[2017] UKUT 204 TCC

Appeal number: UT/2016/0138

VALUE ADDED TAX – whether separate supply by hotel of room for civil wedding ceremony exempt supply of land or standard rated supply of services – hotel actively exploiting room and adding significant value – not the leasing or letting of immovable property – Art 135(1)(l), Principal VAT Directive - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER BETWEEN:

BLUE CHIP HOTELS LIMITED

Appellant

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Roger Berner
Judge Greg Sinfield

Sitting in public at Royal Courts of Justice, Strand, London, WC2A 2LL on 16 March 2017

Timothy Brown, counsel, instructed by Dave Brown VAT Consultancy, for the Appellant

Sarabjit Singh, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Blue Chip Hotels Limited ('BCH') owns and operates a large hotel in Newquay, Cornwall. The hotel has a room ('the Tamarisk Room') which is approved under the Marriages and Civil Partnerships (Approved Premises) Regulations 2005 (the 'Approved Premises Regulations') as premises in which civil marriage ceremonies may take place.

Other parts of the hotel are available for wedding receptions. Customers can choose whether to hire just the Tamarisk Room for the wedding ceremony and have a reception elsewhere or to hold both the ceremony and the reception at the hotel or to hire a room or rooms at the hotel for the reception but hold the wedding ceremony elsewhere. In all cases where it was used, BCH treated the hire of the Tamarisk Room for civil wedding ceremonies as a supply of land which was exempt under Group 1 of Schedule 9 to the Value Added Tax Act 1994 ('VATA94'). The Respondents ('HMRC') considered that where a customer held both a ceremony and a reception in the hotel (a 'wedding package'), the supply was not exempt and that BCH should have charged and accounted for VAT at the standard rate on the hire of the Tamarisk Room. In August 2013, HMRC assessed BCH for VAT of £54,610 in respect of the VAT periods 09/09 to 12/12. BCH appealed to the First-tier Tribunal (Tax Chamber) ('FTT').

2. The FTT (Judge Short) heard the appeal in Plymouth on 14 March 2016. In a decision released on 6 May 2016 with neutral citation [2016] UKFTT 309 (TC) ('the Decision'), the FTT dismissed BCH's appeal. Save as otherwise indicated, paragraph references in square brackets in this decision are to the paragraphs in the Decision.

3. In the Decision, the FTT held, first, that the supply of the hire of the Tamarisk Room was a separate supply for VAT purposes even where it was sold as a part of a 'wedding package' which included the wedding ceremony and other services such catering and the hire of other rooms. That conclusion is not appealed. The FTT then went on to hold that the separate supply of the Tamarisk Room was not an exempt supply of the "grant of any interest in or right over land or of any licence to occupy land" within Item 1 of Group 1 of Schedule 9 to the VATA94 or "the leasing or letting of immovable property" within Article 135(1)(l) of Council Directive 2006/112/EC ('the Principal VAT Directive') but was a standard-rated supply. The reason given by the FTT for this conclusion was that the provision of approved premises in which a civil wedding can legally be carried out is beyond the "passive letting of land" and outside the scope of the exemption for leasing or letting ofproperty.

4. BCH now appeals, with permission of this Tribunal, against the FTT's decision that the supply of the Tamarisk Room is standard rated. The issue in this appeal is whether, as BCH contends, the hire of the Tamarisk Room is a supply of the leasing or letting of immovable property and exempt (as BCH has not opted to tax the property) or a supply of something other than a leasing or letting of immovable property and standard-rated, as HMRC argue.

5. For reasons given below, we have concluded that the hire of the Tamarisk Room is not an exempt supply of immovable property and BCH's appeal must bedismissed.

Factual background

6. There is no challenge to the FTT's findings of fact in the Decision. So far as material to this appeal, the facts can be stated shortly.

7. The Tamarisk Room was approved for the carrying out of marriage and civil partnership ceremonies under the Approved Premises Regulations (set out, as material, at [11] below). It is a requirement of the Approved Premises Regulations that members of the public are given access to civil wedding ceremonies. The Tamarisk Room was the

only room in the hotel which was licensed for wedding services. It was physically separate from the place where the wedding reception and other elements of the wedding celebration would, if relevant, take place. The only activity carried out in the Tamarisk Room was the wedding ceremony. The room was set out with chairs and a desk for the Registrar. No other services were provided to customers as part of the supply of the Tamarisk Room. BCH did not provide the registrar and arrangements with and payment for the registrar were made by the couple hiring the room themselves. If customers required catering services for their wedding celebration, those services would be provided in the dining room, which is a separate room. No alcohol was served in the Tamarisk Room and any drinks after the ceremony were served in another room. Customers who hired the Tamarisk Room were paying for the provision of access to a room which was licensed for carrying out civil weddings. There was significant added value in the provision of the Tamarisk Room as a room which was approved for carrying out marriage and civil partnership ceremonies as compared with the hire of an unapproved bare room with some chairs and a desk.

Legislative framework

8. Article 135(1)(l) of the Principal VAT Directive (formerly Article 13B(b) of Council Directive 77/388/EEC) exempts from VAT "the leasing or letting of immovable property". The provisions of the Principal VAT Directive have been implemented in UK law by the VATA94. Section 31(1) of the VATA94 provides that a supply is exempt if it is of a description specified in Schedule 9. For the purposes of this appeal, the relevant provision of Schedule 9 is Item 1 of Group 1 which, subject to certain exclusions none of which is relevant, exempts:

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

9. It was common ground that the exemptions in Group 1 of Schedule 9 to the VATA must be interpreted consistently with the equivalent European legislation (see Case C-106/89 *Marleasing SA v La Comercial Internacional de Ailmentacion SA* [1990] 1 ECR 4135 at paragraphs 7 and 8).

10. It was also common ground that the exemptions provided for by Article 135 of the Principal VAT Directive and Schedule 9 to the VATA94 must be construed strictly but not restrictively. This was made clear by the CJEU in Case C-284/03 *Belgian State v Temco Europe SA* [2005] STC 1451 (*'Temco'*), at [17]:

> "… the terms used to specify the exemptions provided for by Article 13 of the Sixth Directive are to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person … As the Advocate General rightly states at point 37 of his Opinion, the requirement of strict interpretation does not mean, however, that the terms used to specify exemptions should be construed in such a way as to deprive the exemptions of their intended effect."

11. The Approved Premises Regulations, as amended, provide for the grant of approval of premises, including a room, for the solemnisation of marriages and the formation of civil partnerships (defined as "the proceedings"). Schedule 1 to the Regulations states that it is a requirement for the grant of approval that the premises must be regularly available to the public for use for the solemnisation of marriages or the formation of civil partnerships and must be a seemly and dignified venue for such

proceedings. Schedule 2 to the Regulations provides for a number of conditions that must be attached to grants of approval for the use of premises to conduct civil weddings. It is a condition of approval that the holder of the approval must appoint a suitable person ('the responsible person') to ensure compliance with the conditions. The responsible person or, in his absence, an appropriately qualified deputy must be available on the premises at least one hour before and throughout the ceremony. The conditions also include thefollowing:

> "7. No food or drink may be sold or consumed in the room in the proceedings take place for one hour prior to or during those proceedings.
>
> [With effect from 5 December 2011, Condition 7 was amended to permit non-alcoholic drinks to be consumed prior to the proceedings.]
>
> 8. All proceedings must take place in a room which was identified as one to be used for that purpose on the plan submitted with the approved application.
>
> 9. The room in which the proceedings are to take place must be separate from any other activity on the premises at the time of the proceedings.
>
> …

12. Public access to proceedings in approved premises must be permitted without charge".

The Decision

12. Having concluded that the hire of the Tamarisk Room should be treated as a separate supply for VAT purposes, even where it was sold as a part of a wedding package, the FTT discussed the nature of the supply for VAT purposes.

13. In [97], the FTT accepted HMRC's submission that the provisions of the Approved Premises Regulations meant that BCH did not have the right to grant a licence for the exclusive use of the Tamarisk Room by the customers and their guests for the wedding ceremony because it was a condition of the approval that members of the public should have access to civil weddingceremonies.

14. The FTT also held, in [102], that, relying on paragraph 20 of *Temco* (discussed below), BCH was not merely passively leasing the land:

> "The question for this Tribunal is whether, other than the elements of the Wedding Package which we have accepted to be separate services, [BCH] is providing more than the mere hire of the Tamarisk Room as a "passive" lease of land. In our view there is a clear additional service which … is more than the lease of an area of land, it is the provision of the service of a legal wedding ceremony which can be provided only because of the licensed nature of the Tamarisk Room. … [W]hat is being paid for here is the right to participate in a particular event (the wedding ceremony), only part of which entails the provision of the physical space in which that event occurs. That is the opportunity which is being provided by[BCH]."

15. At [103], the FTT set out the reasons for its conclusion as follows:

> "… a significant fee was charged for the hire of the Tamarisk Room. It seems unlikely to us that any customer would have paid this for the hire of a bare room with some chairs and a desk, which was how Mr Redmond described the Tamarisk Room. Our conclusion is that the payment made for use of the Tamarisk Room was for more than a mere licence over land, it was for the provision of access to a room which was licensed for carrying out civil weddings and which, for that reason, was open to the public. … [BCH] here is

> not engaged in a relatively passive activity, there is significant added value and what is being provided goes beyond an exempt supply of the licence to occupy land."

16. At [104], the FTT concluded that:

> "… the supply of the Tamarisk Room cannot be treated as an exempt supply of land when it is provided as part of a wedding package which includes the wedding ceremony, whether or not the price paid for the hire of the room includes the supply of catering and other related services. … The provision of licensed premises in which a civil wedding can legally be carried out is beyond the 'passive letting of land' and outside the scope of the exemption at Group 1, Schedule 9 VATA 1994."

17. Accordingly, the FTT dismissed BCH's appeal and confirmed HMRC's assessment.

Issue

18. The issue in this appeal is whether the separate and independent supply of an approved room, such as the Tamarisk Room, to consumers for the purpose of holding a civil wedding ceremony is an exempt supply of the leasing or letting of land under Article 135(1)(l) of the Principal VAT Directive as implemented by Item 1 of Group 1 of Schedule 9 to theVATA94.

Case law

19. The leading authority on the issue of what is a leasing or letting of immovable property is *Temco*. Temco was a Belgian company which carried on a property cleaning and maintenance business. It was registered for VAT. Temco owned a building in Brussels which it renovated from 1993 to 1994. In February 1994, Temco entered into contracts with three associated companies. Under the contracts, Temco undertook to grant the companies the use and enjoyment of the building in return for a rent which was a combination of a charge according to the area occupied and an additional amount based on the turnover and number of employees of the transferee companies. The companies were also obliged to pay running costs (eg gas, electricity, overheads) and amounts in respect of dilapidations. Under the contracts, the companies did not have any right to occupy any specific part of the building. Temco, and persons authorised by it, had unlimited access to the building. Temco could require the companies to vacate the building at any time without notice. The parties expressly excluded the concept of letting under Belgian law in the contracts.

20. Temco deducted the VAT which it had incurred on the renovation of the building. The Belgian tax authorities denied deduction on the ground that Temco had made an exempt supply of the leasing or letting of property. Temco appealed to the First Instance Court and won. The tax authorities appealed to the Court of Appeal, Brussels which referred a question to the Court of Justice of the European Union ('CJEU'). The CJEU held that the exclusive occupation of a property did not mean its sole occupation and that it was sufficient if occupation was exclusive in regard to persons not permitted by law or by the contract from exercising a right over the property.

21. In *Temco*, the CJEU, at [19], re-affirmed the meaning of "the letting of immovable property":

> "In numerous cases, the court has defined the concept of the letting of immovable property within the meaning of art 13B(b) of the Sixth Directive as essentially the conferring by a landlord on a tenant, for an agreed period and in return for payment, of the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right (see, to that effect, *Goed Wonen*, para 55; *Customs and Excise Comrs v Mirror Group plc* (Case C-409/98) [2001] STC 1453, [2002] QB 546, para 31; *Customs and Excise Comrs v Cantor Fitzgerald International* (Case C-108/99) [2001] STC 1453, [2002] QB 546, para 21; *Seeling v Finanzamt Starnberg* (Case C-269/00) [2003] STC 805, [2003] ECR I-4101, para 49; and *Sinclair Collis Ltd v Customs and Excise Comrs* (Case C-275/01) [2003] STC 898, [2003] ECR I-5965, para 25)."

22. In [20] of *Temco*, the CJEU contrasted the passive nature of the letting of immovable property with activities which went beyond simply making a property available and were the provision of an industrial or commercial service. The CJEU put it as follows:

> "While the court has stressed the importance of the period of the letting in those judgments, it has done so in order to distinguish a transaction comprising the letting of immovable property, which is usually a relatively passive activity linked simply to the passage of time and not generating any significant added value (see, to that effect, *Stichting 'Goed Wonen' v Staatssecretaris van Financien* (Case–326/99) [2003] STC 1137, [2001] ECR I-6831, para 52), from other activities which are either industrial and commercial in nature, such as the exemptions referred to in art 13B(b)(1) to (4) of the Sixth Directive, or have as their subject matter something which is best understood as the provision of a service rather than simply the making available of property, such as the right to use a golf course (*Sweden v Stockholm Lindöpark AB* (Case C-150/99) [2001] STC 103, [2001] ECR I493, paras 24 to 27), the right to use a bridge in consideration of payment of a toll (*EC Commission v Ireland* (Case C-358/97) [2000] ECR I-6301) or the right to install cigarette machines in commercial premises (*Sinclair Collis Ltd v Customs and Excise Comrs* (Case C-275/01) [2003] STC 898, [2003] ECR I-5965, paras 27 to 30)."

23. In *Temco*, the CJEU held, at [24] - [25], that:

> "24. … as regards the tenant's right to exclusive occupation of the property, it must be pointed out that this can be restricted in the contract concluded with the landlord and only relates to the property as it is defined in that contract. Thus, the landlord may reserve the right regularly to visit the property let. Furthermore, a contract of letting may relate to certain parts of the property which must be used in common with other occupiers.
>
> 25. This 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."

24. The nature of a leasing or letting of immovable property and the approach to determining whether a supply fell within that description were usefully summarised by the CJEU in Case C-270/09 *MacDonald Resorts Limited v HMRC* [2011] STC 412 ('*MacDonald Resorts*') at [46]:

> "According to settled case law, the fundamental characteristic of the concept of 'letting of immovable property' for the purposes of art 13B(b) of the Sixth Directive lies in conferring on the other party to the contract, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right (see, to

> that effect, *Stichting 'Goed Wonen' v Staatssecretaris van Financiën* (Case C-326/99) [2003] STC 1137, [2001] ECR I-6831, para 55; *Customs and Excise Comrs v Cantor Fitzgerald International* (Case C-108/99) [2001] STC 1453, [2001] ECR I-7257, para 21; and *Sinclair Collis Ltd v Customs and Excise Comrs* (Case C-275/01) [2003] STC 898, [2003] ECR I-5965, para 25). 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 (see, to that effect, *Cantor Fitzgerald International* (para 33))."

25. *MacDonald Resorts* was referred to by the CJEU in Case C-55/14 *Regie communale autonome du stade Luc Varenne v Etat Belge* [2015] STC 922 ('*Luc Varenne'*). The appellant corporation purchased a football stadium and incurred VAT. The corporation entered into an agreement with a football club under which the stadium was made available for the use of the club for a maximum of 18 days in a year, with the corporation supplying various services including maintenance, cleaning, repair and upgrading. The corporation treated the supply to the club as taxable for VAT on the ground that it did not constitute a letting of immovable property but a supply of taxable services. The Belgian tax authority disagreed. The corporation appealed and the matter was eventually referred to the CJEU. The CJEU held that a supply, such as that made by the corporation, does not constitute a letting of immovable property as a general rule (although the ultimate decision in that case was for the national court that would find the facts).

26. In its judgment, the CJEU said at [21] – [23]:

> "21. According to settled case law, the fundamental characteristic of the concept of 'letting of immovable property' for the purposes of art 13B(b) of the Sixth Directive lies in conferring on the other party to the contract, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right. 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 (judgment in *Macdonald Resorts Ltd v Revenue and Customs Comrs* (Case C-270/09) [2011] STC 412, [2010] ECR I-13179, para 46 and case law cited).
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> 22. It must also be recalled that, for there to be letting of immovable property within the meaning of art 13B(b) of the Sixth Directive, all the conditions characterising that transaction must be satisfied, that is to say, the landlord of property must have assigned to the tenant, in return for rent and for an agreed period, the right to occupy his property and to exclude other persons from it (judgment in *Belgium v Medicom SPRL* (Joined Cases C-210/11 and C211/11) [2013] SWTI 3457, para 26 and case lawcited).
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> 23. Article 13B(b) of the Sixth Directive constitutes an exception to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person and it must therefore be interpreted strictly. If one of the conditions referred to in the preceding paragraph is not fulfilled, that provision may not be applied by analogy on the ground that a letting within the meaning of that provision is what the use of immovable property at issue most closely resembles (see, to that effect, the judgment in *Medicom*, para 27)."

27. Although it is for the national court to make findings of fact and apply the CJEU's guidance to them, the CJEU in *Luc Varenne* gave a clear indication of how it considered the case should be decided at [29] – [31]:

> "29. In the circumstances of the main proceedings, what seems to be involved is the supply, by the corporation, of a more complicated service consisting of provision of access to sporting facilities, where the corporation takes charge of the supervision, management, maintenance and cleaning of thosefacilities.
>
> 30. As regards, first, supervision, namely the rights of access to the sporting facilities and the control of that access conferred on the corporation, it is true that those rights cannot, in themselves, preclude the classification of the transaction at issue in the main proceedings as a letting within the meaning of art 13B(b) of the Sixth Directive. Such rights may be justified in order to ensure that the use of those facilities by the lessees is not disturbed by third parties. The court has previously stated that the presence of restrictions on the right to occupy the premises let does not prevent that occupation being exclusive as regards all other persons not permitted by law or by the contract to exercise a right over the property which is the subject of the letting contract (judgment in *Belgian State v Temco Europe SA* (Case C-284/03) [2005] STC 1451, [2004] ECR I-11237, para 25).
>
> 31. In the circumstances at issue in the main proceedings, the rights of access to the sporting facilities and the control of that access seem none the less to have the effect, by means of a caretaking service, that representatives of the corporation are permanently present at those facilities, which could be evidence to support the view that the role of the corporation is more active than that which would arise from a letting of immovable property within the meaning of art 13B(b) of the Sixth Directive."

28. The CJEU in *Luc Varenne* then considered the various services of management, maintenance and cleaning provided by the corporation. The CJEU noted that the costs of providing such services represented 80% of the charge for the use of the stadium. The CJEU regarded this as evidence that supported the classification of the transaction as a supply of services rather than a letting of immovable property. The CJEU also observed that, while it may be restricted, the period of enjoyment of the property must not, as a general rule, be occasional and temporary (see at [36] – [37]). In *Luc Varenne*, the period was a maximum of 18 days in each year which the CJEU did not consider negligible but left it to the national court to assess whether, in the light of all the circumstances, the contractual period of enjoyment should be regarded as occasional and temporary.

29. The parties also referred us to decisions of the FTT in *Willant Trust Ltd v HMRC* [2014] UKFTT 1083 (TC) and *International Antiques and Collectors Fairs Limited v HMRC* [2015] UKFTT 0354 (TC) and of the Upper Tribunal in *Zombory-Moldovan (t/a Craft Carnival) v HMRC* [2016] UKUT 433 (TCC), [2016] STC 2436. Although they contain useful comments on the CJEU case law, we did not find those cases assisted us in resolving the issue in this appeal because, unlike this case, all three cases concerned single composite supplies in which the property element was merely one element of a larger package.

Principles derived from the cases

30. It is, in our view, clear from the cases cited above that, in order to be a supply of the leasing or letting of immovable property, a transaction between an owner of an interest in a property ('the landlord') and another person ('the tenant') must:

(1) confer on the tenant the right to occupy the property as if the tenant were the owner;

(2) allow the tenant to exclude from enjoyment of such a right persons who are not permitted by law or by the contract to exercise a right over the property;

(3) be for an agreed period which may be restricted but must not be occasional and temporary; and

(4) be in return for payment.

31. How the transaction is classified by the parties is not determinative and regard must be had to the objective character of the transaction. In determining whether a contract falls within the definition of the leasing or letting of immovable property or is the provision of some other service of an industrial or commercial nature, it is necessary to take account of all the characteristics of the transaction and the circumstances in which it takes place. Where the landlord, as part of the same transaction, does more than simply make property available to the tenant for a period but actively exploits the property to generate significant added value then the transaction is excluded from the scope of the exemption (see *Goed Wonen* [52] and [53]).

Discussion

32. As stated at [3] above, there was no appeal in relation to the FTT's conclusion that the supply of the hire of the Tamarisk Room was a separate supply for VAT purposes even where it was sold as a part of a wedding package. Mr Singh, who appeared for HMRC, submitted that it did not follow from the fact that the hire of the room is a separate supply that it is an exempt supply of land. That is obviously correct. In order to be exempt, the hire of the Tamarisk Room must have all the characteristics of the leasing or letting of immovable property. There was no dispute that the supplies by BCH to persons hiring the Tamarisk Room were for an agreed period and in return for payment. Mr Singh said that HMRC were not relying on the "occasional or temporary enjoyment" point in paragraph [37] of *Luc Varenne* (see [28] above). Mr Singh also said that HMRC were not submitting that the fact that BCH could stipulate the use and enjoyment to which the room could be put precluded the supply from being the leasing or letting of immovable property as this argument had been rejected by the FTT in *Willan Trust* at [158]. The submissions before us focused on two points,namely:

(1) Did customers have a right to occupy the Tamarisk Room as owner and exclude any other person from the enjoyment of such aright?

(2) Did BCH add any significant value to the hire of the space?

Right to occupy as owner and exclude others from enjoying such right

33. The FTT held at [97] that the Approved Premises Regulations meant that BCH did not grant customers an exclusive right to occupy the Tamarisk Room for the wedding ceremony because it was a condition of the approval that members of the public should have access to the room during the ceremony. On that basis, the FTT held that the hire of the Tamarisk Room could be differentiated from a normal letting of land.

34. Mr Brown, who appeared on behalf of BCH, submitted, relying on [25] of *Temco*, that the requirement that the tenant must be able to exclude others from occupying

the property as owner is subject to an exception for those who are permitted by law or the contract to exercise a right over property. The fact that the Approved Premises Regulations provide that members of the public may attend the ceremony does not prevent occupation being exclusive in relation to the public as regards other times and activities. He submitted that paragraph 12 of Schedule 2 of the Approved Premises Regulations allows public access to the room only to attend the wedding ceremony and does not allow members of the public to occupy the room for other purposes or at other times. For example, members of the public do not have the right of access to the room to hold their own private party or meeting. Apart from the ability of the general public to access during the ceremony, the customer occupies the Tamarisk Room as owner during the period of hire and can exclude others from doingso.

35. Mr Singh submitted that the customers do not have a right to occupy the Tamarisk Room as owners. The only right that the customers had was to occupy the space for the purpose of the ceremony. The right of members of the public to enter the room was inconsistent with the rights of the customer as owner. Mr Singh submitted that [25] of Temco did not assist BCH because the category of persons permitted by law to enter the Tamarisk Room includes every member of the public and there is no person against whom a customer could assert exclusiveoccupation.

36. We do not accept Mr Singh's submissions on this point. What is required (see [19] of *Temco*) is that the tenant can exclude any other person from enjoyment of the right to occupy the property as owner. At [24] of *Temco*, the CJEU specifically states that the right to exclusive occupation can be restricted and only relates to the property as it is defined in the contract so, for example, a letting may include parts which are used in common with others. It is clear from the CJEU's comments that 'right to exclusive occupation' does not mean that the test is simply whether the tenant can insist on being the sole occupant of the demised property against all others. As is clear from [24] and [25] in the light of [19], the CJEU is concerned with the right to occupy the property as owner and the ability to exclude other person from the enjoyment of that right. The right to occupy as owner may be but is not necessarily the same as the right to occupy a property exclusively. For example, an owner may be required, by law or contract, to permit others to have access to the property.

37. The fact that the Approved Premises Regulations give members of the public generally access to the formal celebrations of marriages and civil partnerships does not mean, as Mr Singh has submitted, that there is no person against whom a customer could assert exclusive occupation. The public's right of access is restricted to the proceedings, and any member of the public seeking access for another purpose could be validly excluded.

38. In [25] of *Temco*, the CJEU states that the fact that persons are permitted by law or the contract to exercise a right over the property does not prevent the tenant's occupation being exclusive. In the case of premises approved for use for a wedding ceremony, no owner can exclude members of the public from having access during the ceremony. The requirement that members of the public must be allowed access during the ceremony is a legal requirement which gives members of the public a right of access. The rights of BCH as owner were subject to that legal requirement, and it follows that

the right of the customer to occupy the Tamarisk Room was also subject to that requirement. But the mere fact that the customer could not assert exclusivity with respect to members of the public exercising their rights of access does not prevent the occupation having the necessary quality of exclusivity to amount to a letting of immovable property within Article 135(1)(l). As any owner would be subject to the rights of access provided as a matter of law, such rights of access are not inconsistent with a right to occupy as an owner. The finding of the FTT at [97] does not accord with *Temco*, and was an error of law.

39. That conclusion does not resolve this appeal in BCH's favour. It remains necessary to consider whether, having regard to all the circumstances, the objective nature of the supply is one of the letting of immovable property. In the context of this appeal, the remaining question to be considered is whether, having regard to what was provided by BCH, the supply amounted to more than a "relatively passive activity linked solely to the passage of time and not generating any significant added value" (*Temco*, at [20]; *Goed Wonen*, at [52]).

Significant added value

40. Mr Brown submitted that the FTT erred in law when it decided, in [102] and [103], that the hire of a room that had been licensed for a civil wedding ceremony was more than a passive supply of a right over land. He contended that, having held that the supply of the Tamarisk Room was a separate supply, the FTT should have disregarded the other supplies by BCH in determining the nature of the supply of the room. Mr Brown argued that the FTT, in [104], wrongly linked the supply of the room with the supply of other wedding package services. BCH did not provide the wedding service itself; its supply was of a room that is licensed to host a civil wedding ceremony. Mr Brown submitted that, viewed as a separate supply, the hire of the Tamarisk Room remained a passive supply by BCH even if the room was approved for marriage ceremonies.

41. Mr Singh submitted that customers looking to hire the Tamarisk Room did not merely want to hire a room but, as the FTT found in [103], wanted "access to a room which [is] licensed for carrying out civil weddings". BCH was not passively making land available to the customers but was making available a place for the solemnisation of marriage or formation of a civil partnership. Mr Singh submitted that obtaining and maintaining approval for the use of the Tamarisk Room as a place to carry out marriages and civil partnerships added significant value to the supply of the room. The Approved Premises Regulations imposed significant responsibilities on BCH and, by obtaining approval and complying with the Regulations, BCH added significant value to the supply of the room. He submitted that it was clear that a typical customer would not pay the same amount or a similar amount for an unlicensed room because the customer would not then be able to use the room for the purpose for which it was hired, namely to hold a properly authorised weddingceremony.

42. In our view, it is clear from [52] and [53] of *Goed Wonen*, [20] of *Temco* and [29] to [31] of *Luc Varenne* that a supply cannot be characterised as a leasing or letting of immovable property within the scope of the exemption if the landlord does more than simply make property available to the tenant for a period but actively

exploits the property to add significant value to the supply. In this case, the question is whether BCH added significant value to the simple provision of space when it hired out the Tamarisk Room to customers.

43. The FTT held, in [102], that BCH provided more than the lease of an area of land. The FTT found that the customers did not pay merely to hire a room but for the right to participate in a particular event, the wedding ceremony, and the provision of the physical space in which the ceremony occurred was only part of the supply. We do not accept Mr Brown's submission that the FTT had regard to wedding services that had been found to be separate from the hire of the room; the FTT at [102] was clearly focused on provision by BCH apart from those wedding services. At [103], the FTT had regard to the fee paid for the use of the Tamarisk Room, which it considered exceeded what was likely to have been paid for the hire of a bare room with some chairs and a desk. It concluded that the payment for the use of the room was for more than the mere licence over land, but was for the provision of a room licensed for a ceremony of marriage or civil partnership.

44. We agree with the conclusion of the FTT, although we would express our reasons a little differently. We would not describe the right of the customer who hires the Tamarisk Room to be one of participation, and we would not, as the FTT did at [102], equate the position to that in the *International Antiques and Collectors Fairs* case, where the right was one of participation in a wider event organised by the supplier. Our own reasoning follows from the fact that the ability to hold a legal wedding ceremony required the Tamarisk Room to be approved under the Approved Premises Regulations. The service provided by BCH was not simply making a room available to the customers: it was the provision of an approved room for a marriage ceremony. That meant that the Tamarisk Room had to be a seemly and dignified venue for such proceedings and BCH had to meet the obligations imposed on it by the Approved Premises Regulations, such as making a responsible person available and supervising the use of the room. That was, in the words used by the CJEU in [29] of *Luc Varenne*, a more complicated service than simply making the property available to the customer for a period. In our view, BCH actively exploited the Tamarisk Room by obtaining approval for its use for the solemnisation of marriages and the formation of civil partnerships and performing all the required activities to maintain such approval. Those activities went further than simply ensuring that the use by the customers of the Tamarisk Room was not disturbed by third parties (*Luc Varenne*, at [30]); the role of BCH was more active than that which would arise from a mere letting of immovable property (*Luc Varenne*, at [31]). By its active exploitation of the Tamarisk Room, BCH added significant value to the supply of the room. For these reasons, we consider that the supply of the Tamarisk Room was outside the scope of the exemption for the leasing and letting of immovableproperty.

Disposition

45. For the reasons given above, BCH's appeal against the Decision isdismissed.

Costs

46. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a scheduleof costs

claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Judge Roger Berner

Judge Greg Sinfield

Release date: 19 May 2017