Value added tax – construction of written agreement between the purchaser of a holiday lodge and the taxable person constructing it – whether the agreement imposed an obligation on a third party to grant a lease of the plot of land on which the lodge was constructed – held, upholding the decision of the First-tier Tribunal, that it did – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER **Appeal No: UT/2016/0019**

BETWEEN:

FAIRWAY LAKES LIMITED **Appellant**
- and –

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

Tribunal: **Judge Greg Sinfield**
Judge John Walters QC

Sitting in public in London on 3 June 2016

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

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

Introduction

1. This is an appeal from a decision ("the FtT's Decision") of the First-tier Tribunal (Tax) (Tribunal Judge John Brooks and John Coles) ("the FtT") released on 9 November 2015 [2015] UKFTT 0605 (TC). By the FtT's Decision, the FtT dismissed an appeal by Fairway Lakes Limited ("Fairway") against a decision of the Respondent Commissioners ("HMRC") that when Fairway enters into contractual relations with a customer in the terms of a particular agreement ("the Agreement"), which we consider below, in connection with the construction of a lodge and its sale to the customer, it makes to the customer a composite supply of construction services *and* the procurement that the landowners will grant to the customer a lease of the plot of land on which the lodge is to be constructed. Fairway, which contends that the Agreement provides for supplies of construction services only, appeals to this Tribunal by permission of Upper Tribunal Judge Roger Berner dated 16 February 2016.

2. It is common ground between the parties (and, in our judgment, correct) that the correct construction of the Agreement is determinative of the issue of what was provided to a customer by Fairway in consideration of the customer's payment(s) to Fairway. Further, an examination of what was provided to a customer by Fairway (from the view point of the customer) under the Agreement, determines whether or not, as a matter of VAT law, the consideration for the customer's payment went beyond the supply of the construction of a dwelling for the purposes of item 2, Group 5, Schedule 8, Value Added Tax Act 1994 ("VATA").

The facts

3. The background facts were found by the FtT and are recorded in the FtT's Decision at paragraphs 5 to 32. It is not necessary for us to reproduce those paragraphs in their entirety, but we set out the following findings of fact to show the context in which the appeal is made.

4. Sunningdale Investment Limited ("SIL") owns the freehold of 11 plots of land at Fairway Lakes Village in Norfolk, on which holiday lodges are sited (or will be sited). The directors and shareholders of SIL are Mr Laurence Gage, his sister, Mrs Judith Collen, and their mother, Mrs Doris Gage.

5. A partnership between Mr Gage and Mrs Collen ("the Partnership") owns the freehold of a further 31 plots of land at Fairway Lakes Village on which holiday lodges are (or will be) sited. The appeal concerns lodges built on plots owned either by SIL or the Partnership. Like the FtT, we refer to SIL or the Partnership, without making any distinction between them, as 'the landowner'.

6. Fairway is responsible for the construction of the lodges and infrastructure at Fairway Lake Village. It owns the freehold of plots 2, 3 and 5 and has granted leases of these plots. It is also (as "the Management Company") a party to leases of plots granted by each of SIL and the Partnership. Mr Gage and Mrs Collen are the directors of Fairway, each of them holding 50% of the shares in Fairway.

7. The freehold of the Fairway Lakes Village development site was purchased by SIL in the spring of 1996. Although the FtT recorded at paragraph 8 of the FtT's Decision that a 125 year lease in respect of each designated plot was registered at the Land Registry, we were told that there is no overarching lease and that a lease of a plot is granted to a customer by the landowner in the context of the customer's acquisition of a holiday lodge.

8. In 1997, planning permission was granted to Caldecott Golf and Country Club (the trading name of SIL) permitting the construction of holiday lodges - that is, lodges which may only be used for holiday accommodation and not as the sole or main residence of any individual or family.

9. In 2005, at the commencement of the development, two show lodges were erected on the site, one of which, on plot 2 (of which the freehold is owned by Fairway) was leased to KDM International Limited ("KDM"), the UK distributor of the Scandinavian manufacturer (Svenskhomes) of the kits used for the erection of the lodges.

10. The lease of plot 2 between Fairway and KDM was executed on 24 January 2006 and was for a term of 125 years from 1 June 2005 at a premium of £120,000. Fairway and KDM also entered into an oral agreement that KDM would supply further kits to the same specification as the show lodges.

11. The construction of a lodge takes about 4 months from the time when the kit is received from the manufacturer. The kit is erected by a combination of 3 carpenters employed by Fairway, subcontracted building/erection services provided by SIL and outsourced subcontractors as needed. Fairway has access to the land in order to undertake the construction of lodges by virtue of an oral agreement with the landowner.

12. Howards Estate Agents were engaged by the landowners (SIL and the Partnership) to market the lodges, which were held out in the marketing material for sale at a single price with a specific price shown for each lodge.

13. Fairway subsequently granted leases of each of plots 2, 3 and 5 (of which it owned the freehold) to customers. The arrangements concerning those plots were not the subject of the appeal to the FtT. The appeal to the FtT (and to this Tribunal) concerns new arrangements ("the New Arrangements") which were adopted in relation to other plots.

14. Under the New Arrangements, the landowner grants a lease to a customer, who also enters into the Agreement, to which we made reference in paragraph 1 above. The Agreement (in relation to a particular plot) is made between Fairway and the customer.

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

16. The material terms and conditions of the Agreement provide as follows:

1.1 'The Basic Cost of the Lodge' means [£…]
'The Reservation Deposit' means [£…]

1.2 'The Basic Cost of the Lodge' (together with VAT (if any) chargeable thereon) shall be paid by the Buyer at the following stages and in the following amounts

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

2.1 **Particulars and Definitions**

In this Agreement:

'the Plot' means the plot numbered […] on the Fairway Lakes development …

'Completion Date' [specific date] or 10 working days after the date on which the Seller's Solicitors shall give written notice to the Buyer's Solicitors that the Lodge is ready for reinspection.

'the Balance Purchase Monies' means the total of (a)… (b)… (c) the Seller's Legal Costs [a specified amount], (d)…

Less the Reservation Deposit, all stage payments received by the Seller under condition 1.2 and any other monies paid by the Buyer to the Seller on account of the Balance Purchase Monies prior to actual Completion

'the Lease' means a lease of the Plot in favour of the Buyer

'the Lodge' means the Lodge to be erected on the Plot of the type specified in the Schedule

3 **Reservation Deposit**

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

4 **Construction of the Lodge**

The Seller shall build or cause to be built the Lodge on the Plot in a thorough and workmanlike manner ….

5 …

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

The erection and completion of the Lodge shall be carried out by the Seller as quickly as possible …

7 …

8 **Payment of Rent and Service Charge**

8.1 In addition to the Balance of Purchase Monies [*sic*] on completion of the sale of the Lodge the Seller in its capacity as the Management Company shall be entitled to collect from the Buyer and the Buyer shall pay to the Seller: -

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

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

9 **Completion**

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

…

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

10 **General Conditions**

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

…

17. The material Standard Conditions of Sale incorporated into the Agreement by virtue of clause 10.1 are as follows:

4.1 **Proof of Title**

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

…

6.8 **Notice to complete**

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

…

8.2 **New Leases**

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

8.2.2 The conditions apply so that:

'seller' means the proposed landlord,

'buyer' means the proposed tenant,

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

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

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

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

8.2.6 The buyer is to execute the counterpart and deliver it to the seller on completion.

18. The Agreement, which was drafted by Fairway's Solicitors, used the terminology that had been used when Fairway granted leases of each of plots 2, 3 and 5 (of which it owned the freehold) to customers. This was because the Solicitors had decided to modify the old agreement for use in the New Arrangements, rather than start from scratch with a new document.

19. The procedure adopted under the New Arrangements (with which the appeal is concerned) was as follows. Potential customers were shown round the Show Lodge by Howards, the estate agents. If they wanted more information about the lodges to take the matter further, Howards contacted Mr Gage, who attended the site to meet the prospective customers. He explained to them that it was first necessary to decide on the style and specification of the lodge to be acquired. Once this had been done, Mr Gage, in his role as director of Fairway, explained that once a price had been agreed for the construction of the lodge (by Fairway), the customer would have to secure a lease from the Partnership and enter into what he described as a building agreement (in the terms of the Agreement) with Fairway.

20. After a customer had provided his/her required specification, Mr Gage was able, after a couple of days, to give the customer a quotation to supply the kit and construction services. If a customer wished to proceed with the acquisition of a lodge, he/she paid Mr Gage a £5,000 deposit, which he described as "non-returnable". We take it that this deposit was the Reservation Deposit referred to at paragraph 3 of the Agreement. The FtT found that this deposit was paid to Fairway, not the Partnership. Fairway was responsible for the payment of the estate agents' commission and the solicitors' fees.

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

22. Although the FtT did not comment in detail on the terms of the leases, we had, with the papers before us, copies of the leases granted in the case of most of the lodges. The lease relative to Plot 8, which was granted by the Partnership to a Mr Holliday, was referred to at the hearing and was in terms a lease of "Lodge Number 8, Fairway Lakes", granted for a premium of £9,600. The term of the lease is stated to be the period from 'the Commencement Date', as defined, until and including 31st May 2130. The definition of 'the Commencement Date' is: 'the date on which the construction of the Unit on the Property [i.e. 'the timber house which is intended to be

erected on the Property [the site of Lodge Number 8] shall have been completed to the satisfaction of the building control officer of the local authority so that the Lodge is available for occupation by the Tenant'. The rent payable under the lease is stated to rise over the term of the lease. During the period 'from 1st January 2006 until 31st December 2029' it is stated to be £250 a year. The lease is dated 24 July 2007. The Completion Statement relative to Lodge 8 is dated 25 July 2007. In it, the amounts due to Mr Gage and Mrs Collen (the Partnership) are stated to be the premium of £9,600 plus rent of £109.59. That rent figure is the proportion of the yearly rent of £250 appropriate to the period from the completion statement to the end of 2007.

23. Returning to the material facts found by the FtT, the implementation of the New Arrangements continued with the solicitors for the Partnership and Fairway sending to the customer's solicitors Fairway's part of the Agreement and the original lease to be granted by the Partnership and requesting in return the customer's part of the Agreement and the counterpart lease duly executed. The Agreement relative to Lodge 8 shows 'The Basic Cost of the Lodge' as £155,140 and 'The Reservation Deposit' as £5,000. The Completion Statement relative to Lodge 8 shows 'Balance of Basic Cost of Lodge' payable on completion as £150,140. From this it appears that, notwithstanding the terms of clause 1.2 of the Agreement, there was not in practice necessarily an intermediate stage 2 at which a payment was required. The Reservation Deposit of £5,000 was paid on ordering the lodge and the balance of the 'The Basic Cost of the Lodge' was paid at completion.

24. The FtT records Mr Gage's evidence that "we always insist on the lease being in place" before the Agreement is signed. There was evidence that a prospective customer's solicitor had observed that, under the Agreement, there was no obligation to grant the lease, and that the customer would only be protected if the Agreement contained such an obligation together with the obligation to build the lodge. However, that sale did not proceed because the solicitors for the Partnership and Fairway had insisted that the lease must be completed before execution of the Agreement. The FtT found that, in the case of 11 of the 15 plots sold, the lease was granted and the Agreement was signed on the same day, though there was nothing to indicate which took place first. In the remaining four cases, the lease had been granted after the Agreement had been signed.

25. The FtT did not expressly address the question of whether, under the New Arrangements, the lease was granted and the Agreement was signed when the lodge was ready for occupation by the customer, rather than at an earlier time before construction of the lodge.

26. Mr McGurk, for HMRC, submitted that it was plain that the customer pays the balance of 'The Basic Cost of the Lodge' and the lease premium after the local building control officer has certified that construction of the lodge is complete. At that time the Agreement is signed and at the same time (or sometime thereafter) the lease is dated and the term of the lease commences.

27. Mr Collins, for Fairway, submitted that, on the contrary, the landowners (the Partnership and SIL) granted leases over the plots which entitled the customers (described in his skeleton argument as 'tenants') to build lodges on the plots.

28. The FtT recorded that Mr Gage had explained the procedure adopted under the New Arrangements using the sale of Plot 13 as an example. We had with our papers a copy of Mr Gage's witness statement in which he said, in relation to Plot 13, that 'a lease and building agreement were exchanged on 10 January 2008' and that 'the house was then constructed and completed and handed over to the customers on the 31st March 2008'.

29. The FtT did not, however, accept this evidence. They said (at paragraph 32 of the FtT's Decision) that:

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

30. This is a finding that, in relation to Plot 13, the Agreement was signed and the lease was completed on 10 January 2008. The FtT also found that there was evidence that the disparity between the dates of the lease and the Agreement in respect of Plot 13 was 'because of a clerical error by the solicitors'.

31. There was also with our papers the invoice issued by KDM to Fairway for the kit for Plot 13. The date of the invoice is 11 September 2007 and the payment term is specified as "Bill of Exchange 120 days from Invoice Due Date 09/01/08". We notice that that period of 120 days is "approximately four months" – that is, the typical time lag between the date the kit is received from the manufacturer and the completion of construction of a lodge, as found by the FtT.

32. Mr McGurk submitted that this evidence showed that the payment from the customer (made on the signing of the Agreement and the completion of the lease) was received at the time when Fairway was due to pay KDM for the kit. He also submitted that the congruence of the 4 month period required for the construction of a lodge with the payment term under the invoice from KDM showed that a lodge would be built in time for the Agreement in relation to it to be signed and the lease completed – that is, that an Agreement would be signed, and a lease completed, at a time when the lodge concerned had been built and was ready for occupation.

33. Mr McGurk also submitted that this time sequence had been common ground between the parties at the hearing before the FtT and that he had conducted his cross-examination of Mr Gage on that basis.

34. Mr Gage's evidence, as recorded in his witness statement, that the lease was exchanged and the Agreement signed, in relation to Plot 13, on 10 January 2008 and the lodge was then constructed and handed over to the customers on 31 March 2008 was, as noted above, not accepted by the FtT. Also, Mr McGurk drew our attention to HMRC's exceptionally comprehensive decision letter, dated 27 March 2012, which set out a time line, which Mr McGurk said, without being contradicted, was not challenged before the FtT, and which stated that on completion the balance of the

price, over and above the Reservation Deposit of £5,000, is paid to the solicitor acting for Fairway and the landowner and a lease is granted to the customer, and that the lease for each plot commences after the construction of the lodge has been completed to the satisfaction of the Local Authority Building Control Officer. Further, the suggestion that a customer was granted a lease of a plot before the lodge was constructed would be inconsistent with the FtT's finding that Fairway has access to the land in order to undertake the construction of lodges by virtue of an oral agreement with the landowner.

35. Our conclusion on this issue is that the FtT must be taken to have found as a fact that the lease was granted and the Agreement was signed when a lodge was ready for occupation by the customer, rather than at an earlier time before construction of the lodge. (It is, in particular, clear from the calculation of rent due in the Completion Statement in relation to Lodge 8 (which was not suggested to be unrepresentative), that the lease was granted when the lodge was ready for occupation by the customer.)

The applicable law, discussion and decision

36. The FtT set out the applicable VAT law, section 30(2), VATA – the general zero-rating provision - and Item 2, Group 5, Schedule 8, VATA – the zero-rating provision relative to the supply of construction services in the course of construction of a building designed as a dwelling. By reference to Lord Neuberger's approval, in *HMRC v Secret Hotels 2 Ltd* [2014] STC 937, of Lewison J's judgment in *A1 Lofts Ltd v HMRC* [2010] STC 214, the FtT set out its approach to the construction of an agreement for VAT purposes where, as here, parties have entered into the agreement, intending it to govern the legal relationship between them. The kernel of Lord Neuberger's guidance is that 'when interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as a whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense' (*ibid.* [32]).

37. The FtT went on to cite Lord Hoffman's speech in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912-913 where he made "general remarks about the principles by which contractual documents are nowadays construed". Applying this guidance, the FtT formulated its task as being:

> 'required to ascertain the meaning which the Agreement would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.'

The FtT went on to note that:

> '[a]lthough previous negotiations are excluded, the background, or matrix of fact, includes absolutely anything else which would have affected the way in which the language of the document would have been understood by a reasonable man'.

38. The FtT based its decision that the Agreement obliged Fairway, in addition to providing construction services to a customer, to procure the landowners to grant a lease of the related plot of land, on its construction of the conditions 4.1.1 and 6.8 of the Standard Conditions of Sale. It found 'further support' for its conclusion from the

fact that the Agreement referred to the parties as "Buyer" and "Seller", that it provided, by clause 8, for the payment of rent and service charge to Fairway, and that it provided, by clause 9, for Fairway to give the Buyer vacant possession on completion. The FtT also considered that Fairway's responsibility for the payment of conveyancing and estate agents' fees was indicative that the Agreement included an obligation on Fairway to procure the landowners to grant a lease of the plot to the customer.

39. Neither side criticised the legal basis of the FtT's approach to the construction of the Agreement and the disposal of the appeal. Mr McGurk urged us to uphold the FtT's Decision in full. Mr Collins, however, submitted that the incorporation of the Standard Conditions of Sale into the Agreement did not impose an obligation on Fairway to procure the landowner to grant a lease of a plot to the customer. He submitted that they imposed an obligation on a seller of real property to sell to the buyer.

40. Mr Collins argues that condition 4.1.1 (specifically relied on by the FtT) gives a buyer the right to require his seller to show proof of that seller's ability to procure the transfer of the property *to the seller* for on-sale to the buyer. He referred to the Explanatory Notes on the Standard Conditions of sale (4th Edition), in which it is stated that: '[c]ondition 4.1.1 requires the seller to provide the buyer with proof of his title to the property and of his ability to transfer it or to procure its transfer (the latter alternative applying, for example, to a sub-sale)'.

41. We do not accept that the wording of condition 4.1.1 – 'the seller is to provide the buyer with proof of … his ability to transfer [the property] or to procure its transfer' – can have the meaning for which Mr Collins contends. Plainly the condition is concerned with the right of the buyer to be assured that the seller is able to transfer the property *to the buyer* or to procure its transfer by another party (as on a sub-sale) *to the buyer*. The buyer can have no interest in the ability of a seller merely to procure the transfer of a property by another party to the seller itself.

42. Mr Collins contended that other conditions of the Standard Conditions of Sale would be differently worded if they imposed an obligation on a seller to procure the transfer of a property from a third party to the buyer. He referred to conditions 3.1, 4.6.2, 6.5.1 and 7.5.2. However, these conditions are all dealing with the sale of the property as opposed to the transfer of title, and so a reference to the procurement of a third party to sell would be inappropriate.

43. Mr Collins submits that condition 6.8 (the other condition specifically relied on by the FtT), which deals with notice to complete, does not provide a basis for holding that the Agreement imposes an obligation on Fairway to procure the landowner to grant a lease of a plot to the customer. The FtT's point was that condition 6.8 entitled a customer to give Fairway a notice to complete within 10 days, which would put Fairway under an obligation to ensure the grant of a lease by the landowner. While we agree that the condition does not expressly impose that obligation on Fairway (as 'seller'), it can, in our view and in agreement with the FtT, only be made sense of if it places Fairway under an obligation to ensure that the customer (as 'buyer') is able to complete his/her purchase of the lodge, which (pursuant to condition 8.2) means to

ensure that the customer as 'proposed tenant' is able to execute the counterpart of the lease and deliver it to the landowner (the 'proposed landlord').

44. Mr Collins also argues, as his second submission, that, even if the incorporation of the Standard Conditions of Sale into the Agreement imposed an obligation on Fairway to procure the grant of the lease to the customer by the landowner, nevertheless a reasonable person, having all the background knowledge which would have been available to the parties at the time the Agreement was entered into, would not conclude that Fairway was under such an obligation.

45. This argument is effectively one that, having regard to 'the surrounding circumstances in so far as they were known to both parties, and to commercial common sense' (as per Lord Neuberger in *Secret Hotels 2*) the incorporation of the Standard Conditions of Sale into the Agreement does not (despite necessary implications to be made from their provisions and the words used) have the effect of imposing an obligation on Fairway to procure that the landowner would grant a lease of the plot to the customer.

46. The basis of this submission is the proposition that where a court is called upon to construe standard form terms, the court may disregard them if they are inconsistent with the purposes of the agreement into which they are incorporated. Mr Collins cited *Home Insurance Company of New York v Victoria-Montreal Fire Insurance* [1907] AC 59, approved by Lord Griffiths in *Forsikringsaktieselskapet Vesta v Butcher* [1989] 1 AC 852 at 897.

47. The surrounding circumstances and commercial common sense put forward by Mr Collins to make good this submission include the fact, as found by the FtT, that a customer would have been told by Mr Gage, in his role as director of Fairway, that he/she would have to secure a lease from the Partnership (or, we infer, SIL) and enter into the Agreement. Further, the customer's solicitors would have received a draft lease and a draft copy of the Agreement from the solicitors acting for both the landowner and Fairway and the customer would have been invited to execute both documents for forwarding to those solicitors. In the case of 11 of the 15 plots considered by the FtT, the Agreement was countersigned by Fairway on the same day that the relative lease was executed by the landowner. Mr Collins argued that since a customer would know that the landowner had already executed the relative lease (when he/she (the customer) signed the Agreement) or would do so immediately afterwards, there is no warrant for implying a term into the Agreement that Fairway would procure the landowner to grant the lease.

48. Mr McGurk met this point by submitting that the commercial reality was that the grant of the lease and the Agreement had to 'operate in lockstep' with each other to provide protection to a customer against his/her committing to purchase (the construction of) the lodge without obtaining a lease of the plot, or committing to take a lease of the plot without buying (the construction of) the lodge. We agree that what was happening here was that a customer was buying a package of a lease (from the landowner) and a lodge (from Fairway) – and Mr Collins did not suggest otherwise.

49. Mr McGurk submitted that the documentation should be interpreted so as to provide such legal protection for the customer. He submitted that this could have been done in one of two ways. Either the lease might have imposed a duty on the landowner to

require Fairway to enter into the Agreement with the customer, or the Agreement might have imposed a duty on Fairway to ensure that the landowner granted the lease to the customer. He submitted that the second alternative had been adopted by Fairway and the Partnership (and, presumably, SIL).

50. In our judgment, Mr McGurk is correct to advance this argument to refute the suggestion that the incorporation of the Standard Terms and Conditions of Sale into the Agreement was inconsistent with the purposes of the Agreement. We agree with him that *Home Insurance Company of New York* and *Vesta* do not assist Fairway.

51. In the end it is, in our judgment, a matter of construing the Agreement incorporating, as it does, the material Standard Terms and Conditions of Sale (as set out in paragraph 17 above). This is what the FtT did and, in our respectful view, they were right to do so.

52. The most relevant 'surrounding circumstance' is that the customer is agreeing at one and the same time to buy a built lodge from Fairway and to take the relative lease from the landowner. Clauses 4 and 6 of the Agreement, and the definition of 'the Lodge' (and, incidentally, the definition of 'the Unit' in the lease), which assumed that the lodge would be constructed after the Agreement was entered into are, therefore, on their terms inapposite. The Agreement provides for the sale by the 'seller' (Fairway) of a built lodge to be completed. It also provides that upon completion the 'buyer' (the customer) is to be given vacant possession of the lodge (see: clause 9.4). Vacant possession could only be given by the landowner. In these circumstances we consider that the FtT's interpretation that the Agreement provides that Fairway undertook to procure the landowner to grant a lease to the customer is the only natural interpretation which can be given to the Agreement.

53. We also consider, in agreement with Mr McGurk's submissions, that Fairway has not identified an error of law in the FtT's Decision. Accepting, as he does, that the interpretation of a written agreement is a question of law, Mr McGurk is, in our judgment, correct in submitting that Fairway has not identified why the FtT's interpretation of the Agreement was wrong in law. All the relevant background facts (or 'surrounding circumstances') are set out in the FtT's Decision and Mr Collins accepted that the FtT had made no error of fact. It is true that the FtT did not expressly find that a lease was granted and the Agreement was signed when a lodge was ready for occupation by the customer, rather than at an earlier time before construction of the lodge, but we have (as explained above) concluded that such is a necessary implication from the findings expressly made. The need for us to draw that implication does not found a case that the FtT's interpretation of the Agreement was wrong in law.

Disposition

54. For the reasons we have given, the supply by Fairway to the customer was a composite supply which included an undertaking to procure that the landowner would grant a lease of the plot to the customer. That supply does not fall to be zero-rated under Item 2, Group 5, Schedule 8, VATA. It is instead a standard-rated supply. Therefore, the appeal is dismissed.

Judge Greg Sinfield

Judge John Walters QC

Upper Tribunal Judges

Date of release: 25 July 2016