Neutral Citation Number: [2013] EWHC 877 (QB)

Case No: 2011 FOLIO 1184

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LONDON MERCANTILE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2013

Before :

HIS HONOUR JUDGE MACKIE QC

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Between :

KUONI TRAVEL LIMITED	**Claimant**
- and -	
JOHN BOYLE	**Defendants**
DEBORAH MARSHALL	
ANDREW LAPPING	
STEWART ROBERTSON	
PAUL JOHNSTON	

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Clare Reffin (instructed by **Stevens & Bolton LLP**) for the **Claimant**
Jonathan Bremner (instructed by **Gateley**) for the **Defendants**

Hearing dates: 26 to 28 February 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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JUDGE MACKIE QC:

1. This is a claim for about £400,000 by the purchasers of a ski holiday company seeking reimbursement from the sellers for payment of Swiss valued added tax and associated expenses, under the terms of a Deed which formed part of their deal. The purchasers paid the tax but the sellers say that no valid notice was given under the Deed, there was no liability for the tax and, even if there was, this resulted from a voluntary act not covered by the agreement between the parties.

2. The Claimant ("Kuoni") is an English subsidiary of the well known travel company based in Switzerland which, by a Sale and Purchase Agreement dated 21 June 2007 ("SPA"), acquired the share capital of CV Travel Holdings Limited, and thus its subsidiary Ski Verbier Limited ("SVL"), from the Defendants. The documents to be delivered on completion included a Deed of Tax Covenant ("the Deed").

Background

3. SVL is a company which operates in the travel and leisure market. It lets to its clients luxury holiday accommodation (ski chalets and hotel rooms) situated in Verbier, Switzerland. SVL was established by Mr David Pearson who ran the business prior to its acquisition by the Defendants on 19 December 2005. The chalets were leased from their owners by SVL and then sublet to its clients. The hotel rooms were situated in the Les Rois Mages Hotel (the "Hotel"). The Hotel was owned not by SVL but by a separate company (Ski Verbier Hotel Limited) which also employed the Hotel staff members who were recruited and paid for by SVL. Ski Verbier Hotel Limited is still owned by Mr Pearson. The Hotel has about 16 rooms all of which were, for the winter season, rented by SVL for its clients. In April 2006 Ms Deborah Marshall took over from Mr Pearson as Managing Director of SVL, working from London but frequently visiting Verbier. During the ski season (December-April) SVL employed staff in Veriber including a resort manager, representatives, drivers and a bookkeeper in Verbier, some 40 staff in all. SVL had five staff in London all year round, where the marketing, sales, major invoicing, major contracting and top management were carried on.

4. In the period up to its acquisition by Kuoni SVL had never accounted to the Swiss tax authority, the AFC, for value added tax, known as TVA, and for a while thereafter that remained the position. As is explained in the experts' joint statement, it is, as in the UK, the taxpayer's responsibility to register and to pay on the basis of self-assessment returns. SVL charged its customers neither TVA nor VAT.

5. I heard evidence from Mr Mark Norman, Deputy Managing Director and Chief Financial Officer, and Ms Jackie Farr, Financial Controller for Kuoni and from Ms Deborah Marshall, Managing Director of SVL until December 2010 and Mr Stewart Robertson, a Director of Hamiliton Portfolio Limited for the Defendants. All four witnesses were admirably candid and honest as were the two Swiss Law experts Dr Grunblatt for the Claimant and Dr Honauer for the Defendants. The issues of fact turn on the inferences to be drawn from largely undisputed events not on close analysis of the quality of the oral evidence. Nevertheless the oral evidence was helpful in presenting a full picture, in particular of how SVL operated in practice. The parties agreed a detailed chronology which I bear in mind as well as the following summary of relevant events.

How SVL came to pay TVA- matters agreed or not much disputed

6. From at the latest September 2008, the Swiss tax authorities were considering the possible liability of SVL to Swiss taxes, including TVA and the company's business consultants in Martigny, Switzerland, FIDAG, were advising it.

7. On 29 April 2009, FIDAG advised Ms Marshall that SVL needed to set up a *succursale* (branch) registered in Switzerland to comply with the requirements of Swiss law and the authorities. On 6 January 2009 a cantonal official threatened that the Bagnes municipality would not allow SVL to operate in the season 2009/2010 if SVL's Swiss tax affairs were not in order and suggested that SVL might register a branch. FIDAG advised SVL that both tax and TVA depended on the existence of a permanent establishment (*établissement stable*). Correspondence about different types of tax and national insurance-type liabilities continued.

8. In July 2009 Kuoni was advised by Homburger, the principal advisers to Kuoni's head office in Switzerland, that there was a risk of retrospective liability to TVA for SVL as a result of the Branch registration. This advice was forwarded on 7 October 2009 to Mr Norman in England. Similar advice was given by FIDAG to Ms Marshall and Ms Errington of SVL on 2 December 2009.

> *"Another big problem is the Swiss VAT. Once your branch office is registered in the trade registry, you must subject it to the Swiss VAT for the sales revenue achieved in our territory. It may also be that it will go back to the past."*

9. On 4 December 2009, at the start of season 2009/2010, the municipality of Bagnes ruled that SVL had a permanent establishment in Verbier and must pay direct taxes to the canton.

10. On 4 May 2010, SVL registered its branch with the Commercial Registry in Martigny. On 24 July 2010, the AFC sent SVL a questionnaire for completion to serve as a basis for the AFC to decide whether and from when SVL should be entered into the register of TVA taxpayers.

> *"Enclosed herewith please find a questionnaire in order that we can examine whether we must enter you in the register of VAT taxpayers in accordance with Articles 10 and 11 of the Federal Law on Value Added Tax of 12 June 2009.*
>
> *This 'questionnaire for registration as a VAT taxpayer' (from page 3) serves as a basis for us to determine whether, and from when, we must register you in the register of VAT taxpayers."*

11. The answers to the questionnaire, on behalf of the new branch alone, described its activity as sale of tourist stays in Switzerland, commencing on 4 May 2010, and (consistently with that) showed no turnover in the years 2004-2009. FIDAG's advice was that they would try to get the branch alone registered and *"hope that the past will perhaps be forgotten"*, but they expressed increasing certainty that SVL would be

asked to pay TVA for prior years. On 17 and 27 August 2010 FIDAG advised Ms Marshall and Ms Errington of SVL that the AFC would seek to recover TVA for prior years back to 2005. A letter (enclosing a questionnaire relating to registration) in similar terms to that of 24 July 2010 was issued by the AFC to SVL on 22 September 2010. The AFC sent reminders during August, September and October 2010. In an email on 27 October 2010, Ms Farr advised Mr Norman that:

> *"Below is the correspondence and confirmation from the accountant of what we need to pay. It is far more than we had expected (my initial calculations are about CHF 600k. Originally we were expecting far less than this as early indications were that the TVA would be applied to turnover derived in resort – now it is ALL turnover."*

FIDAG had on 27 October 2010 emailed Ms Farr:

> *"Everything that follows must seem terribly complicated to you, but the thing is that making English companies subject to VAT is completely new, nobody knows exactly how it's happening yet.*
>
> *The VAT Division has altered its principles; this is what it means for you:*
>
> *Your **entire turnover** is subject to Swiss VAT, because it is the place where the taxable service is supplied that it taxable (in your company, everything is about Verbier). A margin calculation no longer needs to be performed. You need to take your turnover from your financial statements and convert it into Swiss francs.*
>
> *The rate has changed, however; it has been set at 2% (from 2005 onwards)"*

By this time, Mr Norman was aware of the possibility of a tax warranty claim against the Defendants. As he emailed to Ms Farr

> *"On the years does it go back to 2007 as we may be able to claim from the seller under the tax warranties to reduce our exposure."*

12. On 3 November Kuoni apparently retained Stevens & Bolton LLP to advise about the Defendants' potential liability. Mr Norman telephoned Mr Robertson on 12 November 2010, Mr Robertson's contemporaneous manuscript note of that conversation records that:

- the AFC was going back five years in its tax assessments, saying that any Revenue wherever it owns is subject to Swiss VAT, all SVL's revenue in the UK would be subject to TVA;

- *"2% of turnover is the tax"; "got a tax guy on the case"* SVL *"will use Kuoni's tax adviser/legal adviser".* A *"heads up that there may be a tax warranty issue". "Kuoni are fighting the case + challenge the case".*

Mr Norman's evidence was that the note was accurate apart from the fact that he did not recall saying that Kuoni was fighting the case.

13. In a letter dated 16 November 2010 the AFC threatened that, if the AFC's questionnaire about turnover had not been returned by 1 December 2010 the AFC would enter SVL on the register of TVA taxpayers with effect from 1 January 2005.

14. Mr Norman by email on 22 November 2010, asked Mr Haesler for speedy guidance from the tax advisers (Homburger) on whether SVL was liable. If SVL would be liable, Mr Norman would cause it to fill in the questionnaire for the AFC. On 26 November having consulted Homburger, Mr Haesler advised that *"unfortunately there is no way round the VAT in CH [Switzerland]"*. He added *"VAT: If they [that is FIDAG] succeed with 2% net rate (i.e. gross rate 3.6% less 1.6%pt general deduction) this is the best you can get according to Swiss law, this 2% net rate is (up to 2009) only available for turnover of up to CHF 3 million; at least in 2008 that turnover was higher as from 1.1.2010 the cap is fixed at CHF 5 million; not helping as the turnover was GBP 3.7mHomburger rates the risk much higher i.e. that CV need to pay 3.6% VAT with only little recoverable 'paid' VAT."*

15. Mr Norman's evidence is that it was only then that he was aware that SVL would actually be liable for TVA. On 10 December he emailed Mr Robertson passing on to Mr Robertson the advice from Homburger *"As discussed we have used the Kuoni group Swiss tax advisers – Homburger – to assess the work of the local Tax adviser FIDAG to see whether they have been representing us as strongly as possible. Below is the extract from the mail which confirms that they have been and if we can get a ruling at the lower rate of 2% rather than the 3.6% then that is a tremendous outcome as it looks like it should be at the higher rate."* That message goes on to provide more detail and to describe what Kuoni will be doing in December before being able to assess the total charge which will be levied.

16. On 14 December 2010 the AFC entered SVL on the TVA taxpayers' register with effect from 1 January 2005, without having received the completed questionnaire. They now enclosed a form of décompte (self-assessment computation form) for completion by SVL. The AFC's letter was received by FIDAG on 16 December 2010. It is not clear whether or when FIDAG forwarded it to SVL. A spreadsheet (which did not include sterling figures for individual years) was received by Ms Errington and Ms Farr from FIDAG on 16 December in response to a request for an estimate of the liability to TVA.

17. Mr Norman was on holiday for the week commencing 13 December 2010 and saw FIDAG's spreadsheet on his return on Monday 20 December. Once Mr Norman had on 20 December 2010 authorised completion of the forms for the AFC, Ms Errington in the presence of Ms Farr on 21 December 2010 completed the questionnaire and related declaration d'adhesion. Around that time Ms Farr checked FIDAG's figures, discussed them with Mr Norman, and confirmed to him by email that they were in line with FIDAG's earlier indication. On 24 December 2010, Mr Norman emailed Mr Robertson with an update on expected liability set out in a spread sheet. Some further

work was needed on the figures but *"as we are getting more definition around this I will more formally write to you in the new year under the process of the sale agreements."*

18. On 14 January 2011 Kuoni's solicitors wrote to the Defendants with a copy to their solicitors in terms which are accepted to comply with the notification requirements of the Deed. The letter accurately set out the position which had been reached at that point-

> *"The Claim relates to a potential assessment to Swiss value added tax (tax sur la valeur ajoutée ("TVA")) by the Swiss tax authorities in respect of the activities of Ski Verbier Limited during the period 1 January 2005 to 31 December 2009, part of this period falling within the scope of the covenant contained at clause 2 of the Tax Deed. It is understood that there has already been quite significant discussion and correspondence between Mark Norman and Stewart Robertson in relation to the subject matter of the claim and the initial investigations carried out by our client into the technical merits of the potential assessment.*
>
> *Ski Verbier Limited is a Subsidiary as defined for the purposes of the Tax Deed and therefore falls within the definition of 'Company' for the purposes of the covenant contained within the Tax Deed.*
>
> *Although no formal assessment has yet been received from the Swiss Federal Tax Administration, the indication is that an assessment to TVA will be issued to Ski Veriber Limited shortly on the basis that there was a liability to TVA on all sales of Ski Verbier Limited in the period under consideration. There has been some discussion with the Swiss tax authorities as to the scope of the potential assessment and whether this should apply solely to incidental sales made in Switzerland and such as lift passes etc or to the all supplies (including that of the chalet accommodation). The position of the Swiss tax authorities is that the liability to TVA is due where the service is delivered (i.e. Verbier) and therefore it is understood that the assessment will be based upon the turnover of Ski Verbier Limited irrespective of the fact that almost all sales were concluded in the United Kingdom."*

19. The letter also gave the best estimate at that date of the amount to be claimed, £250,861.02 less a deduction for TVA from 22 June 2007 – 31 December 2007. Clause 6 of the Deed enabled the Defendants to require Kuoni to procure SVL to resist and dispute any liabilities to tax provided that they provided indemnities. The letter reminded the Defendants of their rights under Clause 6. The Defendants did not invoke that provision to put forward their view that no tax was payable but they did ask Kuoni not to pay.

20. The amount claimed under the Tax Deed was not established for a considerable time. The liability was for the years 2005 to 2009 with the Defendants allegedly liable for the period up to 21 June 2007 and Kuoni responsible for payment after that.

What is the effect of the notice provisions in the SPA and the Deed?

21. The SPA and the Deed must of course be read in context as a whole but it is necessary to set out in detail only the provisions in each which lead Kuoni to argue that notice was given in time and the Defendants to contend that it was not.

22. By Clause 2 of the Deed the Defendants promised to pay Kuoni an amount equal to any Tax Liability(which definition includes this claim) of (inter alia) SVL *"which arises directly or indirectly as a result of or in respect of or in connection with an Event occurring, or income, profits or gains earned, accrued or received, on or before Completion"*. (2.1) and *"all reasonable costs and expenses properly incurred…in connection with any such Tax Liability or any Claim relating to such Tax Liability or in taking or defending any action in respect of such Tax Liability under this Deed"* (2.4)

23. That promise was subject to the limitations set out in Clause 5 which provided that:

> *"**5. Limitations***
> *The Sellers shall not be liable under the covenants contained in clause 2 in respect of any Tax Liability to the extent that:*
>
> *5.4 the Tax Liability arises or is increased as a direct result of a voluntary act of the Purchaser or the Company after Completion otherwise than*
> *5.4.1 in the ordinary course of business of the Company; or*
> *5.4.2 as required by any law or regulation of any competent authority; or*
> *5.4.3 pursuant to any contract or other legally binding agreement entered into before Completion*
> *which the Purchaser knew or ought to have known on the basis of information Disclosed would give rise to the Tax Liability in question…*
>
> *5.6 unless (except in the case of fraudulent or negligent conduct) written notice of the Tax Liability or the Claim in respect thereof has been served on any of the Sellers on or before the expiry of seven years from the end of the accounting period current at Completion;*
>
> *5.7 the Tax Liability is expressly excluded or limited by Part 5 of the Schedule to the Agreement, provided that, in the case of any conflict between the provisions of this clause 5 and Part 5 of the Schedule to the Agreement, the provisions of this clause 5 shall prevail."*

It is common ground that clause 5.7 contains an error and should be construed to read (rather than *"the Tax Liability is expressly excluded or limited by Part 5…"*) *"the Sellers' liability is expressly excluded or limited by Part 5…"*).

24. The relevant limitations in Part 5 of the Schedule to the SPA are those in Paragraphs 2 and 3 which provide :

> *"2. The Sellers shall not be liable in respect of any claim under the Warranties or under the Tax Deed unless it shall have been made in the case of the Tax Deed or the Tax Warranties before the expiry of 7 years from Completion and in the case of the Warranties (other than the Tax Warranties) before 31 March 2009.*
>
> *3. No claim under the Warranties or under the Tax Deed shall be deemed to have been made unless notice of such claim was made in writing to the Sellers specifying in reasonable detail the event, matter or default to which the claim related and the nature of the breach and the amount claimed as soon as reasonably practicable but in any event within 30 days of the Purchaser or the Company becoming aware thereof."*

25. The Defendants say that Kuoni failed to give the 30 days notice required by Part 5 Paragraph 3 of the SPA. Kuoni says that the notice required by the Deed was given and that Paragraph 3 does not apply.

Kuoni's case on construction.

26. Kuoni's interpretation is as follows. The essential commercial purpose of the Deed is for the sellers to assume financial responsibility for tax in respect of the period before the sale. Such agreements are regularly encountered on sales of companies. The payments due under Paragraph 2 are not damages for breach of any warranty given in the SPA. They are indemnity payments.

27. The Deed makes up, together with the SPA, the *"entire agreement"* between the parties under 11.1 SPA. Accordingly the SPA may be relied upon as an aid to construction of the Deed. While no doubt all the documents associated with the sale were negotiated between the parties, the primary responsibility for drafting the SPA lay with the sellers' solicitors and that for drafting the Deed with the purchaser's solicitors. This may go some way to explain inconsistency between the two agreements.

28. Paragraph 3 is intended to work with Paragraph 2, and defines and limits the circumstances in which a claim is *"made"* for the purpose of Paragraph 2. The effect of the two paragraphs is to apply a time bar by reference to a written notice in respect of all possible claims under the Tax Deed (or Warranties) by the Claimant.

29. There are a number of conflicts between Part 5 and Clause 5.6:

(i) The time bar time limit in Part 5 is shorter; even the long-stop date (para 2) falls before the time limit in cl 5.6 which is later in 2014, and if knowledge had been obtained soon after the purchase, the time limit imposed by para 3 would have been little over a month from Completion.
(ii) The time bar in Part 5 if it applied would exclude all claims under the Tax Deed, not just some.
(iii) The requirements for content of the notice are much more demanding under Part 5.
(iv) The notice under Part 5 must be served on all of the Sellers.

30. As there is such a conflict between Part 5 of the Schedule to the SPA and clause 5.6 of the Deed, clause 5.6 prevails. The judgment of Parker LJ in *Sabah Flour v Comfez [1988]2 Lloyd's Rep 18,* CA, at p20 col 1, with its repeated use of the word *"conflict"*, shows that two time bar clauses, setting differing time limits, conflict. *Sabah Flour* explains how time bars are exemption clauses. Since clear words are required for the imposition of a time bar, a conflict must be resolved in favour of the longer time limit. See similarly *Finagra v OT Africa Line [1998] 2 Lloyd's Rep 622* at p629 col 2: *"in a case of doubt or ambiguity the conflict must be resolved in favour of the longer time limit".*

The Defendants' case on construction.

31. Mr Bremner says that there is no relevant *"conflict*" between Paragraph 3 and clause 5.6 of the Deed. As to the correct approach to potential inconsistency as Bingham LJ observed in *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 3 All ER 565 (CA):

> *"It would in my judgment be quite wrong to approach this question of construction [that is, whether there was an inconsistency between the two relevant clauses] with any predisposition to find inconsistency between the special condition and cl 19 [of GAFTA form 119]. […]*
>
> *On the other hand it is wrong to approach the contract on the assumption that there is no inconsistency. By including the inconsistency clause, the parties have acknowledged that there may be. One should, therefore, approach the documents in a cool and objective spirit to see whether there is inconsistency or not.*
>
> *The judge found the arguments on this issue finely balanced, but concluded that there was no inconsistency as submitted by the buyers. I agree with his conclusion, but I have less hesitation in reaching it. It is a commonplace of documentary construction that an apparently wide and absolute provision is subject to limitation, modification or qualification by other provisions. That does not make the later provisions inconsistent or repugnant."*

32. Mr Bremner submits that the argument that there is a conflict between 5.6 of the Deed and Paragraph 3 is misconceived. The provisions of clause 5.6 of the Deed and paragraph 3 of Part 5 of the SPA perform different functions which complement one another. They are not in conflict.

33. Clause 5.6 of the Deed (like Paragraph 2), seeks to set down the long stop date within which a claim must be made in order for the Purchaser to hold the Seller liable. Paragraph 3, however, fulfils a distinct purpose from both Paragraph 2 and Clause 5.6 of the Deed, to set out the requirements which must be met in order for notice of a claim under the Deed to have been made. This is clear not only from the terms of Paragraph 3 (which express that provision to be concerned with the circumstances in which a claim under the Deed (and/or under the Warranties) *"shall be deemed to have*

been made") but also from the structure of Paragraphs 2 and 3. Paragraph 2 imposes a seven year time limit. Paragraph 3 then imposes the requirements which must be satisfied for a valid claim to be made.

34. Accordingly the parties, when they agreed Paragraphs 2 and 3, clearly did not envisage any "conflict" in a mechanism containing (i) a long stop time limit (Paragraph 2), together with (ii) conditions which had to be fulfilled in order for a claim to be deemed to be made (Paragraph 3). Were it otherwise, Paragraphs 2 and 3 would not have both been set out in the SPA by the parties the one immediately after the other. Paragraph 3 was intended to complement the long stop seven year time limit in Paragraph 2. In the same way, there is no conflict (and the parties would not recognise there being any conflict) between Paragraph 3 and Clause 5.6 of the Deed.

35. There is nothing surprising about this result. On the contrary, as Lord Goff noted in *Yien Yieh Commercial Bank v Kwai Chung Cold Storage Co Ltd [1989] 2 HKLR 639 (PC) at 645I:*

> *"Where the document has been drafted as a coherent whole, repugnancy is extremely unlikely to occur. The contract has, after all, to be read as a whole; and the overwhelming probability is that, on examination, an apparent inconsistency will be resolved by the ordinary processes of construction."*

36. The present case is therefore not akin either to *Sabah Flour v Comfez* or *Fingara v OT Africa Line*.

Decision on construction

37. The able arguments of Counsel have identified a number of rules and guides to construction which they see as relevant. I bear these in mind but in resolving which of two legitimate and plausible interpretations to prefer I consider that a more straightforward approach can be adopted, bearing in mind the *Rainy Sky* principles.

38. The starting point for decision is the discussion of Lord Clarke in *Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900 (SC)* and in particular the following:

> *"the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant". The relevant "reasonable person" is "one who has 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"* (Rainy Sky para 14). He added at para 30*"Where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense".*

39. Part 5 of the Schedule to the SPA headed Limitations limits liability for breaches of Warranties and of covenants in the Deed. Paragraph 2 limits liabilities to claims made

within 7 years of completion and much earlier if they do not relate to tax. Paragraph 3 deems such claims not made unless notice of them has been given to the extent and within the 30 day time limit specified. The Deed imposes covenants in Clause 2 but in 5 removes liability *("to the extent that"*, which words are not apt for 5.6 but are for 5.7) unless written notice of the liability or claim has been served on any of the Sellers within the time specified, (a notice requirement which in this case was given on time). Clause 5.7 also excludes or limits liability to the extent that Part 5 of the Schedule to the SPA does so but with the Deed prevailing over any conflict with the SPA.

40. The liability arises under the Deed not the SPA. That deed sets out not only the limits upon that liability but also how notice is given, by service on any Seller (service on all the Sellers is not required), and when (within the 7 year period). The SPA, a separate agreement between the parties, applies further limits on claims but the Deed removes those limits to the extent to which there is a conflict. In this case the SPA requires a 30 day limit to be complied with which would not apply if the Deed alone governed its terms. As I see it the SPA does conflict with the terms of the primary document on this issue, the Deed. If the Deed had not dealt with notice explicitly my view might well have been different. But it has a notice provision in 5.6 and there is no need to look to the notice machinery in the SPA. That machinery conflicts, an expression which, as I see it, has to be given a reasonably broad meaning. But for the SPA notice of the claim under the Deed would have been well within time. There is therefore a conflict between the notice provisions and, as a result Clause 5.7 of the Deed prevents the application of Paragraph 2 of the Schedule to the SPA. As with so many issues of construction the reasons for preferring one view to another are incapable of useful detailed elaboration.

41. I do not see the case law which discourages the finding of inconsistency in contractual provisions of much application to a specific clause providing for what is to happen in the event of a conflict. In a sense Clause 5.7 simply removes the need to apply that case law when an apparent conflict emerges. Similarly there is no contractual disharmony when a provision like Clause 5.7 exists to remove it.

42. Two other factors fortify me in that view. First Mr Bremner is right to distinguish the time bar cases which Ms Reffin cites from the present case but they do illustrate that clear words are required for any time bar and that in the case of ambiguity the longer limit prevails. He is also right that it is arguable that in a strict sense this is not a comparison between competing time bars but, in a commercial sense, as I see the position it is exactly that.

43. Secondly it seems to me legitimate to bear in mind that the documents were drawn up by lawyers on different sides of the transaction and that the parties would have seen Clause 5.7 as intended to entrench the limitation provisions of the Deed ruling off any contrary provisions in the SPA. The purpose of Clause 5.7 is to protect the relevant terms of the Deed from contrary indications in the SPA.

Was notice given in time under Paragraph 3 of Part 5 of the Schedule to the SPA?

44. If I am wrong on the approach to construction then it is necessary to consider whether or not Kuoni's notice was in time. Was Kuoni or CV Travel Holdings aware of the matters specified in Paragraph 3 which, like Mr Bremner, I will call the Relevant

Details, more than 30 days before 14 January 2011 when notice was given? The Relevant Details are the event, matter or default to which the claim under the Tax Deed related and the nature of the breach and the amount claimed.

45. The Defendants contend that there was awareness of the Relevant Details *"on 21 September 2010, or, at latest, 16 November 2010"* or at some later point more than 30 days before 14 January.

Kuoni's case on the time point.

46. Miss Reffin argues that there is no definition of *"becoming aware",* but the term *"aware"*, in its ordinary meaning and having regard to the context, must refer to conscious knowledge. Putting the Claimant or Company on notice of Relevant Details would not suffice. Further, given the context, that knowledge must be knowledge of a person with responsibility for deciding whether to give the notice under Paragraph 3. Compare the view of the court in *ROK PLC v S Harrison Group Ltd 2011 EWHC 270 (Comm),* at para 74, that the term *"information then available to the Purchaser*", in the time bar by reference to notice at issue in that case, referred to information actually known to the persons within the Purchaser responsible for taking the decision as to whether or not to serve a notice. This is an *a fortiori* case, as *"aware"* is a more demanding concept than having information available.

47. Neither Jackie Farr nor Bryony Errington could have any relevant awareness. They were not employed by the Claimant or the Company, but by subsidiaries. They also lacked the required responsibility. Mr Norman of Kuoni was responsible both for giving final authorisation for submitting the completed turnover questionnaire for the AFC and for instructing solicitors to prepare a formal notice.

48. The Claimant and Company were aware of the *"event or matter"* only once they were aware that SVL had actually been registered as a TVA taxpayer for the relevant period. SVL cannot have been aware of the registration before 16 December 2010, when FIDAG learnt of it. Mr Norman was on holiday that week, and returned on Monday 20 December 2010. So 20 December 2010 appears to be the likely date of awareness. Thirty days from 20 December would be 19 January 2011, five days after the notice letter was received.

The Defendants' case on the time point

49. The requirements of Paragraph 3 were not onerous. Paragraph 3 merely required that the Relevant Details should be specified *"in reasonable detail"*.

50. The knowledge of Ms Farr and Ms Errington should be taken into account for the purposes of determining whether the requirements of Paragraph 3 were satisfied. The context of Paragraph 3 is that of a claim under the Warranties or under the Deed. The matters which would give rise to such a claim would be matters affecting either CV Travel (the target company) or its subsidiaries. Indeed, it is more likely that the subsidiaries (as the operating companies) would have issues giving rise to potential warranty claims (rather than CV Travel). Limiting the class of company whose knowledge counts makes little commercial sense. Kuoni's contention also fails to take into account the fact that Ms Errington and Ms Farr are (among others) the people tasked by Kuoni with working on SVL's TVA issue. There is no warrant for

concluding that the knowledge of Ms Farr and Ms Errington somehow does not count for the purposes of Paragraph 3.

51. The evidence shows that C was aware of the Relevant Details by at latest 16 November 2010. The subsequent chronology speaks for itself. Kuoni's reliance on Mr Norman's email of 22 November 2010 as demonstrating that as at that date *"he did not know that SVL was liable to TVA from 1 January 2005"* does not assist it. Mr Norman was well aware of the advice that had been given to Kuoni (and to SVL) that there would be a retrospective liability going back to 2005.Seeking a second opinion from Homburger did not alter Mr Norman's knowledge that it was overwhelmingly likely that the AFC would issue assessments covering the period 2005 to 2010 against SVL.

52. On Kuoni's own evidence, therefore, it was aware of the first aspect of the Relevant Details before 15 December 2010. By this point in time at the latest it also had sufficient awareness of the amount of the claim to be able to specify it in reasonable detail.

Decision on the time point

53. First there can obviously be no awareness of Relevant Details until there is sufficient information available to serve a valid notice. Secondly I agree with Mr Bremner that the knowledge of Ms Farr and her colleague when doing work for Kuoni cannot be excluded simply because their direct employer was another company. Thirdly awareness means conscious knowledge, it is more than notice. Fourthly that awareness must be that of employees who have or should have responsibility for the issue- if a fully documented tax demand was mistakenly delivered only to a SVL ski instructor who did not speak the language it was written in, I doubt that the company would be aware.

54. Mr Bremner's argument that what Mr Norman told Mr Robertson in November showed that all the requirements for a notice were available is, as I see it, misconceived. Kuoni was commendably keeping the Defendants informed of these matters well before they had a legal obligation to do so. I reject the suggestion that there could be awareness before advice had been received from the principal tax advisers. At various points Kuoni could no doubt by giving the matter particular energy and attention at the expense of other pressing tasks gone out and accelerated crystallisation and awareness of the liability and its amount. But Kuoni was under no obligation to do that commercially, it would have been odd to do so and the Defendants are unlikely to have approved of such a course. As I see it Kuoni was aware that liability to tax in principle was probably inevitable by the time advice was received on 26 November. But the amounts had not been worked through, no registration had taken place and of course no demand for tax would be made for a considerable period. Common sense required caution if it did not mandate sitting tight.

55. By 16 December Kuoni staff had information from the spreadsheet sufficient for there to be awareness of the Relevant Details but the decision taker, Mr Norman, was on holiday, a conventional event in any business. The other staff were relatively junior, technicians rather than decision takers on this issue. While all these clauses turn on their own facts and wording I respectfully agree with the approach of Mr Siberry QC

in *Rok* that the awareness (in *Rok* it was availability) is that of the relevant personnel. Awareness is also, as I see it, that acquired in the ordinary course of a competently run business where the personnel will have a variety of tasks to do and will not have a single minded concentration on the tax issue to the exclusion of other duties. On 20 December Mr Norman returned and by 24 December the position was as described in his message to Mr Robertson with the position still that no assessment had been made and the sum due had not been determined. Indeed the letter of 14 January accurately records that uncertainties remained even at that point.

56. Approaching the matter with commercial common sense I conclude that Kuoni were not aware of the Relevant Details until 20 December 2010. Even if the date were to go back to 16 December the notice would still have been in time.

57. The Defendants are entitled to enforce their rights to the letter but I reach the result I do without misgiving in a context where Kuoni kept the Defendants closely and commendably informed throughout the evolution of the issue.

Was the tax due?

58. Kuoni concedes that it must show that the TVA was due and that the burden of establishing that SVL was liable for the tax, as a matter of Swiss law, lies upon it and not the Defendants.

59. The relevant statutory provisions concerning TVA throughout the period of the present case were contained in the *"Federal Law with regard to Value-Added Tax"* dated 2 September 1999 which came into force on 1 January 2001. It was replaced by the VAT Law dated 12 June 2009 with effect from 1 January 2010 (which contained substantive amendments to the place of supply rules concerning holiday accommodation).

60. TVA is due on services which are supplied in Switzerland. The services of a provider of holiday accommodation (such as SVL) will be supplied in Switzerland if (and only if) it has a permanent establishment in Switzerland from which the services were provided (article 14(1) of LTVA 2001). There is no definition of the term *"permanent establishment"* in the LTVA 2001.

61. The experts are agreed in the Joint Report para 6 (g):

> *"the AFC and the competent Swiss Administrative Court and Swiss Federal Supreme Court, if interpreting the meaning of permanent establishment and auxiliary and preparatory activities in the LTVA 2001 consider the definition used in Article 5 of the OECD Model Tax Convention on Income and Capital, Version July 2005 ("Convention")*

and that in the light of this (Joint Report para 8):

> *"as per the relevant definition of the term 'permanent establishment', the following criteria must be met in order that in the Relevant Period the activity conducted by Ski Verbier in Verbier constituted a permanent establishment in Switzerland:*

a. there must be a 'place of business in Verbier';

b. this place must be 'fixed';

c. there must be a business carried on in whole or in part through this fixed place of business; and

d. the activity must not be of merely ancillary or preparatory nature."

Thus if these criteria are not fulfilled, there will not be a permanent establishment in the relevant sense. The experts disagree whether or not these criteria are fulfilled in the present case. Although in a strict sense the role of the experts is to explain the law so that the Court can apply it to the facts, in reality, particularly in a tax dispute, I must choose between their competing views.

62. The AFC produced Guidelines on TVA, published in summer 2000 setting out their interpretation of the law and practice which included a definition of *"permanent establishment"*. According to the AFC, permanent establishments included holiday apartments and holiday homes. The Defendants contend that the AFC Guidelines were wrong in this respect. It is common ground that the AFC Guidelines do not have legal force, and it would be open to the Swiss courts to decide that they are wrong. However, there has been no such decision on the definition in issue.

63. The parties agree with and rely upon the core of the AFC's definition of *"permanent establishment",* namely "*a fixed place of business through which the business activity of an enterprise… is exercised in whole or in parts"* and on the express exclusion of *"fixed places of business used to conduct activities for the foreign enterprise of merely preparatory or auxiliary nature"*.

64. It is also common ground that in interpreting the Swiss law in this area, the Swiss court would look at the OECD Model Tax Convention. Switzerland is a member of the OECD and the concept of permanent establishment in LTVA 2001 is based on the Convention. The joint statement points out that the Swiss Federal Administrative Court recognised, in its decision of 22 July 2008, that those two aspects of the definition in the Guidelines are largely identical to the definitions in Articles 5(1) and 5(4) of the Convention.

65. The Convention's definition of *"permanent establishment"* is in Article 5. It is common ground that one cannot conclude that an activity is not a permanent establishment merely from its absence from the list of examples in Art 5(2). Thus, the fact that holiday apartments are not listed does not mean that they cannot be a permanent establishment. Both experts also refer to the OECD Commentary on Article 5 of the Convention. The OECD Commentary is agreed by the OECD members, including Switzerland, and is regularly referred to by the Swiss Federal Supreme Court in tax cases, according to Dr Grunblatt.

66. It is common ground that the decision on whether a permanent establishment exists is fact-dependent, requiring an evaluation of all the facts and circumstances.

Kuoni's case on whether the tax was due.

67. Ms Reffin submits that it is clear from the OECD commentary that the fact that premises are rented to SVL does not preclude a permanent establishment, and nor does the fact that SVL's business is renting out those rented premises to others, so long as SVL has a place of business in Verbier through which that letting business is managed and/or has staff there who operate and service the premises under SVL's responsibility and control. Further the activities of employees do not have an ancillary character if they form an essential and significant part of the activities of SVL as a whole.

68. In short, SVL was in the business of providing luxury accommodation in Verbier in catered chalets on a half-board (plus tea) basis; in hotel rooms on a bed-and-breakfast (plus tea) basis; and in one or few self–catering chalets; plus services such as ski passes, guides, in-resort transport and massage. For that purpose it had at its disposal rented chalets, exclusive use of the hotel Les Rois Mages each ski season for at least 6 years, and staff accommodation rented for the season, as well as rented vehicles. SVL employed directly, in addition to its team of around 5 employees in London, 40 to 50 staff working in Verbier: a resort manager and three representatives, chalet chefs, chalet "hosts" or assistants, and a bookkeeper who worked in a room behind reception at the hotel. Further, SVL refunded the wages paid to the hotel staff by David Pearson's company Ski Verbier Hotel Limited (along with all the other hotel running costs), managed the hotel and recruited the employees, as well as obtaining their work permits.

69. I observe at this point that, on the evidence I heard, this assertion by Ms Reffin as to how the business worked is correct. She also submits that the activities of SVL's employees in Verbier, contrary to Dr Honauer's views, were an essential and significant part of SVL's services to its customers. Services to both chalet and hotel guests were provided through the property at SVL's disposal at its responsibility and control.

Was the tax due? - the Defendants' case

70. Mr Bremner submits that the evidence of Dr Honauer that there is no permanent establishment is to be preferred to that of Dr Grunblatt.

71. First no fixed place of business is at the disposal of SVL in Verbier (Joint Report para 10(b)). The notion of a place of business generally connotes a facility, such as premises (see paragraph 2 of the OECD Commentary.) Paragraph 8 of the OECD Commentary shows that the mere letting of immovable property does not constitute a permanent establishment. On the contrary, it is only when the enterprise *"maintains a fixed place of business"* for that letting activity that the enterprise could have a permanent establishment. This is because the land which is being let out is not at the disposal of the enterprise.

72. The essential first step in any argument as to whether there is a permanent establishment is to identify the fixed place of business (which must be at the disposal of the enterprise). On no view, however, were the chalets (which are let to the clients) or the hotel (which is owned and operated by an independent third party, Ski Verbier Hotel Limited) at the disposal of SVL. Nor is the staff accommodation at the disposal of SVL (it is being used by the staff members to live in, not for the purposes of carrying on any business of SVL).

73. SVL did not maintain any offices (or other fixed place of business) within Verbier. Kuoni's argument mistakenly conflates the carrying on of business activities in Verbier with the existence of a fixed place of business. In the present case, SVL had no fixed place of business in Verbier. The first essential condition for there to be a permanent establishment is therefore not met. For this reason alone, Kuoni's claim fails.

74. Moreover, and in any event, the activities of the staff were (as Dr Honauer observes) auxiliary in nature. Accordingly, even if those activities did lead to SVL having a fixed place of business there would not, in any event, be a permanent establishment. So far as the chalets are concerned, the staff provided (essentially) cooking, cleaning and driving services. These services are clearly intended better to enable the client to enjoy the time that he spends in the chalet and are not ends in themselves. They are therefore auxiliary in nature and do not constitute a permanent establishment. The same point applies to the bookkeeper. Nor are the activities of the staff at the Hotel of any assistance to Kuoni. The staff at the hotel are employees not of SVL but of an independent third party company, Ski Verbier Hotel Limited. As they have no relevant connection to SVL, their activities could not constitute a permanent establishment for SVL.

75. With effect from 1 January 2010 the LTVA 2001 was replaced by the LTVA 2010. As Dr Honauer observes (without apparent dissent from Dr Grunblatt) *"the new legislation has therefore changed the legal analysis in this area".* This is a substantive change in the law in this area. The need for such legislative intervention reinforces D's case that its activities did not give rise to a permanent establishment during the Relevant Period: there would have been no need for the amendment effected by LTVA 2010 if C's analysis were correct.

Was the tax due? - Decision

76. Both expert witnesses are distinguished tax professionals with considerable experience and of high intellect. Against Dr Grunblatt is the fact that he comes from Homburger, Kuoni's advisers, and indeed advised on this matter albeit in general terms without access to the facts in a highly fact sensitive case. Kuoni chose to use him to save money given the cost of this case and the amount involved. This is a significant consideration not diminished by the commendably moderate manner in which Mr Bremner put the point. Against that I had a sense of Dr Grunblatt telling the court what he actually believed to be the case after now having close exposure to the facts (not surprisingly the Defendants would retort) while Dr Honauer was perhaps arguing, as Leading Counsel might in London, an attractive and plausible point of view.

77. The views of the experts are set out in their reports and also in the unusually skilled and helpful Joint Report. This carefully reasoned document identifies what is agreed and what is not. As the Joint Report makes clear the issue is essentially one of applying fact to clear principles about which the differences are mainly those of emphasis.

78. Dr Honauer's opinion, summarised at 10 of the joint report, rests on assumptions that the business is more transitory and the service provided more basic than the evidence shows to be the case. He was mistakenly informed that SVL's contract with its

customers *"is limited to the mere rental of the chalet or holiday flat"*, but chalet clients received breakfast, tea and a five-course dinner and extensive *"lackey"* services. Hotel guests enjoyed similar services excluding dinner. Similarly he was informed that SVL's *"offer also included optional catering services, if requested",* but all guests received catering services apart from the small minority in the self-catered chalet/s. He was informed that SVL's supplies to customers staying at the hotel consist only of *"holiday flats that [SVL] rents to customers"*, but it is a normal small hotel where guests get en-suite bedrooms and use of communal areas including a living area, sauna and bar, and breakfast and tea is included; and where SVL's bookkeeper had the use of a room behind Reception for his/her work.

79. Further the clients of SVL paid for and received an all in package plus optional extras for an additional charge. This was an overall and largely indivisible holiday experience as one sees from the brochures and similar material in the documents and as I heard from the witnesses. Ownership of the hotel and chalets was not necessary for them to be at the disposal of SVL (I accept the analysis of Dr Grunblatt at 11 b and c of the Joint Report) and in a practical sense they were plainly at SVL's disposal and at the same fixed place over a number of years albeit only during the ski season. Similarly the business was conducted *"through"* the fixed place by staff whose care and attention was an essential part of what the clients were buying. Finally I conclude that the services provided (except perhaps those available from third parties as extras) were in no sense ancillary but were an essential part of the overall package that the client paid for. This would be obvious to any client taking what is a traditional British style (although highly professional and up market) package ski holiday.

80. It follows that I prefer the approach of Dr Grunblatt essentially because his views are based on more accurate facts than those assumed by Dr Honauer and are consistent with the sense of the provisions relied upon as these are explained in the reports. It is obviously unsatisfactory for an English judge to have to decide between the views of distinguished experts on Swiss tax law. I draw some reassurance however from two commercial considerations which are irrelevant in law. First the tax affected not just the Sellers but also, in the period after June 2007, Kuoni as well. This is not one of those cases where the purchaser is indifferent to whether a liability is incurred because the whole of it will be passed to the seller. Secondly while it is true that the Sellers asked Kuoni not to pay the liability they did not, as I have pointed out, invoke their rights under Clause 6 of the Deed to take the claim over or at that stage put forward the view of the tax now advanced.

81. I add that Dr Honauer relied on two Swiss decisions concerning "permanent establishment" under other tax statutes. These appear to turn on different facts and did not seem to me to be relevant to the outcome.

Clause 5.4

82. The Defendants argue that it was the registration of the Branch by Kuoni that led to SVL's payment to the AFC, with the result that the limitation in clause 5.4 of the Deed applies. The argument goes as follows. TVA is a self-assessed tax. At no point during the years to which this dispute relates did SVL self-assess on the basis that it was liable to account for TVA in respect of its supplies of holiday accommodation. In circumstances where (as in this case) the taxpayer has self-assessed bona fide on the basis that the tax is not due and maintains that view, the only action that would in

practice lead to an alteration of the position is an enquiry and assessment by the AFC. Dr Honauer's evidence is that:

> *"As a result of the changes in the VAT law … SVL was obliged to register for VAT as of 1st January 2010. This was because the place of supply of accommodation services was changed to the place of the real property. A registration as of that moment was mandatory. A registration based on the change of the law would create less discussion with the [AFC] about the situation in the past. Indeed, based on my experience it is more likely than not that the [AFC] would have registered SVL without analysing the past at all. Had this course been taken, therefore, the dispute with the AFC concerning SVL's historic VAT position may well not even have arisen."*

83. The Defendants argue that it is more likely than not that had registration been made on the basis of the change in TVA law (rather than on the basis upon which it was in fact made), the AFC would not have sought to reopen the past at all. Had that been the case, the present dispute would not even have arisen.

84. The first problem with this argument is that it depends on evidence of fact from an expert witness which necessarily makes a number of assumptions about what might or might not have happened. The second problem is that Dr Honuauer frankly accepted that this part of his evidence necessarily involved speculation. The third problem is that good evidence would be needed for this argument to succeed in a situation where an experienced Swiss company has acted on the clear advice of two experienced and reputable sets of advisers as to what steps it was required to take in registering the branch and in other matters. As I see it this point does not get off the ground evidentially and it is therefore unnecessary for me to examine the competing submissions about the meaning of Clause 5.4 and the further arguments put forward by Ms Reffin.

Conclusion

85. I therefore conclude that Kuoni did not have to give 30 days notice under Paragraph 2 of the Schedule to the SPA but that, if it did, such notice was in fact given. I also conclude that the tax in issue was payable under Swiss law and that the Defendants have no grounds under Clause 5.4 not to pay what was otherwise due. I will deal with matters arising at the hand down of this judgment to the extent that agreement cannot be reached.

86. I shall be grateful if the parties will, not less than 72 hours before the hand down of this judgment, let me have a list of corrections of the usual kind and a draft order (both preferably agreed) and a note of any issues they wish to raise at the hearing.

87. I am grateful to Counsel and solicitors for the admirable way in which this case was presented and prepared which saved the parties the cost of what would otherwise have been a longer trial.