[2017] UKFTT 140 (TC)

TC05634

Appeal number: LON/2004/00793
TC/2012/07734
TC/2015/02396

VALUE ADDED TAX – "points" based rewards scheme – whether payments made to redeemers third party consideration for supply of rewards – no – whether redeemers made separate supplies to operator of scheme – yes – whether those separate supplies relate to immovable property or constitute advertising services – no – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARRIOTT REWARDS LLC **Appellants**
WHITBREAD GROUP PLC

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS
SONIA GABLE

Sitting in public at The Royal Courts of Justice, Strand, London on 3 October 2016 to 5 October 2016 and having considered supplemental written submissions from the Appellants dated 13 October 2016

Nicola Shaw QC, instructed by Baker & McKenzie LLP for Marriott Rewards LLC

Amanda Brown of KPMG LLP for Whitbread Group plc

Nigel Pleming QC, Andrew Macnab and Ewan West, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. These appeals raise common issues of fact and law that arise from the customer loyalty scheme operated by Marriott Rewards LLC ("MR") and Marriott Rewards Inc, in connection with hotels operated under the "Marriott" and other brands. That reward scheme has been known by a number of different names over the years. We will refer to it in this decision as the "Program".

2. We will make detailed findings on the nature of the Program later in this decision. However, by way of very broad summary, it bore a number of similarities to the "Nectar" reward scheme that the Supreme Court and the Court of Justice of the European Union ("CJEU")[1] considered in *HMRC v Loyalty Management UK Ltd* [2013] STC 784 and *HMRC v Loyalty Management UK Ltd, Baxi Group Ltd v HMRC (Joined Cases C-53/09 and C-55/09)* [2010] STC 2651. Whenever a customer who was a member of the Program (the "Member") purchased a qualifying stay at a participating hotel, or a "non-hotel participant" in the Program (in this capacity, a "Sponsor"), MR[2] issued reward points to the Member with the number of points issued calculated by reference to the amount paid by the Member to the Sponsor. MR[3] charged the Sponsor when it issued reward points to Members. When a Member had earned enough reward points, he or she was able to use those points to obtain a free stay at a participating hotel (a "reward stay") or to obtain other goods and services from non-hotel participants. We use the expression "Redeemers" to refer to the hotels, or other participants in the Program who provided goods or services on redemptions of points[4]. When points were used to obtain rewards, MR made a payment to the relevant Redeemer.

3. A schedule of all decisions under appeal is set out in Appendix 1 to this decision. However, by way of high level summary:

> (1) MR is appealing against decisions that HMRC has made covering a period from July 2010 to June 2014. In those decisions, HMRC refused

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[1] We will similarly refer to the European Court of Justice, the predecessor to the CJEU, as the "CJEU" in the interests of brevity.

[2] For a period of time relevant to Whitbread's appeals, the Program was operated by Marriott Rewards Inc. However, the precise entity which operated the Program is not relevant to Whitbread's appeal since we understood it to be common ground that both MR and Marriott Rewards Inc belonged outside the UK at all material times for VAT purposes. Therefore, when dealing with Whitbread's appeal, we use the expression "MR" to encompass both Marriott Rewards Inc and Marriott Rewards LLC.

[3] The contractual arrangements are described in more detail later in this decision. MR did not contract direct with participating hotels and it made, and received, payments under the Program through an intermediary company.

[4] Both MR's and Whitbread's appeals are concerned only with payments made to UK-based Redeemers who were providing hotel facilities. However, we mention the fact that points could be earned and redeemed with non-hotel participants in the Program because significance was attached to that point in MR's and Whitbread's arguments.

MR's claim under s39 of the Value Added Tax Act 1994 ("VATA 1994") for recovery of some £8.3m of VAT associated with payments that MR made to Redeemers. In essence, HMRC refused these claims because they determined that the payments MR made were third party consideration given for a supply of hotel rooms made by Redeemers to Members. MR argues that HMRC's analysis is wrong and that the payments it made were consideration for a supply of services by Redeemers to MR.

(2) At material times, Whitbread Group plc ("Whitbread") took part in the Program and, in its capacity as a Redeemer, received payments from MR. Whitbread's appeals cover VAT periods 12/99 to 12/02 as well as a period from 5 March 2003 to 5 May 2005. Those appeals relate to HMRC's refusal to repay some £2.4m of output tax paid by Whitbread in that period. In essence, Whitbread argues that this output tax should be repaid on the basis that, while it did supply services to MR when it acted in the role of Redeemer and the sums that it received from MR were consideration for that supply of services, the supply took place in the US (where MR belonged) and was thus outside the scope of VAT.

4. Thus, these appeals raise two separate issues:

(1) Issue 1 is whether, as both MR and Whitbread argue, when MR made payments to a Redeemer (including Whitbread) it provided consideration for a supply of services made by that Redeemer to MR. HMRC argue that MR was giving third party consideration for a supply, by the Redeemer to the Member, of hotel accommodation and ancillary services. If HMRC are correct on Issue 1, all parties were agreed that both MR's and Whitbread's appeals would fail.

(2) If MR and Whitbread are correct on Issue 1, then the Tribunal would necessarily have concluded that Redeemers were supplying services to MR. Issue 2 is concerned with the nature of those services. Whitbread argues that they were "advertising services" which, under the place of supply rules in force prior to 1 January 2010 (the period relevant to Whitbread's appeals) were treated as supplied in the US, where MR belongs. Accordingly, Whitbread argues that it had no obligation to account for output tax on supplies that it made in its capacity as a Redeemer (since, being supplied in the US, they were outside the scope of VAT). By contrast, MR argues that the services it received were connected with immovable property which, under the place of supply rules in force after 1 January 2010 (the period relevant to MR's appeals) were treated as made in the UK. Therefore, MR argues that services it received from UK-based Redeemers were subject to VAT with the result that MR can claim a repayment of VAT under s39 of VATA 1994. It was agreed that HMRC did not need to establish the nature of any supplies being made: MR's appeal would fail if its characterisation of the supplies was wrong and Whitbread's appeal would fail if its characterisation was wrong.

Evidence

5. For MR, we had evidence from Robert Michael Behrens, the Vice President of Marketing of MR. Mr Behrens's first witness statement contained evidence as to the nature of the Program and MR's business, but also included opinion evidence as to the legal effect of various contracts constituting the Program. We agree with Mr Pleming that opinion evidence of this kind is not admissible: matters of UK law are for the Tribunal to decide and Mr Behrens did not claim expertise in relation to matters of non-UK law (and in any event was not independent). Since Mr Pleming did not wish to cross-examine Mr Behrens on his factual evidence, and did not need to cross-examine him on his opinion evidence (since it was not admissible), we have accepted his evidence as unchallenged, but have simply disregarded statements of opinion that he made.

6. For Whitbread, we had evidence from Paul Simmons who was, at the times relevant to Whitbread's appeals, Whitbread's Group Financial Controller and from Martin Watt who was, at relevant times, Whitbread's VAT manager. Mr Pleming did not wish to cross-examine Mr Simmons or Mr Watt on their factual evidence. We therefore adopted the same approach to their witness statements as we followed in relation to that of Mr Behrens (although Mr Watt's witness statement contained little, if any, opinion evidence that we needed to disregard).

7. We also had evidence in the form of several volumes of documents.

PART I - FINDINGS OF FACT

8. In Part I of this decision, we will make certain findings of fact. In large part, those findings will focus on the contractual and other relationships between the various people involved in the Program. In some cases, the contractual terms have changed over the years. In addition, the method by which Members redeem points has changed from a system based largely on the telephone and paper documents (during the period relevant to the Whitbread appeals) to a system based largely around the internet (during the period relevant to the MR appeals). Therefore, where relevant we will make separate findings relating to separate periods.

Overview of the Marriott business, the Whitbread business, the Program and the contractual framework establishing the Program

9. MR is a company incorporated in the United States. It is a wholly owned indirect subsidiary of Marriott International Inc, the ultimate parent of the Marriott Group, a worldwide operator, franchisor and licensor of hotels operating under a variety of different brand names. It was common ground that for the purposes of these appeals both MR and Marriott International Inc "belong" outside the UK for VAT purposes.

10. Under its business model, the Marriott Group does not typically own Marriott branded hotels – in 2004 only 1.4% of all Marriott branded hotel rooms were owned or leased by the Marriott Group. Rather, the Marriott Group either manages hotels owned by third parties (in 2014, these constituted 42.4% of all Marriott branded hotel

rooms) or grants a Marriott franchise to third party hotel owners (in 2014 franchise agreements, accounted for some 56.2% of Marriott branded hotel rooms).

11. Whitbread is a company incorporated in the UK which operates in the hospitality sector. At the times relevant to its appeals, Whitbread owned a number of hotels that it operated under franchise agreements with the Marriott Group. Subsequently, in 2006, it sold its Marriott branded hotels. Therefore, Whitbread's appeals relate to transactions that it undertook in its capacity as a franchisee of the Marriott Group.

12. As at 31 December 2014, the Program had over 49 million Members. Members could earn points under the Program when they spent money at Marriott branded hotels or with over 15 participating brands (including Hertz and British Airways). Similarly, Members could use points that they accumulated under the Program to obtain reward stays at Marriott branded hotels and to obtain goods and services from other participating brands.

13. Mr Behrens, in unchallenged evidence, described the commercial objective of the Program as being:

> (1) To assist participating hotels to attract more customers (which would increase the revenue of those hotels);
>
> (2) To encourage hotel owners to launch more Marriott branded hotels (as opposed to competitor brands);
>
> (3) To increase the revenues of the Marriott Group (which are directly linked to the performance of participating hotels).

14. During the period of MR's appeals, the Program was operated in accordance with the following network of contracts and arrangements:

> (1) Program Terms and Conditions (the "T&Cs") govern the arrangement between MR and Members and the entitlement of Members to earn and redeem points under the Program.
>
> (2) MR does not contract directly with hotels that participate in the Program. Rather, MR enters into a Participation Agreement with a large number of other Marriott Group companies (who are licensors, managers or franchisors of Marriott branded hotels). One of those Marriott Group companies was Global Hospitality Licensing SarL, a company incorporated in Luxembourg ("GHL"). Under the Participation Agreement GHL committed to "cause" participating hotels to participate in the Program.
>
> (3) GHL honours the obligation set out at [(2)] above by including relevant terms in contracts or arrangements between GHL and participating hotels. Where the Marriott group is managing a particular hotel, the relevant contract is the International Services Agreement entered into between GHL and the relevant hotel. Where the relevant hotel is operated under a franchise agreement, the relevant contract is the International Franchise Agreement between GHL and the hotel.

15. During the period relevant to Whitbread's appeals, Whitbread owned hotels that were operated under a franchise arrangement with the Marriott Group. The network of contracts and arrangements was broadly similar to that outlined at [14] (although the arrangements with managed hotels in that period are not relevant since Whitbread was a franchisee). Moreover, until 2004, the Program was operated by Marriott Rewards Inc (and not by MR)[5]. In overview:

(1) MR entered into T&Cs with Members that dealt, among other issues, with the collection and redemption of points.

(2) MR entered into a Participation Agreement dated 2 January 1998 with, among other companies, Marriott Rewards Corporation, a US corporation in the Marriott Group ("MRC"). A further amended Participation Agreement dated 2 January 2004 was entered into between, among other companies, International Hotel Licensing Company SarL ("IHLC"), a Luxembourg company in the Marriott Group. Pursuant to those Participation Agreements, MRC and IHLC respectively agreed to "cause" Marriott franchise hotels owned by Whitbread to participate in the Program.

(3) At the times relevant to Whitbread's appeals, each hotel had its own franchise agreement with IHLC or MRC. We were provided with a sample franchise agreement relating to a hotel at Heathrow Airport and it was common ground that the terms of the franchise agreements with other hotels were similar, in all material respects. By including particular terms within these franchise agreements, IHLC and MRC honoured their commitments under the Participation Agreement.

16. Under the Program, MR (and Marriott Rewards Inc while it was the operator of the Program) received (through MRC, IHLC and GHL as relevant) sums from Sponsors (when points were issued) and paid sums (through MRC, IHLC and GHL as relevant) to Redeemers (when points were redeemed). The Program did not envisage that MR or Marriott Rewards Inc would make a profit out of their operation of the Program (and therefore, payments to Redeemers were to be funded entirely out of payments received from Sponsors with no surplus left over). It was common ground that, despite this absence of profit, both MR and Marriott Rewards Inc were engaged in an economic activity for VAT purposes when they operated the Program.

[5] As we have indicated, when dealing with Whitbread's appeals, we will use the defined term "MR" to embrace both Marriott Rewards LLC and Marriott Rewards Inc.

PART 1A – FINDINGS OF FACT SPECIFIC TO MR'S APPEALS

The relationship between MR and Members in the period relevant to the MR appeals

General

17. No charge is made for a Member to join the Program. A Member can sign up to the Program at a participating hotel, online or by telephone. However the Member joins, he or she must accept the T&Cs. We were shown the T&Cs printed out from the Marriott website on 3 November 2015 (which was after the period relevant to MR's appeal). Mr Behrens exhibited these T&Cs to the witness statement that he gave in support of MR's appeal and he made a number of points as to the effect of the T&Cs. We did not see an express statement by Mr Behrens that the T&Cs were the same, in all material respects, throughout the period relevant to MR's appeals. However, we considered that to be the clear implication of his evidence. Since Mr Pleming did not cross-examine Mr Behrens and did not suggest to him that there was any material difference with an earlier set of T&Cs, we have accepted that the T&Cs we were shown set out the contractual position throughout the period of MR's appeals.

18. The T&Cs were divided into different sections under separate subheadings. The introductory clauses of the T&Cs set out an overview of the Program and that Members "may" earn points described as "the currency of the Rewards Programs" or airline frequent flyer miles ("Miles"). Since the treatment of rewards in the form of Miles is not relevant to this appeal, we will not deal with provisions relating to Miles in any detail in this decision.

19. Clauses 4 to 6 of the "General Membership" section of the T&Cs read as follows:

> 4. The Rewards Structure is subject to modification, cancellation or limitation at the Company's discretion, with or without notice. The number of Points or Miles required to redeem any Reward may be substantially increased, any Reward may be withdrawn, and restrictions on any Reward or reward redemption ("Reward Redemption") may be imposed at any time.
>
> 5. The Company and its travel partners have the right to change, limit, modify or cancel the Rewards Program Rules, Rewards and reward levels at any time, with or without notice, even though such changes may affect the value of Points or Miles or the ability to obtain certain Rewards. The Company and its travel partners may, among other things, a) increase or decrease the number of Points or Miles received for a stay or required for a Reward; b) withdraw, limit, modify or cancel any Reward; c) add blackout dates, limit rooms available for any reward at any participating hotel or otherwise restrict the continued availability of Rewards; d) change program benefits, travel partners, locations served by the Company or its travel partners, conditions of participation, rules for earning, redeeming or forfeiting Points or Miles, or rules governing the use of Rewards; or e) change or cancel its travel partner Rewards. In accumulating Points or Miles, Members may not

> rely upon the continued availability of any Reward or Reward level, category or tier.
>
> 6 Additionally, the Company reserves the right to terminate the Rewards Program by providing written notice to its Members six months in advance of Rewards Program termination…

20. Mr Behrens gave evidence as to MR's commercial approach to the flexibility afforded by the T&Cs. That was evidence as to fact rather than opinion evidence and we have therefore accepted it since it was not challenged. We have concluded from that evidence that, whatever discretion MR had as a matter of law, given that the Program was regarded as important to the overall success of the Marriott Group and participating hotels, it believed it needed to treat Members fairly so as to ensure that they were able to exercise rights accrued under the Program. By way of example of this approach, from 1 February 2016, MR had the contractual right to forfeit the accumulated points of Members who had not been active for 24 months. However, it did not exercise this contractual right immediately and instead took steps to put potentially affected Members on notice (which it was not contractually obliged to do) so as to minimise adverse reaction and publicity.

21. When a Member joined the Program, MR created a file containing that Member's details and issued the Member with an account number and a card (physical or electronic) by means of which the Member could "earn" points. MR would issue a periodic "activity statement" showing activity on the Member's accounts (points collected and points redeemed).

Earning points

22. Clause 11 of the terms relating to "General Membership" provided that Members "may" earn Points or Miles and "may" redeem Points at participating Marriott hotel brands and Ritz-Carlton hotels. Clause 11 then set out a lengthy list of the relevant hotel brands, excepting, where relevant, particular hotels that did not participate (for example The Ritz Hotel in London) and particular brands for which the Program operated in a non-standard way.

23. Clause 12 of the terms relating to General Membership gave MR the right, among other matters, to terminate a Member's membership for breach of the rules of the Program or for failure to pay hotel or other bills.

24. The "Earn Points" section of the T&Cs set out the basic entitlement to earn points, although did not itself set out precisely how many points would be earned for any particular stay at any particular hotel. Rather, detailed information such as that was included on Marriott's website. For example, that website specified that 10 points per $1 spent on "qualifying charges" would be earned at "Marriott" branded hotels. By contrast, at "Courtyard Marriott" branded hotels, 10 points were awarded for each $1 spent, but only expenditure on "room rates" qualified. For "Residence Inn Marriott" branded hotels, the website indicated that 5 points would be awarded for every $1 spent on "room rates". Members staying more than a certain number of nights per year could obtain "elite status" (itself divided into three categories of platinum, gold

and silver) which would entitle them to bonus points (for example, a silver level elite status member would obtain an additional 20% bonus points for each stay).

25. Clause 1 of the "Earn Points" section of the T&Cs provided that points would be automatically credited to a Member's account if that Member's membership number was quoted on the folio attributable to the Member's room. Therefore, to obtain their points, Members would provide their membership number on booking a room, checking in, or checking out of a participating hotel. Points would be credited to the Member's account by MR (and not by the participating hotel).

26. Members did not have to pay for the issue of points. However, Clause 1 of the "Purchasing Points" section of the T&Cs provided that Members could purchase points (limited to 50,000 points per calendar year) for a price equal to $12.50 per 1,000 points purchased.

Redeeming points

27. A Member can find out via Marriott's website how many points would be needed to obtain what the website described as a "free night" and the T&Cs described as "Reward Redemption" at a particular hotel. For example, the website might indicate that 45,000 points are needed to obtain a reward stay at the Grosvenor House Hotel in London.

28. A section of the T&Cs headed "Use Points" dealt with the redemption of points. Clause 1 of the section of the T&Cs under "Hotel Rewards" stipulated that a Member wishing to redeem points had to make a reservation at the relevant hotel and indicate that the reservation was for a "Rewards Redemption". In practice that was done either by clicking on a "use Marriott Rewards points" icon when making an online booking or through the Marriott reservations team when making a telephone booking. A "Rewards Redemption" could not be paid for partly with cash and partly with points: a Member needed to have sufficient points to cover the entirety of the Rewards Redemption sought (although, as noted at [26] and [31], there was a limited right to purchase additional points).

29. The T&Cs did not define the concept of "Rewards Redemption" with a great degree of precision. Clause 4 of the "General Membership" section simply defined a "Rewards Redemption" as a "reward redemption". We have concluded that a reasonable member reading the T&Cs would conclude that the nature of a "Reward" was the obtaining of a stay at a participating hotel for which the Member did not need to pay cash but could instead use points in lieu of payment. That analysis is borne out by a number of sections of the T&Cs. For example, Clause 5 of the "Hotel Rewards" section of the T&Cs stated that:

> Payment using points must be confirmed with the hotel or with the reservations agent at the time of reservation.

30. If the Member had sufficient points for the reward stay in question then the Member's account would be debited with the number of points, the Member's booking would be confirmed and MR would generate a reward "e-certificate" to the

hotel which would be available to the hotel at check-in so that the hotel knew not to require separate payment from the Member. Members could request a paper certificate on payment of a fee. (We will refer generically to both kinds of certificates as "Certificates".) As noted at [29], the T&Cs suggested that a Member was using points to "pay" for reward stays. We do not consider that an objective reading of the T&Cs supports the conclusion that Members were in fact "paying" for MR's agreement to procure a reward stay by tendering a Certificate to a Redeemer. Rather, we consider that an objective reading of the T&Cs indicates that, as between MR and the Member, the Member gave consideration for MR's promise to procure that a Redeemer would provide it with a reward stay by agreeing that MR could debit the Member's balance of points.

31. If the Member did not have sufficient points for the Rewards Redemption in question, he or she would still have the option of purchasing sufficient additional points as noted at [26]. In addition, Clause 6 of the "Hotel Rewards" Section of the T&Cs provided that the Rewards Redemption could still be made if the Member accrued sufficient points no less than seven days prior to arrival. If either of these actions still did not result in the Member having sufficient points, Clause 6 provided that the reservation would be cancelled and the Member would need to rebook the hotel room for the best available rate for which he or she qualified.

32. We were not shown any provision of the T&Cs that indicated that, when a Member claimed a reward stay, the Redeemer concerned would be paid any amount by MR (or indeed by any other person). We have concluded that there was no such provision.

Conclusion on the effect of the above arrangements

33. The effect of the above arrangements was, at least in part, disputed and we will set out our conclusions on the effect of the arrangements below.

34. Mr Pleming submitted, partly in reliance on the provisions referred to at [19] that the Program was essentially gratuitous or discretionary and that "benefits" that Members obtained under the Program were similarly discretionary up until the point at which a Member entered into a binding contract with a Redeemer for a Rewards Redemption. He amplified that submission by arguing that points Members earned under the Program represented nothing more than a record of stays that they had paid for at qualifying hotels. Ms Shaw submitted that the Program was not discretionary and characterised the provisions at [19] as offering MR an entirely normal "commercial discretion" as to the way it operated the Program. Therefore, she submitted that Members had a contractual right both to earn and to redeem points.

35. We prefer Ms Shaw's submissions. If MR had wished to make the ability to earn and/or to redeem points entirely discretionary, it could have said so in very few words. Moreover, if MR had a complete discretion as to whether to award points or to permit the redemption of points, there would be no need for Clause 12 referred to at [23] as MR could simply notify badly-behaved Members that it would no longer exercise its discretion to permit them either to earn, or redeem, points in the future.

36. The contractual provision referred to at [19] which entitles MR to withdraw rewards has given us pause for thought. However, that power is taken in the context of a clause dealing with change to the "Rewards Structure". We consider that an objective reading of the T&Cs makes it clear that MR had an extremely broad discretion as to how the Program as a whole would be operated. Members would have no ground for complaint, for example, if MR determined that, in the future, only three points would be awarded for every $1 spent on qualifying charges. Similarly, if a particular hotel had ceased to be Marriott branded and so had withdrawn from the Program, a Member would have no ground for complaint if MR said that Rewards Redemptions for that hotel would no longer be honoured, even if the Member had already made a reservation at the hotel in question. Decisions such as this essentially related to the Program as a whole although obviously the latter decision would have a particular effect on Members who wished to use points to stay at a particular hotel.

37. However, from the perspective of the Members individually, we consider there was a certain irreducible contractual entitlement namely that stays at qualifying hotels would entitle the Member to earn points in accordance with the T&Cs. While MR had a broad discretion to determine, for the purposes of the operation of the Program as a whole, how many points were awarded for particular types of stay, Members paying the same amount for identical stays at the same hotel at the same time would be awarded the same number of points.

38. The entitlement to redeem points (in accordance with the T&Cs) was similarly an irreducible contractual entitlement although MR clearly had a wide commercial discretion. However, MR's commercial discretion related to the scheme as a whole: a Member being told that a night at the Grosvenor House Hotel in London would now cost 50,000 points (and not the 45,000 points that had previously been advertised) would know that this exercise of MR's discretion affected all Members who were interested in staying at the Grosvenor House Hotel in the same way. Similarly, if a Member were told that he or she could no longer book a reward stay at a particular hotel (because, for example, it was no longer part of the Program), the Member would know that other Members wishing to stay at that hotel would be similarly affected.

39. We do not consider that the fact that MR could serve notice to discontinue the Program alters this conclusion as, unless and until MR served such a notice, Members had the irreducible contractual rights referred to above.

The relationships between Sponsors, Redeemers and MR in the periods relevant to MR's appeal

40. As noted at [14] above, in periods relevant to MR's appeals, the relationships between Sponsors, Redeemers and MR were documented in three agreements: the Participation Agreement, the International Services Agreement (which was relevant to managed hotels) and International Franchise Agreements (which had no relevance to managed hotels, but which applied to hotels operating under a Marriott franchise).

The Participation Agreement dated 1 September 2010

41. The Participation Agreement dated 2 September 2010 applied throughout the period relevant to MR's appeal. It was entered into between MR and a large number of companies defined as "Management and Franchise Companies". GHL was a "Management and Franchise Company" as defined. Clause 8 of the Participation Agreement stated that the Participation Agreement was governed by, and should be construed in accordance with, the law of the state of Maryland. No evidence was given as to the effect of Maryland law (which would be a question of fact for this Tribunal if it were in dispute). We have therefore assumed that Maryland law is the same in respects relevant to these appeals as English law.

42. One of the Recitals to the Participation Agreement included the following:

> WHEREAS, in connection with the Marriott Rewards program … hotels that are … participating in the Rewards Program (such hotels, "Participating Hotels") … buy points from [MR]. Those points are issued to members of the Rewards Program … and Members can then redeem points by means of an award certificate which can be exchanged for complimentary rooms at Participating Hotels or other awards ("Program Awards").

43. A further Recital to the Participation Agreement read as follows:

> WHEREAS [MR] and the Management and Franchise Companies desire to have the Participating Hotels participate in the Rewards Program and desire to confirm the terms and conditions pursuant to which [MR] has operated the Rewards Program… and the terms and conditions under which the Management and Franchise Companies have participated in the Rewards Program and shall continue to participate in the Rewards Program.

44. Clause 1.1 of the Participation Agreement provided that:

> The Participating Hotels shall each participate in the Rewards Program. [MR] will allow the Participating Hotels to participate in the Rewards Program in accordance with the terms and conditions set out herein. Members will earn points in the Rewards Program through their patronage of Participating Hotels and the Participating Hotels will provide discounted room nights to be used as Program Awards in the Rewards Program.

45. Clause 1.2 of the Participation Agreement provided that, from time to time, MR and the Management and Franchise Companies would establish:

> a) the price Participating Hotels will pay to [MR] for points issued to Members for stays or use of their services
>
> b) the method of calculating the reimbursement amount [MR] will pay the Participating Hotels based on room nights used for Program Awards.

46. Clause 1.4 of the Participation Agreement provided that:

> Management and Franchise Companies shall cause Participating Hotels to accept and honor Program Awards presented for complimentary room nights at such hotel in accordance with the requirements, conditions and restrictions established by [MR] from time to time.

47. Clause 5.4 of the Participation Agreement provided that any funds received by MR from Participating Hotels would be held "for the benefit of the Rewards Program". If the Program was terminated, any excess funds remaining (after payment of all costs, for example the costs of redemptions) would ultimately be distributed among Participating Hotels that were participants in the Rewards Program at the time of its termination in a "fair and reasonable manner, as determined by MR in its absolute discretion".

48. Clause 6.1 of the Participation Agreement included the following provision:

> 6.1 Management and Franchise Companies [which included GHL] shall cause Participating Hotels to participate in the Rewards Program in accordance with all applicable laws and regulations.

The International Services Agreement

49. Each hotel managed by the Marriott Group (as distinct from franchised hotels that are dealt with below) entered into an International Services Agreement with GHL as part of a suite of documents setting out the agreements under which that hotel would be managed. We were shown an example of a particular International Services Agreement entered into with a particular London hotel and both parties were content to proceed on the basis that this was representative of International Services Agreements generally entered into with managed hotels at the times relevant to MR's appeals. The International Services Agreement that we saw was short and was governed by English law.

50. Clause 1.03 provided that:

> GHL and its Affiliates [which included MR] may provide and the Hotel will participate in all or some aspects of loyalty recognition, affinity and other programs designed to promote stays at, or usage of the Hotel and other hotels operated or franchised by Manager and its Affiliates… (the "Loyalty Programs")…

It was common ground that the Program was a "Loyalty Program" as defined.

51. Clause 1.05 provided that the owner of the managed hotel would reimburse GHL and its Affiliates (which included MR) on a "fair and reasonable basis" for the costs of, among other matters, providing the Loyalty Programs.

52. We were not shown any provision of the International Services Agreement that gave the owner of the managed hotel the express right to receive payment when it acted in the capacity of Redeemer.

The International Franchise Agreement

53. We were shown an International Franchise Agreement dated December 2012 between GHL and the owner (defined as the "Franchisee") of a hotel in Edinburgh. It was common ground that at times relevant to MR's appeal, all owners of franchised hotels were obliged to enter into a franchise agreement in substantially similar form. The International Franchise Agreement that we were shown was governed by English law.

54. Pursuant to Clause 2.1 of the International Franchise Agreement, the Franchisee was granted a licence to use certain intellectual property rights and the "System" in connection with the relevant hotel. In addition, the Franchisee agreed to operate that hotel in accordance with the "System". The "System" for these purposes was defined to include a number of intellectual property rights and also "Frequent Traveler Programs" which were defined as:

> The frequent traveler appreciation program(s) for System Hotels and such other Franchisor Lodging Facilities designated by Franchisor or its Affiliates designed to increase the market share, length of stay and frequency of usage of such Franchisor Lodging Facilities, and/or any similar, complementary or successor program. As of the Effective Date, such programs include "Marriott Rewards".

Therefore, Clause 2.1 of the International Franchise Agreement imposed a positive obligation on the Franchisee to participate in the Program.

55. Clause 3.2 of the International Franchise Agreement required the Franchisee to pay a franchise fee. Clause 3.3(A) of the International Franchise Agreement required the Franchisee to pay a separate international marketing fund charge. Clause 3.3(B) also required the Franchisee to pay GHL:

> the Hotel's share, as determined by the Franchisor, of the cost of any Special Marketing Programs.

The definition of "Special Marketing Programs" was:

> As further described in Section 7.4, advertising, marketing, promotional, public relations and sales programs that are not designated by Franchisor as International Marketing Fund Activities.

Clause 7.4 of the International Franchise Agreement made it clear that the Program was an example of a "Special Marketing Program" and also provided that all System Hotels would pay for the cost of Special Marketing Programs on the same basis as each other.

56. We were not shown any provision of the International Franchise Agreement that gave the owner of a franchised hotel the express right to receive payment when it acted as a Redeemer under the Program.

Amounts payable by Sponsors, and payable to, Redeemers

57. Under the above arrangements, all participating hotels were eligible to be both Sponsors and Redeemers. In practice, however, not all participating hotels would act as Redeemers as, Members might prefer to use points to pay for reward stays at a "flagship" hotel in a mainstream tourist destination (such as London) rather than at a hotel used mainly by business travellers in an "out of the way" location.

58. Some complication is introduced by the fact that participating hotels did not contract directly with MR but rather contracted with GHL (in the International Service Agreement or International Franchise Agreement) with GHL contracting with MR (in the Participation Agreement). We have concluded that the effect of the network of contracts is as follows:

(1) Participating hotels all owed a contractual duty to GHL to participate in the Program as Sponsors and as Redeemers (although their obligation to act as Redeemers depended on Members wishing to use points to pay for reward stays at their hotel). That obligation to participate in the Program included a contractual obligation (owed to GHL) to make payments to GHL and its Affiliates (in the case of the International Service Agreement) and to GHL (in the case of the International Franchise Agreement) to defray the cost of operating the Program.

(2) Participating Hotels did not owe any direct contractual obligation to MR or have any direct contractual right to receive payments from MR.

(3) Perhaps because the International Franchise Agreement and the International Services Agreement were standard form documents that were drafted by advisers to the Marriott Group with the interests of the Marriott Group in mind, those documents did not expressly set out a right of a hotel to receive payment (when it acted as Redeemer) although they did contain obligations to make payment (when the hotels concerned acted as Sponsor). However, both documents imposed obligations on hotels to "participate" in the Program and a key constituent of the Program was that Redeemers would receive payment. We therefore consider that, properly construed, Redeemers had contractual rights, enforceable as against GHL to receive payments in respect of their participation in the Program. Nevertheless, since MR had a wide discretion to set the parameters of the "Program" (and whatever parameters set, hotels were obliged to participate in it) MR had a high level of control over the basis on which payments would be made to Redeemers.

(4) Although the Participation Agreement did not expressly state that MR would put GHL in funds to enable it to make payments to hotels participating in the Program, it was implicit that MR assumed such a contractual obligation to GHL since Clause 1 and Clause 6.1 of the Participation Agreement were seeking to ensure that participating hotels would (themselves) participate in the Program. Therefore, the intention behind the Participation Agreement was that, as between MR and GHL,

MR would be put in the same position it would be in if it had contracted directly with participating hotels in relation to the Program.

(5) Similarly, although it was not expressly stated in the Participation Agreement that GHL would pay MR sums received from participating hotels, this was also implicit.

59. MR and/or GHL had a wide-ranging entitlement to determine the basis on which Sponsors would make payments and Redeemers would receive payment. In practice, during the periods relevant to MR's appeals, MR determined that the basis on which Sponsors would make payments was as follows:

(1) When a hotel acted as Sponsor and a Member stayed at the hotel and earned points, the hotel was obliged to make a payment, typically between 2% and 4.5% of the "qualifying spend" (calculated in US Dollars) by the Member at that hotel. The precise percentage applied depended on the brand of hotel. The "qualifying spend" included the room rate together with amounts spent on extras such as restaurant and bar bills and an estimate of local taxes payable in respect of the stay.

(2) In order to give hotels an incentive to sign new Members up to the Program a lower fixed rate percentage would be applied where a Member signed up to the Program at the time of the stay (referred to as an "enrolment stay").

(3) A special fixed charge of $6.50 per 1000 points applied where hotels agreed to make discretionary awards of points (for example as compensation or goodwill gestures).

(4) As noted, the number of points that a Member would receive depended on a number of factors including whether the Member had "elite level" status. However, whatever the status of the Member, qualifying hotels acting as Sponsor made payments on the basis set out at (1) to (3) above. There was not necessarily any straightforward arithmetic link between the number of points that a Member received in respect of a particular stay and the amount of Sponsor payment that the hotel in question was obliged to make.

60. We were not referred, in the period of MR's appeals, to evidence as to how Sponsors in general treated the payments that they made to MR for VAT purposes although we had evidence from Whitbread as to how it treated this payment (referred to at [91] below).

61. Amounts payable to Redeemers were calculated by taking into account the occupancy rate of the participating hotel at the time of redemption in order to reflect the true cost to that hotel of providing the complimentary room. We have accepted Mr Behrens's unchallenged evidence (that he gave when agreeing with similar evidence given by Mr Simmons) that the fee payable to Redeemers would always be in excess of the marginal cost of providing the room and that, in most situations, including in periods of high occupancy, it was always in the financial interest of a hotel to accommodate a Member who wished to claim a reward stay.

62. A Redeemer who had provided a Member with a reward stay would issue a pro-forma invoice (to MR, not to GHL) which would notify MR of the Certificate number that had been redeemed and the Redeemer's calculation of the amount due to it in respect of that reward stay. Confusingly, this was done using the same form of invoice as the hotel would issue to a hotel guest. However, it was clear that invoices such as this were intended to notify MR of an amount the hotel considered to be due to it in accordance with the Program. They were not seeking to suggest that the Redeemer was making a supply of hotel accommodation to MR.

63. Every month, GHL (in its own name) would invoice UK-based hotels for a net sum due from that hotel both in respect of the Program and other services provided by GHL and its affiliates (including central reservations, international marketing and other relevant services). Sums due to the hotel in its capacity as Redeemer would operate as a downward adjustment to the net sum due from the hotel; sums due from the hotel acting as a Sponsor would increase the net sum due. All payments due from and to UK-based hotels would be made through GHL which Mr Behrens described as acting as "collection agent" for MR. Therefore, Mr Behrens's unchallenged evidence was that GHL allocated revenues collected from UK-based hotels to MR and MR funded payments that GHL needed to make to UK-based hotels in respect of redemptions.

The relationship between Members and participating hotels in the period relevant to MR's appeal

64. The parties did not refer in detail to standard terms and conditions governing a customer's stay at a Marriott branded hotel. However, from the witness evidence we saw and our analysis of the various contracts set out above, we have inferred that the contract between a non-Member and a participating hotel was in most material respects identical to the contract between a Member and a participating hotel. Members enjoyed some benefits, for example they had access to free wi-fi and some hotels provided Members with free breakfast (these benefits being provided at the hotel's cost were not compensated by MR). However, as a general matter, Members had no greater right to use a hotel's facilities than a non-Member.

65. There was one important exception to this. Where a Member booked a reward stay at a participating hotel, that hotel agreed not to charge the Member for the room (but would charge the Member for extras such as bar and restaurant bills). We were not shown any contractual or other arrangements that indicated that the contract between a Redeemer and a Member linked a Member's entitlement to free use of the hotel room to any arrangement between MR and the participating hotel. For example, we were not shown any contractual term that suggested that a Member was even aware of the fact that a payment was made from MR to the participating hotel in connection with the reward stay. Still less were we shown any contractual obligation on the part of a Member to procure that MR made such a payment or indicating that, if MR failed to make a payment, the Member would be obliged to pay for the hotel room. Finally, we note that the amount that MR agreed to pay to a Redeemer depended on occupancy levels of the hotel in question. Even if a Member knew or suspected that the Redeemer would receive some payment in connection with the reward stay, he or

she would have no means of knowing how much that payment would be. We have concluded, therefore, that the contract between a Member and a Redeemer entitled the Member to stay in the hotel without being charged for the room occupied irrespective of whether the Redeemer was able to, or did, obtain any payment from MR or any other person.

66. The point at [65] ties in with the status of the Certificate that a Member had to tender in order to obtain a rewards stay[6]. As we have noted, we had little evidence as to the precise nature of the contract between a Member and a Redeemer (although, of course, there was a large amount of evidence as to the arrangement between MR and a Member). We have concluded from our review of the Program as a whole that a Member arriving at reception and having tendered a Certificate would expect to have a contractual right to stay at the Redeemer's hotel without being charged by the Redeemer. A Member would not expect to be turned away from the hotel if he or she tendered the Certificate. We therefore consider that the act of tendering the Certificate was the consideration that a Member gave in return for the Redeemer's promise to allow him or her to occupy the room. However, given our findings at [65], we do not consider that there was any understanding between a Member and a Redeemer that the Redeemer would be able to use the Certificate to obtain payment from MR.

67. We have also concluded from the T&Cs referred to at [31] that a hotel room booked as a Rewards Redemption was in a different category from hotel rooms booked on terms that payment would be made in cash. A stay at the hotel was either a Rewards Redemption (in which case the Member never paid, or had any contractual obligation to pay the hotel a cash sum) or it was not a Rewards Redemption, in which case the hotel would need to be paid cash in the usual way.

68. We have therefore concluded that, as between a Member and a Redeemer, the contractual understanding was that a Member had no obligation whatsoever, whether to pay, or to procure payment in cash, for a hotel room supplied as part of a Rewards Redemption. The sole consideration given by a Member for a rewards room was the tendering of the Certificate.

69. Every time a Member stayed at a participating hotel and earned points, the participating hotel would be obliged to pay a fee to GHL effectively to defray the cost of issuing points to that Member as noted at [51] and [55] above. However, we were not shown any evidence to the effect that Sponsors would seek to charge Members extra for the points that were issued. Nor was the legal effect of the arrangements set out above that the Sponsors "purchased" points from MR, or indeed any other company that they would be capable of supplying to Members. We have therefore accepted Mr Pleming's submission that the transaction between Members and Sponsors did not involve Sponsors making a taxable supply for VAT purpose of points to Members. (There was no question of MR making a taxable supply of points to Members since MR did not "belong" in the UK for VAT purposes).

[6] As noted, an e-certificate would be sent automatically to the hotel concerned but there was some facility for a Member to hand over a paper certificate instead. We refer to both of these acts as the "tendering" of a Certificate.

PART 1B – FINDINGS OF FACT SPECIFIC TO WHITBREAD'S APPEALS

The relationship between MR and Members in the period relevant to Whitbread's appeals

70. The relationship between MR and Members in the period relevant to Whitbread's appeals was substantially similar to that outlined in Part 1A. However, as noted, that relationship was less reliant on the internet given that Whitbread's appeal relates to an earlier period than that of MR.

71. Members joining the Program received a letter through the post welcoming them to the Program. That letter enclosed a document entitled "Marriott Rewards Program Overview" that explained how the Program worked in plain English and also contained terms and conditions in more legal language.

72. The "Earning Points" section of the Program Overview explained how points could be earned. The applicable regime was in essence the same as that set out at [22] to [25]: amounts spent at Marriott branded hotels would entitle the Member to be credited with points on a variety of different bases. At some brands of hotel, 5 points would be issued for every US dollar spent on the room rate only. At other brands, 10 points would be issued for every US dollar spent on a wider category of qualifying charges. Amounts spent with other businesses, including Hertz and AT&T could also result in points being awarded under the Program.

73. The "Redeeming Awards" section explained how points could be redeemed. In summary:

> (1) A Member would first need to select a reward either by calling a Marriott customer service agent or checking the internet.
>
> (2) The Member could then call the Marriott central reservations system and make a reservation at the relevant hotel. When making that reservation, the Member would need to specify that he or she wanted to redeem Marriott Rewards points. Assuming that the reservation could be made, on the same telephone call, the Member would be taken through the process of ordering a Certificate (which was always in paper form at the times relevant to Whitbread's appeals) which could take up to four weeks for a UK-based customer to receive, although, for a fee, that could be expedited.
>
> (3) Alternatively, the Member could make a reservation (and request a Certificate) online.

74. Part of the "Marriott Rewards Program Overview" document consisted of T&Cs written in more legal language. These had a substantially similar overall effect to the T&Cs applicable to the period of MR's appeals. However, the provisions setting out MR's discretion to make changes to the Program was worded somewhat differently as follows:

> 1. Marriott Rewards and its partners have the right to change, limit, modify or cancel program rules, regulations, rewards and reward levels

> at any time. That includes increasing or decreasing the number of points or miles received for a stay or required for a reward, changing rewards, adding black-out dates, limiting rooms available for a reward at any participating hotel, changing locations served by Marriott or its travel partners, or changing or canceling its travel partner rewards. Program rules may change due to changes in the participating airlines' frequent flyer programs. In the event that any of these conditions occur, members may not be able to obtain certain rewards.
>
> 2. Additionally, Marriott has the right to end the Marriott Rewards program by providing written notice to its members six months in advance of program notification…
>
> 9. Membership in Marriott Rewards, including any reward certificates that may have been issued to a member may be revoked or suspended at Marriott's sole discretion if a member fails to pay any Marriott hotel bills or accounts at participating hotels when due.

75. Despite these small differences, we regarded the effect of the T&Cs as in force at the time of Whitbread's appeals as being, subject to one exception, in all material respects the same as the T&Cs in force at the time of MR's appeals. In particular, we consider that under the T&Cs applicable in the periods relevant to Whitbread's appeals, Members had a contractual right as against MR to earn points and to use points to pay for reward stays. The T&Cs did not, however, contain a provision similar to that outlined at [31] that provided for the reservation to be cancelled altogether if a Member had insufficient points.

The relationship between Whitbread and MR in the period relevant to Whitbread's appeal

76. As was the case in the period relevant to MR's appeals, during the period relevant to Whitbread's appeals, owners of franchised hotels (such as Whitbread) did not contract directly with MR. Instead, the same architecture as is set out above applied, with Marriott Rewards Inc entering into "participation agreements" with a number of "Management and Franchise Companies" including MRC and IHLC. IHLC and MRC (as relevant) then entered into separate franchise agreements in relation to each Marriott franchised hotel.

77. We were not shown franchise agreements relating to all Marriott franchised hotels that Whitbread owned during the period. However, the parties were happy to proceed on the basis that the relevant terms were in all material respects contained in a sample franchise agreement relating to a Marriott franchised hotel at Heathrow airport that Whitbread entered into with IHLC with effect from 7 January 1999.

78. The participation agreements referred to at [76] were periodically amended and restated with new "Management and Franchise Companies" being added as contracting parties. We were not shown participation agreements covering the entire period relevant to Whitbread's appeals (1999 to 2005). We saw a participation agreement dated 2 January 1998 (which was before the period relevant to Whitbread's appeals). IHLC does not appear to have been a party to that participation agreement. We also saw a version of the participation agreement dated 2 January 2004 (to which

IHLC was a party) but were not referred to any versions of the participation agreement in between. Mr Pleming did not take any point in this respect and, since Mr Simmons's unchallenged evidence was that the relevant "Management and Franchise Company" was IHLC, which was a party to the 2004 participation agreement, but not a party to the 1998 participation, we are prepared to accept that, at all times relevant to Whitbread's appeal, the applicable participation agreement was in all material respects identical to that dated 2 January 2004 (although earlier versions of this participation agreement would have involved MRC, instead of IHLC).

79. Mr Simmons gave unchallenged evidence as to the benefit of the Program from Whitbread's perspective. He said that the aim of the Program was to increase turnover in Marriott franchisee hotels by attracting new customers and to provide an incentive for Members not to stay at competitor hotels (thereby encouraging repeat business at Marriott branded hotels).

The Participation Agreement dated 2 January 2004

80. The Participation Agreement dated 2 January 2004 was in all material respects identical to that dated 1 September 2010 referred to at [41] to [48] with the minor exceptions set out below.

81. First, at that time, Marriott Rewards Inc operated the Program. Therefore, rather than imposing contractual obligations on Marriott Rewards LLC (which was not incorporated until later) the Participation Agreement imposed obligations on Marriott Rewards Inc. As we have said, we do not regard this as a material distinction.

82. There were some minor differences in the numbering of clauses and recitals.

83. The 2004 Participation Agreement contained no provision like Clause 5.4 of the 2010 Participation Agreement referred to at [47].

The Franchise Agreement

84. The Franchise Agreement that we saw relating to the Marriott hotel at Heathrow Airport was similar, but not identical to, that referred to at [53] to [56]. However, its overall effect was in most material respects the same.

85. Pursuant to Clause 2.01 of the Franchise Agreement, Whitbread undertook an obligation to operate the hotel pursuant to the "System". Since the definition of the System included the "Frequent Traveler Program", the effect of Clause 2.01 was that Whitbread had an obligation to operate the Program at the particular franchised hotel.

86. Clause 4 of the Franchise Agreement set out a number of fees that Whitbread had to pay to IHLC. These included a franchise fee, fees relating to Marriott's central reservation system and an "international marketing fee". In addition to these fees, Clause 4.03B of the Franchise Agreement provided as follows:

> In addition to the International Marketing Fee, Whitbread shall participate in and pay in Pounds Sterling or U.S. Dollars as reasonably

> specified to IHLC …. the HOTEL's fair and equitable share of the costs of every additional marketing or promotional program (e.g., the Frequent Traveler Program) as … IHLC acting in reasonable good faith may prescribe.

87. We were not shown any provision of the Franchise Agreement that gave Whitbread an express contractual right to receive payment when it acted as a Redeemer of reward stays. However, we consider that the Franchise Agreement nevertheless conferred such a right by implication. The whole effect of the Franchise Agreement was to permit Whitbread to operate the franchised hotel in accordance with a standardised system. The Program was part of that standardised system and, under the Program, Redeemers were entitled to receive a payment from MR although MR had a wide discretion to determine the amount of payment that would be made. Moreover, as noted at [90] to [92] below, MR did make payments to Whitbread when it acted as Redeemer. We have therefore concluded that part and parcel of Whitbread's right (and obligation) to operate the hotel in accordance with the "System" was a contractual right to receive a payment when it acted as Redeemer.

88. Clause 21.17B of the Franchise Agreement included the following provision:

> IHLC covenants that it shall ensure that all of its Affiliates fully comply with the covenants restrictions and obligations stated in this Agreement as if they were parties to this Agreement.

Ms Brown submitted that this clause gave Whitbread a direct contractual right to recover sums due under the Franchise Agreement from MR as well as IHLC. While on first reading, the clause appears to have the meaning for which she argues, we do not consider that the true effect of the clause was to entitle Whitbread to recover all sums owed to it from all Marriott Group companies (not least since there was no clause that dealt with questions of double recovery). Rather, we consider that the clause seeks to ensure that IHLC cannot procure an effective breach of the Franchise Agreement by ensuring that it is not IHLC, but an affiliate, that acts contrary to the agreement. Without such a clause, an affiliate of IHLC might, for example, be able to open a competitor "Marriott" hotel right next door to one operated by Whitbread and argue that no breach of the Franchise Agreement was involved because IHLC had not itself opened that hotel.

Amounts payable to, and by, Whitbread in connection with the Program

89. We therefore consider that the relevant contractual matrix applicable to Whitbread was very similar to that applicable during the period relevant to MR's appeals. In particular:

> (1) Whitbread had, as against IHLC, both the contractual right and the contractual duty to participate in the Program. That involved an obligation to pay its "fair and equitable share" of the costs of the Program and the right to receive payment when it acted as Redeemer. Despite Clause 21.17B of the Franchise Agreement, Whitbread had no contractual relationship with MR.

(2) As between MR and IHLC, MR was entitled to receive a payment equal to the net sums that IHLC received from Whitbread in respect of the Program. MR had the obligation to ensure that IHLC had sufficient funds to discharge its (IHLC's) obligations to Whitbread in respect of the Program.

90. Ms Brown gave us a detailed and helpful explanation of precisely how fees payable by and to Whitbread under the Program were calculated. We have concluded that fees payable by Whitbread in respect of points issued were between 4.5% and 5% of the total amount spent by the Member during his or her stay at the relevant Whitbread hotel calculated as summarised at [59(1)]. Therefore, as was the case in the period relevant to MR's appeal, there was no straightforward arithmetical link between the amount of a payment made to Whitbread and the number of points issued to the Member.

91. For VAT purposes, Whitbread considered that the payments that it made when points were issued to Members were consideration for a service that MR supplied to it with the result that Whitbread considered that it had an obligation to account for output VAT on those services under the "reverse charge" mechanism set out in s8 of VATA 1994. Whitbread set out that understanding in correspondence with HMRC. Although we were not shown Whitbread's VAT returns setting out the amount of these "reverse charges", we have concluded that, having stated its position to HMRC, Whitbread accounted for VAT in accordance with the reverse charge mechanism in its applicable VAT returns.

92. The amounts payable to Redeemers were calculated in accordance with a complicated formula. We will not set that out in detail but will summarise it as saying that a central item in the formula was the concept of "RevPar" which was the total rooms revenue of the hotel over the previous 12 months divided by the total sleeping room capacity. So, for example, if a hotel had 50 rooms, over a period of 365 days, it would have 18,250 (365 x 50) "room nights" available to it. If, over that period it made $684,375 of room revenue, "RevPar" would be $37.50 (684,375 ÷ 18,250). A proportion of redemption stays would attract a relatively small payment (that was intended simply to compensate the hotel for the additional cost of providing that room, for example the incremental laundry and cleaning costs involved). However, the remainder would be compensated by means of a payment equal to the "RevPar" of the hotel for the period in question. Therefore, as was the case in the periods relevant to MR's appeal, average occupancy was right at the heart of the calculation of payments due to Redeemers. It also follows from the calculation adopted that in all cases the amount paid to Whitbread in respect of a Rewards Redemption would be less than the full "rack rate" of the hotel concerned.

93. We have concluded that invoicing procedures at the time of Whitbread's appeals were similar to those relating to MR's appeals since we saw an invoice under which IHLC invoiced a particular hotel on a similar net basis as was summarised at [63].

The relationship between Members and participating hotels in the period relevant to Whitbread's appeals

94. We consider that the position is in all material respects the same as that outlined at [64] to [69] above.

95. We had evidence as to the procedure that was adopted during the period relevant to Whitbread's appeals at the front desk of a hotel providing a Rewards Redemption. From that we have concluded that the hotel would set up two accounts for the Member. The first, the "mains account", was in respect of the room. The hotel's regular rack rate was debited to that account. However, staff at the front desk were instructed not to show that mains account to the Member making a reward stay at any time. We have concluded, therefore, that the mains account was set up for purely administrative purposes (perhaps so that the hotel's systems recognised the room as being occupied) and did not indicate that the Member had a contractual obligation to pay the hotel's regular rack rate which was then satisfied by a payment from MR (not least since we concluded that the amount of payment that MR made in respect of a Rewards Redemption was always lower than the rack rate of the hotel involved). The second account (the "extras account") was presented to the Member for settlement on check out in the usual way.

96. We have therefore concluded that, just as in the period of MR's appeals, Members had no pre-existing contractual obligation to pay an amount to Whitbread in respect of reward stays with that obligation being discharged by MR. Rather, we have concluded that the sole consideration the Member gave the Redeemer for the use of the room was the tendering of the Certificate. However, there was no contractual understanding between a Member and a Redeemer that the Redeemer could, or would, use that Certificate to obtain payment from MR or anyone else.

PART 2 – THE LAW

Relevant statutory provisions

97. MR's appeal relates to its claim for repayment of input tax that is provided for by s39 of VATA 1994. That section provided, relevantly, as follows:

> **39 Repayment of VAT to those in business overseas**
>
> (1) The Commissioners may, by means of a scheme embodied in regulations, provide for the repayment, to persons to whom this section applies, of VAT on supplies to them in the United Kingdom or on the importation of goods by them from places outside the member States which would be input tax of theirs if they were taxable persons in the United Kingdom.

"Place of supply" rules as applicable to MR's appeal

98. Section 7A of VATA 1994 determined the "place of supply" of services in the periods relevant to MR's appeal and provided as follows:

7A Place of supply of services

(1) This section applies for determining, for the purposes of this Act, the country in which services are supplied.

(2) A supply of services is to be treated as made—

(a) in a case in which the person to whom the services are supplied is a relevant business person, in the country in which the recipient belongs, and

(b) otherwise, in the country in which the supplier belongs.

…

(5) Subsection (2) has effect subject to Schedule 4A.

99. It was common ground that, if the place of supply of any services that Redeemers provided to MR was determined in accordance with the general rule in s7A(2) of VATA 1994, the place of supply would be in the United States with the result that MR would have no right to a repayment of VAT under s39 of VATA 1994.

100. Section 7A(5) of VATA 1994 makes it clear that the "general rule" in s7A(2) is subject to specific rules set out in Schedule 4A. It was common ground that, in order for MR's appeal to succeed, it would need to establish that any services it received from Redeemers fall within Item 1 of Schedule 4A which provided as follows:

1 Services relating to land

(1) A supply of services to which this paragraph applies is to be treated as made in the country in which the land in connection with which the supply is made is situated.

(2) This paragraph applies to—

(a) the grant, assignment or surrender of any interest in or right over land,

(b) the grant, assignment or surrender of a personal right to call for or be granted any interest in or right over land,

(c) the grant, assignment or surrender of a licence to occupy land or any other contractual right exercisable over or in relation to land (including the provision of holiday accommodation, seasonal pitches for caravans and facilities at caravan parks for persons for whom such pitches are provided and pitches for tents and camping facilities),

(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,

(e) any works of construction, demolition, conversion, reconstruction, alteration, enlargement, repair or maintenance of a building or civil engineering work, and

(f) services such as are supplied by estate agents, auctioneers, architects, surveyors, engineers and others involved in matters relating to land.

101. Item 1 of Schedule 4A was enacted to give statutory effect to Article 47 of the Principal VAT Directive (as amended by Council Directive 2008/8/EC of 12 February 2008 with effect from 1 January 2010) which provided as follows:

> **Article 47**
>
> The place of supply of services connected with immovable property, including the services of experts and estate agents, the provision of accommodation in the hotel sector or in sectors with a similar function, such as holiday camps or sites developed for use as camping sites, the granting of rights to use immovable property and services for the preparation and coordination of construction work, such as the services of architects and of firms providing on-site supervision, shall be the place where the immovable property is located.

"Place of supply" rules applicable to Whitbread's appeals.

102. Section 7(10) of VATA 1994 as in force during the period relevant to Whitbread's appeals provided as follows:

> A supply of services shall be treated as made-
>
> (a) In the United Kingdom if the supplier belongs in the United Kingdom; and
>
> (b) in another country (and not in the United Kingdom) if the supplier belongs in that other country.

103. However, the above general rule was displaced in relation to certain types of supply. Article 16 of the Value Added Tax (Place of Supply of Services) Order 1992 provided that certain services listed in Schedule 5 of VATA 1994 were to be treated as supplied where the customer belonged. "Advertising services" were listed in Schedule 5. That rule was intended to give effect to Article 9(2)(e) of the Sixth VAT Directive which listed "advertising services" as a category of service deemed to be supplied where the customer belongs.

PART 3 – DISCUSSION OF ISSUE 1

The decision of the Supreme Court in *Revenue and Customs Commissioners v Loyalty Management Limited*

104. The parties differed as to how similar the facts of this appeal were to those considered by the Supreme Court in *Revenue and Customs Commissioners v Loyalty Management Limited* [2013] STC 784 (which we will refer to as "*LMUK SC*" to distinguish it from the decision of the CJEU which we will refer to as "*LMUK CJEU*"). However, it was clear that there were some important similarities and all parties made lengthy oral and written submissions as to the effect of the Supreme Court's decision. So that our decision is of a manageable length, we will not set out all of the parties' respective submissions or lengthy quotes from the decisions, but rather will set out our overall conclusions on what the Supreme Court decided in *LMUK SC*, with sufficient quotes from the judgments and the parties' submissions to explain why we have reached those conclusions.

The extent to which LMUK CJEU is binding on UK courts

105. Both Lord Reed and Lord Hope made determinations as to the extent to which *LMUK CJEU* was binding on UK courts (including the Supreme Court itself). At [54] and [56] of *LMUK SC*, Lord Reed concluded that, very broadly, the CJEU had jurisdiction in relation to the interpretation of EU treaties and directives. Decisions of the CJEU on such matters of interpretation are binding on UK courts by reason of s3 of the European Communities Act 1972. However, the evaluation of the facts of the case and the application of EU law to those facts are for national courts to determine. Lord Hope expressed a similar view at [103] of the reported decision.

106. At [56] of the reported decision, Lord Reed concluded that in *LMUK CJEU*, the CJEU provided (binding) determinations as to the interpretation of EU law in two respects: first by determining that consideration of economic realities is a fundamental criterion for the application of the common system of VAT and second by determining that, where a transaction comprises a bundle of features and acts, regard must be had to all the circumstances in which the transaction in question takes place. At [109] of the reported decision, Lord Hope concluded that the only statement of principle that could be found in *LMUK CJEU* is the statement that the consideration of economic realities is a fundamental criterion for the application of VAT.

107. At [112] of the reported decision, Lord Walker expressed himself to be in "full agreement" with the judgments of Lord Reed and Lord Hope and set out short reasons of his own. He made no specific observations on the binding nature of the CJEU's decisions and, therefore, the ratio of *LMUK SC* in this respect is as summarised at [105] to [106] above.

108. We have not, therefore, accepted Mr Pleming's submission that *LMUK CJEU* is the definitive ruling of the CJEU on the interpretation of VAT directives in the context of a typical retail loyalty scheme. Nor have we accepted his submission that the appellants can only avoid the consequences of *LMUK CJEU* if they can distinguish their cases from *LMUK CJEU* by reference, specifically, to the judgment of Lord Reed. Rather, we have concluded that *LMUK SC* is authority that is binding on us. Moreover, *LMUK SC* has made clear which aspects of *LMUK CJEU* are binding on UK courts, which are those referred to at [106] above.

The significance of particular features of the Nectar rewards scheme considered in LMUK SC

109. At [48] of the reported decision, Lord Reed refers to a number of salient features of the Nectar rewards scheme being considered in *LMUK SC*, which he considered the CJEU did not take fully into account in *LMUK CJEU,* saying:

> It left out of account a number of matters found by the tribunal and relied upon by LMUK before the national courts, including (1) the fact that sponsors pay LMUK for the grant to collectors of the right to receive goods and services, (2) the fact that LMUK meets the cost of the provision of goods and services to collectors out of those payments, (3) the fact that LMUK has, in return for those payments, granted

> collectors the right to receive goods and services without further payment or at a reduced cost, (4) the fact that collectors obtaining goods and services from redeemers are therefore exercising a right which has already been paid for, (5) the fact that the provision of goods and services by the redeemers is the means by which LMUK discharges its obligations to sponsors and collectors, and (6) the fact that the payments made by LMUK to redeemers are therefore an essential cost of its business. More generally, as I have explained, the court does not appear to have assessed the transactions in question in the context of the arrangements considered as a whole, or determined on that basis what they amounted to in terms of economic reality. Nor is it apparent that the court took into account, in reaching its conclusion, the fact that (1) LMUK had agreed to make a taxable supply when it granted to collectors the right to receive goods and services at no cost or at a reduced cost, and (2) collectors receiving goods and services on that basis were therefore exercising a right for which LMUK had already been paid, and the consideration for which had already been subject to VAT.

110. As well as mentioning factors that he considered the CJEU had not fully taken into account, Lord Reed also appears to have attached significance to certain other aspects of the Nectar scheme. For example, at [79] of the reported decision, he refers to LMUK's business model of deriving a profit from the difference between the price it paid redeemers and the amount that it received from sponsors.

111. Perhaps unsurprisingly, the parties treated the features to which Lord Reed referred almost as a checklist. The appellants sought to emphasise that most, if not all, of the features to which Lord Reed referred were present in the Marriott rewards scheme. By contrast, HMRC referred to a number of aspects that they submitted were not present.

112. Elsewhere in this decision, we set out our conclusions on whether differences to which HMRC refer were indeed present and, if they were, their effect on the VAT analysis. However, before expressing our conclusions on this issue, we will set out our views on how we consider the features that Lord Reed identified contributed to his decision. In order to do so, it is convenient to start at [45] of the reported decision where Lord Reed explains the CJEU's conclusion (based on its decision in *Kuwait Petroleum (GB) Ltd v Customs & Excise Commissioners* (Case C-48/97)) that collectors did not give consideration for supplies of rewards (made by redeemers) when they purchased goods and services from sponsors. At [46] of the reported decision, Lord Reed comments:

> So far as it went, that conclusion was uncontentious. What is however significant is that the court did not address the possibility that the sponsors might have provided consideration for the supply of the rewards when they paid LMUK for the points issued to collectors as the Court of Appeal's judgment had suggested. The court again left out of account the fact (1) that the award of points was a taxable supply by LMUK, separate from the supply of goods or services by the sponsor, (2) that, as a consequence of LMUK's having made that supply, the collectors were entitled to receive goods and services at no cost or at a

> reduced cost, and LMUK had to make goods and services available to them on that basis, and (3) that it paid redeemers to provide those goods and services on that basis. These features had not been present in the Kuwait case. [emphasis added]

113. The relevance of these factors, and of those set out at [48] of the reported decision is thrown into focus in the comments that Lord Reed makes on "fiscal neutrality" at [77] and [78] of the reported decision as follows:

> The appeal before this court is concerned with the claim of LMUK, a taxable person, to deduct input tax. LMUK's business is of an unusual character. Through the Nectar scheme, it provides collectors with a contractual right to obtain goods and services from redeemers in exchange for points. It is common ground before this court that that is a taxable supply, and that the taxable amount is the whole of the consideration which is received by LMUK. The counterpart of the right supplied to collectors is an obligation on the part of LMUK to procure that redeemers provide goods and services in exchange for points. The payments made to redeemers constitute the cost of fulfilling that obligation, and are therefore a cost of LMUK's business.
>
> [78] Applying the principles summarised at [73] and [74], above, VAT should be chargeable on LMUK's taxable supplies only after deduction of the VAT borne by LMUK's necessary costs. The most obvious of those costs, as I have explained, is the cost of securing that goods and services are provided to collectors in exchange for their points: that is to say, the payments made by LMUK to the redeemers.

114. We consider that Lord Reed was deciding in essence that, since LMUK was providing collectors with a contractual right to obtain goods and services and that LMUK made a taxable supply when it provided collectors with that right (consideration for which was given by sponsors), considerations of fiscal neutrality meant that it should obtain credit for input tax it incurred in connection with payments to redeemers (since those payments represented the cost of LMUK fulfilling its obligations). We therefore consider that the list of facts that Lord Reed set out served to explain his approach to the doctrine of fiscal neutrality. Those factors should not be regarded as a "checklist" and the absence of any particular factor (or its presence in a different form) does not mean that the reasoning set out in *LMUK SC* is inapplicable. Accordingly, we do not consider that Lord Reed was ruling out the possibility that the presence of similar, but different, factors in the context of a particular rewards scheme could lead to the same result on fiscal neutrality grounds.

The approach to Redrow set out in LMUK SC

115. Lord Reed, Lord Hope and Lord Walker were all agreed that the decision of the House of Lords in *Customs and Excise Commissioners v Redrow Group plc* [1999] STC 161 was correct (see [65], [108] and [117] of the decision in *LMUK SC*). However, all were agreed that Lord Millett should not be taken to have decided that a person making a payment is necessarily entitled to input tax credit provided that he obtains "anything – anything at all – used or to be used for the purposes of his business in return for making that payment". Rather, Lord Millett's apparently broad

statement needs to be understood as being concerned with a realistic appreciation of the transactions in question (see Lord Reed's judgment at [66] and Lord Hope's judgment at [110]) or as a reference to anything that constitutes a taxable supply (Lord Walker's judgment at [117]).

116. All three members of the majority in *LMUK SC* delivered judgments that applied principles that had been applied in *Redrow*.

117. Although Lord Reed did make a number of comments on the doctrine of "fiscal neutrality", paragraphs [79] to [83] of the reported decision make it clear that he was also applying principles set out in *Redrow*. In those paragraphs, Lord Reed concluded that there was a legal relationship between a redeemer and LMUK pursuant to which there was reciprocal performance with the redeemer accepting points with no inherent value in exchange for goods and services and LMUK paying it for doing so. As a matter of economic reality, and having regard to LMUK's business model, payments that LMUK made to redeemers were an essential cost of its business. Therefore, the only economically realistic explanation of LMUK's behaviour was the value to LMUK itself of the redeemers' acceptance of points in exchange for the provision of goods and services with the result that LMUK should be entitled to recover input tax associated with the payments it made to redeemers. As Lord Reed acknowledged at [83], this approach was entirely consistent with that adopted in *Redrow*.

118. Lord Hope was even more explicit in his application of *Redrow*. He concluded at [108] that, when redeemers provided rewards to collectors, they were making two supplies: the first being a supply of the rewards themselves to collectors and the second being a supply of different services to LMUK (namely "redemption services" amounting to the honouring of the obligation to provide rewards in return for points). LMUK gave consideration for those redemption services and, as a matter of economic reality benefited from them with the result that it was entitled to credit for input tax that it incurred.

119. Lord Walker's approach was similar to that of Lord Hope. At [115], he noted:

> This court was not shown any authority establishing that a payment by A to B cannot be both consideration for a service supplied to A by B, and (as third-party consideration) an element of the consideration paid for a supply by B to C (in this case, the collector, who is usually, but not always, also the final consumer).

Overall conclusion on Issue 1

120. The parties all made lengthy written submissions on Issue 1 which ran to well over 100 pages. To keep this decision to a manageable length, we will not summarise all of the various competing arguments that the parties put forward. Rather, in this section, we will set out our overall conclusions on Issue 1 (in which we broadly accept the submissions that Ms Shaw made). In later sections we will explain why we have not accepted some of the rival contentions that were put forward. However, the fact that we do not mention specifically all of the arguments that were advanced should not be taken as an indication that we have not considered them.

121. As a preliminary matter, we note that the circumstances in which Issue 1 arises in MR's appeals are different from those applicable to Whitbread's appeals. MR needs to establish that it was itself the recipient of a supply of services that Redeemers made in order to be entitled to a repayment of VAT under s39 of VATA 1994. MR would not be entitled to a repayment of VAT if Redeemers made their supplies to GHL. By contrast, Whitbread needs to show in order to succeed on Issue 1 that, when it accepted Rewards Redemptions, the relevant supply for VAT purposes was made to a person who "belonged" outside the UK. In principle it could succeed with that argument if it supplied those services to IHLC: it does not need to show specifically that its supplies were to MR.

122. Throughout the hearing before us, and in all parties' written submissions, the parties referred to MR making payments to Redeemers and receiving payments from Sponsors. As we have noted above, the contractual matrix was somewhat more complicated than this in that there was an intermediary company (GHL in MR's appeals and MRC and IHLC in the periods relevant to Whitbread's appeals) that stood between MR and the Sponsors and Redeemers. Moreover, our conclusions as to the way that Sponsors and Redeemers were invoiced (referred to at [63] and [93]) seem to mean that a payment could be made to a Redeemer (by GHL, for example) without MR needing to make any payment to GHL. For example, if GHL owed $10,000 to a particular Redeemer but was owed $10,000 by a particular Sponsor, it would not have any net amount to pay and so would not need to call on MR to make any payment. Rather, GHL could in theory use the $10,000 received from the Sponsor to pay $10,000 to the Redeemer without MR needing to put GHL in funds at all.

123. Having said that, while there may be arguments to the contrary, we consider that the facts we have found are clearly consistent with a conclusion that, as a matter of economic reality, MR was the company making payments to Redeemers and receiving payments from Sponsors. All parties, in their submissions, appear to have adopted this approach and it was no part of HMRC's pleaded case (nor did Mr Pleming seek to argue) that MR could not claim VAT repayment as any relevant services were supplied to GHL. In those circumstances, we will follow the parties' approach and will also refer to payments being made to, and by, MR.

124. We also consider that the approach at [123] is supported by authority. The CJEU has made it clear in *Town and County Factors Ltd v Customs & Excise Commissioners* (Case C-498/99) [2002] STC 1263 that, in order for a supply to be effected for a consideration, it is not necessary for the person making the supply to have an enforceable contractual right to payment. It is enough that there be a legal relationship between the supplier and the recipient under which there is reciprocal performance and the remuneration received by the provider constitutes value actually given in return for the service supplied to the recipient (see the CJEU's decision in *Tolsma v Inspecteur de Omzetbelasting Leeuwarden* [1994] STC 509). We consider that requirement to be satisfied since the overall effect of the contractual arrangements, and the way in which they are operated, is that a Redeemer becomes entitled to receive a payment (albeit a payment made through an intermediary) precisely because it agrees to make a hotel room available to a Member as a Rewards Redemption as an integral part of the Program that is operated by MR. Therefore,

while particular considerations of English law relating to privity of contract means that MR does not actually owe contractual obligations direct to Redeemers, we do not regard that as an obstacle to a conclusion that Redeemers are providing services to MR.

Conclusion on Issue 1 in relation to MR's appeals

125. The question is whether, for the purposes of MR's claim under the s39 of VATA 1994, sums that MR paid to Redeemers were consideration for a supply made by Redeemers to MR (as distinct from third party consideration for the supply of hotel rooms made by Redeemers to Members). It was common ground that we should approach this question in the same way as we would the question of whether MR (if it belonged in the UK) would be entitled to credit for input tax in respect of the services said to be supplied by Redeemers.

126. We have taken as our starting point the statement of Lord Hope in *Redrow* at page 166d of the reported decision:

> The matter has to be looked at from the standpoint of the person who is claiming the deduction by way of input tax. Was something being done for him for which, in the course or furtherance of a business carried on by him, he has had to pay a consideration which attracted VAT? The fact that someone else…also received a service as part of the same transaction does not deprive the person who instructed the service and who has had to pay for it of the benefit of the deduction.

127. MR's business involved it assuming obligations to Members to provide them with points and also to ensure that Members are able to redeem those points in order to obtain reward stays. In order for MR to be able to honour its obligations to Members, it needed to be sure that Redeemers would allow a Member claiming a Rewards Redemption to use a hotel room without being charged for it. In that respect, MR's business is similar to that of LMUK as analysed in the passages of Lord Reed's judgment referred to at [117].

128. Moreover, MR was supplying services to Sponsors. When it issued points to Members it was entitled to receive a payment from Sponsors (although its entitlement to receive payment might be "netted off" against amounts owed by MR). There was therefore reciprocity between the payment that MR received and MR's issue of points to Members such that, if MR had belonged in the UK, on issue of points to Members, it would be regarded as making a taxable supply to Sponsors for a consideration equal to the amount payable to it. Whitbread has reflected the fact that it was receiving a taxable supply of services from MR in its VAT returns by treating itself as receiving a supply that is subject to the "reverse charge" in s8 of VATA 1994. We did not understand HMRC to be arguing that Whitbread was wrong to apply that "reverse charge" and we consider that Sponsors should have adopted a similar treatment in the periods relevant to MR's appeals as well.

129. We acknowledge that Lord Millett's formulation of the question of whether MR receives "anything – anything at all" in return for paying amounts to Redeemers needs

to be approached in the light of "economic reality". As is clear from paragraph [80] of Lord Reed's judgment in *LMUK SC*, Lord Reed saw nothing "economically unreal" about the proposition that LMUK made payments to its redeemers because it attached value to those redeemers' acceptance of points in exchange for the provision of goods and services. Given the nature of MR's business, we similarly see nothing economically unreal about MR making payments to Redeemers in similar circumstances. We do not consider that conclusion to be affected by the fact that MR does not make a profit out of its operation of the Program. Even though the Program does not turn a profit for MR, it is still an economic activity and MR still needs Redeemers to allow Members to use free hotel rooms in order to discharge its own obligations under the Program.

130. When a Redeemer made a hotel room available to a Member as a reward stay, it was making two separate supplies. First, under its contract with the Member, it was supplying a hotel room to the Member for a consideration consisting only of the tendering of a Certificate. Second, it was supplying MR with a service of agreeing to provide the Member with a hotel room on terms that the Member was not obliged to pay cash for that room. That is not an obstacle to MR being entitled to VAT recovery as is clear from the judgments of Lord Hope and Lord Walker in *LMUK SC* as well as the decision in *Redrow* which allowed Redrow credit for input tax incurred on supplies of estate agency services to it even though those services were also supplied to individual home-owners.

131. However, we do need to consider whether the payments that MR made to Redeemers amounted to third party consideration for supplies of hotel rooms to Members as, if they were, even applying the principles set out above, MR would not be entitled to repayment of VAT associated with those payments. It is possible for consideration paid in respect of the supply of goods or services to a third party to constitute third party consideration. Paragraph 67 of the Lord Reed's judgment in *LMUK SC* makes this clear, as does paragraph 55 of Lord Neuberger's judgment in *HMRC v Airtours Holidays Transport Ltd* [2016] STC 1509. During the hearing, Ms Shaw accepted, quite rightly, that she had gone too far when she submitted that MR could only be giving third party consideration if the effect of the payments it made to Redeemers was to discharge a liability of a Member to pay for a hotel room. Therefore, while we have concluded that payments that MR makes to Redeemers are not made in discharge of a Member's obligation to pay for hotel rooms (see [67] and [96] above), that is not itself enough to dispose of the question whether payments that MR made amounted to third party consideration for the supply of those hotel rooms to Members.

132. Nevertheless, as Lord Reed said at [67] of *LMUK SC*:

> Economic reality being what it is, commercial businesses do not usually pay suppliers unless they themselves are the recipient of the supply for which they are paying (even if it may involve the provision of goods and services to a third party), but that possibility cannot be excluded a priori.

In this appeal, MR makes payments to Redeemers for the economically real reasons set out at [127] to [129] above. That of itself suggests that this is not an "unusual" situation where a commercial business is paying third party consideration. Moreover, there was no contractual understanding between Members and Redeemers that any consideration for the reward stay would be provided by MR. Accordingly, when MR made payments to Redeemers, it was giving consideration for the (separate) services that Redeemers were providing to MR outlined at [130] and not third party consideration for the supply of a hotel room to a Member.

133. MR did not make any "fall back" argument to the effect that, even if part of the payments that it made to Redeemers was third party consideration for a supply of hotel rooms to Members, there was still a part of those payments that was consideration for a separate supply of services to MR. Mr Pleming formally reserved his position on the question of apportionment. We have not made any determination on issues of apportionment because we do not consider that any such determination is necessary. The conclusion that we have reached at [132] is that the consideration that MR paid to Redeemers was, in its entirety, consideration given for a supply of services to MR. No part of it was third party consideration for a supply of hotel rooms to Members.

Conclusion on Issue 1 in relation to Whitbread's appeals

134. From Whitbread's perspective, Issue 1 is concerned with output tax, not input tax. However, the essence of the question is the same as that arising in MR's appeals. We consider that considerations of fiscal neutrality mean that the same approach should be adopted to the determination of Whitbread's liability to account for output tax as is applied to the determination of MR's entitlement to repayment of VAT under s39 of VATA 1994. We agree with Ms Brown that the decision of the Supreme Court in *Customs and Excise Commissioners v Plantiflor Ltd* [2002] STC 1132 demonstrates principles similar to those set out in *Redrow* being applied in the context of output tax, rather than input tax.

135. We do not consider that there is any material difference between the facts relevant to Whitbread's appeals and those relevant to MR's appeals. We therefore conclude Issue 1 in Whitbread's favour as well and conclude that, at times relevant to its appeals, it was supplying services to MR when it permitted a Member to use a room provided as a reward stay without payment. The consideration for that supply was the amount paid to Whitbread as outlined at [90] to [93].

136. We do not consider that the minor differences in the T&Cs referred to at [70] to [75] alter that conclusion. In particular, while MR had no specific contractual power to cancel a rewards reservation if the Member had insufficient points, that does not suggest that, when a Member made a rewards booking, the agreement between Whitbread and the Member was that the Member would give consideration for the room by either paying for the room itself or procuring that MR would pay for it. The reason for the absence of this contractual right in Whitbread's appeals was simply that it was not necessary as a Member making a rewards booking had to order a (paper) Certificate at the time of booking. If the Member had insufficient points this would

come to light during the booking process itself and a rewards reservation would not be made. MR only needed the power to cancel rewards reservations in the later period relevant to MR's appeals because, since the Certificate was provided electronically (rather than being sent by post 4 weeks after the reservation was made), MR could countenance taking bookings for reward stays even when the Member did not have sufficient points at the time of booking. Having opened that possibility to Members, MR then needed a "long-stop date" by which the Member had to have sufficient points.

137. Nor, for reasons that we have set out at [95] and [96] above, do we consider that procedures at the front desk of a hotel during the periods relevant to Whitbread's appeals meant that a Member had an obligation to pay cash for a hotel room supplied as part of a Rewards Redemption with the Member agreeing either to pay or procure payment of that amount by MR. It follows that our conclusion on the question of "third party consideration", and our reasons for reaching that conclusion are as set out in the context of MR's appeals.

138. In her submissions, Ms Brown adopted the submissions that Ms Shaw made on Issue 1 and supplemented them with some additional observations. We mean no discourtesy to Ms Brown in not setting out those additional observations in any great detail. However, since we have broadly accepted Ms Shaw's submissions in relation to Issue 1, and have concluded that the factual background makes those submissions equally applicable to Whitbread's appeals, we do not wish to lengthen an already long decision by considering whether there are any additional reasons that could support our conclusions.

HMRC's counter-arguments on Issue 1 and our reasons for rejecting them

Third party consideration

139. Mr Pleming took as his starting point the supply of hotel rewards to Members. He noted that the possibility of a Redeemer receiving any payment from MR was conditional on the supply by the Redeemer of a loyalty reward to the Member. Therefore, he argued that there was a direct link between the Redeemer's receipt of a payment from MR and the provision of a hotel room to a Member. Having submitted, taking into account the decision of the CJEU in *Kuwait Petroleum (GB) Limited v Customs & Excise Commissioners* [1999] STC 48, that Members could not be said to be giving consideration for the provision of the hotel room by buying goods and services that entitled them to be credited with points (since those goods and services cost the same whether points were issued or not), he submitted that the entirety of the payments that MR made were third party consideration for the supply of hotel rooms to Members.

140. Another aspect of the argument referred to at [139] was a submission that the reality of the situation was that the Member gave consideration for a rewards room at a hotel by tendering the Certificate in circumstances where the Redeemer could use that Certificate in order to obtain payment from MR. That, Mr Pleming argued, was a

further reason why payments that MR made in relation to that Certificate should be treated as third party consideration for the supply of the hotel room to the Member.

141. Mr Pleming amplified his submissions by reference to *Airtours*, noting the central importance of economic reality and an evaluation of the contractual matrix underpinning the arrangements. He argued that the economic reality was entirely consistent with the analysis that the Program was simply an arrangement under which MR agreed to pay for the supply of hotel accommodation by Redeemers to Members and that MR and Whitbread had not pointed to a contractual provision that established that Redeemers were supplying services to MR. He argued that this conclusion was borne out by Clause 1.1 of the Participation Agreement which referred to Members being provided with "discounted room nights" which was a reference to an arrangement under which MR would pay an amount as consideration for the provision of the room which was less than the market rate for that room.

142. The first point to note is that Mr Pleming's analysis took as its starting point the supply of the reward stay by the Redeemer to the Member. He then labelled amounts that MR paid to Redeemers as third party consideration for that supply. We consider he has taken the wrong starting point since, as noted at [126], it is necessary to approach the question from MR's perspective. Mr Pleming's approach, therefore, does not adequately take into account the benefits that MR obtained by making payments to Redeemers. In consequence, his approach ignores the crucial fact that, in this appeal, just like *LMUK SC* and *Redrow,* there were two relevant supplies, the first consisting of a supply of a hotel room by a Redeemer to a Member and the second consisting of a supply by a Redeemer to MR consisting of an agreement to provide the hotel room to a Member without requiring payment by the Member.

143. Mr Pleming's submissions on the question of third party consideration were powerful. However, in essence they followed the approach that the CJEU adopted in *LMUK CJEU*. As we have explained, we do not consider that *LMUK CJEU* is the relevant binding authority on third party consideration. We considered Mr Pleming's submissions to be at odds with the approach set out in *LMUK SC* which is binding on us and have already explained why, applying that authority, MR was not giving third party consideration for the supply of hotel rooms to Members. We do not consider that conclusion is affected by the reference in the Participation Agreement to "discounted room nights". First, as we have noted, the Participation Agreement does not set out any contractual understanding with Redeemers. Rather, it sets out the terms of a contract with GHL (or IHLC and MRC in the context of Whitbread's appeals). In any event, if the Participation Agreement truly was seeking to suggest that MR would pay a "discounted" rate for the provision of rooms to Members, it could be expected that, in the interests of contractual certainty, the Participation Agreement would explain precisely how that discount would be calculated. Moreover, the Participation Agreement refers in a number of places to "complimentary" rooms being offered to Members (and indeed this term appears in the definition of "Program Awards" outlined at [42]). We therefore consider that Mr Pleming was attaching too much weight to the word "discounted". The understanding set out in the Participation Agreement was that Members would be provided with rooms at no cost to them.

144. Nor did we consider that *Airtours*, on which Mr Pleming relied, altered the position. *Airtours* was concerned with a situation where there was a single relevant supply (that of the PwC report) and the question was whether that supply was made to Airtours or to the financial institutions. As we have noted, the situation in this appeal (and in *LMUK SC*) was different as there were two relevant supplies. We do not agree with Mr Pleming that MR has failed to demonstrate a contractual entitlement to receive the relevant supply. The relevant supply from MR's perspective is the service that Redeemers provide of agreeing to provide Members with hotel rooms on terms that the Members do not have to pay cash for them. Although the contractual matrix (and the use of intermediary companies such as GHL, IHLC and MRC) does complicate matters, we consider that MR does have the relevant contractual entitlement. Put another way, and applying the language of *Tolsma* and *Town and County Factors*, there is a reciprocity between the payments made to Redeemers and the service Redeemers provide MR when they make reward rooms available to Members without charging Members for them such that, even though there is no direct contractual relationship between Redeemers and MR, the payments made to Redeemers are consideration for that service.

145. Finally, Mr Pleming relied on the CJEU's judgment in *Customs & Excise Commissioners v First Choice Holidays plc* [2003] STC 934. We regard that as being, primarily, a decision on the effect of the Tour Operators Margin Scheme and as deciding that, although Article 26(2) of the Sixth VAT Directive referred to "the total amount to be paid by the traveller", this was not to be read unduly literally and should include all consideration that the tour operator receives whether it is paid by the traveller or not (see [26] to [28] of the CJEU's decision). Understood in that context, the CJEU's conclusion that the amount that the tour operator actually invoiced to the travel agent could be regarded as "the amount to be paid by the traveller" was not surprising and has not altered our view on the question of third party consideration.

Distinguishing LMUK SC

146. The crucial issue in relation to Issue 1 is whether MR received a separate supply of services from Redeemers connected with Redeemers' provision of reward stays to Members. In *LMUK SC*, the Supreme Court found that LMUK did receive a separate supply of services in connection with a similar loyalty scheme. Mr Pleming argued that the following crucial factors that led the Supreme Court to that conclusion were not present in this appeal:

(1) Nectar "points'" (in the *LMUK SC* appeal) represented collectors' contractual rights to receive goods and services at no cost or at a reduced cost.

(2) Sponsors paid LMUK for granting collectors those contractual rights to obtain goods and services in exchange for their points.

(3) The points were supplied by Nectar to collectors pursuant to a taxable supply by LMUK.

147. We largely agree with Mr Pleming that reference to the above factors is made in the judgment of Lord Reed in *LMUK SC*. (We do not agree, however, in relation to [146(3)] that Lord Reed made reference to points being supplied to collectors pursuant to a taxable supply that was made to collectors and will deal with that point in the section headed "Sticking tax" below.) However, as we have noted, the references that Lord Reed made to these issues should be taken as explaining the points that he made on "fiscal neutrality". We do not consider, therefore, that Lord Reed intended these features to set out a comprehensive list of factors that need to be present in order for a taxpayer in a similar position to LMUK to be entitled to input tax credit. Therefore, we consider that even if one or more of the above factors was not present (or perhaps even if all of them were not present), LMUK would still have been entitled to succeed in its appeal given that all three judges in the majority applied *Redrow* reasoning in their judgments and, while the *Redrow* decision does need to be approached through the prism of economic reality, it does not itself expressly invite an examination of factors similar to those set out at [146].

148. In any event, we do not agree with Mr Pleming that the factors set out at [146] are not present.

149. As we have noted at [35] to [67] MR did give Members a contractual right to earn points and to use points to obtain redemption rewards. In any event, as we have noted, the T&Cs indicated to Members that they were "paying" for reward stays with points. Even if that right fell short of an absolute contractual right, we consider that MR still had an overwhelming commercial incentive to ensure that Members were able to use their points to obtain reward stays. In practice it paid Redeemers for their agreement to provide hotel rooms to Members without charging Members for them and we have already concluded that there is the requisite reciprocity between payments made to Redeemers and the service that Redeemers were performing. Therefore, we have not accepted Mr Pleming's submission that the absence of a "contractual right to goods and services" is a relevant distinguishing feature since, whatever the precise characterisation of MR's obligation to Members, MR was still paying Redeemers for the service of agreeing to provide rooms to Members at no cost to those Members.

150. Mr Pleming also argued that the fact that the Program was "self-funding" and not designed to make a profit for MR was an important distinguishing factor. In circumstances where LMUK was seeking to make a profit from its operations, he argued it was understandable that it was receiving services from Redeemers who agreed to provide goods and services in exchange for points. By contrast, since MR was not seeking to make a profit, it was not correct to treat it as receiving services from Redeemers particularly given that the aim of the Program was to ensure that members of the public buy hotel accommodation from participants in the Program rather than other providers.

151. We have not accepted that submission first because we regard Lord Reed's comments as to LMUK's profit motive in *LMUK SC* as explaining his reasoning rather than as setting out a necessary condition for that reasoning to apply. In any event, whether MR made a profit or not, its economic activity still required it to ensure that Redeemers would agree to provide rewards. Therefore, when it paid

Redeemers to ensure that Redeemers would provide hotel rooms to Members without payment, it was still obtaining a service that was necessary to the conduct of its business. That was the case whether MR made no profit in respect of its management of the Program or made $1 of profit. Moreover, our conclusion is not affected by the fact that a clear purpose of the Program was to benefit the Marriott brand, and the businesses carried on by participating hotels.

152. Mr Pleming also argued that that six factors that Lord Reed set out at [48] of the reported decision (referred to at [109] above) were crucial to the Supreme Court's acceptance of the taxpayer's argument based on *Redrow*. Since those factors were not present in this appeal, he submitted that represented a further reason why *LMUK SC* should be distinguished.

153. As we have said, we do not agree with Mr Pleming that these six factors represent a checklist. They appear in a section of Lord Reed's judgment that explains aspects of the case that he did not consider the CJEU adequately addressed in *LMUK CJEU* and should not, therefore, be read as essential preconditions for the *Redrow* approach adopted in *LMUK SC*. More fundamentally, for reasons that we set out elsewhere in this decision, we consider that Lord Reed's six factors are present, or at very least largely present, in the context of this appeal.

"Sticking tax"

154. Mr Pleming submitted that the analysis of Issue 1 that we have adopted was incorrect as it led to the conclusion that there was final consumption (of a hotel room by a Member) and yet that final consumption did not result in HMRC collecting output VAT that was not matched by a corresponding input tax credit ("sticking tax").

155. We agree with the general point that final consumption of goods or services should lead to "sticking tax" in the manner that Mr Pleming submitted. However, the amount of "sticking tax" that arises must depend on the amount of consideration that the final consumer gives for the supply. Since we have concluded that, when a Member obtains a Redemption Reward the Member gives no cash consideration for the resulting supply of a hotel room, it does not seem to us incongruous that there is no "sticking tax" in relation to that supply. At the same time as supplying a hotel room to the Member, the Redeemer made a separate supply to MR. Since MR used that supply in the course of a business that would (if it were conducted in the UK) involve the making of taxable supplies, it does not seem to us incongruous that there is no "sticking tax" on that separate supply.

156. More fundamentally, we did not consider that the authorities provide that the absence of "sticking tax" is an impediment to us deciding Issue 1 in favour of MR. In *Redrow*, there was no "sticking tax" even though there was final consumption of the services of an estate agent by private individuals selling their houses and yet the House of Lords did not give this as a reason for denying Redrow input tax credit.

157. Mr Pleming submitted that a close analysis of Lord Reed's judgment in *LMUK SC* demonstrated the importance of "sticking tax" to his reasoning. He argued that it was

crucial to Lord Reed's reasoning that the provision of points by LMUK to collectors involved LMUK making a taxable supply of points (see for example paragraphs [10], [31] and [77] of his judgment). In Mr Pleming's submission, when Lord Reed expressed his view at [84] and [85] of his judgment that his conclusion (that redeemers made a supply of services to LMUK) was entirely in accordance with the scheme of the VAT legislation, he was implicitly stating that his conclusion only held good given that LMUK was, when it issued points, making a taxable supply of points to individual collectors of those points. He submitted that, when MR issued points to Members there was no taxable supply of points to Members and, accordingly, MR could not take the benefit of the Supreme Court's judgment in *LMUK SC*.

158. We agree with Mr Pleming that, as we have found at [69], when MR issued points to Members, there was no taxable supply of points to Members. It does seem to us that, in paragraphs [84] and [85] of his judgment, Lord Reed was perhaps assuming that the issue of points by LMUK amounted to a taxable supply to collectors which gave rise to "sticking tax". In particular, in paragraph [85], Lord Reed assumes that the tax authorities are "receiving VAT on the amount received by LMUK for supplying the right to receive those goods and services". In the context of the paragraph as a whole, it is possible that Lord Reed did not have in mind that sponsors could obtain an input tax credit for that VAT. However, we do not agree that this is the only way that that paragraphs [84] and [85] of Lord Reed's judgment can be read. It is possible that he was just making a point about "fiscal neutrality" for LMUK alone.

159. In conclusion, we have not accepted Mr Pleming's argument on "sticking tax" for the following reasons:

(1) Nowhere in Lord Reed's judgment does he state expressly that his conclusions hold good only on the basis that there was a taxable supply of points to collectors. In those passages of his judgment in which he refers to the issue of points, he is silent as to whether that amounted to a supply to collectors or to sponsors.

(2) Paragraphs [84] and [85] appear after he has reached his conclusion that, on redemption, LMUK received a supply of services from redeemers on which it could claim input tax credit. Those paragraphs explain why Lord Reed considered his conclusion consistent with the scheme of VAT as a whole but do not form part of the conclusion itself.

(3) Whether or not Lord Reed thought that LMUK made taxable supplies of points to collectors, it is clear from paragraph 35 of the VAT Tribunal's determination of the appeal that LMUK treated itself as supplying the relevant services to sponsors and indeed sponsors claimed input tax credit in respect of those payments. Moreover, the relevant paragraphs of the VAT Tribunal's decision were set out verbatim in Lord Justice Chadwick's judgment in the Court of Appeal.

(4) Mr Pleming's submission appears to us to be inconsistent with the actual decision in *Redrow* as noted at [156].

PART 4 – DISCUSSION OF ISSUE 2

160. Following our analysis of Issue 1, we have concluded that Redeemers (including Whitbread) provided services to MR consisting of their agreement to provide hotel rooms to Members as reward stays without requiring Members to pay cash consideration for those hotel rooms. Issue 2 involves the classification of those services for VAT purposes.

161. The parties were agreed that, although the relevant "place of supply" rules had changed between the periods relevant to Whitbread's appeals and those relevant to MR's appeals, the classification of Redeemers' services could not have changed. Redeemers could not, for example, be providing services relating to land in one period but advertising services in another. Therefore, they agreed that there was only one correct classification of those services which would apply both to the period of Whitbread's appeals and that relevant to MR's appeals. In this section, we will consider the various competing classifications that the parties put forward.

Whether the services were services relating to land (as MR argues)

162. Ms Shaw argued that the services that MR received were services relating to land that fell within paragraph 1 of Schedule 4A of VATA 1994. At first sight, this does not appear to be a very promising argument. MR is clearly not itself receiving a supply of hotel accommodation so paragraph 1(2)(d) of Schedule 4A does not obviously appear to be on point. Moreover, the services that MR receives are very different from those of the estate agents, auctioneers, surveyors and other professionals referred to in paragraph 1(2)(f) of Schedule 4A. However, we agree with Ms Shaw that paragraph 1 of Schedule 4A must be interpreted so as to give effect to Article 47 of the Principal VAT Directive which it is intended to implement.

163. Article 47 is shorter than paragraph 1 of Schedule 4A. We have concluded from *Minister Finansów v RR Donnelley Global Turnkey Solutions Poland sp zoo* (Case C-155/12) [2014] STC 131 that the fact that the services that MR received are not specifically mentioned in Article 47 does not prevent them from being "services connected with immovable property" for the purposes of Article 47.

164. We agree with Mr Pleming that Article 47 gives "the provision of accommodation in the hotel sector" as an example of a "service connected with immovable property". Article 47 does not have the effect that any supply that is "connected" with the provision of accommodation in the hotel sector is necessarily a "service connected with immovable property".

165. Ms Brown and Mr Pleming submitted that the fact that MR did not itself obtain any right to use the Redeemers' hotels necessarily meant that the Redeemers' supplies could not be of "services connected with immovable property". They derived support for that conclusion from paragraph [39] of the CJEU's decision in *Donnelley* as follows:

> 39. Consequently, the answer to the question referred is that art 47 of the VAT Directive must be interpreted as meaning that the supply of a

> complex storage service, comprising admission of goods to a warehouse, placing them on the appropriate storage shelves, storing them, packaging them, issuing them, unloading and loading them, comes within the scope of that article only if the storage constitutes the principal service of a single transaction and only if the recipients of that service are given a right to use all or part of expressly specific immovable property.

166. We have not accepted those submissions. Rather, we agree with Ms Shaw that, in this paragraph, the CJEU was explaining how the test should be applied to the particular storage services with which *Donnelley* was concerned (having noted that these were questions for the referring court to decide). We do not consider that the CJEU was deciding that a "right to use all or part of expressly specific immovable property" was an essential component of every "service connected with immovable property". Such a conclusion would be at odds with the wording of Article 47 of the Directive itself which envisages that the services of experts and estate agents fall within Article 47. Such services would not generally involve the right to use real estate. On the contrary, such services could be received by someone who does not own real estate (for example an estate agent could be instructed to advise on the value of a property that a person is considering purchasing).

167. Moreover, at [34] and [35] of the CJEU's decision, the CJEU had already formulated the relevant test as follows:

> 34. Consequently, as the Advocate General noted at point 35 of her opinion, in order for a supply of services to come within the scope of art 47 of the VAT Directive, that supply must be connected to expressly specific immovable property.
>
> 35. However, in so far as a large number of services are connected in one way or another with immovable property, it is, in addition, necessary that the supply of services should relate to the immovable property itself. That is the case, inter alia, where expressly specific immovable property must be considered to be a constituent element of a supply of services, in that it constitutes a central and essential element thereof (see, to that effect, *Heger*, para 25).

Having formulated the test in that way, we do not consider that the CJEU were intending to introduce a completely new requirement in paragraph 39. Paragraph 39 which begins with the word "consequently", and paragraph 37, which begins with "It follows that…" are an application of the test to a specific situation rather than constituents of the test.

168. We accept that the Advocate General said something slightly different in paragraph [40] of her Opinion as follows:

> 40. Against this background, a sufficiently direct connection between the service and immovable property for the application of art 47 of the VAT Directive is to be found if the service has the use of, work on, or assessment of specific immovable property as its subject-matter or is explicitly listed in the provision.

If the CJEU had adopted that statement in its decision, we would in all likelihood have agreed with Mr Pleming's and Ms Brown's submissions to the effect that the services supplied by Redeemers were simply not capable of falling within Article 47. However, the CJEU did not adopt the Advocate General's formulation. While they referred with approval to paragraph 42 and paragraph 43 of the Advocate General's opinion (at paragraph [38] of their judgment), no mention was made of paragraph 40. We do not, therefore, consider that the CJEU should be taken to have adopted these statements in its decision.

169. Therefore, we do not consider that the fact MR is not conferred a right to use specific immovable property is fatal to MR's argument. However, there remains the question of whether the services that MR receive fall within paragraph 1 of Schedule 4A construed so as to give effect to Article 47 (the meaning of which is in turn to be determined in the light of the *Donnelley* decision). We have approached that by asking the following two questions which are derived from the *Donnelley* decision:

> (1) Are the services that MR receives connected with "expressly specific immovable property"?
>
> (2) Is that "expressly specific" immovable property a central and essential element of the services that MR receives?

170. The services that Redeemers provide to MR consisted of agreeing to make hotel rooms available to Members without charging Members cash for the use of those rooms. While those services clearly had a connection with hotel rooms generically, they did not relate to specific hotel rooms. Moreover, it did not seem to us that those services needed even to relate to a specific hotel as, while we had evidence that, in the period of Whitbread's appeals, each franchisee entered into a separate Franchise Agreement for each hotel that it owned, we were not satisfied on the evidence in front of us that this was necessarily true in the period of MR's appeals or was necessarily true of managed hotels as well as franchised hotels. If a particular Redeemer owned two or more hotels the services that it provided to MR consisted of providing rooms at either or both of those hotels to Members. We do not consider that such services relate to "expressly specific immovable property".

171. Nor do we consider that "expressly specific immovable property" was a "central and essential element" of the service supplied to MR. As we have concluded in our consideration of Issue 1, what MR required from Redeemers was a contractual assurance that Redeemers would provide hotel rooms to Members without requiring those Members to pay cash for the rooms. MR needed this so that MR could discharge its own obligations to Members under the Program. MR did not care whether a Redeemer chose to locate its Marriott hotel in London or in Oxford so long as, if a Member requested a reward redemption at the Redeemer's hotel, the Redeemer would provide the room without charging the Member cash for it.

172. Therefore, what Redeemers provided to MR was the generic service of agreeing to provide reward stays generally. Of course, when a Member requested a rewards redemption, that would be at a specific hotel (though we were not satisfied that it would relate to a specific room at a hotel). However, while Members were interested

in their reward stay being at a specific hotel, what MR was concerned with was ensuring that reward stays generally would be honoured. That conclusion is emphasised by the wording of the International Services Agreement and International Franchise Agreement by which Redeemers were obliged to provide reward stays. Both of those agreements used extremely general terms to describe Redeemers' obligations. In the International Services Agreement, the obligation was to participate in "loyalty, recognition, affinity and other programs designed to promote stays at, or usage of the Hotel" (see [50] above). In the International Franchise Agreement, the obligation was essentially to participate in the "frequent traveler appreciation program for System Hotels… including 'Marriott Rewards'". The contractual documentation did not even spell out that Redeemers were required to provide free hotel rooms to Members. Still less did those contracts make "expressly specific immovable property" the subject of the contract.

173. Ms Shaw referred us to *RCI Europe v HMRC* (Case C-37/08) [2009] STC 2407. We do not consider that it alters our conclusions above. Indeed, we note that the service at issue in that appeal related to timeshare usage rights in holiday accommodation that were owned by the recipients of the service. In those circumstances, the difficulties relating to expressly specific immovable property referred to above did not arise.

174. Finally, in support of her challenge to the characterisation of the supplies as being connected with immovable property, Ms Brown referred us to Explanatory Notes issued by the European Commission dealing with the place of supply rules on services connected with immovable property that come into force in 2017. For the reasons set out above, we have concluded that the services Redeemers provided were not "connected with immovable property" and so did not fall within Article 47 of the Principal VAT Directive (or paragraph 1 of Schedule 4A of VATA 1994). We have reached that conclusion without needing to refer to these Explanatory Notes. We will not, therefore, decide whether they are a permissible aid to construction.

Whether supplies made by Redeemers were of "advertising services" (as Whitbread argues)

175. The term "advertising services" is not specifically defined either in VATA 1994 or in in the Sixth VAT Directive. In *EC Commission v French Republic* (Case C-68/92), the CJEU gave guidance on the meaning of the concept. The Court's conclusion set out at [16] of their judgment was as follows:

> The concept of advertising necessarily entails the dissemination of a message intended to inform consumers of the existence and the qualities of a product or service, with a view to increasing sales. Although that message is usually spread, by means of spoken or printed words and/or pictures, by the press, radio and/or television, this can also be done by the partial or exclusive use of other means.

176. At paragraph [15], the Court noted that one of the reasons why "advertising services" were, at the time, to be treated as supplied where the recipient belonged was because the recipient was presumed to be using advertising services for the purposes

of making supplies of goods and services in the territory in which it belonged. Therefore, it was desirable that the advertising services should be taxed by the same jurisdiction as was taxing the underlying supplies of goods and services. This purpose should be borne in mind when considering whether particular services are "advertising services" or not.

177. At paragraph [16], the Court noted that in principle there was nothing to prevent "advertising services" being supplied by a person who does not carry on business as an advertising agency (although stated that this was an "unlikely eventuality"). At [18], the Court observed that a promotional activity such as the supply of services at reduced prices could amount to an advertising service provided that it:

> involves the dissemination of a message intended to inform the public of the existence and the qualities of the product or service which is the subject matter of the activity with a view to increasing the sales of that product or service.

178. At paragraph [19], the Court determined that the same principles applied to any activity which "forms an inseparable part of an advertising campaign and which thereby contributes to conveying the advertising message".

179. The essence of Ms Brown's argument was that the Program as a whole involved advertising in the sense set out above: it informed Members of the global reach of the Marriott network and disseminated the message that loyalty to Marriott brands would be rewarded. It also had the ability to inform consumers of the existence and quality of Marriott hotels as Members could use points accumulated by renting cars with Hertz to experience Marriott hotels for the first time. More generally, she submitted that the fact that Members would in many cases be existing Marriott customers did not prevent the services that Redeemers provided from being advertising services: existing customers could be given a message about the existence or qualities of a product just as much as new customers. Since the Program as a whole involved "advertising services", and the redemption of rewards was an integral part of the Program, it followed in her submission that the redemption of rewards involved the provision of an advertising service.

180. In Ms Brown's submission, it was not relevant that in legal form Redeemers were honouring their contractual obligations to provide Members with reward stays at their hotels. Nor was it relevant that MR used the supplies that it received from Redeemers in its own business. Rather, she said that the question should be answered by considering objectively the nature of the supplies that Redeemers made. She also submitted that the services were consumed by MR in the US which, given the comments of the CJEU referred to at [176], was consistent with those services being "advertising services".

181. A difficulty we have with Ms Brown's submissions is that they involved starting with an examination of the Program as a whole. We consider that *Commission v French Republic* requires the analysis to start with the actual services being provided (whose potential classification as advertising services is at issue). Those services consist of Redeemers providing hotel rooms to Members without requiring Members

to pay for them in cash. Having identified the services in that way, it is necessary to consider whether they involve the dissemination of a message intended to inform the public of the existence and qualities of the "product or service which is the subject of the activity". The "subject" of a Redeemer's agreement to provide rewards rooms is the goods and services offered by the relevant participating hotel. We consider, therefore, that the relevant question is whether a message regarding the existence and qualities of the redeeming hotel is being disseminated to the public. The test should not focus on the question of whether a message is being disseminated in relation to the Program as a whole.

182. A further difficulty is that *Commission v French Republic* envisages that the purpose of the message must be to inform the public of the existence and the qualities of the relevant goods or services. A Member obtaining a reward stay at a particular participating hotel cannot have been unaware of the existence of that hotel not least since the Member would have made a positive choice to obtain the reward stay at that very hotel.

183. We accept that it is entirely possible that a Member, having chosen to make a Rewards Redemption at a particular Marriott hotel owned by Whitbread, might be so impressed by the qualities of what they obtained, that they made further cash bookings at that, or other, hotels owned by Whitbread. However, we were not shown any evidence as to the extent that this happened in practice. Nor, on the evidence before us were we satisfied that the prospect of obtaining such repeat bookings was the purpose behind Whitbread agreeing to make hotel rooms available to Members without charging Members for them. Rather, the evidence before us suggested that the purpose Whitbread had in making reward rooms available was simply that it was contractually obliged to do so. One of the costs of obtaining a Marriott franchise was Whitbread's agreement to participate in the Program. No doubt Whitbread expected that, taking into account all the costs of the franchise, it would still make an acceptable profit for itself. It may well be that Whitbread hoped that providing reward rooms under the Program would drive repeat (cash) business at the hotels concerned or at Whitbread hotels generally. However, we are not satisfied on the evidence before us that Whitbread agreed to make rewards rooms available to Members without charge in order to inform the Member of the existence or qualities of its goods or services.

184. Finally, if the issue is looked at from the perspective of MR, it is clear that MR is receiving from Redeemers services that are crucial to the operation (not the promotion) of MR's business. We agree with Ms Brown that it is possible for a recipient of advertising services to incorporate those services into a separate supply that it is making. However, from MR's perspective it is not receiving "advertising services". It is receiving the "raw material" (Redeemers' agreements to provide rewards to Members without payment in cash) which is central to its business. The services from Redeemers therefore enable MR to perform obligations associated with its business, not to promote or advertise it.

185. Applying the test in *EC Commission v French Republic*, therefore, whether the matter is approached from the standpoint of Redeemers (as providers of the services)

or of MR (as recipient) we are not satisfied that the services in question were of "advertising services".

Conclusion

186. Marriott and Whitbread have both succeeded on Issue 1. However, neither of them has succeeded on Issue 2. In those circumstances, both appeals are dismissed.

187. 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 42 days after this decision is sent to that party (a shorter period of time than would normally apply as we have previously released a copy of this decision in draft to the parties and so they are already aware of its contents and conclusions). 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 27 JANUARY 2017

APPENDIX ONE – DECISIONS UNDER APPEAL

Decisions appealed by MR

Date of decision	Nature of decision	Period to which decision relates	Amount
9 July 2012	Rejection of claim for VAT repayment	July 2010 to June 2011	£1,457,352
5 June 2013 and 23 January 2014	Rejection of claim for VAT repayment	July 2011 to June 2012	£2,115,377
19 December 2013	Rejection of claim for VAT repayment	July 2012 to June 2013	£1,709,081.88
6 August 2014	Rejection of claim for VAT repayment	July 2012 to June 2013	£653,512.58
24 October 2014	Rejection of claim for VAT repayment	July 2013 to March 2014	£131,503.78
30 March 2015	Rejection of claim for VAT repayment	July 2013 to June 2014	£1,365,233.90

Decisions appealed by Whitbread

Date of decision	Nature of decision	Period to which decision relates	Amount
12 March 2004	Rejection of claim under s80 of VATA 1994	VAT periods 12/1999 to 12/2002	£1,502,122.40
24 February 2015	Rejection of claim under s80 of VATA 1994	5 March 2003 to 5 May 2005	£969,769.34