the Space Available Programme can be made up to 72 hours in advance of the arrival date for any residence type and may only be made one at a time for up to a maximum of 3 nights each stay.

56. 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 2 stays not exceeding 7 nights each stay up to 180 days in advance of the desired arrival date.

57. A member is entitled to have people listed as a delegate who may use the Primary Use Time but not Extended Occupancy Time or a residence made available under the Space Available Programme (see below). The member must make any such reservation for the delegate and must give the Manager the person's personal details at least 24 hours before arrival. The delegate must, on arrival, provide written confirmation from the member that he is the member's guest. Mr Dowling said that in practice occupation is restricted to 4 people in a 1 bedroom residence and 6 in a 2 bedroom residence.

58. Mr Dowling noted that there is a dedicated reservation team for members who advise them on the reservation rules and the other Plan rules to assist members to maximise the value of their interests in the Property.

59. It was put to Mr Dowling that, once all fractional interests are sold, the number of available stays at the Property in a year would be 17,885 but the maximum number of stays which could be required by members as occupation under Primary Use Time and Extended Occupancy Time rights would be 22,085. HMRC asserted that this means that members are not guaranteed to be able to reserve all of their Primary Use Time and Extended Occupancy Time in a year. Mr Dowling said that in practice this is not an issue. The appellant is able to satisfy the requirements of members as regards reserving their Primary Use Time albeit that members may not always get their first choice of nights or may have to go on the waiting list. Members use an average of only 3.4 nights of Extended Occupancy Time per year. He was confident that would continue to be the case even when all of the fractional interests are sold (he said they are currently at 98% of the full capacity with 617 interests sold). He noted that if there were a serious problem with reservations, the Manager has the right to amend the reservation rules and the Members Committee has the right to approve any such proposed changes, which gives the members some measure of control.

60. A member may cancel the agreement by written notice of cancellation to the director of sales at the property which is a requirement of the Timeshare Regulations.

Particular terms

61. On purchasing a fractional interest a member enters into a short agreement setting out the Particular Terms relevant to his purchase. At clause 2 this specifies that the appellant sells to the purchaser the specified fractional interest, which is then shown as the specified type of residence, subject to receipt by the appellant of the full purchase price and the other terms and conditions set out in the agreement.

Other services and benefits for members

62. Whilst not provided for under the agreement, members also have access to a number of additional services which the Manager is responsible for providing:

> (1) The following services are provided with the cost included in the Annual Residence Fee: a valet service, a 24-hour front desk, a concierge service and tour desk, a business centre, free Wi-Fi, fax and photocopying services, a daily maid service and luggage storage.
>
> (2) The following services 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.

63. Non-members can also access the above services but a number of them such as grocery delivery, personal shopping and car valet and limousine services are not actively marketed to non-members.

64. Members also have access to a number of services supplied by third parties which are not referred to in the agreement. These are regarded by the appellant as commercial "tie-ins" which are intended to act as a marketing benefit for both the appellant and the third parties involved. None of these facilities are actively marketed to non-members who stay at the property. 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.

65. Mr Dowling gave evidence that, in his experience, there is no real difference between fractional ownership interests such as those under consideration here and more traditional timeshare interests. In summary:

> (1) The sale of both types of interest is governed by the Timeshare Regulations.
>
> (2) Under the Timeshare Regulations in both cases rights can be granted for a maximum of 50 years (longer if granted before those regulations came into effect).
>
> (3) The period of occupation in a timeshare arrangement is one week or more on a fixed basis or on a "floating" basis within a particular season (and only to be used in that season). An owner of a fractional interest would typically be entitled to 21 days of occupation (or in some cases up to 3 months) divided across multiple seasons to provide all members with some use in peak season. In both cases, the owners would pay an upfront premium in return for the rights acquired.
>
> (4) An owner of a timeshare interest would not usually have any additional occupation rights whereas an owner of a fractional interest would usually have extended occupation rights of up to 14 days for each calendar year for an additional daily rate to cover certain housekeeping costs.
>
> (5) It is usual in both cases for the provider to enhance the appeal of the product by offering systems that enable owners to use other properties the provider operates or those of affiliates (such as under the Marriott and Interval Programmes in this case) and to provide access to a facility enabling the use of the owner's interest in the rental market.
>
> (6) In both cases owners are usually able to reserve occupation up to 12 months in advance or 13 months for owners of rights to multiple weeks or multiple interests. For fractional interest owners there would usually be some flexibility for last minute bookings up to 72 hours from the requested date of occupation.

(7) In both cases the relevant property is usually managed by a management company, which is often affiliated with the provider, to which owners are required to pay an annual maintenance fee which represents the allocable share of the property running costs and a contribution to fund future repairs and renovations. In both cases owners would usually be required to pay an annual fee to the manager of 15% of the maintenance/residence fee.

(8) In both cases there would usually be a members committee with up to 7 elected members each holding an appointment of, in a timeshare case, 2 to 7 years and, in a fractional ownership case, 3 years.

66. Mr Dowling also gave evidence that there are much more significant differences, in his view, between the rights members have as owners of fractional interests and the sorts of rights a hotel guest has:

(1) Members are required to pay an Annual Residence Fee which covers all running costs of the property and a sinking fund to replace mechanical and other assets. There is no such overt contribution to such costs for hotel guests.

(2) Hotel guests pay a nightly fee only whereas members pay a substantial upfront purchase price plus the Annual Residence Fee.

(3) A hotel guest has no influence over costs whereas the members have some influence through the Members Committee which agrees the Annual Operating Budget and Annual Residence Fee.

(4) A hotel guest has the right to enjoy the residence for the period of the booking only whereas a member has rights to occupy up to 31 October 2050.

(5) A hotel guest cannot leave personal belongings between stays whereas a member can do so.

(6) Unlike a member, a hotel guest cannot rent his room or sell his right to occupy it or use his interest as security.

Law

67. Article 135(1) of the Principal VAT Directive 2006/112/EC (the "**Directive**") provides that "Member States shall exempt the following transactions" which under (l) includes "the leasing or letting of immovable property" (the "**Directive exemption**").

68. Article 135(2) provides that "the following shall be excluded from the exemption referred to in point (l) of paragraph 1" which includes at (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." (We refer to this as the "**Directive hotel exclusion**".)

69. The final section of article 135 (2) provides that:

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

70. The Directive exemption has been enacted in the UK in group 1 of schedule 9 VATA to provide an exemption under item 1 for:

> "1. The grant of any interest in or right over land or of any licence to occupy land, or, in relation to land in Scotland, any personal right to call for or be granted any such interest or right…"

71. This is subject to a number of exclusions including as regards certain hotel and holiday accommodation, in relation to which item 1 continues as follows:

> "other than –
>
> (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, or
>
> (e) the grant of any interest in, right over or licence to occupy holiday accommodation…"

72. Note (9) to group 1 ("**note (9)**") provides that a "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".

73. Note (12) to group 1 provides that item 1(e):

> "does not include a grant in respect of a building or part which is not a new building of –
>
> (a) the fee simple, or
> (b) a tenancy, lease or licence to the extent that the grant is made for a consideration in the form of a premium."

74. Note (13) to group 1 states that "holiday accommodation" within the meaning of para (e):

> "includes any accommodation in a building, hut (including a beach hut or chalet), caravan, houseboat or tent which is advertised or held out as holiday accommodation or as suitable for holiday or leisure use, but excludes any accommodation within paragraph (d)."

Appellant's submissions

Nature of supply and land exemption

75. The different elements provided for under the agreement have to be analysed separately for VAT purposes and not as a composite whole, by reference to an "over-arching" supply, as HMRC seek to do. It is clear from the decisions of the Court of Justice of the European Union ("**CJEU**") in the cases of *RCI Europe v Revenue and Customs Commissioners* (case C-37/08) [2009] STC 2407 and *MacDonald Resorts Ltd v Revenue and Customs Commissioners* (case C-270/09) [2011] STC 412 that multifaceted and complex arrangements associated with land and property matters have to be analysed according to their individual components, on a close examination of the contractual provisions and the different payments provided for, having regard to the ultimate intentions of the recipients of the services.

76. Moreover the arrangements embodied in the agreement are incapable of being classified as a composite supply as a number of the constituent elements are provided by different entities. It is clear in the caselaw that, where there are a number of elements provided by different suppliers, they cannot be fused together to make a single supply (see *Telewest v HMRC* [2005] STC 481 per Arden LJ and *Wellington Hospital v HMRC* [1997] STC 445 per Millet LJ.)

77. The appellant agrees with HMRC that it is clear from the cases (such as *Customs and Excise Commissioners v Cantor Fitzgerald International plc and another* [2001] STC 1453) that in carrying out the required exercise to determining the nature of a supply it is essential to look at the economic realities of the circumstances.

78. On that basis, under the terms of the agreement (together with the Particular Terms) it is clear that, having regard to the member's ultimate intention and the economic realities of the transaction, the purchase price is paid by a member in return for a guaranteed right exclusively to occupy a reserved residence under the Primary Use Time and Extended Occupancy Time rights in each year until the expiry of the term on 31 October 2050. A person would not pay a substantial upfront purchase price (ranging from £92,000 to £243,000) merely in return for an opportunity to occupy, for access to a reservation system or for access to the plan as whole.

79. That the agreement also provides for the members to have access to other Plan benefits does not affect the position. These are distinct free standing programmes made available by other parties (MGRC, Interval or Marriott) in return for separate payment to those parties (which charge VAT on those fees accordingly) which members may choose to join. The appellant is not involved in these programmes and the provision of benefits under them except that the appellant bears the cost of each member's first year of membership of the Interval Programme. The provision of free membership of this programme for one year is an ancillary benefit only which must be taxed in the same way as the grant of the occupancy rights.

80. The ability to access these benefits is derived from the occupation rights; the member obtains those potential benefits only as a consequence of having obtained those rights. That a member does not pay the purchase price to access these benefits is demonstrated by the fact that the member has to pay additional amounts for the services received under these programmes to the relevant party. In any event, as noted the provision of supplies by different entities cannot be fused into a single supply. Under the principles established in *Card Protection Plan v Customs and Excise Commissioners* (Case C-349/96) [199] STC 270 (on which HMRC seek to rely), these programmes are not ends in themselves but simply a better way for members to enjoy their occupation rights.

81. All other services provided to members, such as those listed at 62 and 64 above, are provided by MGRC, as the Manager, or by third parties in return for separate payments on which the relevant party charges VAT where due.

82. As noted, the appellant's analysis follows that in *MacDonald Resorts* and *RCI Europe* albeit the facts are clearly distinguishable from those in *RCI Europe.* In *RCI Europe* the taxpayer operated a scheme whereby members could make available timeshare rights in return for being able to use timeshare rights made available by other members. Members were required to pay a one off enrolment fee, an annual subscription fee and an exchange fee which was payable in advance on the date of the request for a timeshare exchange. The CJEU disagreed with the UK's position which was that all three sets of fees could collectively be said to be consideration in return for an overall supply of club membership. A closer examination of the rights and what the payments were made for was required, looking at the intention of the members of the plan. It was on that basis that the CJEU held (at [28] to [35]) that the service supplied by RCI Europe, for which the enrolment and annual subscription fees were paid, was that of facilitating the exchange.

83. The CJEU held in effect that the market place created by the taxpayer in that case had a free standing value for which the members of that scheme were prepared to pay the relevant fees. In this case, the reservation system is part and parcel of the relevant rights of occupation and has no independent value. The further benefits or services deriving from the fractional interest ownership are paid for separately and must be treated separately for VAT purposes. In such circumstances it cannot be held that members intend to buy the mere opportunity to acquire rights of occupation or the right to access a reservation system or plan. A member would simply not pay such a substantial upfront amount unless the intention was that he would receive an entitlement to occupy the property for a given period of time.

84. The CJEU followed the same type of approach in *MacDonald Resorts.* This concerns a plan whereby members could buy points from the taxpayer which, once sufficient were acquired, could be converted into various different benefits including nights of accommodation in different properties in Europe. HMRC took the view that the sale of points rights was to be treated as the taxable supply of benefits arising from membership of a club and that the place of that supply was in the UK.

85. The Advocate General said that the UK's view was untenable following the decision in *RCI Europe* requiring the position to be assessed by looking at the individual components of the contract and identifying the different kinds of fees provided for (see [50], [90] and [91]). The same can be said of the similar argument which HMRC is putting forward in this case, that the price is paid to access the plan benefits.

86. The CJEU followed the same approach as the Advocate General and noted (at [22]) that, whilst the factual circumstances were somewhat different to those in *RCI Europe*, that distinction did not prevent the same criterion being adopted being the members' ultimate intention when they pay for services received (citing *RCI Europe* at [29]).

87. On that basis (at [24]) the correct time to test the VAT position was when the points acquired by the members of the plan were actually exchanged for timeshare interests. The acquisition and conversion of the points rights were preliminary transactions in order for the member to be able to exercise the right to temporarily use a property, or to stay in a hotel or to use another service. Accordingly (at [27] to [29]) the real service, of providing such benefits, was only obtained when the points were finally converted thereby in effect providing consideration for the benefits obtained. It was only at that point that the nature of the VAT supply fell to be assessed. The CJEU decided (at [47]) that the resulting supply, where points were exchanged for a right to occupy accommodation on a short term basis, was that of the "letting of immovable property" (as set out in 93 below).

88. Applying that test here, as noted, it is clear that the member's intention is to acquire the occupancy rights. The fact that the reservation system must be used to crystallise the occupation rights is irrelevant in the same way as the acquisition of points rights was in that case. The reservation system process is merely a step which has to be taken for the member to receive the intended value, his right of occupation, which crystallises when the reservation is made; it facilitates and is a necessary corollary to the enjoyment of the occupancy rights.

89. This right to occupy a reserved residence has the essential characteristic required to be the "letting of immovable property" within the meaning attributed to that term by the CJEU as:

> "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 *Belgian State v Temco Europe SA* (Case C-284/03) [2005] STC 1451 at [19]).

90. Once the member reserves nights of occupation, he obtains the exclusive possession of the residence of a specific type; he has the right to occupy the residence of the relevant type for the reserved period as if he were the owner and to exclude any other person from the enjoyment of that right. This is the case whether the member actually physically occupies the residence in the reserved period or not. Critically a

member owns a right which he can fully exploit as the owner in that he can obtain value from it whether by renting it out under the Rental Programme, selling it or granting security over it or exchanging the benefit for stays in other properties or for points carrying entitlement to a range of benefits under the Interval and Marriott Programmes. The rights the member receives are commensurate with those of an owner of a property.

91. From the cases it is clear that the duration of the period of the "letting or leasing of immovable property" is not of itself decisive in determining whether a supply falls within the Directive exemption (see *Temco* at [20], [21] and [22]) and accordingly the land exemption. In any event, any requirements as to duration are satisfied. Whilst the member has the entitlement to occupy a reserved residence for a relatively short period in each year only, that right endures over a term which does not expire until 31 October 2050. Moreover it was held in *MacDonald Resorts* that a right to short term accommodation falls within the Directive exemption (albeit that member states have discretion to exclude such interests from the exemption under the Directive hotel exclusion).

92. HMRC acknowledge that a grant may amount to a licence even though the period granted is not continuous (see Business Brief 22/98 dated 3 November 1998). *Temco* is authority that non-exclusive use of non-specific parts of a property is within the Directive exemption. The CJEU held that the Directive exemption applied notwithstanding that the three companies in question did not receive rights to a specific part of the property in which they each acquired a property interest.

93. In the *MacDonald Resorts* case, as noted, it was held that once points were converted into a right to occupy a property on a short term basis, the resulting supply was of the "letting of immovable property". That was on the basis that the key characteristic of such a letting was present (adopting the same view of that characteristic as set out in *Temco* as cited at 89 above). The CJEU noted at [48] that (as the Advocate General said, in point 105 of her opinion), as a customer acquires points rights ultimately in order to obtain the right to temporarily use a holiday property "it is irrelevant that there is insufficient knowledge of the individual characteristics of the property concerned as, in any event, the conditions of use are known to the parties to the contract." In the same way the position is not affected in this case by the fact that the member does not know which specific residence he will occupy on making a successful reservation. They key fact is that the member knows the conditions of use, as to the type of residence, from the outset.

94. The fact the member has to comply with certain conditions to be able to exercise his rights, in particular, by paying the Annual Residence Fee and remaining in Good Standing does not affect the position. It is acknowledged in *Temco* that the presence of conditions does not detract from an interest being a "letting of immovable property" (at [24] and [25]).

95. HMRC's argument (as set out in 118) that members may not in fact exercise or be able to exercise their rights of occupation is unrealistic. The disparity between the reservation windows and the time and seasonal restrictions on booking Primary Use

Time mean that Extended Occupancy Time cannot generally be booked at the expense of another owner's Primary Use Time. Members are entitled to book Primary Use Time up to 13 months in advance. It is not feasible that an owner would pay a substantial premium for a licence to occupy reserved accommodation and would not then make any reservation to secure that right.

96. The nature of the supply has to be assessed from the perspective of the *typical* fractional interest owner (see *Card Protection Plan* at [29]). It must be assumed that a typical owner who does not wish to occupy a residence will nevertheless make reservations so that he can secure a return on his premium payment. A typical member clearly must intend to enjoy or commercially exploit the purchased assets, being the right to the reserved residence. It is only once reservations are made that a member can exercise their other rights exploiting that asset under the various programmes.

97. The case of *Revenue & Customs Commissioners v Esporta* [2014] STC 1548 cited by HMRC is not concerned with the land exemption but with the nature of rights in a sports club membership. It is another example of the type of submissions held to be "legally untenable" in *Macdonald Resorts*. Further, unlike in this case, the payments under consideration in *Esporta* were periodic monthly payments, reflecting the on-going nature of the "club membership" services. As noted, that the price is not for participation in the system in this case, is demonstrated by the fact that the member is obliged to pay further sums of money whenever he uses the other services. It is clear from this that there is no direct link between the purchase price and the other services.

Meaning of Directive hotel exclusion and item 1(d)

98. The supplies are not excluded from the land exemption under item 1(d). The appellant does not dispute that the residences are "accommodation" within the meaning of item 1(d) but does not accept that such "accommodation" is provided in a "hotel, inn, boarding house or similar establishment" (including as the term "similar establishment" is expanded upon by note (9)).

99. Item 1(d) in effect enacts the Directive hotel exclusion applicable to accommodation (as defined by member states) in the "hotel sector" or "sectors which a similar function". The reference to a "hotel, inn, boarding house" corresponds to the "hotel sector" and the reference to a "similar establishment" corresponds to "sectors with a similar function". Accordingly the meaning given to the terms in the Directive by the CJEU has to be taken into account in interpreting the UK provisions. The VAT tribunal considered that this was the correct approach in the case of *Geoffrey Ross Holding and June Monica Holding v HMRC* LON/05/341 (VTD 19573) (at [27] and [28]).

100. HMRC seek to interpret the provisions by reference to the nature of the premises and hotel style services provided. However, as the provisions seek to set out what constitutes a sector with a similar function to a hotel, they are not looking simply at the type of accommodation provided in terms of the physical space and facilities. Rather they have to be interpreted by reference to whether the appellant's business, whereby it grants long term fractional interests to members in return for a premium, is part of the "hotel sector" or a "sector with a similar function". It is the nature of the *legal right* granted in exchange for the price that is the key consideration. Accordingly, the different interests of such the non-members, as transient visitors, and the long term interests of members have to be analysed separately (as is supported by the approach in *MacDonald Resorts*).

101. That this is the correct approach is clear from the decision of the CJEU in *Blasi v Finanzamt Munchen I* (case C-346/95) [1998] STC 336. That case establishes that the purpose of the words "sectors with a similar function" is to ensure that the provision of temporary accommodation suitable for short term commercial exploitation, which is similar to and, hence, in potential competition with, the hotel sector, is subject to tax (see [18] and [23] of that decision). An interest which lasts until 31 October 2050 is neither temporary nor for short term exploitation.

102. Moreover in *MacDonald Resorts* the CJEU acknowledged that the UK has discretion to exclude interests of this type from the land exemption (see [49] to [54]). Despite this clear steer from the CJEU, the UK has not exercised its discretion to do so. The UK cannot lawfully fill that legislative gap administratively or in reliance on the device of interpretation. The appellant's analysis on this point is further set out in the discussion section below.

103. HMRC argue that note (9) extends the meaning of item 1(d) such that it represents a "further exclusion" from the land exemption, introduced by the UK in exercise of its discretion in article 135(2), rather than an attempt to enact the Directive hotel exclusion. The tribunal took that view of the effect of note (9) in the *Geoffrey Ross* case. However, whilst this may well be the case, the wording used in note (9) is not explicit enough to demonstrate that the UK intended to exclude from the land exemption long term interests of the type in issue here. The tribunal's obligation to interpret UK legislation in accordance with EU law principles is such that it cannot assume that Parliament intended to remove long term rights of occupation granted in exchange for a premium from the scope of the land exemption in the absence of clear words (see the guidance in *Vodafone 2 v Revenue & Customs Commissioners* [2009] EWCA Civ 446 where it was held (at page 1493) that the principle that the obligation is on the English courts to construe domestic legislation consistently with Community law is broad and far reaching).

104. In view of these principles of interpretation and the clear guidance from the CJEU in *Blasi*, a Treasury Order setting out an explicit exclusion would be necessary to exclude long term interests from the scope of the land exemption. Note (9) does not provide any such explicit exclusion and simply does not address the situation where a building is being put to a hybrid use in that it is occupied by members under

their long term rights acquired in return for a premium and by transient guests who pay a daily rate.

105. Aside from the length of the interest acquired, there are other clear indicators that the supplies are not within item 1(d)/the Directive hotel exclusion.

(1) The ownership rights are classified as part of the timeshare sector (and accordingly sales of the rights are subject to Timeshare Regulations).

(2) Members pay upfront substantial premiums for the rights and the rights can be sold, used as security or exchanged for other rights.

(3) Members pay a separate fee to the Manager for maintenance of the Property (and other costs) and have a say over certain matters such as changes to the reservation system through the Members Committee.

(4) The Property will eventually be held in a trust arrangement once all fractional interests are sold.

(5) The appellant's business is not that of a hotelier and the lease the appellant holds in the Property does not permit it to use the premises as a hotel but rather only as serviced flats or private residential flats.

(6) Members are entitled to store their personal belongings at the Property between stays.

106. These factors demonstrate that the appellant is not operating a business akin to that in the hotel sector and, accordingly, that the rights members have are more commensurate with property ownership rather than those of hotel guests. This is supported by the fact that fractional interests in the Property are marketed for sale as an alternative to second home ownership.

107. On that basis, the points HMRC make about the physical attributes of the Property and the nature of the available services are irrelevant. In any event all the features to which HMRC refer simply enable members to better enjoy their rights. They are all ancillary to supplies of occupation rights to members and not ends in themselves under *Card Protection* Plan principles. It is also clear from *Brian Leonard Mills v HMRC* LON/84/91 (VAT Decision 1686) and the *Geoffrey Ross* case that the mere existence of services, such as concierge or cleaning services, is to be given little weight in circumstances where long term rights of occupation are granted.

108. HMRC place reliance on the comments of the Advocate General in *Blasi* which they say indicate that he thought that long term hotel accommodation should fall within the Directive hotel exclusion. However, these comments are irrelevant as they were not adopted by the CJEU and are inconsistent with the CJEU's reasoning. In any event if the German legislation was inadequate for failing to tax long term accommodation then so is the UK's legislation.

109. Finally, the supplies are not within item 1(e) as the provision of holiday accommodation as the grant of an interest in such accommodation in return for a premium, such as the purchase price, is expressly excluded from falling within item 1(e) under note (13) to group 1 of schedule 9 of VATA.

Overall taxable supply

110. As noted, HMRC is not correct to take the approach that, if there is an exempt supply of land, it is part of a complex of supplies the "over-arching" nature of which is as a taxable supply of club membership on the basis of the principles in *Card Protection Plan* (as applied in UK cases). The CJEU in *MacDonalds Resorts* has ruled in effect that HMRC's approach of looking to an "over-arching" supply is not appropriate in cases concerning multi-faceted and complex property interests. In that context, all of the other authorities cited by HMRC in support of their argument on this are irrelevant as they concern the parameters of the *Card Protection Plan* principles. Moreover even if that approach were to be adopted, the approach in *Card Protection Plan* does not support HMRC's analysis. The CJEU warned in that case against artificially splitting supplies (see [29]) which is exactly what HMRC's approach leads to.

Fiscal Neutrality

111. Under the EU principle of fiscal neutrality member states are precluded from treating similar services, which are in competition with each other, differently for VAT purposes (see *Commissioners v Rank Group plc* (Case C-259/10) [2010] STC 23 at [32]). The existence of a discretion, such as that in article 135 of the Directive, does not relieve HMRC from the obligation to administer VAT in such a way as to respect this principle or the tribunal from the obligation to interpret the UK legislation to respect this principle (see the Court of Appeal's decision in *Sub-One Ltd v HMRC* [2014] STC 2508).

112. There is no justification for treating comparable supplies of timeshare rights and these rights differently by reference to the objective of the Directive exemption/land exemption as that objective is explained in *Blasi* (the relevant passages are set out in the discussion section at 300). As set out in *Rank* supplies are similar for this purpose if they have similar characteristics and meet the same needs of the consumer. The test is whether their use is comparable and whether the differences between them have a significant influence on the decision of the average consumer to use one service or the other. Artificial distinctions based on insignificant differences must be ignored. An investor would not detect any material difference between the fractional interests offered by the appellant and timeshares offered by other providers who benefit from the land exemption.

113. Comparators need not be in actual competition with each other (see *Marks v Spencer v HMRC* [2008] STC 1408 at [49]). Complex analysis is not required to resolve issues of similarity (see *Commissioners v Isle of Wight Council* (Case C-288/7 [2008] STC 2964 at [45]-[52]). The principle of fiscal neutrality does not require proof of distortion of competition or the actual existence of competition between the services in question (see *Rank* at [36]). It is also irrelevant whether any distortion is substantial (see *JP Morgan Fleming Claverhouse* [2008] STC 1180 at [47]).

HMRC's submissions

Supply of membership of a plan

114. The supplies the appellant makes to members in return for the purchase price are taxable supplies of services akin to the provision of membership of a club. In return for the price a member receives a bundle of rights to participate in a plan, with a number of potential benefits, which includes merely the opportunity to obtain a right to occupy a certain category of residence at future points in time which is conditional upon not only availability but also on payments being made on time.

115. That this is the correct way to view the nature of the supply results from the following:

> (1) It is clear in the agreement that members do not just receive potential occupancy rights. They also receive access to all the Additional Plan Benefits in exchange for the purchase price. It does not matter that the services/benefits might ultimately be delivered by another entity; the appellant is to procure that the members have access to these benefits under the terms of the agreement and in return for the price.
>
> (2) Looking at the economic realities it cannot be said that the appellant is providing the members with an entitlement to the actual use of a residence of a specified type. A member acquires a mere possibility of occupation at some future unknown time. This is not sufficient for the appellant to be regarded as conferring on members an exclusive right to occupy a particular residence which is the essential characteristic for there to be a "letting of immovable property".

116. In support of their view HMRC refer to the CJEU decisions regarding the key characteristic for a supply to be within Directive exemption referring, in particular, to *Temco* (at [19]) (and the Advocate General's opinion in *Temco* (at [22], [24], [25] and [26]) and to *Sweden v Stockholm Lindopark* (Case C-150/99) [2001] *STC* (at [122]). They referred also to the approach taken in the House of Lords in the case of *Sinclair Collis* where (at [73] and [74]) Lord Scott emphasises that there is a licence to occupy land as distinct from a licence to use only if some degree of control and/or possession is present.

117. HMRC also note that it is well established in the cases that, in determining the nature of a supply, regard must be had to the economic realities of the position in all the circumstances of the case (referring in particular to the CEU decision in *R&CC v Loyalty Management UK Lt*d (Case C-53/09) [2010] STC 2651 (at [39]), the Supreme Court decision in *R&CC v Aimia Coalition Loyalty UK Ltd* (formerly known as *Loyalty Management UK Ltd*) [2013] UKSC 15 at [38] and the Advocate General's opinion in *C&EC v Cantor Fitzgerald International plc* (case C-409/98) [2001] STC 1453 (at [27]).

118. In terms of the economic realities, once all fractional interests are sold the number of stays available in the 49 residences each year exceeds by some way the stays required to satisfy the Primary Use Time and Extended Occupancy Time rights (see 59 above). The appellant simply makes no guarantee that a member will actually

be able to occupy a residence of the specified type. Moreover, in view of the reservation restrictions, a member who leaves it until late to reserve may not be able to use all or any of his Primary Use Time in any given year. His 21 days of Primary Use Time are not rolled over to the next year. In such circumstances there would be no breach of contract by the appellant; the member would have received exactly what he paid for, namely, access to the accommodation plan. This analysis is supported by the fact that the rights granted are expressed in permissive language only using the word "may".

119. The situation here is not, as the appellant argues, like that in *Temco* where the CJEU held that 3 companies collectively had exclusive rights of occupation notwithstanding that none of the companies had a right to a particular area. It cannot be the case that the members collectively have ownership of the whole Property as they have no rights at all until as and when they make a successful reservation.

120. It should be noted that members would be trespassing if they entered a residence without a confirmed reservation. In any event, the right to enter land (without being a trespasser) does not equate to the right to occupy property as owner. Lord Scott gave an analogous example in the context of car parking in the House of Lords decision in *Sinclair Collis* at [71]. He said that a contract for parking space might entitle the grantee to the exclusive use of a specified parking space. On the other hand it might simply entitle him 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. He said that "the former might constitute a 'letting'" whereas the latter arrangement "could not possibly be held to do so."

121. The first example given by Lord Scott is analogous to "old fashioned timeshare" where a person obtains a right to occupy a property for a stated week each year; the second is equivalent to the rights obtained by members in this case. If a member successfully reserves a residence, he may be able to occupy it as owner and to exclude others for the period of his stay but the supply is not of actual use (or occupation of a space/residence), it is simply the right to participate in the system or merely the opportunity to secure a reservation.

122. Whilst English principles of contract cannot be determinative, that is not to say that they have no effect on the analysis (see, by analogy, *Reed Employment Ltd v RCC* [2011] UKFTT 200 (TC) at [78]). "Personal rights" can only be enforced by the parties to the agreement or contract and are not binding on third parties. In contrast, "proprietary rights" are capable of binding or affecting third parties, not only the parties to the contract. All that is granted to a member is a personal right.

123. Under general principles, there must be reciprocity (or a direct and immediate link) between whatever is provided and the amount of the consideration paid, for there to be a supply for VAT purposes. There is no such reciprocity as regards the actual use of a residence in this case. A member pays the same price however many nights he actually occupies for in any given year. There can, therefore, be no direct and immediate link between the amount of the price and the number of nights of occupation actually used by a member. Hence the supply made by the appellant in

return for consideration cannot be of actual use of the residence as is required for there to be a "letting of immovable property".

124. All of these factors mean that the supplies made by the appellant are akin to those granting membership of a club such as a sporting club, as in *Kennemer Golf & Country Club v Staatssecretaris van Financien* (Case C-174/00) [2002] STC 502 and *Esporta*, or to a facilitating service, as in *RCI Europe*. It is clear from these cases that there can be a supply of such membership services even though the payment is not linked to the actual use of the facilities or provision of the benefits in question:

> (1) In *Kennemer* it was held that annual subscription fees paid in advance for membership of a golf club were consideration for services provided by the golf club even where those facilities were not used at all.
>
> (2) In *Esporta* the Court of Appeal held that monthly membership fees paid to a health club were paid for the right of access to the health club, conditional on payment, and not actual access. There was a continuing supply of a conditional right to use the premises throughout which took place even if the member did not exercise his right to make a payment in order to gain actual access. Accordingly there was a supply of services even during periods when the member was barred from access due to non-payment of the fees (see Vos LJ at [34] to [36] and Arden LJ at [45] to [48]).
>
> (3) In *RCI Europe* the enrolment and subscription fees were held to be paid to enable members to participate in the exchange scheme with the exchange fee being paid for an actual exchange (see for example, the Advocate General's opinion at [86] and [87] and the decision of the CJEU at [34] and [35]).

125. In this case, as noted the price is due even if a member does not use any nights at the Property (whether he has attempted to make reservation or not). The price cannot relate, therefore, to each personal use of a residence. The relevant legal relationship, with the required reciprocity, exists here between overall participation in the plan and the payment of the purchase price. The daily rate paid for Extended Occupancy Time is a payment for actual use in the same way as the exchange fee was in *RCI Europe*. The position cannot be any different in this case merely because the member pays upfront for on-going membership of the plan over a long period.

126. The appellant contends, on the basis of *MacDonald Resorts*, that in effect the supply must necessarily be the use or occupation of a residence because that is a member's ultimate intention. But the observations as regards intention made in that case were made in the context of a scheme where whatever "rights" (if any) a member derived from the issue of points were inchoate. It could not reasonably be said that the relevant supply was participation in a system because members in effect obtained nothing from that system in return for their initial outlay. In this case members obtain valuable rights from participating in the plan at the outset (such as the opportunity to reserve accommodation). Accordingly, it is correct to analyse the service supplied by the appellant in return for the price as the right to participate in the system.

127. Once the service supplied has been properly identified as the right to participate in the system (and not the actual use or occupation of accommodation) it is clear that on payment of the purchase price the member does not obtain any right to occupy any of the residences as owner and to exclude others.

Exclusion from land exemption as a "hotel or similar establishment"

128. HMRC contends that in any event the appellant's supplies are excluded from the land exemption under item 1(d) when read together with note (9). The appellant clearly provides "accommodation" within the meaning of item 1(d). That "accommodation" is provided within a "similar establishment" being "premises in which there is provided furnished sleeping accommodation... which are used by or held out as being suitable for use by visitors or travellers" (within note (9)).

129. HMRC agree that item 1(d) is intended to enact the Directive hotel exclusion. However, note (9) was introduced as an exercise of the UK's discretion to extend the exclusions from the land exemption as provided for article 135(2). The VAT tribunal held that this is the correct interpretation of item 1(d) and note (9) in *Geoffrey Ross* (at [31]). Accordingly, the correct interpretation of note (9) is a matter of UK statutory interpretation only. On that basis the decision of the CJEU in *Blasi*, which the appellant relies on as authority that long term interests of this kind are not included in the exclusion, is not relevant. It is clear that case is not concerned with the scope of the member states' permitted exercise of discretion under article 135(2) (see [35] of the Advocate General's opinion).

130. If, contrary to HMRC's view, the decision in *Blasi* is relevant, it does not in any event support the appellant's position. The CJEU and Advocate General emphasised that the Directive exemption is to be interpreted strictly; in contrast, the Directive hotel exclusion is to be construed broadly. The Advocate General considered that, in principle, long term hotel stays should be taxable (see [19]). The CJEU focused on the length of the stays in the relevant property rather than the length of any agreement emphasising (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 this case the actual maximum stay a member can obtain in each year is a few weeks only.

131. The interaction of item 1(d) and 1(e) shows that Parliament plainly intended supplies of accommodation in a "hotel, inn, boarding house or similar establishment" to be excluded from exemption even if such supplies are paid for by way of a premium. The exclusion in item 1(e) for "holiday accommodation" does not apply to the extent that the grant is made for consideration in the form of a premium (under note (12) to those provisions). However, "holiday accommodation" does not include any accommodation falling within item 1(d) (under note (13)). Therefore, there is no exclusion for the provision of accommodation which falls within the scope of item 1(d) which is paid for by way of premium. This is consistent with the Advocate General's observations in *Blasi* that even long term stays in the hotel sector are intended to be taxable.

132. It is clear that the focus of item 1(d) and note (9) is on the nature of the "establishment", "premises" and "accommodation". There is useful guidance on how to approach this in the *Geoffrey Ross* case. The VAT tribunal said (at [34]) that the right approach to deciding whether there is a "similar establishment" is to compare the functions or characteristics of a "hotel, inn or boarding house" with those of the establishment in question. At [35] the tribunal noted that the essential function performed by a hotel is "the provision of temporary accommodation on a commercial basis" and that accommodation is generally provided for shorter stay customers being persons who "are for varying periods away from their home or who, for the time being, have no home". In other words it is accommodation for a "transient or floating class of resident" taken with "view to moving on in due course."

133. The tribunal went on to cite the Advocate General in *Blasi* (at [19]) that the common feature of supplies within the "hotel sector" is that they entail more active exploitation of the immovable property and that short term lets are more likely to involve additional services and greater supervision and management. On that basis the tribunal concluded that the following factors are relevant in assessing whether an establishment is in the "hotel sector":

> (1) The extent to which facilities are provided which could be expected in a hotel such as bed linen and cleaning, catering facilities, laundry facilities.
>
> (2) The degree of management of customers in the sense that greater management would be expected in the "hotel sector" such as in terms of checking in and out procedures.
>
> (3) As the "hotel sector" involves commercial exploitation of the property through supplying accommodation, an establishment in that sector can be expected to offer overnight accommodation to any acceptable customer who turns up and who can pay (rather than a selective approach such as offering accommodation only to persons of a particular type).
>
> (4) The extent to which rules of conduct are imposed upon those using the accommodation. More restrictive rules will generally be evidence of an establishment in the "hotel sector" where the function of the sector is to afford temporary use of the accommodation to paying customers
>
> (5) The way an establishment is advertised or promoted.
>
> (6) The appearance and extent of the accommodation. For example, in a hotel communal rooms such as a lounge and bar may be expected.

134. There is also relevant guidance in *Acrylux Ltd v Revenue and Customs Commissioners* [2009] UKFTT 223 (TC) where at [38] the tribunal referred to the decision in *Asington* (VAT Decision 18171), stating that it is clear on the authorities that the essential features of the hotel sector are:

> "(i) temporary furnished sleeping accommodation, (ii) occupation by a transient resident who is away from home for one reason or another, and (iii) some related service, whether it simply be a change of bedding from

time to time or minimal cleaning on change of occupant or a more extensive range of housekeeping and other services."

135. In this case the residences are used by "visitors and travellers" as well as being "held out as being suitable for such use".

(1) Mr Dowling describes the non-members who use the same suites as the members as "transient travellers".

(2) Rates for non-members are set by reference to comparisons with a group of hotels. For non-members, the reservation process is described as being "the same as for any other hotel reservation from the [Marriott] website" and non-members can also reserve rooms from other websites.

(3) The numerous third party websites through which a non-member may book a room refer to the property as a "hotel" and market it alongside other 5 star London hotels. In their reviews on such websites, non-members who have stayed at the property describe it as a "hotel" and its accommodation as "rooms" or "suites" (as opposed to "flats").

(4) The Property is also marketed to members as a hotel or an alternative to a hotel stay: in particular, the appellant's former managers are quoted in newspaper articles as drawing a comparison to hotel stays and the appellant's advertising identifies membership as an alternative to hotel stays. Members themselves view the accommodation as an alternative to staying in a hotel as is clear from their testimonials on the website. Mr Dowling accepted in cross-examination that a typical member will be a visitor to London who had previously been staying in hotels or private clubs.

136. Applying the tests set out in *Geoffrey Ross* and *Acrylux* the following factors demonstrate that the Property is a similar establishment to a hotel:

(1) The Property is plainly being commercially exploited. The evidence suggests that ability to pay and availability are the two criteria determining whether the appellant offers accommodation and/or membership.

(2) The accommodation is equivalent in appearance to that found in other five star hotels in the Mayfair area. There is a small lounge, internet room and ladies and gentleman's cloakrooms at the property. Mr Dowling accepted in cross-examination that the lounge and internet room were both comparable to those which might be found in a small, boutique hotel.

(3) There is supervision and restriction in that, as Mr Dowling said, the appellant restricts the number of overnight guests in a one-bed residence to 4 and in a 2 bedroom residence to 6.

(4) The appellant itself undertakes to members that it will ensure that the residences are "operational with respect to electricity, water and telephone connections, furnished and ready for occupancy". Accordingly, notwithstanding that these services may be paid for by the member

through charges due to the Manager, they are nonetheless part of the overall service provided to members by the appellant under the agreement.

137. Given that the focus is on the nature of the establishment and premises, the factors listed by the appellant in support of their position are not relevant as they focus on the nature of the business, the length of the term and the nature of the rights. The appellant points to the members' ability to store belongings at the Property. However, this is not part of the agreement as it is a service provided by MGRC. The restriction on use of the premises in the lease cannot be relevant to determining the VAT treatment. The appellant states that the tribunal decisions in *Geoffrey Ross,* and *Brian Mills* indicate that the provision of cleaning and such services is not material where the interest granted is a relatively long term one. However the periods of letting in question in those cases are much longer than the few weeks per year here (one month to eight years in the case of *Brian Mills* and a period of 12 months, 22 months as well as shorter periods in *Geoffrey Ross*).

Single taxable supply – Card Plan Protection

138. HMRC contends in the alternative that the supplies made by the appellant comprise a single "over-arching" supply of taxable services. This is based on the principles set out in the case of *Card Protection Plan* on how to categorise transactions involving a number of elements, in particular, as explained by Roth J in *HMRC v Bryce (t/a The Barn)* [2011] STC 903 (at [23]) and in the decisions in *Middle Temple v HMRC* [2013] STC 1998 (at [60]), *College of Estate Management v Customs and Excise Commissioners* [2005] STC 1597 and *Byrom (trading as Salon 24) v Revenue and Customs Commissioners* [2006] STC 992.

139. In summary, HMRC rely on the comments in those cases that, the fact that one element in a package of elements supplied cannot be described as ancillary to another element, does not mean that it is to be regarded as a separate supply for tax purposes. The question is whether those separate elements are to be treated as separate supplies or merely as elements in some "over-arching" single supply. In that context, the test is whether the various elements supplied to the customer are so closely linked that they form, objectively, a single indivisible economic supply, which it would be artificial to split.

140. In the *College of Estate Management v Customs and Excise Commissioners* [2005] STC 1597 Lord Walker emphasised (at [29] to [33]) that, in determining the "over-arching" nature of a supply it is not necessary to squeeze every element of a supply into the matrix of what is "principal" and "ancillary" and that the natural meaning of "ancillary" should not be strained in an attempt to do so. He noted for example, that as regards a restaurant, food is not ancillary to restaurant services but rather it is of central and indispensable importance to them. Nevertheless there is a single supply of restaurant services in such a case.

141. In *Byrom* Warren J followed this type of approach in considering the correct categorisation of supplies made to a masseuse which included the grant of a licence to

use the room in which the masseuse services were provided, receptionist and laundry services and the right to use a day room. At [68] Warren J held in effect that the other services were not ancillary to the provision of the licence to use the room, as they did not enable the masseuse "the better to enjoy" the licence, notwithstanding that the masseuse's business may be carried on in the room (unlike services such as cleaning and lighting and the use of common parts for access to the rooms). On that basis he concluded (at [70]) that there was an "over-arching" single supply of which "the description which best reflected economic and social reality is a supply of massage parlour services, one element of which is the provision of the room". He concluded that was the case notwithstanding that he acknowledged that probably, the provision of the room was, to the masseuse, the "single most important element of the overall supply and the one predominating over the other elements taken together".

142. On the basis of the above principles, the overall supply in this case is a taxable supply of membership of the plan or the right to participate in the plan. In return for the price, the appellant provides not just occupancy rights but also agrees to procure access to the other programmes and to procure that the residences are fully furnished and equipped, connected to utilities which are operational and "ready for occupation".

143. Accordingly, this is a supply comprising a number of elements in return for payment of the purchase price which it would be artificial to split. As in *Byrom*, it does not matter that the provision of the occupancy rights might be seen as being "essential to the supply" as opposed to merely "ancillary". What is important is that the other elements supplied cannot properly be regarded as ancillary to the supply of occupancy rights; they are not provided to members to enable them "the better to enjoy" the use of the accommodation in the residences. Indeed, in any given year, a member might make significant use of the relevant benefits under the various programmes without physically occupying a residence at all. It is then necessary to categorise the resulting single supply viewed as a complex of elements. The over-arching single supply is not to be treated as a supply of a licence to occupy land. The description which reflects economic and social reality is a supply of membership or participation in the plan only one element of which is the provision of the residence.

144. If there is any doubt about classification, then the tribunal should recall the points made in *Temco* that an exempt "leasing or letting of immovable property" is generally a relatively passive activity without significant added value or additional services (as referred to in *Byrom* at [72]). The provision of the various additional benefits under the plan over and above the mere provision of the residence itself militates against such a supply being an exempt supply of land.

Fiscal neutrality

145. Any complaint that HMRC is treating the appellant unequally or inconsistently because HMRC is allowing operators in the timeshare sector to treat their supplies as exempt, is essentially one about HMRC's conduct. The proper remedy is judicial review (see, for example, *C&EC v National Westminster Bank plc* [2003] STC 1072 per Jacob J. at [47]-[48] and the cases cited therein). In any event, the appellant has failed to provide any evidence of unequal treatment.

146. There is no fiscal neutrality issue here. On HMRC's interpretation, the grant of an interest in accommodation which falls within item 1(e) as "holiday accommodation" is within the land exemption if the grant is made in return for a premium. On the other hand the grant of an interest in sleeping accommodation in a "hotel... or similar establishment" is not exempt whether made in return for a premium or not. But this is not unequal treatment; the underlying supplies are simply different. As the CJEU made clear in *Cantor Fitzgerald* (at [31]-[33]), the fact that the economic impact of a supply might be comparable to an exempt leasing or letting does not justify interpreting the relevant article in such a way as to permit exemption where it does not properly apply. Such an approach would be contrary to the VAT system's objectives of ensuring legal certainty and the correct application of the exemptions. 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. A similar approach is taken by the Advocate General's opinion at [60] in *Deutsche Bank AG* (Case C-44/11) [2012] STC 1951.)

Discussion – supply of a licence to occupy or membership of a plan

147. The issue is the nature for VAT purposes of contractual arrangements between the appellant and members who, on entering into the agreement and paying a substantial purchase price, acquire contractual rights and obligations as regards the use of a residence of a specified type at the Property and enjoyment of a number of associated benefits.

148. The appellant argues that the only supply it makes to a member in return for the purchase price is the grant of a licence to occupy land, which falls within the land exemption, such that no VAT is due. The supply is not, in its view, excluded from that exemption as the provision of "accommodation" (as defined in item 1(d)) in a "hotel, inn, boarding house or similar establishment" or as the provision of "holiday accommodation" (under item 1(e)).

149. HMRC's position is that the appellant does not provide any interest in land capable of falling within the land exemption. In their view the appellant provides a taxable service of the right to participate in a plan (akin to club membership) which includes the provision only of an opportunity for a member to occupy a residence (either by analogy with the cases of *Esporta*, *Kennemer* and *RCI Europe* or under the principles in *Card Protection Plan*). In any event, if the appellant is held to make a supply of an interest in land it would be excluded from the land exemption under item 1(d).

Nature of the supply under the contractual arrangements

150. To recap, as set out more fully above, on paying the purchase price the member receives the following under the terms of the agreement and the Particular Terms:

> (1) Access to occupancy rights whereby, for each fractional interest purchased, a member may occupy a fully furnished and operational residence of a specified category:

(a) for 21 nights (of Primary Use Time) during each year until the expiry of the term on 31 October 2050 for no additional payment; and

(b) where such nights have been used in full, a further 14 nights (of Extended Occupancy Time) in each such year on paying an additional Per Diem Rate (to cover certain housekeeping charges)

in each case, subject to making an advance reservation (in accordance with the reservation rules as described in 55 above).

(2) Access (as available) to a Rental Programme operated by the Manager of the Property. This enables a member in effect turn the Primary Use Time rights to monetary value by opting to rent out nights reserved in a residence under those rights at the commercial daily rate. The Manager acts as the exclusive rental agent for members who join this programme in return for a fee.

(3) Access to a Space Available Programme, whereby a member who has signed up to the Rental Programme and who has reserved all of his 21 nights of Primary Use Time, may (at the Manager's discretion) obtain further nights in any residence at a Per Diem Rate to cover certain housekeeping costs and subject to the reservation rules (see 55). We note that this will not be available to members once all of the fractional interests have been sold.

(4) Access (where available) to any Resale Programme which the Manager may set up to assist members in selling their interests should they wish to do so.

(5) Under arrangements with third parties, access to all exchange programmes that are available or may become available under the Plan, including the Interval Programme and the Marriott Programme. Under the Interval Programme a member can exchange one or more weeks of Primary Use Time for stays of an equivalent time in other properties. Under the Marriott Programme a member can exchange up to two weeks of Primary Use Time for points which entitle him amongst other things to stays in Marriott hotels. The appellant is not involved in the provision of the relevant benefits except that it bears the cost of each member's initial 12 months of membership of the Interval Programme. After that it is for members to choose whether to stay in the programme on paying the required fee to Interval.

151. In addition to its responsibilities under the relevant programmes described above, the Manager (which at all times to date has been MGRC) makes all arrangements for the upkeep and administration of the Property, administers the reservation system and the relationship with other parties who provide Plan benefits and liaises with the Members Committee. Members are required to pay the Manager an Annual Residence Fee for the running costs and expenses relating to the property, including for maintenance and upkeep, for services such as the concierge desk and cleaning and a fee for the Manager for providing its Property and Plan management services. The ability to continue to benefit from and exercise his contractual rights

under the agreement is conditional upon a member paying this fee on a timely basis and remaining in Good Standing (meaning good financial standing). The Members Committee comprises 7 of the members who participate on a voluntary basis. The Committee has limited approval and review powers in relation to the Manager's activities such as the right to approve the Annual Operating Budget by reference to which the Annual Residence Fee is set, to approve the Per Diem Rate set for each year and to approve any changes proposed to the reservation rules. This is set out in more detail in 45 to 54 above.

152. It is clear that, as a contractual matter, the appellant is agreeing itself (as it is the landlord as the owner of the leasehold interest in the Property) to provide occupation rights in respect of the fully furnished residences of the specified type and to procure access for members to the other Plan benefits provided by the Manager or by others such as Interval or Marriott. (The nature of the relationship between the appellant and the Manager is considered further in the discussion in relation to item 1(d)).

153. As regards the occupancy rights, we interpret the provisions as giving a member an entitlement to occupation of the residence of the specified purchased type for a maximum number of nights each year during the term. The statement in the relevant provisions that a member "may" occupy merely means that it is at the member's option whether and to what extent to take up the entitlement. The fact that the ability to exercise this right is subject to advance reservation under detailed reservation rules does not in our view mean that the member has the mere possibility of occupation as HMRC suggest. Whilst much would depend on the particular circumstances of individual cases, we find it difficult to see that a member, who has attempted to reserve in good time and acting reasonably taking into account the restrictions under the reservation rules, would not have any recourse against the appellant should he not be able to occupy at all in a year.

154. As regards the other Plan benefits/programmes, we note that the appellant merely agrees to provide members with access to such programmes as the Manager sets up or, as regards programmes offered by other parties, as are made available under the Plan. The appellant does not guarantee the availability of programmes as such.

Directive exemption/land exemption

155. We look first at what is required for a supply to fall within the Directive exemption/land exemption before turning to the cases on the overall approach to categorisation in circumstances such as these involving a number of elements.

156. There is no dispute that the UK land exemption is intended to enact the Directive exemption for the "leasing and letting of immovable property" and has to be interpreted in accordance with decisions of the CJEU on the meaning of that provision. The parties, therefore, cited a number of CJEU decisions as to what is required for a supply to fall within the Directive exemption.

157. As set out by the CJEU in *Sinclair Collis Ltd v Customs and Excise Commissioners* (Case C-275/01) (at [22]) it is settled case law that the exemptions from VAT provided for in the Directive have their own independent meaning in EU law and must be given an EU definition. It is also settled, as set out in that case at [23]), that the terms used to specify those exemptions are to be interpreted strictly as they constitute exceptions to the general principle that VAT is to be levied on all relevant services supplied for consideration by a taxable person.

158. As regards the particular meaning to be given to the "leasing or letting of immovable property" it is also settled, as set out in *Sinclair Collis* at [25], that the "fundamental characteristic" of a letting of immovable property lies in:

> "conferring on the person concerned, for an agreed period and for payments, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right."

159. The CJEU endorsed this in the later decision in *Temco* to which both parties referred. The issue in that case was whether the exemption applied to contractual rights granted by the taxpayer to three group companies to occupy a building without any individual rights over any specific part of the property and for the duration of the companies' activities but with *Temco* being entitled to require the companies to vacate at any time without notice.

160. The CJEU noted (at [16] and [17]) that the Directive exemption has its own independent meaning in EU law and therefore must be given an EU definition and that the terms used are to be construed strictly although "that does not mean that the terms should be construed in such a way as to deprive the exemption of the intended effect". The CJEU then adopted (at [19]) the same definition of the fundamental characteristic of letting of immovable property as set out in *Sinclair Collis*.

161. The CJEU continued to consider the relevance of the period of the letting. They noted that while the court has stressed the importance of the period of letting in the cases (such as in *Sinclair Collis* and *Cantor Fitzgerald*), it has done so in order to distinguish between 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. The CJEU concluded, therefore, (at [21]) that the actual period of letting is not decisive even though the fact that accommodation is provided for a brief period may be an appropriate basis for distinguishing the provision of hotel accommodation:

> "The actual period of the letting is thus not, of itself, the decisive factor in determining whether a contract is one for the letting of immovable property under Community law, even if the fact that accommodation is provided for a brief period only may constitute an appropriate basis for distinguishing the provision of hotel accommodation from the letting of dwelling accommodation …."

162. The CJEU also noted (at [22]) that in any event 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 (citing *Blasi* at [26]). The period of letting may be shortened or extended by mutual agreement of the parties during the performance of the contract.

163. The CJEU continued (at [23]) that while a payment which is strictly linked to the period of occupation by the tenant appears best to reflect the passive nature of letting it is not to be inferred from that that a payment which takes into account other factors has the effect of precluding a "letting of immovable property":

> "particularly where the other factors taken into account are plainly accessory in light of the part of the payment linked to the passage of time or pay for no service other than the simple making available of the property."

164. Finally the CJEU noted at [24] and [25] that the tenant's right of exclusive occupation of the property can be restricted in the contract concluded with the landlord and that it only relates to the property as it is defined in the 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.
>
> 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."

165. The CJEU concluded (at [26] and [27]) that it was for the national court to consider all the circumstances to establish the characteristics and assess whether the exemption applied. It was also a matter for that court to establish whether the contracts, as performed, have as their essential object the making available, in a passive manner, of premises or parts of building in exchange for a payment linked to the passage of time, or whether they give rise to the provision of a service capable of being categorised in a different way.

166. In *MacDonald Resorts* the CJEU considered the nature of supplies made under a timeshare club arrangement whereby members purchased points rights which they later exchanged for benefits including the right to occupy holiday accommodation. They concluded that there was no supply until points were exchanged for a stay in accommodation or other benefit (see below as regards the analysis on this). They held that, assessing the nature of the supply at that point, it constituted an exempt "letting of immovable property".

167. At [45] of that decision the CJEU noted that the exemptions provided for in the Directive must be interpreted strictly. They continued at [46] to note that the fundamental characteristic of the concept of the letting of immovable property is the right to occupy property as the owner citing the same test as set in *Sinclair Collis* and

Temco and noting that in order to determine whether a contract falls within that definition:

> "account should be taken of all the characteristics of the transaction and the circumstances in which it takes place. The decisive factor in this regard is the objective character of the transaction at issue, irrespective of how that transaction is classified by the parties."

168. At [47] the CJEU stated that the right to temporary use of a property obtained in exchange for rights initially acquired fulfils the conditions for a letting as, once the member has converted his points into such a right, he is entitled to occupy a property as if he were the owner and to exclude any other person from its enjoyment for a specific period.

169. At [48] the CJEU noted that as the Advocate General had said, in point 105 of her opinion, under a system such as that at issue:

> "a customer acquires "points rights" ultimately in order to obtain the right to temporarily use a holiday property. Therefore, in order to classify the transfer of such a usage right as a "letting" it is irrelevant that there is insufficient knowledge of the individual characteristics of the property concerned as, in any event, the conditions of use are known to the parties to the contract."

170. The parties both referred to decisions which have emphasised the need, when determining the nature of a supply, to have regard to the economic reality in all the circumstances of the case. For example in *R&CC v Loyalty Management UK Lt*d Case C-53/09) [2010] STC 2651 (at [39]) the CJEU emphasised that "consideration of economic realities is a fundamental criterion for the application of the common system of VAT".

171. In the Supreme Court decision in *R&CC v Aimia Coalition Loyalty UK Ltd* (formerly known as *Loyalty Management UK Ltd*) [2013] UKSC 15 at [38] Lord Reid noted that :

> "when determining the relevant supply in which a taxable person engages, regard must be had to all the circumstances in which the transaction or combination of transactions takes place".

172. Similarly in (Case C-409/98) *C&EC v Cantor Fitzgerald International plc* [2001] STC 1453, the Advocate General said at [27]:

> "In order to identify the key features of a contract, however, we must go beyond an abstract or purely formal analysis. It is necessary to find the contract's economic purpose, that is to say, the precise way in which performance satisfies the interests of the parties. In other words, we must identify the element which the legal traditions of various European countries term the cause of the contract and understand as the economic purpose, calculated to realise the parties' respective interests, lying at the

heart of the contract. In the case of a lease, as noted above, this consists in the transfer by one party to another of an exclusive right to enjoy immovable property for an agreed period."

173. Looking at the principles established in the above cases, it is clear that, at the time when the member successfully reserves a residence, the key requirement for there to be a "letting of immovable property" is satisfied. For the agreed reservation period, the member has the right to occupy property as if he were the owner and to exclude any other person from enjoyment of such a right. This is no less the case if, rather than physically occupying the residence, the member chooses to make nights reserved as Primary Use Time available for rent under the Rental Programme or in effect to exchange such reserved nights for those in another property or for another benefit under the Interval or Marriot Programmes. For that period, the residence is his to occupy himself or to seek to exploit. *MacDonald Resorts* is authority that such short term rights of occupation potentially fall within the land exemption (subject to the further question of whether the right is excluded under the Directive hotel exclusion) (as set out at 167 to 169 above).

174. There are essentially, however, two issues which prevent this being a straightforward case where the purchase price can be taken to be paid for a supply of a licence to occupy land:

(1) First, there is the question of whether there can be a "letting of immovable property" where the ability to occupy is conditional on reservation and, when the member pays the price, there is no certainty as to precisely when and, for what periods, the member will occupy and what particular residence will be occupied on each occasion.

(2) Secondly, there is the question of whether the fact that the member is expressed to receive not just access to occupation rights but also access to other potential Plan benefits affects the nature of what is supplied.

175. HMRC argue that these factors mean that what is supplied lacks the key characteristic to be a "letting of immovable property". In their view the conditionality means that a member has no actual entitlement to occupy. Both as a contractual matter and in economic reality the member receives merely an opportunity to occupy a residence on paying the purchase price with no certainty as to whether any nights can be reserved at all. They state that given the overall number of fractional interests which will be granted and the restrictions of the reservation rules, occupation is not guaranteed. They argue also that, in such circumstances, there is no direct and immediate link (as required for there to be a supply of services for consideration) between the purchase price and the actual occupation/usage given that a member pays the same price however many nights he ultimately occupies for.

176. HMRC say that, given there is a lack of an actual entitlement and, therefore, a link between the price and actual occupation, it must follow that a member is not paying for actual occupation but merely for access to the system or plan giving an opportunity to take up occupation. They argue in addition that the price is paid also for the appellant agreeing to procure that the member has access to a range of other

benefits. Overall, therefore, a member pays for access to a plan or system giving both an opportunity to occupy and to obtain a range of other benefits. This, they say, is akin to the provision of facilities such as at a sports club (as in *Kennemer* and *Esporta*) or of a facilitating service (as in *RCI Europe*). As in those cases the fact that the price is not directly linked to the actual usage of the residence does not prevent there being reciprocal performance. The member is paying an upfront price to access the range of available benefits over a lengthy period.

177. The appellant's view is that the key factor is that the appellant is the exclusive owner, with the right to occupy as such, once a successful reservation is made. Looking at the economic realities, the member's intention must be to obtain that right to reserved occupation. A member would not pay such a substantial upfront amount in return merely for accessing a plan giving only an opportunity to occupy. The appellant says its analysis is based on and is supported by the approach taken by the CJEU in the cases of *RCI Europe* and *MacDonald Resorts* of closely examining the contractual arrangements, with regard to the intention of the parties, to ascertain what the member receives in return for the price being, in this case, the occupation rights. On that approach, it is clear that the purchase price is not paid for the appellant agreeing to provide access to the other benefits available under the various programmes. These are free standing programmes provided by third parties in return for separate payments made to those parties. These benefits are available only as a consequence of the occupancy rights.

178. The appellant argues that the conditionality has no effect on this analysis. On the authority of *MacDonald Resorts,* gaining access to the reservation system is not an end in itself, for which a member would pay. It merely facilitates the member obtaining occupation. It is clear from *Temco* that the presence of conditions, such as regards making payments, does not affect the position. *MacDonald Resorts* also provides authority that it suffices for there to a "letting of immovable property" that the member knows only the type of residence he will occupy at the outset.

RCI Europe

179. Turning first to *RCI Europe* the facts were that RCI, a UK business, operated a time share exchange scheme whereby members could in effect exchange the benefit of their own timeshare or "holiday usage" rights for those of other members in the scheme. Title to the timeshare interest remained at all times with the member; there was no exchange of the property interests themselves. Members only had contact with RCI as regards this process. To gain access to the scheme members were required to pay a one off enrolment fee (covering a period of 1 to 5 years) and an annual subscription fee. An exchange fee was payable in advance on the date of the request for a timeshare exchange. The majority of the timeshare properties in question were in Spain.

180. The UK took the view that RCI made a supply of membership of a timeshare exchange club in return for the fees and that this was a supply of travel services which took place in the UK and so was subject to UK VAT. The Spanish authorities took

the view that the services supplied were connected with immovable property and so subject to VAT in the country where the property was located.

181. Essentially the CJEU concluded that the enrolment and subscription fees were paid by the members in return for RCI providing a service of facilitating the exchange of timeshare interests whilst the exchange fee was paid for the actual exchange.

182. The CJEU considered (at [22]) that the essential question was the extent to which the various types of fees payable by members of the scheme could be attributed to individual services supplied by RCI. Such an examination was required (at [23] and [24]) in the light of the general principle that, there is a supply of services for consideration only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is "reciprocal performance" (in the sense of mutual rights and obligations), where the remuneration received by the provider constitutes the value actually given in return for the service provided to the recipient. In the light of that principle (at [25]) it was necessary to examine each transaction under the scheme in order to identify the supply of services effected in return for the various fees and then to assess the characteristics of those services.

183. In carrying out this exercise the CJEU considered (at [28] and [29]) that the intentions of the members must be relevant noting that although a close examination of RCI's business model showed that in return for payment of the enrolment fee, a member initially received only access to the exchange scheme, it was also true that, "for the owner of timeshare usage rights, membership of such a scheme would be pointless if he had no intention of exchanging his right for those of other members." Furthermore:

> "it is in that context that the synallagmatic nature of the contract concluded between RCI Europe and each of its members must be taken into consideration. Even if the various stages of the RCI Weeks system are taken into account, the fact remains that, if there was no intention to exchange timeshare usage rights through the market created by RCI Europe, the enrolment and subscription fees would lack any point."

184. At [30] the CJEU continued that, in that context, it is clear from the cases that the basis of assessment for a supply of services is everything which makes up the consideration for the service and that a supply of services is taxable only if there is a direct link between the service supplied and the consideration received. They noted that the service provided by RCI Europe was not immediate but it "undertakes to supply in the future the service required at the request of one of its members."

185. At [32] they noted that although owners of timeshare rights always had the possibility of renting another property on paying a rental fee, such an owner who was a member of the scheme and regularly paid subscription fees had the opportunity, with the help of RCI, of exchanging his right for that of another owner on merely paying the exchange fee. Therefore:

> "The enrolment and subscription fees are in fact paid by members in return for a service provided, or to be provided, by RCI Europe in order to facilitate the exchange of its members' timeshare usage rights, rather than rental through a third party agency."

186. At [33] the CJEU held that the fact that an annual fee is a fixed amount which cannot be related to each case of actual use does not alter the fact that there is reciprocal performance between the parties:

> "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 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))".

187. At [34] the court concluded that, 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" in return for those fees.

MacDonald Resorts

188. In *MacDonald Resorts* members could join an options scheme enabling them to access timeshare properties owned by other members of the club as well as other benefits. Those who joined the scheme acquired points rights either by purchasing them from the taxpayer or by depositing timeshare usage rights relating to fixed weeks. The taxpayer allocated a value to all timeshare weeks available for use by members, in terms of an allocation of a certain number of points according to the type and location of the property. Members could redeem their points allocated to them for a year by occupying particular accommodation for a chosen period up to the value of their points and the number of weeks available. There was no fee for joining but a new member had to acquire points rights. The taxpayer could allow members to exchange points for accommodation in its hotels or other benefits and to have access to an external timeshare arrangement.

189. Similarly to its stance in *RCI Europe* HMRC took the view that the sale of points rights was to be treated as the taxable supply of benefits arising from membership of a club and that the place of that supply was in the UK.

190. Essentially the CJEU adopted the same type of approach to classifying the supplies as they had in *RCI Europe.* However, the conclusion in this case was that there was no supply until the points acquired by members were actually exchanged for a relevant benefit. Assessing the supply at the point of exchange, where the

benefit received was a right to occupy property, the supply was an exempt "letting of immovable property".

191. The CJEU noted that, whilst the facts of the two cases were different, that distinction (at [22]):

> "does not prevent the same criterion from being used for its assessment, namely the members' ultimate intention when they pay for the services received (*RCI* at [29])."

192. At [24] and [25] the CJEU continued that looking at the intention of the members it was clear that a member completed the initial transaction of paying for points, not to collect points, but with the intention of temporarily using accommodation or of obtaining other services which he would choose at a later date. Therefore the purchase of point rights was "not an aim in itself". The acquisition of such rights and the conversion of points were "preliminary transactions" in order to be able to exercise the rights the customer intended to obtain. It was only at the final moment of that conversion that the purchaser of such rights receives the consideration for his initial payment for the points.

193. The CJEU held (at [26] and [27]) that having regard to the well established principles, that the basis of assessment for a supply of services is everything which makes up the consideration for the service supplied and, a supply of services is taxable only if there is a direct link between the service supplied and the consideration received by the supplier:

> "the actual service for which "points rights" are acquired is the making available to participants in the scheme of the various possible benefits which may be obtained by virtue of the points deriving from those rights. The service is not fully supplied until those points are converted.

194. It followed (at [28]) that:

> "in cases where the service consists in providing hotel accommodation or a right to temporarily use a property, it is when the points are converted into specific services that the connection between the service supplied and the consideration paid by the customer is established, the consideration being constituted by points deriving from previously acquired rights."

195. The CJEU continued (at [29]) to note that when points rights are acquired, the customer does not know exactly which accommodation or other services are available in a given year or the value in points of a holiday in that accommodation or of those services. Moreover, it is the taxpayer who determines the points classification of the available accommodation and services, so that the customer's choice is limited from the outset to accommodation or services which are accessible to him with the number of points he has. In those circumstances, the factors necessary for VAT to become chargeable were not established when the points rights were initially acquired so that there was no chargeable event at that time (as such an event is triggered only when services are performed).

196. The CJEU continued (at [31]) that it follows from the judgment in Case C-419/02 *BUPA Hospitals and Goldsborough Developments* [2006] ECR I-1685, that in order for VAT to be chargeable:

> "all the relevant information concerning the chargeable event, namely the future delivery of goods or future performance of services, must already be known and therefore, in particular, the goods or services must be precisely identified. Therefore, payments on account of supplies of goods or services that have not yet been clearly identified cannot be subject to VAT (*BUPA Hospitals and Goldsborough Developments*, paragraph 50)."

197. The CJEU held (at [32] and [33]) that since the real service is obtained only when the customer converts the points attaching to the points rights, the chargeable event occurs and the tax becomes chargeable only at that moment. It follows (at [33]) that it is only when the customer converts the points deriving from rights previously acquired into the temporary use of a property or hotel accommodation or another service that it is possible to determine the treatment for VAT purposes applicable to the transaction, according to the type of service supplied.

Approach to classification - decision

198. We note that in both *RCI Europe* and *MacDonald Resorts* the key concern of the CJEU in categorising the transaction, which in each case comprised a number of elements, was to identify the legal relationship between the provider of the service and the recipient, pursuant to which there is reciprocal performance and, in return for which, the provider receives the value given for the service provided. In other words, the concern was to identify correctly what it is that a party is legally bound to provide and the other party has a right to receive in return for the particular payments made. In each case it is apparent that this was regarded as central to the VAT analysis as VAT is only chargeable on supplies made in return for consideration where there is such reciprocal performance or what may be referred to as a "direct link" between the supply and the consideration.

199. Accordingly to identify correctly what was supplied in return for the payments made required a close analysis of the arrangements. In that context, the CJEU held in both cases that the intentions of the recipients of the service, as regards what they considered they were acquiring in return for the payments made, were highly relevant. In our view in taking that approach the CJEU was not conducting an enquiry into the mind of the relevant persons but rather determining what such intent must be from the objective characteristics of the transaction (in line with the comments at [45] of *MacDonald Resorts* (see 167 above)).

200. Adopting the approach in *RCI Europe* and *MacDonald Resorts*, the question is what it is that a member obtains from the appellant on entering into the agreement in return for the purchase price on a close examination of the arrangements and looking at the underlying intention of the members. In making that assessment we are

mindful that we must have regard to the economic realities underpinning the contractual arrangements (on the basis of the authorities set out at 170 to 172).

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.

202. The position as regards occupation rights which may be obtained under the Space Available Programme is less clear given that it is only in relatively limited circumstances that members may be able to reserve nights under that programme. However, we regard the provision of any occupation rights under that programme as essentially ancillary to the provision of occupation under the Primary Use Time and Extended Occupancy Time rights such that it should not be treated as a separate supply.

203. We note that as a matter of contractual construction it is clear that the appellant is agreeing with the member also to provide access to such other programmes as may be available under the Plan (currently being the Rental Programme, the Resale Programme, the Interval Programme and the Marriott Programme). What the appellant is agreeing to provide as regards these programmes is relatively limited, in that (as set out above) the appellant provides access only to the extent of such programmes as may be available and there is no guarantee that they will remain available or what other available future programmes may be.

204. It is the member's choice whether he joins the relevant programmes. Should he choose to do so he must do so under separate arrangements with the Manager, Interval or Marriott as appropriate on payment of a separate fee (except that the appellant bears the cost of the first year of membership of the Interval Programme). It is entirely clear, therefore, that the actual service provided under these programmes is provided by the Manager, Interval or Marriott as appropriate and not by the appellant.

205. In effect, where a member has reserved nights of occupancy under his Primary Use Time Rights, each of the Rental, Interval and Marriott Programmes enables the member to extract value from his reserved occupation rights, should he chose not to actually occupy, by allowing the residence of the specified category to be rented out for the nights reserved or by exchanging reserved nights for stays in other properties or for other benefits.

206. Looking at the commercial and economic realities of these arrangements, the member is not paying the purchase price in order to obtain the possibility of benefitting from the Rental, Interval or Marriott Programmes. In return for the price, the appellant is essentially providing the asset, being the right to occupy a reserved

residence, which enables the member to benefit from those programmes to the extent they continue to be available under the Plan. Without that asset the member has nothing to "trade" in order to gain the benefits available under these programmes. In other words these potential benefits flow from and can be exercised only as a result of the member obtaining occupation rights. In that context, we cannot see that the mere procuring by the appellant of access to benefits, which a member may or may not choose to avail himself of, as an alternative to occupying a residence, can be said to be anything other than incidental or ancillary to the provision of the occupancy rights themselves.

207. For similar reasons, our view is that the member is not paying the price in order to obtain access to the Resale Programme. This is a programme which the Manager may set up in future to enable members to sell their fractional interests should they wish to do so. Members are free to make alternative arrangements for sale. If a member chooses to use this programme the Manager or an affiliate would act as his agent for sale in return for a fee. This is merely an available option to assist a member in realising the value of what he actually pays to acquire under the agreement, the occupancy rights.

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 appellant 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.

209. This is not, in our view, a situation like that in *Kennemer*, *Esporta* or *RCI Europe* where the member is paying for the right to access a plan, a range of facilities or a facilitative system. For all the reasons set out above, we consider that the member is paying for the occupancy rights. This is not a case where the member pays the price in order to receive a bundle of benefits, rather than just the occupation rights, given that those benefits can only be accessed, in effect, through the prior obtaining of the occupancy rights and that they are provided under free standing programmes for separate payments. The analogy with *RCI Europe* and the other cases would have to be that the member is paying merely for the right to access the reservation system and not for the actual occupancy rights.

210. The CJEU decided in *RCI Europe* that the taxpayer had set up a market for the exchange of timeshare usage rights and that members paid the initial fee and annual fees to access that market with the ultimate aim of being able to exchange their timeshare usage rights with those of other members. The CJEU concluded that there was reciprocal performance as regards the supply of that exchange facility service and the fixed fees notwithstanding that, as members may not in fact actually make an exchange, there was no direct link between the fee and actual usage of the facility. This was on the basis of "sports club" cases such as *Kennemer*. In HMRC's view, the price is equivalent to these fees. They assert that the fact that the member is, as they

say, prepaying for the right to access the system over a number of years cannot affect the position.

211. The CJEU decided in effect that the provision of a market and facility for the exchange of timeshare interests was a service which had an independent function and value (in the sense of independent from the provision of an actual exchange) for which a member paid the relevant fees. Accordingly, it did not matter that there was no direct link between the fee and actual use of the exchange system. It can be assumed from that conclusion that the initial and annual fees were commensurate with the value someone would pay for the provision of such a facilitating service. We note that a separate exchange fee was paid when an actual exchange of timeshare interest was made.

212. In this case the economic and commercial reality is very different. The appellant has not created a market or system with any such free standing value. As the appellant has put forward, the obtaining of access to a reservation system is not an end in itself in the same way as the acquisition of points was not in the in *MacDonald Resorts* case. It is merely the process by which the member obtains what he actually intends to acquire in return for the price, namely, occupation or enjoyment of a reserved residence of the specified type. It is provided as part and parcel of those occupation rights. It is unrealistic that a person would pay amounts of £93,000 to £243,000 merely for the ability to access that system. As a matter of intention and economic reality the member is paying for the rights of occupation albeit that the member knows he will have to make a successful reservation in order to avail himself of that right. At the most it could be said that the member is paying a small proportion of the price for the reservation service but in our view it would be artificial to seek to divide matters up in that way.

213. For similar reasons we cannot see that a member can be held to pay the purchase price in return for access to a club akin to a sporting club. This is simply not the same situation, in contractual and economic terms, as where a member pays periodic fees for access to a club where the club provides a range of possible facilities and benefits which a member may avail himself of. In this case there is a clearly identified asset which the member is paying to obtain, namely, the right to occupy a residence in a Mayfair property for a certain maximum number of nights per year. It would be wholly unrealistic, where there is a single valuable identified asset, to hold that a person is paying to obtain club membership only. It is correct that a member may, as a result of acquiring this asset, turn it to account to receive other benefits but that is not the same as joining a sports or health club on paying periodic payments for access to a range of facilities.

214. In our view, the real issue in these circumstances, arising from the reservation system and lack of knowledge of when a residence and what residence will be occupied, is not as regards what is supplied but rather the timing of the supply. The question is whether there is sufficient reciprocal performance or a sufficiently direct link at the outset between the price and the actual provision of the occupation of a reserved residence and, sufficient knowledge of what is supplied, for this to constitute an immediate supply of the "letting of immovable property". The alternative analysis

would be that, similarly to the situation in *MacDonald Resorts*, there is a supply only on each occasion when a residence is reserved and actually used by the member (whether by occupation or under one of the programmes).

215. As set out above, in that case, it was held that members of the points scheme who purchased points rights were doing so not with a view to acquiring the rights attaching to those points but with a view to obtaining a future benefit, such as stay in a hotel or other accommodation, on the exchange of the points for such benefit. The CJEU noted that when the rights were acquired the customer did not know which accommodation or services were available or the value in points attributable to that accommodation/service. In those circumstances, the conditions for there to be a chargeable event at the outset were not satisfied. Whilst it was clear a member paid the price for points ultimately to acquire the benefit attaching to those points, it was not known at the outset what that benefit would be and accordingly what the supply would comprise. Therefore, it was only when points were converted into the relevant benefit that there was a chargeable event and that the nature of the supply could be determined (which, when the exchange was for a right to stay in a property, was held to be a "letting of immovable property"). The relevant passages from MacDonald Resorts are set out at 193 to 197 above.

216. In this case, there is a similar situation to some extent in that it is clear that a member does not pay the purchase price to access the reservation system but with the ultimate intention of being able to exercise rights of occupation of a reserved residence. The member does not actually obtain exclusive occupation (in the sense set out in the cases) until each occasion on which a successful reservation is made. It is only at that point that a member knows precisely which residence he will occupy on that occasion. As in *MacDonald Resorts*, therefore, there is some time delay between the making of the payment and the obtaining of the relevant benefit, in the sense of the ability to take up the occupation rights, and some degree of uncertainty at the outset as to the supply.

217. However, there is an essential distinction between the two cases. In *MacDonald Resorts* the principal reason why there was no immediate supply, when the price was paid, was that it was simply not known what type of benefit would be received, amongst a range of options and thereby no sufficient link, at that point, between any service to be obtained and the price. In this case it is known from the outset that the supply is of occupancy rights of residence in a specified category for a maximum number of nights in each year. The only uncertainty is precisely when those nights of occupancy will occur and which particular residence of the purchased category will be occupied.

218. In our view, in these circumstances, there is sufficient reciprocal performance and a sufficiently direct link between the price and the occupation for this to be a "letting of immovable property". Essentially the member has the option, should he so choose, and subject to successful reservation, to occupy a residence of a specified type for a specified maximum number of nights each year in return for an upfront price. The individual may not take up all his rights in a particular year but as he has paid the full price it cannot really be assumed that he will not obtain (assuming he is

the typical consumer as set out in *Card Protection* (see 225 below)) occupancy for at least some nights in the year. If he actually reserves a residence for less than the maximum number of nights, in effect he will have paid more for reserved nights on a pro rata per night basis. That does not, in our view, alter the nature of what he is receiving in return for the price. He has paid upfront for the reserved nights he receives albeit at an effective higher rate than if he used all his available nights.

219. We note that in *MacDonald Resorts*, it was held that, in assessing the nature of the supply when it took place on the exchange of points for a right to stay in a property, it did not prevent the supply from being a "letting of immovable property" that the member did not know the individual characteristics of the residence (as set out at [48] of that case (see 169 above)). That was because the conditions of use under the scheme were known. The same can be said here as regards not only the type of residence but also the reservation system and the period of occupation. These conditions and uncertainties fall into this category rather than being sufficient to prevent any supply arising until a later date. The member knows from the outset what type of residence he is entitled to occupy (on making an advance reservation) but does not know precisely which one of that type he will in fact have the right to occupy on successfully reserving. The member has the guaranteed right to nights in residence of that type (once reserved). We cannot see that there is significance in the fact that the member does not know precisely where it is located or that the member may well not occupy the same residence on each occasion when a reservation is made. The fact that the member has to make a reservation and is constrained by the reservation rules is known from the outset as is the maximum period for which the member may occupy in each year albeit that the member may choose not to take up the maximum number of nights.

220. As regards the requirement for the members to keep up to date with the Annual Residence Fee and to remain in Good Standing to continue to be able to exercise their occupation rights, it is common for tenants to forfeit rights if they make default in making payments relating to the premises occupied. As set out in *Temco*, the fact that a landlord reserves rights or makes conditions does not necessarily prevent the tenant from having exclusive occupation (at [24] and [25] of that case (see 164 above)).

221. We note that the courts have held that the length of the relevant property right is not necessarily determinative of whether the land exemption applies albeit that it may be a criterion for determining what constitutes taxable hotel accommodation (as stated at [21] of the decision in *Temco* (see 161 above)). In *MacDonald Resorts* the CJEU held that the short term rights to occupy property acquired by members in that case fell within the Directive exemption albeit it was then open to member states to provide for such interests to be excluded (see 167 and 168 above and 259 and 260 below). On the authority of that decision, therefore, a grant of a right carrying entitlement to occupy a residence for a few weeks only per year should not prevent the land exemption potentially applying but subject to the further question of whether the UK has excluded such interests from its scope.

222. We note HMRC's submissions that due to the number of fractional interests and the conditions of the reservation system a member may not be able to reserve

successfully any nights such that, they argue, a member is not guaranteed to be able to occupy for any nights at all. However, we accept Mr Dowling's evidence that in practice this has not been a problem for members and if there were any serious issue it is likely that steps could be taken to change the reservation rules. This highly theoretical possibility does not in our view detract from the economic reality of the position that a member intends to obtain occupancy rights in return for the purchase price. Moreover it is only if the member can reserve at least some Primary Use Time that the member can access most of the other programmes/benefits. If a member could not realistically expect to reserve the Property under those rights, entering into the agreement would be worthless to the member.

Card Protection Plan analysis

223. HMRC raise as an alternative argument that there is a single "over-arching" supply of services of a bundle of rights under the principles in *Card Protection Plan*, as applied in a number of UK cases. However, our view is that the principles set out in that case support the analysis set out above. Our conclusion is the same applying those principles.

224. In that case the CJEU considered, in the context of insurance services, the appropriate criteria for deciding for VAT purposes "whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be assessed separately".

225. The CJEU noted (at [27]) that having regard to the diversity of commercial operations, it is not possible to give exhaustive guidance on how to approach the problem correctly in all cases. However, (at [28]) where the transaction in question comprises a bundle of features and acts, regard must be had to all the circumstances in which the transaction takes place. Whilst each supply must normally be regarded as distinct a supply which comprises a single service should not be artificially split (at [29]):

> "In this respect, taking into account, first that it follows from art 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service".

226. The CJEU noted at [30] that there is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast as ancillary services which share the same tax treatment as the principal service:

> "A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied".

227. At [31] they state that the fact that a single price is charged is not decisive. If the service provided to customers consists of several elements for a single price, the single price may suggest there is a single service. However if circumstances indicated that the customers intended to purchase two distinct services [in that case being an insurance supply and a card registration service] it would be necessary to identify the part of the single price which related to the insurance supply.

228. HMRC point to a number of UK cases, in which the above principles have been applied, in support of their analysis referring in particular to Lord Walker's comments in the *College of Estate Management*, those of Roth J in *Bryce* and the decision in *Byrom* (as set out in their submission in 138 to 144). In those decisions, consideration was given to the scope of the principle set out in *Card Protection Plan* that a service must be regarded as ancillary where it does not constitute an aim in itself but rather a means of betting enjoying the principal service. The principle emerging from those cases is that (as Roth J states in *Bryce*), when looking at circumstances involving a number of elements, it is not appropriate to conclude that a supply must necessarily be a distinct supply if it cannot be categorised as ancillary; rather the question is whether the relevant separate elements are to be treated as separate supplies or merely as elements in some "over-arching" single supply. In that context, the test is whether the various elements supplied to the customer are so closely linked that they form, objectively, a single indivisible economic supply, which it would be artificial to split.

229. HMRC rely particularly on the *Byrom* case where Warren J held that there was a singly supply to a masseuse of various services required for her to operate her business. He held that the services such as laundry and receptionist services and access to a room used as a waiting area could not be said to be provided to enable the masseuse to "better enjoy" the licence granted to her to use the room where she provided her masseuse services. Therefore, they were not ancillary to the provision of the licence. As a matter of economic and social reality the supply was of massage parlour services, one element of which was the provision of the room. This was the case even though, the provision of the room was, to the masseuse, probably the single most important element of the overall supply and one predominating over the other elements taken together.

230. On the basis of these principles HMRC argue that the appellant makes supplies comprising a number of elements which are so closely linked that they form a single supply which it would be artificial to split. They argue that, on the basis of the decision in *Byrom*, the key factor is that the provision of access to the various benefits available to a member under the Plan cannot be said to be provided to enable members to "better enjoy" the use of the accommodation in the residences; in any given year, a member might make significant use of the other benefits available under the Plan without even setting foot in a residence. Therefore, in their view, the description which reflects economic and social reality is a supply of membership or participation in the plan, only one element of which is the provision of the residence.

As in *Byrom* it does not matter that the provision of the occupancy rights might be seen as being essential to the supply as opposed to merely ancillary.

Conclusion on Card Protection Plan argument

231. HMRC appear to treat the test in that case as distinct and separate from the approach adopted in *RCI Europe* and *MacDonald Resorts*. However, we see the approach in those cases as simply applying the general approach advocated in the earlier *Card Protection Plan* case in the particular context in question rather than as embodying a different and distinct principle. The CJEU noted in that case that it was not possible to give exhaustive guidance to cover all situations in determining whether there is one or more supplies. They noted the need to look at all the circumstances of the case, they looked to economic realities and also to intention in reaching their conclusion that a service should be regarded as ancillary if it does not constitute for customers an aim in itself. It seems to us that despite the use of different terminology, the fundamental initial question is the same under this approach, namely, that it is essential to identify precisely what is being provided in return for each payment on a detailed examination of all the circumstances. In any event, as set our below, our view is that the same conclusion is reached in this case whichever test is applied.

232. In this case, our view is that it is wholly consistent with the principles in *Card Protection Plan* to regard the effect of the arrangements as being that the appellant makes a supply of occupancy rights and not of membership of a plan or club. For the reasons set out above, the reservation system merely facilitates and is a required step to be taken in the obtaining of the rights of occupation. Gaining access to the reservation system is not an aim in itself but merely facilitates the obtaining of occupation. To seek to split out the right to access the reservation system from the occupancy rights obtained pursuant to that system would be artificial and would be the division of a supply which in economic terms is one supply. Similarly providing access to the other programmes/benefits is entirely consequent upon the member obtaining occupation rights by reserving a residence under the Primary Use Time rights or simply assists a member to realise the value of those rights. For all the reasons set out in the analysis above, it is difficult to see the agreement to provide access to those programmes as anything other than ancillary to the provision of the occupancy rights themselves. Access is provided to enable members to obtain better enjoyment from the occupancy rights by giving them the option of receiving the various benefits offered on entering into arrangements with the relevant third party in return for a separate fee.

233. We do not agree with HMRC's view that the provision of access to the various potential benefits does not enable members "the better to enjoy" the occupation rights on the basis that, for that to be the case, the services would have to enhance the member's own actual use, in the sense of physical occupation, of the residences. The essence of the occupation rights is that they confer the right to occupy a residence as owner to the exclusion of all others. A person may enjoy such a right no less by exploiting it for value than by physical occupation. The appellant procures the other benefits to enable members to obtain value from that right should they choose to do so. On that basis and, given our conclusion that what the members intend to obtain as

matter of economic reality is the right to occupy a reserved residence, it is in accordance with social and economic reality for the supply to be categorised as the grant of a licence to occupy land.

Conclusion

234. For all the reasons set out above we have concluded that the appellant's supplies to the members in return for the purchase price are of rights to occupy a reserved residence which fall within the land exemption as a licence to occupy land.

Discussion –Directive hotel exclusion/item 1(d)

235. The next question is whether the supplies are excluded from the land exemption under item 1(d) or 1(e). It is not disputed that item 1(d) enacts in the UK the Directive hotel exclusion which, to recap, provides for the exclusion from the Directive exemption for the provision of accommodation, as defined in the laws of the member states, in the "hotel sector" or in "sectors with a similar function".

236. The exclusion in item 1(d) applies to the provision in a "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". Note (9) provides that a "similar establishment" for the purposes of item 1(d):

> "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".

237. It is common ground between the parties that, as item 1(d) is intended to enact the Directive hotel exclusion, the terms used in item 1(d) correspond to those in the provisions in the Directive. Item 1(d) describes the "accommodation" covered by the exclusion, which is the UK exercising its permitted discretion to define such "accommodation". The references in item 1(d) to a "hotel", "inn" and "boarding house" correspond to the "hotel sector" and the reference to a "similar establishment" corresponds to "sectors with a similar function".

238. It is not disputed that the residences are "accommodation" within the meaning of item 1(d). The residences all comprise sleeping accommodation (with 1 or 2 bedrooms) and a living room, bathroom and kitchen which are provided in conjunction with that sleeping accommodation. HMRC do not suggest that the residences are provided in a "hotel", "inn" or "boarding house" but rather that they are provided in a "similar establishment" within the meaning of note (9).

Meaning of "similar establishment", "hotel sector" and "sectors with a similar function"

239. There is some dispute as to the relevance of the CJEU decisions on the meaning of the Directive hotel exclusion in interpreting item 1(d). HMRC adopt the view, as

was held in the *Geoffrey Ross* case, that in enacting note (9), the UK was exercising its permitted discretion under article 135(2) of the Directive to provide for "further exclusions" from the land exemption. HMRC argue that, on that basis, whether or not supplies are of "accommodation" within the "premises" set out in note (9) is purely a matter of UK statutory construction. It is for the UK to determine the correct interpretation of a provision which it has exercised its permitted discretion to introduce. Therefore, the CJEU decisions, such as *Blasi*, on which the appellant relies, are not relevant (although, in HMRC's view, in any event, that decision does not in fact support the appellant's position as set out further below).

240. In the appellant's view, relevant decisions of the CJEU are in point. The appellant asserts that the CJEU has given clear guidance in *Blasi* that long term interests in property, of the kind in issue here, are not included in the Directive hotel exclusion. Whilst note (9) may well be intended to be a "further exclusion" from the land exemption as HMRC argue, the appellant asserts that the tribunal cannot interpret it as covering interests which the CJEU has decided are not within the Directive hotel exclusion in the absence of very clear wording to that effect. In its view, there is no such clear wording here.

Relevance of CJEU decisions

241. We have difficulty in seeing that, in enacting note (9), the UK was exercising its discretion to introduce "further exclusions" from the land exemption. As set out above, it seems clear that the wording in item 1(d) is intended to enact the Directive hotel exclusion in UK law and that is not disputed by the parties. Note (9) states that the term "similar establishment *includes*" premises of the specified type. On the basis that "similar establishment" is intended to equate to "sectors with a similar function", it is difficult to see the enactment of note (9) as anything other than the UK seeking to set out what it considers is a particular instance of such a sector. Our view, therefore, is that the entirety of the provision, including note (9), represents the UK setting out the Directive hotel exclusion in UK law.

242. The tribunal in the *Geoffrey Ross* case expressed two concerns in viewing note (9) as providing merely an interpretation of what constitutes a "similar establishment" (rather than constituting a "further exclusion"). The first was that, as note (9) is limited to sleeping accommodation, accommodation provided for the purpose of catering would be taxable only if provided at a "hotel, inn or boarding house" and not if provided at a "similar establishment". The second was that note (9) applies expressly to "visitors or travellers" whereas there is no such restriction expressly imported into other meanings which "similar establishment" could have. Neither of these points affects our conclusion. Note (9) merely states that "similar establishment *includes"* the premises further described in that note. It does not provide an exhaustive definition of what is to be regarded as a "similar establishment".

243. The question, therefore, is whether the provision of the residences is within a "similar establishment" (including as defined in note (9)) to a "hotel", "inn" or "boarding house" seeking to interpret those provisions in accordance with decisions of the CJEU on the meaning of "hotel sector" and "sectors with a similar function".

CJEU decisions – Blasi and MacDonald Resorts

244. As noted, the appellant places a great deal of reliance on the decision of the CJEU in the *Blasi* case. The CJEU was required to consider the German rule providing for the exclusion from the Directive exemption (as enacted in Germany) of "the letting of living and sleeping accommodation which a trader keeps available for the short-term accommodation of guests". The CJEU noted that according to the German case law this test is applied by reference to whether the supplier's intention is to make the premises available for temporary accommodation only. This is assessed by reference to the duration provided for under the letting agreement. The let is deemed to be short term if the agreement states it is for a period of less than 6 months. Essentially the question was whether this rule, as applied according to German case law, is compatible with the Directive hotel exclusion.

245. The facts were that Mrs Blasi provided accommodation in Munich for refugee families referred to her by the municipal social services department. The letting agreements were always stated to be for a period of less than 6 months but in most cases the actual duration of the refugees' stay was greater than 6 months (with the average being around 14.4 months). The buildings used for accommodation were normal residential buildings each containing several dwellings. The refugee families occupied fully furnished rooms equipped with cooking facilities. The rooms were cleaned by the refugees themselves but Mrs Blasi supplied and washed the bedlinen and also saw to the cleaning of the landings, staircases, bathrooms and lavatories. Occupants were not supplied with meals. There was no reception area in the buildings, nor any lounges or other common amenity rooms. The accommodation costs were met by the City of Munich; the municipal social services department issued Mrs Blasi with certificates attesting that it would pay the costs incurred, which were usually valid for one month and could be extended if necessary.

246. The Advocate General set out useful guidance in his opinion which we have referred to in 266 below. The CJEU set out the questions they had to consider (at [17]) as:

> "whether [the Directive hotel exclusion] may be construed as meaning that what is defined in German law as the provision of short-term accommodation for guests constitutes, within the meaning of Community law, the provision of accommodation in sectors with a function similar to that of the hotel sector, thus being subject to VAT…."; and
>
> "whether it is compatible with [the Directive hotel exclusion] to draw a distinction between taxable transactions and transactions that are exempted on the basis of the duration of the accommodation, such exemption being reserved for those letting transactions that involve the conclusion of a letting agreement for more than six months, irrespective of the actual total duration of the let."

247. At [18] the CJEU noted that the terms used to specify exemptions including the land exemption are to be construed strictly "since they constitute exceptions to the

general principle that turnover tax is to be levied on all services supplied for consideration by a taxable person". On the other hand (at [19]) the provisions of the Directive hotel exclusion, as it introduces an exception from the exemption, cannot be construed strictly rather it should (at [20]) be "given a broad construction since their purpose is to ensure that the provision of temporary accommodation similar to, and hence in potential competition with, that provided in the hotel sector is subject to tax."

248. The CJEU continued to say at [23] that where taxable hotel accommodation is distinguished from exempt supplies of the letting of dwelling accommodation on the basis of its duration:

> "that constitutes 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, a stay in a hotel tends to be rather short and that in a rented flat fairly long."

249. It is clear that in referring to "the duration of the stay" and that "a stay in a hotel tends to be short" the CJEU meant that it is the period of the actual stay in accommodation that is an appropriate criterion for distinguishing between taxable hotel accommodation and exempt letting of a dwelling. They then continued to conclude accordingly (at [24]) that, as the German rule applies to the provision of short term accommodation, defined as less than 6 months, that is a reasonable criterion for making the distinction:

> "the use of the criterion of the provision of short-term accommodation, being defined as less than six months, appears 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 a hotel, namely the provision of temporary accommodation on a commercial basis, are subject to tax."

250. The CJEU went on to consider (at [25]) the impact on the position of the fact that the German rule did not seek to make the relevant distinction by reference to the actual duration of the period for which the accommodation is provided but by reference to whether the operator intended to provide the accommodation on a short term basis, as evidenced in the letting agreement or contract:

> "Furthermore, in regard to the definition of the concept of "short-term" in German law, the requirement derived from the case-law of the Bundesfinanzhof, to the effect that, in order to qualify for the exemption, it is necessary to prove the intention, evidenced by a letting agreement or other contract, to let property for a minimum period of six months, appears to be a criterion that is easily applied and appropriate to attain the objective sought by Article 13B of the Sixth Directive, which is to ensure a correct and straightforward application of the exemptions for which it provides".

251. They recognised, however, (at [26]) that in some circumstances (which they thought would probably be exceptional), it is possible that some clauses in a letting agreement, including that relating to duration, will not "fully reflect the reality of the contractual relations". They noted that this could be the case, for example, where (as in that case) the taxable person is "unable to fix the duration of the let freely with his tenants where it depends on certificates from the public authorities attesting that they will pay the costs incurred". They said that, in such circumstances, it is ultimately for the national court to determine whether it might not be appropriate to take into consideration "the actual total duration of the accommodation rather than that specified in the letting agreement".

252. The CJEU concluded (at [27]) that "in the light of the foregoing" the Directive hotel exclusion:

> "may be construed as meaning that the provision of short-term accommodation for guests is taxable, as constituting the provision of accommodation in sectors with a function similar to that of the hotel sector.
>
> In that regard, the [Directive hotel exclusion] does not preclude taxation in respect of agreements concluded for a period of less than six months, if that duration is deemed to reflect the parties' intention. It is, however, for the national court to determine whether, in a case before it, certain factors (such as the automatic renewal of the letting agreement) suggest that the duration stated in the letting agreement does not reflect the parties' true intention, in which case the actual total duration of the accommodation, rather than that specified in the letting agreement, would have to be taken into consideration."

253. In our view this decision does not provide authority, as the appellant argues, that the grant of an interest of the type in issue does not fall within the Directive hotel exclusion. The appellant asserts essentially that the CJEU decided in effect that the grant of a right to a short term letting is within the Directive hotel exclusion so that it must follow that the grant of a right which endures over a long period of time is not included. Our view is that, to the contrary, the decision points to an interest of this type being included in the Directive hotel exclusion.

254. The situation in this case is very different from the factual scenario the CJEU was concerned with. In this case, a member receives the right to occupy a residence of the specified type for a relatively short period each year of 21 nights under the Primary Use Time rights and 14 nights under the Extended Occupancy Time rights. However, these rights endure over many years from the date of grant until 31 October 2050. The question here, therefore, is 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 any "sector with a similar function".

255. In *Blasi*, in contrast, the CJEU was looking at the situation where there was a single continuous period of letting, in the sense of the conferring of a continuous right to occupy, over relatively short term periods. The issue was that in many instances the period of actual (continuous) occupation extended beyond that stated in the letting agreement. The German provision under consideration excluded short term occupation, of less than 6 months, from exemption in effect by reference to the intended period the accommodation was to be let for, as evidenced in the letting agreement.

256. In approaching the issue of whether the German rule is compatible with the Directive provisions, it is clear throughout the decision that the CJEU was focussing on the duration of the *period for which the accommodation is provided*. They started by noting that this is an appropriate criterion for making the distinction between taxable hotel/hotel style accommodation since one of the ways in which such lettings differ "is the duration of the stay" noting that a "stay" in a hotel tends to be rather short and that in a rented flat fairly long. They concluded, accordingly, that a rule, such as that in Germany, which seeks to make the distinction by reference to the provision of short term accommodation of less than 6 months is an appropriate criterion. They went on to consider the impact on the position of the fact that the German case law determines whether a letting is for less than 6 months or not by reference to the intentions of the supplier, as evidenced in the letting agreement. They decided that the Directive provisions "do not preclude taxation in respect of agreements concluded for a period of less than six months, if that duration is deemed to reflect the parties' intention". In the context of the preceding comments of the CJEU and the factual background, it is clear that the period referred to is that of the provision of the accommodation. If the stated period does not reflect the parties' intentions, which is a question for the national court to decide, the actual duration of the letting would have to be considered.

257. We cannot see how it can be extrapolated from this decision that an interest, which endures for a long period over many years but which confers the right to stay for short periods only in each year (which stays are likely to take place on an intermittent basis in that year), is not within the Directive hotel exclusion. The CJEU was not concerned with such circumstances. They did not make any finding that it is the duration of the agreement itself, in which the right to the right to the letting is conferred, which is an appropriate criterion for distinguishing between taxable hotel/hotel style accommodation and exempt lettings. Rather, in the context of arrangements providing for continuous short term occupation, they decided that it is the period of the letting, in the sense of the period during which the accommodation is provided, which provides the criterion. They concluded that it is not incompatible with the Directive provisions to apply that criterion, in effect, by treating the period stated in the letting agreement as the true period of occupation, as long as that stated period is based in reality by reference to the parties' true intentions. If it is not, the actual duration has to be considered.

258. The decision does not, therefore, in our view provide support for the assertion that the rights granted by the appellant to members do not fall within the Directive hotel exclusion. To the contrary, given the focus on the duration of the period for

which the accommodation is provided, our view is that the decision clearly indicates 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.

259. The appellant also points to the *MacDonald Resorts* case as supporting its position. Having decided that the exchange of points in return for a short term stay in holiday accommodation was potentially within the Directive exemption, the CJEU considered the effect of the Directive hotel exclusion. At [49] and [50] the CJEU referred to the *Blasi* decision noting that, as set out in that case, the words "sectors with a similar function" should be given a broad construction. The CJEU continued to note that member states have a measure of discretion in determining what accommodation is to be included:

> "In defining the classes of provision of accommodation which are to be taxed by derogation from the exemption for the leasing or letting of immovable property, in accordance with Article 13B(b)(1) of the Sixth Directive [now article 135(1)(l)], the Member States enjoy a margin of discretion. It is consequently a matter for the Member States, when transposing that provision, to introduce those criteria which seem to them appropriate in order to draw the distinction between taxable transactions and those which are not, that is the leasing and letting of immovable property."

260. The CJEU continued (at [51]) that it follows from the foregoing provisions that the Directive exemption does not preclude a member state from imposing VAT "on the transfer for consideration of rights held by third parties to the temporary use of a property". Similarly at [52] it was held that under a scheme such as that in issue:

> "when the customer converts his initially acquired rights into a right to temporarily use a property, the supply of services concerned constitutes a letting of immovable property within the meaning of Article 13B(b) of the Sixth Directive (now Article 135(1)(l) of Directive 2006/112). However, that provision does not prevent Member States from excluding that supply from exemption."

261. The appellant argues that, in making these statements, the CJEU has acknowledged in effect that the UK, which could have used its powers under s 31 VATA, had the right expressly to exclude the temporary use of accommodation over long periods of time from the scope of the land exemption so as to capture the sale of fractional interests. Having chosen not to do so, despite the very clear steer given by the CJEU, it is not now open to HMRC to seek to exclude the sale of fractional interests from the scope of the exemption by filling a legislative void via interpretation.

262. We cannot see that the conclusions of the CJEU in this case can be interpreted as the appellant argues. The questions which were referred to the CJEU were, in summary, (at [14]) whether the relevant supplies were to be characterised as the "leasing or letting of immovable property" or as membership of a club, or in some

other manner, whether certain features of the scheme affected the answer to that question and whether the relevant supplies of services were "services connected with immovable property" (within the meaning of the place of supply rules).

263. In deciding the question of whether the supplies were the "leasing or letting of immovable property", as set out above, the CJEU noted that the Directive exemption did not prevent member states exercising their discretion to exclude the temporary use of accommodation from the exemption. The CJEU did not make any comment on whether the UK rules in fact have the effect of excluding the temporary use of accommodation from the land exemption. The CJEU was not specifically asked to decide if the supply in question was within the UK rules in item 1(d).

264. In any event the issue before the CJEU did not concern the current situation. In that case, what members of the scheme acquired, on realising the value of points, was the right to occupy a holiday property for a short period. The supply in question, therefore, was that of a right to occupy a property for a defined short period on a particular occasion. The statement that member states may exclude such supplies from the Directive exemption does not inform the current issue as regards a supply of a right to occupy for a short period in each year over many years. We take from these comments in *MacDonald Resorts* only that, consistently with the decision in *Blasi*, if the UK rules in item 1(d) are to be interpreted as applying to short term occupation, that would be compatible with EU law.

Interpretation of item 1(d) in the light of CJEU decisions

265. As noted our view is that we must interpret item 1(d), including note (9), taking into account the CJEU decisions on the meaning of "hotel sector" and "sectors with a similar function". The CJEU decision in *Blasi* tells us that a criterion by which a sector may be held to have a function similar to that of a hotel is the provision of the relevant accommodation on a short term basis only. That is one of the essential differences between exempt dwelling accommodation and taxable hotel accommodation. The CJEU described the essential function performed by a hotel as being "the provision of temporary accommodation on a commercial basis."

266. The opinion of the Advocate General in that case also provides useful guidance. At [20], he referred similarly to the "essential function performed by a hotel" as being "the provision of temporary accommodation on a commercial basis". At [19], he gives the following indication of what distinguishes the provision of accommodation as being in the hotel sector, being the temporary nature of the accommodation, the provision of additional services and more active exploitation in the sense of greater supervision and management, as follows:

> "As regards the German provision, it is true that the short-term letting of residential property may not entail all of the additional supplies of goods and services, such as provision of meals and drinks, cleaning of rooms, provision of bed linen etc, normally provided in hotels. Nevertheless, there can be no doubt that a taxable person offering, for example, short-term holiday lets of residential property fulfils essentially the same

function as - and is in a competitive relationship with - a taxable person in the hotel sector. The essential distinction between such lettings and exempt lettings of residential property is the temporary nature of the accommodation. In any event, short-term lets are more likely to involve additional services such as provision of linen and cleaning of common parts of buildings or even of the accommodation itself (indeed a number of such services are provided by Mrs Blasi); moreover, they involve more active exploitation of the property than long-term lets in so far as greater supervision and management is required."

267. The factors identified accord with the fact that the "leasing and letting of immovable property" is generally regarded in the case law as a passive activity where the consideration for the supply is linked to the passage of time as contrasted with cases where there is some more activity or exploitation (as set out in *Temco* (at [21]) (see 161 above)).

Interpretation of item 1(d) and note (9)

268. Looking at the UK provisions, the question is whether the Property comprises a "similar establishment" and, in particular (under note (9)) whether it comprises "premises which include furnished sleeping accommodation…..used by or held out as suitable for use by visitors or travellers".

269. As noted, it is clear from *Blasi* that the essential function of a hotel is the provision of temporary accommodation on a commercial basis, involving the provision of services such as cleaning and changes of bed linen and more active exploitation (compared with the passive letting of immovable property). For the provision of accommodation to be regarded as made in an establishment similar to such a hotel, therefore, (or in sector with a similar function) it must be provided in an establishment/sector sharing at least some of these characteristics.

270. Looking at the wording of note (9), on their natural meaning, the terms "travellers" and "visitors" refer to persons who are itinerant or transient, in the sense of being temporary and/or occasional potential occupants of the relevant premises, as someone who is away from their usual home for whatever reason. It is implicit, therefore, in the use of those terms that the accommodation in the relevant premises "used by or held out as suitable for use by" such persons must generally be for occupation on a short term basis.

271. The fact that the premises are confined to those which are "used by" or "held out as suitable for use by" by such short term occupants persons means that consideration is required of what makes premises suitable for such use. In our view, premises are suitable for such use only if they have at least a minimum of the facilities and services which would typically be regarded as indicative of a hotel service such as cleaning and changes of bed linen. It is inherent in the nature of short term occupation by persons away from their usual home, as travellers or visitors intending to move on in in a short period of time, that the accommodation needs to be fully operational and equipped for the occupants use without any or only minimal input from the occupant. For example, such occupants would not generally expect and would not be equipped

to clean the room occupied or provide their own changes of bed linen. For premises to be "held out" as suitable for use by such persons clearly they would have to be marketed or advertised to "visitors or travellers" as being suitable for their use.

272. The UK provisions can, therefore, on their natural meaning, be interpreted in a manner which is in accordance with the guidance in *Blasi*. The criteria indicated by the wording of note (9) for the exclusion to apply are that the furnished sleeping accommodation in the relevant premises is used (or is held out as suitable for use) by those generally occupying on a temporary or short term basis, with at least some of the attendant facilities and services required for such short term stays, thereby indicating more active commercial exploitation as regards the premises.

273. The main difference between the parties as regards the interpretation of "similar establishment" and note (9) is that HMRC consider that the nature of the premises and the attendant facilities is determinative whereas the appellant argues that the key factor is the nature of the appellant's business and rights granted to members in the context of that business.

274. The appellant argues that the position has to be assessed separately as regards transient non-members who use the premises and the members. It is the nature of the right granted to members and, in particular, the fact that it is a long term right granted in return for a premium and the nature of the appellant's business (as a provider of fractional interests rather than a hotelier) (see 282 and 105), which demonstrates that the appellant provides the accommodation to members in the form of a passive letting of the land rather than as part of a hotel/hotel style sector. In its view, the members have rights akin to those of an owner of residential property (with at least some of the attendant risks and rewards of ownership) rather than merely hotel guests. In that context, it is irrelevant that the accommodation is also provided to non-members in what may be regarded as a "similar establishment" to a hotel. As set out above, we do not accept the appellant's argument that such a long term right is incapable of falling in the "hotel sector"/"sectors with a similar function" following the decision in *Blasi*.

275. We agree with the appellant that, to the extent that HMRC are saying that the classification of the supply depends solely on the character of the physical space and services provided at it, having regard to the CJEU authorities (as in our view we must), that cannot of itself be determinative. Essentially the authorities draw the distinction between an exempt supply of land, as a passive "letting of immovable property" as dwelling accommodation, and a taxable supply of accommodation in the hotel sector/sector with a similar function, as the provision of temporary occupancy rights requiring greater active commercial exploitation. This clearly requires consideration of the particular way in which the supplier is exploiting the premises as regards the type of interest or rights it grants to the recipient of the supply.

276. Looking at the physical attributes and services provided at a building alone could lead to anomalous results. For example, it is conceivable that the owner of a building with identical furnished apartments may operate a distinct set of apartments on a hotel basis (with the provision of services such as cleaning and changes of bed linen) and may let some of them under longer term lets with the provision of no such

services. If the different nature of the rights granted to the hotel occupants and the long term residents are disregarded altogether, the whole of such premises could fall within the exclusion.

277. Our view is, therefore, that where, as in this case, the provider of the accommodation supplies it to different sets of "visitors or travellers" on a different basis, a separate assessment can be made of whether the premises fall within note (9) as regards each set of such "visitors or travellers". We do not consider that the wording of the provisions precludes such a separate assessment taking into account our obligation to interpret the UK provisions in accordance with EU law as set out in the *Vodafone* case to which the appellant refers.

Decision on item 1(d)

278. It is not disputed that, as regards the non-members who stay there, the premises include "furnished sleeping accommodation used by or held out as suitable for use by visitors or travellers". It is clear that the residences at the Property are marketed as hotel stays to non-members and, as HMRC note, there are many references to the Property as a hotel or to a stay in a hotel in the descriptions used by websites through which non-members can make bookings and in their on-line reviews of their stays. It is also not disputed that both members and non-members receive a range of services of a type which a visitor could expect in a high class hotel. Accordingly the appellant accepts that the provision of accommodation in the residences to non-members is within item 1(d).

279. As regards members, the appellant advertises fractional interest ownership as an alternative to second home ownership as well as, in some instances, providing the equivalent of a hotel stay. Members refer to the residences as providing essentially "home away from home" accommodation as well as, in some cases, noting that the high quality services are what can be expected of a high class hotel. HMRC note that Mr Dowling accepted that it is likely that members are persons who previously used a hotel for stays in London rather than those who have sold alternative accommodation in order to purchase a fractional interest. We are not able to form any conclusion from this other than that it can be expected that members will have a mixture of motivations in their own minds for purchasing a fractional interest.

280. In any event, to what extent the purchase of a fractional interest in the premises is held out as an alternative to second home ownership or to hotel stays, does not affect the position. In our view it is clear, on either basis, that in its marketing materials the appellant is holding the premises out as suitable for members' use on a short stay basis in each year, with the provision of attendant services and facilities which may be expected for such short stays, and that the premises are so used by members. We consider below whether the fact that such short stays are made under a long term right (and the other factors raised by the appellant) affects the position.

281. There are very few differences between what a member and non-member may experience in the terms of the available facilities on staying in a residence. In summary the features of and facilities at the Property are as follows:

(1) There are limited public areas comprising the reception area which includes a concierge desk, a small lounge, an internet room and toilets/cloakrooms. Mr Dowling noted that many hotels would comprise much more extensive public areas and facilities (such as a bar and restaurant) but accepted that the facilities are not dissimilar to what may be found in a small boutique hotel.

(2) A member reserves his nights at the Property through a dedicated reservation team for members which also advises members on how to maximise the use and value obtained from their fractional interest ownership. A non-member reserves typically through the Marriott website or other independent booking agents. All occupants check in at the reception area and receive a key card for accessing the residence of the specified type. The reception desk provides a 24 hour service for all occupants.

(3) The residences all comprise fully furnished apartments extending beyond a traditional hotel room in that they each have equipped kitchen facilities and a living area (as well as 1 or 2 bedrooms and 1 or 2 bathrooms). Whether occupied by members or non-members, the residences have "extras" often found in hotels such as dressing gowns and slippers and complimentary toiletries and a guide pointing out the available facilities and services.

(4) For all occupants there is a 24-hour front desk, a concierge service and tour desk, a business centre, free Wi-Fi, fax and photocopying services, a twice daily maid service with the provision of clean linen and towels as required, a luggage storage facility, an "in room a la carte" dining service, laundry and dry cleaning, an in house florist and newspaper delivery. Members can also benefit from grocery delivery, personal shopping, car valet and limousine services which are not actively marketed to non-members. Members only can also benefit from a number of negotiated discounted or preferential services provided by third parties (as further described in 64 above)

(5) Occupants can of course use the kitchen facilities. Members can order groceries to be delivered to them on arrival for their stay or during their stay. All occupants can use the "in room a la carte" dining facility whereby they can order breakfast and other meals to be delivered to their residence. Mr Dowling gave evidence that around 30% of members use the kitchen facilities.

(6) Members can store their belongings at the Property between stays and arrangements can be made for them to be unpacked by the housekeeping service for their arrival.

282. There are differences between a member and a non-member's rights and obligations the main ones being as follows:

(1) A non-member occupies on an occasional or ad hoc basis (subject to availability/prior reservation) at a single daily commercial rate. Members

occupy under a long term right in return for the payment of an upfront price and have rights to stay for a maximum number of nights per year. There are detailed reservation rules but, essentially, subject to making a successful reservation, a member has flexibility to choose when he wishes to occupy and for what length of period (subject to seasonal and weekend restrictions) up to the maximum permitted occupancy in any given year.

(2) A member may permit others to occupy a residence reserved under his Primary Use Time rights.

(3) A member's right to occupy is subject to the member paying the Annual Residence Fee, which covers both costs of the Property and services which may be termed "hotel services" as set out above (and to remaining in Good Standing). There is no overt charge of an equivalent type for non-members.

(4) Unlike a hotel guest, members can realise value from their interests in that they can rent out a reserved residence of the specified category rather than occupying it, they can sell their interest or use it as security and they can in effect exchange reserved nights for other accommodation/benefits.

(5) Members have a Members Committee which has some limited input on the management of the Property/plan.

283. As noted, the appellant accepts that the services received by occupants are akin to those provided in the "hotel sector" (and we refer to them as "**hotel style services**"). However, the appellant argues that the key factor is that the position has to be assessed according to the particular rights granted by the appellant to the members under which they occupy the residences looking at those rights in the context of the appellant's business. Although members essentially receive the same experience (subject to some extra benefits reserved for members only), they do so under a fundamentally different right, being a long term right granted for a premium and with the other features set out in 105 and 282 above.

284. HMRC counter that such matters are irrelevant; it is the nature of the premises/establishment rather than the rights of the occupants or the nature of the grantor's business which are the essential factor. The premises are clearly used by and held out for use by travellers and visitors with the attendant facilities to be expected in a hotel.

285. Members and non-members both occupy the same residences and receive the benefit of the same facilities and services as can be expected at a hotel. Essentially the question is whether the appellant supplies a residence as a dwelling, rather than as accommodation in a hotel/similar establishment, by virtue of the fact that the appellant grants a member the right, which is paid for in full upfront, to stay in a residence on a repeated short term basis over many years on the basis that the member pays for a proportionate share of the running costs of the property and for the type of services that can be expected at a hotel under separate fees paid to a different party. In other words, the issue is whether these factors (and the related ones referred to by the appellant (see 105 and 282)) create a "passive" letting of dwelling accommodation

or can be said to involve "more active commercial exploitation" of the kind typical in the "hotel sector".

286. We have found this a difficult issue but looking at all the circumstances, we have concluded that the provision of the residences to members under their fractional ownership interests, falls within the exclusion in item 1(d). In forming that view we are mindful that, whilst the Directive exemption is to be construed strictly (but not such as to deprive it of its intended effect), the Directive hotel exclusion is to be interpreted broadly (as stated in *Temco* (see 160 above)).

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.

290. As noted, we consider that in assessing whether an entity provides accommodation in a "sector with a similar function" to that of the "hotel sector" (or in a "similar establishment") it must be relevant to have regard to the nature of the business of the accommodation provider. We note that in this case the appellant does not itself provide or engage in, what may be described, as the active elements of the exploitation of the establishment, namely, the management and operation of the Property. In these circumstances, however, we do not consider that factor converts its supplies into those of accommodation in dwellings within the land exemption rather than of hotel style accommodation.

291. From the terms of the agreement, it is clear that in effect the appellant, as the owner of the Property (under its leasehold interest), has sub-contracted or outsourced

the maintenance and administration of the Property to the manager, MGRC. The agreement refers to the Manager as having entered into an agreement with the appellant whereby the Manager is responsible for the "maintenance, management and administration of the Property" (as set out in 45 and 46). We have not seen a copy of the agreement between the appellant and the Manager but it is reasonable to conclude from the overall terms of the agreement with the members that the Manager provides the hotel services for members pursuant to that arrangement. Whilst the agreement does not provide for the Manager to provide such services, it sets out the general role of the Manager and provides for the calculation and payment of the Annual Residence Fee which includes both amounts to cover the running costs of the Property and amounts payable for certain of the services provided at the premises (see 48). Members are obliged to pay the Annual Residence Fee to the Manager and the continuation of the members' rights under the agreement is conditional upon the timely payment of that fee (see 52).

292. The commercial reality of the arrangements, therefore, is that the appellant, in effect, procures that the Manager will administer all aspects of the property management and operation and will provide the relevant hotel services, through sub-contracting the management and administration of the Property to the Manager. This is done on the basis that the members will pay a proportionate share of the running costs of the Property and will pay for the hotel style services direct to the Manager, as the party responsible for operating the Property and as the actual provider of the services, and, on condition that the rights the appellant grants under the agreement only continue as long at those payments are made.

293. In that context, we find it difficult to see that the fact that the appellant's own supply to the members is confined to providing the occupancy rights means that it is not involved in the commercial exploitation of the Property as an establishment which is similar to a hotel. In our view a business is no less engaging in such exploitation where it provides all elements necessary for there to be the provision of hotel accommodation than where, in effect, it outsources certain of the elements to another party. The essential nature of the business sector within which the 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 made with other parties.

294. We note also that in the marketing materials the appellant essentially presents the benefits of ownership of a fractional interest as a package which includes the provision of the hotel type services. The sales brochure sets out the benefits available to members as a result of owning a fractional interest which includes details of the hotel style services. From a member's perspective, therefore, we would expect the perception to be that the facilities and services to be enjoyed on occupying a residence are part and parcel of what he receives as an owner of a fractional interest.

295. The appellant also takes support for its view from the fact that members are responsible for the running costs of the Property through the Annual Residence Fee and have some measure of involvement in the management of the Property through the Members Committee. These are, of course, not features which would be seen in the "hotel sector" where it would not be feasible to arrange matters in this way as

regards occasional or transient visitors. It is the fact that members have on-going long term rights to occupy on a short term basis that enables these features to be provided in this case.

296. As regards the fee for the Property costs, as a matter of pricing and economics it is to be expected that the costs of running a hotel property are reflected in the setting of the daily rate payable by hotel guests. A separate calculation in a rate charged to a hotel guest is not necessary or feasible. In this case, due to the on-going nature of the rights a member has, it is possible to calculate such costs on an annual basis and make separate charges for them. We cannot see, therefore, that the overall economic position is materially different, for hotel guests or members, such that this does not affect our conclusion.

297. The Members Committee has limited powers, largely in the nature of a right of review and some limited approvals, such as in relation to the setting of the Annual Residence Fee and the Per Diem Rate and any proposed changes to the reservation rules. These are matters of interest to members given the on-going nature of their right to occupy. However, having decided that the on-going nature of the right does not prevent this from falling in a sector with a similar function to a hotel, taking into account all factors, we do not see this as sufficient of itself to tip the balance the other way.

298. The fact that the appellant's business is not described as that of a hotelier but as the seller of fractional interests, that the appellant is subject to the Timeshare Regulations and that the appellant's lease prohibits use of the residences other than as serviced apartments, does not affect the position. The correct VAT classification is not determined by the label put on the arrangements by one of the parties or by how the transaction is categorised for a different purpose (whether as between landlord and tenant or under industry regulations).

Item 1(e)

299. As we have concluded that the appellant's supplies fall within item 1(d), item 1(e) is not in point. Item 1(e) does not apply to accommodation which falls within item 1(d) under note (13) to group 1 of schedule 9 VATA.

Discussion – Fiscal neutrality

300. The appellant argues that under the principle of fiscal neutrality the supplies it makes should be treated in the same way as supplies of more traditional timeshare interests which it asserts are treated as falling within the land exemption. Mr Dowling gave evidence that in his experience there is very little difference between such timeshare interests and fractional interests (as set out at 65). The appellant argues that supplies of both types of interest fall within the objective of the Directive exemption as that is explained by the Advocate General in *Blasi* (at [15]) such that there is no justification for a difference in treatment:

> "Unlike ordinary goods, land is not the result of a production process; moreover, buildings, once constructed may change hands many times

> during their life, often without being subject to further economic activity…Under the Sixth Directive the charge to VAT is therefore limited in principle to the supply of building land or of new buildings and the land on which they stand". The preparation of such land for development entails economic activity enhancing the value of the land; and the supply of a new building marks the end of the production process. Thereafter, repeated taxation of immovable property each time it is sold would not be justified. The same applies to the letting of such property, which is normally a comparatively passive activity not entailing significant added value".

301. We note that at [16] the Advocate General then notes that there are certain exclusions from the exemption and that the common feature of the excluded transactions is "that they entail more active exploitation of the immovable property justifying further taxation in addition to that levied upon its initial sale".

302. We cannot see that fiscal neutrality is in play in this case. 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". Accordingly, if any other type of timeshare interests are not regarded as made in the "hotel sector" or any "sector with a similar function" that entails the opposite conclusion that they are passive in nature rather than entailing more active exploitation. The two sets of supplies are simply different in nature.

Conclusion

303. For all the reasons set out above, the appeal is dismissed.

304. 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.

HARRIET MORGAN
TRIBUNAL JUDGE

RELEASE DATE: 11 August 2016