NATIONAL INSURANCE CONTRIBUTIONS - services provided through service company - if the arrangements had taken the form of a contract between the Appellant and the client whether the Appellant would be regarded as employed - yes - appeal dismissed - Social Security Contributions and Benefits Act 1992 Ss 2 and 4A; Social Security Contributions (Intermediaries) Regulations 2000 SI 2000 No. 72 7 Reg 6(1)

THE SPECIAL COMMISSIONERS
EDDIE BATTERSBY Appellant
and
STEPHEN DAVID CAMPBELL
(HM INSPECTOR OF TAXES) Respondent
SPECIAL COMMISSIONER: DR NUALA BRICE
Sitting in private in London on 3 August 2001
The Appellant in person
Barry Williams, Regional Advocacy Adviser, for the Respondent

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ANONYMISED DECISION

The appeal

1. Mr Eddie Battersby (the Appellant) appeals against a decision made on 29 November 2000 relating to national insurance contributions. The decision was:
"That the circumstances of the arrangements between Mr E Battersby and Pennyright Bank for the performance of services from 31/05/2000 to 29/11/2000 are such that, had they taken the form of a contract between Mr E Battersby and Pennyright Bank, Mr E Battersby would be regarded for the purposes of Parts I to V of the Social Security (Contributions and Benefits) Act 1992 as employed in employed earner's employment by Pennyright Bank. That E.B.COM Limited is treated as liable to pay primary and secondary Class 1 contributions in respect of the worker's attributable earnings from this engagement."

The legislation

2. The legislation relevant to the issue in the appeal has become known colloquially as the IR35 legislation because that was the reference number of a Press Release which was issued by the Inland Revenue on 9 March 1999. The Press Release was entitled "Countering avoidance in the provision of personal services." The legislation proposed in the Press Release changes the treatment, for the purposes of income tax and national insurance contributions, of payments made to service companies. This appeal concerns only national insurance contributions.

3. The legislation about the payment of national insurance contributions is contained in The Social Security Contributions and Benefits Act 1992 (the 1992 Act) which contains separate provisions applicable to employed earners on the one hand and self-employed earners on the other. Section 75 of the Welfare Reform and Pensions Act 1999 inserted a new section 4A into the 1992 Act to take effect from 22 December 1999. New section 4A provided that Regulations might make provision for securing that, in stated circumstances, payments to service companies should be treated as earnings paid to a worker in respect of an employment. The Regulations made under the provisions of new section 4A are the Social Security Contributions (Intermediaries) Regulations 2000 SI 2000 No. 727 (the 2000 Regulations). These came into force on 6 April 2000. The relevant part of Regulation 6 provides:

"6(1) These Regulations apply where-
(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client"),
(b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and
(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts 1 to V of the Contributions and Benefits Act as employed in employed earner's employment by the client."

The issue

4. The Appellant is a computer consultant. In 1988 he established a limited company through which he supplied his services (the service company). In 1993 he started supplying services to Pennyright Bank through the service company. It was not disputed that the Appellant personally performed services for the purposes of the business carried on by Pennyright Bank and that the performance of those services was carried out not under a contract directly between the Appellant and Pennyright Bank but under arrangements involving an intermediary (namely the service company) within the meaning of subparagraphs (a) and (b) of Regulation 6(1).

5. Thus the issue for determination in the appeal was whether the circumstances were such that, had the arrangements taken the form of a contract between the Appellant and Pennyright Bank, the Appellant would be regarded for the purposes of the 1992 Act as employed in employed earner's employment by Pennyright Bank within the meaning of paragraph (c) of Regulation 6(1).

The evidence

6. Oral evidence was given by the Appellant on his own behalf. An agreed bundle of documents was produced. The Appellant produced three more documents in addition to those in the bundle.

The facts

7. The Appellant is a computer analyst and programmer. From 1982 he was employed by various companies. On 20 June 1988 he established a service company called E.B.Com Limited (E.B.COM) of which he and his wife were the directors. The Appellant then became self-employed. In the early 1990's there was an economic recession and the Appellant was out of work for nine months. This caused him hardship because, as a self-employed person, he did not receive unemployment benefits. The Appellant accepted work in Scotland but did not move his home there; he found the traveling between home and work to be inconvenient.

8. In 5 April 1994 the Appellant started working for Pennyright Bank whose premises were a half hour's drive from his home. He obtained the contract through an agency called Grinstead Associates (Grinstead). Pennyright Bank paid Grinstead who paid E.B.COM from whom the Appellant took his remuneration in the form of dividends. When the Appellant started to work for Pennyright Bank he was working on an old computer system that was to be replaced. Accordingly, he would not at that stage have been offered a permanent job with Pennyright Bank.

9. In 1996 E.B.COM bought out the contract with Grinstead for the sum of £5,460.00. Thereafter the Appellant continued to work for Pennyright Bank as a self-employed contractor directly through E.B.COM. In May 1999 Pennyright Bank wished to consolidate the procurement of all its self-employed contractors and did that through a company called Staff Agency Limited (Staff Agency). Thereafter the contracts were between E.B.COM and Staff Agency; Pennyright Bank paid Staff Agency who paid E.B.COM from whom the Appellant received his remuneration.

10. The Appellant's contracts with Pennyright Bank were initially for six months and later for twelve months at a time. The contract in force at the relevant time was a consultancy agreement between Staff Agency and E.B.COM. Under that agreement E.B.COM agreed to procure that the Appellant would devote his time, attention, skill and ability in accordance with the requirements of Pennyright Bank at such location as Pennyright Bank might reasonably require. The agreement contained a special provision in the following terms;

"This agreement does not create the relationship of employer/employee between the company [Staff Agency Limited] or client [Pennyright Bank] and the contractor [E.B.COM] or any of its personnel [the Appellant] ... ."

11. At the relevant time the arrangements under which the Appellant worked for Pennyright Bank had the following features:

- E.B.COM agreed to assign to Pennyright Bank all intellectual property or other rights created during the performance of the Appellant's services.
- E.B.COM remained responsible for the Appellant's sickness, disability and pension arrangements.
- E.B.COM was only to be paid for time worked by the Appellant and not for sickness and holidays. Any absence of the Appellant had to be agreed and approved in advance by Pennyright Bank.
- Staff Agency could end the agreement at any time on giving four weeks notice to E.B.COM or with immediate effect if there were technical incompetence, unprofessional performance, unsuitability or misconduct of the Appellant.
- Responsibility for the quality, quantity, and performance of the services rested with Pennyright Bank at all times.
- The normal hours of work were seven hours a day and payment was of an hourly rate with overtime paid pro rata; reasonable travelling and subsistence expenses were also payable.
- If Pennyright Bank complained about the Appellant, or if the Appellant withdrew, Staff Agency would provide Pennyright Bank with a replacement.
- The equipment used by the Appellant was a mainframe computer system which was owned by Pennyright Bank and which was situated at Pennyright Bank's premises.

12. At Pennyright Bank's premises the Appellant worked in a large open plan office which accommodated about 55 people. As a self-employed contractor the Appellant did not have a job title. The Appellant managed a small group of seven, of whom two were self-employed contractors and the rest were permanent employees. The self-employed contractors were mainly involved in project planning and the employees mainly supplied general production support. However, they all used the same equipment and the work was managed as a whole. The Appellant reported to a personal manager who was employed by Pennyright Bank. He had meetings with the

personal manager to discuss how projects were going, whether he would meet his deadlines, and any other problems. The Appellant was the technology manager for his team. However, as a self-employed contractor he was not able to undertake any personnel management of the permanent employees. This was done by another employed manager who reported to the same person as the Appellant. The Appellant could express views about the performance of the employees in his team but the permanent manager formally reviewed their performance. Although the Appellant attended project meetings he did not attend other meetings arranged for permanent employees.

13. In April 2001 Pennyright Bank offered the Appellant a permanent position as an employee and he accepted that offer. He considered that it had many advantages. He would not be troubled by the IR35 legislation; he would obtain the benefits of private health insurance, sick pay, holiday pay and pension provision; he would have job security; he could manage the permanent employees in his team; and he would become involved in internal management and company decisions.

The arguments of the Appellant

14. The Appellant argued that he was not employed by Pennyright Bank. He argued that it was common in the computer industry for enhancement work to be undertaken by selfemployed contractors and for support work to be undertaken by permanent staff. Employers preferred self-employed contractors because they could be laid off without severance pay. He took the risks of self-employment and he did not have any employment rights. Pennyright Bank could reduce his earnings without notice. He had had to renew his contract after each period of six months (or latterly each year) during the time he was self-employed. The Appellant emphasised that he ran his company properly and said that he paid an accountant £1,000 per year to perform the appropriate professional services to keep it in order. He distinguished his company from an "umbrella" company which was a single company out of which many contractors operated and where the contractors were not directors of the company. He argued that the IR35 legislation was more likely to apply to umbrella companies than to his own.

The arguments for the Respondent

15. For the Respondent M-r Williams argued that it was necessary to look at the substance of the arrangements rather than the form. The substance was that the Appellant was an employed earner. He had a personal obligation to Pennyright Bank and had been there for seven years. He supervised seven others, including employees, and in turn he was supervised by a personal manager. He was integrated into the structure of Pennyright Bank. Although in theory the Appellant could have been substituted by another employee, in practice that had never been done. The Appellant was not at risk of bad debts and he had not called a witness from Pennyright Bank to speak to the relationship. Mr Williams cited the authorities referred to later in this Decision and also Bank voor Handel en Scheepvaart N.V. v Administrator of Hungarian Property (1952) 35 TC 311; Morren v Swinton and Pendlebury Borough Council [1965]1 WLR 576; Massey v Crown Life Insurance Co [1978] 2 All E.R. 576; O'Kelly v Trust House Forte Plc [1984] QB 90; [1983] ICR 728; Carmichael and another v National Power plc [1999] 4 All ER 897; Express and Echo Publications Ltd v Tanton (1999) CA Transcript of 11 March 1999; MacFarlane and Skivington v Glasgow City Council EAT/1277/99 Transcript of 17 May 2000; O'Murphy v Hewlett-Packard Ltd Employment Tribunals Case 5300148/01 Transcript of 27 March 2001; and R (on the application of Professional Contractors Group Ltd and others) v Inland Revenue Commissioners [2001] STC 629.

Reasons for decision

16. Before considering the arguments of the parties it is convenient first to deal with a point made at the hearing by the Appellant with some force. The Appellant emphasized that people who supplied their services through service companies were not "tax fraudsters". He said that he had run E.B.COM for 14 years; all the money was accounted for in the books and he had paid all his income tax and value added tax. I have much sympathy with these comments. The Appellant, and his wife who assisted him, were honest, frank and open. There is no question in this appeal of any tax fraud. In this appeal the Inland Revenue do not dispute that the service company was run correctly, and that the right amounts of tax were paid, before the changes in the law which were effected by the 2000 Regulations. However, what has to be decided in this appeal is the effect of the changes made by the 2000 Regulations and, in particular, whether the Appellant now comes within the terms of Regulation 6(1)(c) of those Regulations.

The legislation

17. In considering the legislation I start with the 1992 Act. The definitions are in section 2 and the relevant parts provide:

"2(1) In this Part of this Act and Parts 11 to V below-
(a) "employed earner" means a person who is gainfully employed ... either under a contract of service, or in an office ... with emoluments chargeable to income tax under Schedule E; and

(b) "self-employed earner" means a person who is gainfully employed ... otherwise than in an employed earner's employment...."

18. The relevant parts of the new section 4A of the 1992 Act, as inserted by the Welfare Reform and Pensions Act 1999, provide:

"4A(1) Regulations may make provision for securing that where-
(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person (the client),
(b) the performance of those services by the worker is (within the meaning of the regulations) referable to arrangements involving a third person (and not referable to any contract between the client and the worker), and
(c) the circumstances are such that, were the services to be performed by the worker under a contract between him and the client, he would be regarded for the purposes of the applicable provision of the Act as employed in employed earner's employment by the client, relevant payments or benefits are, to the specified extent, to be treated for those purposes as earnings paid to the worker in respect of an employed earner's employment of his."

19. The relevant parts of the 2000 Regulations have already been referred to. To complete the legislative picture a reference should be made to the Social Security Contributions (Transfer of Functions, etc.) Act 1999, which transferred the exercise of certain functions under the 1992 Act to the Board of Inland Revenue, and to Regulation 6(4) of the 2000 Regulations which provides:

"(4) Any issue whether the circumstances are such as are mentioned in paragraph 1(c) is an issue relating to contributions that is prescribed for the purposes of section 8(1)(m) of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 (decision by officer of the Board)."

The issue

20. The issue in the appeal is whether the circumstances were such that, had the arrangements taken the form of a contract between the Appellant and Pennyright Bank, the Appellant would be regarded for the purposes of the 1992 Act as employed in employed earner's employment by Pennyright Bank within the meaning of paragraph 6(1)(c) of the 2000 Regulations. The full text of Regulation 6(1)(c) is;

"(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client."

21. The 1992 Act defines an employed earner as a person who is gainfully employed either under a contract of service, or in an office ... with emoluments chargeable to income tax under Schedule E. As it was not argued that the Appellant was employed in an office, the issue is whether the Appellant would have been gainfully employed under a contract of service if his contract had been with Pennyright Bank and not with E.B.COM.
The authorities and the principles

22. The authorities establish the principle that the question as to whether a person is employed under a contract of service, or whether he is self-employed and provides a contract for services, is a question of fact in each case to be determined having regard to all the relevant circumstances.

23. In Ready Mixed Concrete (South East), Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 the issue was whether a worker was within the class of employed persons under the National Insurance Act 1965 as being an employed person under a contract of service. At page 515C MacKenna J said:

"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

24. At page 515F MacKenna J added:
"Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done."

25. MacKenna J then went on to identify a number of factors to be taken into account in deciding whether a contract was a contract of service. These included: whether the contractor hired his own employees; whether the contractor provided and maintained his own tools or equipment; whether the contractor was paid by reference to the volume of work done; whether the contractor had invested in the enterprise and bore the financial risk; whether the contractor had the opportunities of profit or the risk of loss; and whether the relationship was permanent.

26. In Market Investigations Ltd v Minister of Social Security [1968] 2 All E.R.732 Cooke J said that the fundamental test was whether a person performed services as a person in business on his own account. Although control was relevant it was not the sole determining factor; when one was dealing with a professional man, or a man of some particular skill and experience, there could be no question of the employer telling him how to do the work.

27. In Hall v Lorimer [1994] STC 23 the taxpayer was a vision mixer who undertook work for a number of different television production companies and whose engagements consisted of short term contracts lasting one to two days. In four years he worked on over 800 days. The Court of Appeal held that there was no single path to a correct decision. The question whether an individual was in business on his own account might be helpful but might be of little assistance in the case of one carrying on a profession or vocation. Factors which were critical in that appeal were the duration of the particular engagements and the number of people by whom the individual was engaged.

28. McManus v Griffiths (1997) 70 TC 218 established the principle that, in deciding whether a person was employed or self-employed, the task was to try to make legal sense of the arrangements made. Especially where the documents had not been drafted professionally, it was necessary to concentrate on the substance of the contractual arrangements rather then their form or the parties' labels.

29. Applying those principles to the facts of the present appeal I find that a number of factors point to the conclusion that, if the Appellant had been employed under a contract with Pennyright Bank, he would be regarded as gainfully employed under a contact of service. Such factors are:
- The Appellant did agree, in consideration of remuneration, to work a given number of hours a day and to provide his own work and skill to Pennyright Bank. Any absence of the Appellant had to be agreed and approved in advance by Pennyright Bank.
- The Appellant was a man of skill and experience and so it would not be expected that Pennyright Bank would tell him how to do his work; however, the Appellant was managed by a personal manager employed by Pennyright Bank.
- In the performance of his work the Appellant was subject to Pennyright Bank's control inasmuch as the contract provided that it could be ended for incompetence or misconduct and that responsibility for the quality, quantity and performance of the services rested with Pennyright Bank at all times.
- The Appellant did not hire his own employees; the members of his team were either self-employed contractors who had contracted directly with Pennyright Bank or permanent employees of Pennyright Bank.
- The Appellant did not provide and maintain his own tools and equipment; he used the mainframe computer owned by Pennyright Bank.
- The Appellant was not paid by reference to the volume of work done but by reference to the number of hours he worked.
- The Appellant did not invest in any enterprise and he did not bear any financial risk; he had no opportunity of profit and no risk of loss.
- The relationship between the Appellant and Pennyright Bank had an element of permanency as it lasted for seven years.
- The Appellant only provided work for Pennyright Bank and for no other client.
- The Appellant was integrated into the structure of Pennyright Bank to the extent that he worked closely with its employees.

30. On the other hand, some other factors point to the conclusion that, if the Appellant had been employed under a contract with Pennyright Bank, he would not be regarded as being gainfully employed under a contact of service but rather as providing services under a contract for services. Such factors are:

- After incorporating the service company, and before working for Pennyright Bank, the Appellant accepted the consequences of self-employment as he was unable to claim benefits when he was out of work. However, this was a consequence of the fact that his clients contracted with the service company. Under Regulation 6(1)(c) of the 2000 Regulations the assumption has to be made that the arrangements take the form of a contract between the Appellant and Pennyright Bank.

- The agreement between Staff Agency and E.B.COM provided specifically that it did not create the relationship of employer/employee between Pennyright Bank and the Appellant. However, such label given by the parties cannot be conclusive.

- Pennyright Bank was not obliged to pay the Appellant while he was sick or on holiday; the Appellant did not participate in Pennyright Bank's pension scheme nor did he receive private health insurance.

- In theory the Appellant did not enjoy job security as his contract could be terminated on four weeks' notice. However, in practice the Appellant worked for Pennyright Bank continuously for seven years.

- The Appellant did not participate in any management decisions at Pennyright Bank and could not manage permanent employees.

31. Having considered all the relevant factors I conclude that those which point towards there being a contract of service outweigh the factors which point towards there being a contract for services. Concentrating on the substance of the contractual arrangements rather than their form, I therefore conclude that, if the Appellant had been employed under a contract with Pennyright Bank, he would be regarded as being gainfully employed under a contact of service.

Decision

32. My decision on the issue for determination in the appeal is that, if the arrangements had taken the form of a contract between the Appellant and Pennyright Bank, the Appellant would be regarded for the purposes of the 1992 Act as employed in employed earner's employment by Pennyright Bank.

33. The appeal is, therefore, dismissed.

DR NUALA BRICE
SPECIAL COMMISSIONER

NATIONAL INSURANCE CONTRIBUTIONS – services of individual provided to client through service company and agency – whether "the arrangements" included the contract with the agency – yes - whether, if the arrangements had taken the form of a contract between the individual and the client, the individual would be regarded as employed – yes – whether the individual fell within the category of employed earner under the 1978 Regulations – appeal dismissed - Social Security Contributions and Benefits Act 1992 Ss 2 and 4A; Social Security (Categorisation of Earners) Regulations 1978 SI 1978 No 1689 Reg 2(2) and Sch 1 Part I Col (A) Item 2(a); Social Security Contributions (Intermediaries) Regulations 2000 SI 2000 No. 727 Reg 6(1)

THE SPECIAL COMMISSIONERS

F.S. CONSULTING LIMITED

Appellant

- and -

PATRICK McCAUL
(HM INSPECTOR OF TAXES)

Respondent

SPECIAL COMMISSIONER : DR NUALA BRICE

Sitting in London on 3 December 2001

John Antell of Counsel for the Appellant

I B Mitchell, Advocacy Adviser of the London Region Advocacy Unit, for the Respondent

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ANONYMISED DECISION

The appeal

1. F.S. Consulting Limited (the Appellant) appeals against four decisions made on 21 June 2001 relating to national insurance contributions. The first decision was in the following terms:

> "That the circumstances of the arrangements between Frank Simpson and Better Investments Plc for the performance of services from 6 April 2000 to 30 June 2000 are such that, had they taken the form of a contract between Frank Simpson and Better Investments Plc, Frank Simpson would be regarded for the purposes of Parts I to V of the Social Security (Contributions and Benefits) Act 1992 as employed in employed earner's employment by Better Investments Plc. That F.S. Consulting Limited is treated as liable to pay primary and secondary Class I contributions in respect of the worker's attributable earnings from that engagement."

2. The other three decisions were in the same terms save that the dates mentioned were:

In the second decision -	3 July 2000	to 1 September 2000
In the third decision -	4 September 2000	to 30 November 2000
In the fourth decision -	1 December 2000	to 29 June 2001

The legislation

3. The legislation about the payment of national insurance contributions is contained in The Social Security Contributions and Benefits Act 1992 (the 1992 Act) which contains separate provisions applicable to employed earners on the one hand and self-employed earners on the other. Section 75 of the Welfare Reform and Pensions Act 1999 inserted a new section 4A into the 1992 Act to take effect from 22 December 1999. The relevant parts of section 4A provide:

> **"4A(1) Regulations may make provision for securing that where-**
>
> **(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person (the client),**
>
> **(b) the performance of those services by the worker is (within the meaning of the regulations) referable to arrangements involving a third person (and not referable to any contract between the client and the worker), and**
>
> **(c) the circumstances are such that, were the services to be performed by the**

worker under a contract between him and the client, he would be regarded for the purposes of the applicable provision of the Act as employed in employed earner's employment by the client,

relevant payments or benefits are, to the specified extent, to be treated for those purposes as earnings paid to the worker in respect of an employed earner's employment of his."

4. The Regulations made under the provisions of new section 4A are the Social Security Contributions (Intermediaries) Regulations 2000 SI 2000 No. 727 (the 2000 Regulations) which came into force on 6 April 2000. The relevant parts of Regulation 6 provide:

"6(1) These Regulations apply where-

(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client"),

(b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and

(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client."

The issues

5. Mr Frank Simpson (Mr Simpson) is a computer consultant and the sole director and shareholder of the Appellant. During the relevant time Mr Simpson supplied his services to the Appellant who supplied them to an agency called Topper Recruitment Limited (Topper) who supplied them to Better Investments Plc (Better). It was not disputed that Mr Simpson personally performed services for the purposes of a business carried on by Better within the meaning of section 4A(1)(a) and Regulation 6(1)(a).

6. The Inland Revenue argued that Regulation 6(1)(c) applied. The Appellant argued: first, that "the arrangements" mentioned in Regulation 6(1)(c), and the arrangements mentioned in Regulation 6(1)(b), were those involving the intermediary (the Appellant) but not the arrangements involving Topper who was not an intermediary as defined; secondly that had those arrangements taken the form of a contract between Mr Simpson and Better, Mr Simpson would not be regarded as employed by Better, in particular because under those arrangements Better did not pay remuneration to Mr Simpson but to Topper; and, thirdly, that the arrangements involving Topper were governed by the Social Security (Categorisation of Earners) Regulations 1978 SI 1978 No. 1689 (the 1978 Regulations) but that under those Regulations Mr Simpson was not treated as falling within the category of an employed earner because Mr Simpson was not subject to supervision, direction or control as to the manner of the rendering of his services.

7. It seems to me it would not be proper for me to determine this appeal on the basis of the Appellant's third argument. The decision under appeal is not based on the 1978 Regulations but, more importantly, the third argument does not concern the Appellant in

this appeal (F.S. Consulting Limited) but does concern Topper and Mr Simpson, neither of whom are parties to this appeal. I have therefore identified the first two of the Appellant's arguments as being the issues in the appeal. However, as I heard arguments from the Appellant about the 1978 Regulations I will very briefly express my views.

8. Thus the issues for determination in the appeal are:

(1) whether "the arrangements" mentioned in Regulation 6(1)(c), and the arrangements mentioned in Regulation 6(1)(b), are those involving the intermediary (the Appellant) but not the arrangements involving Topper who was not an intermediary as defined; and

(2) whether, had the arrangements taken the form of a contract between Mr Simpson and Better, Mr Simpson would be regarded as employed in employed earner's employment by Better.

The evidence

9. Oral evidence was given by Mr Simpson on behalf of the Appellant. On 19 November 2001 Mr Simpson signed a written statement of his evidence. An agreed bundle of documents, which contained a copy of Mr Simpson's statement, was produced.

The facts

10. From the evidence before me I find the following facts.

11. The Appellant was incorporated on 21 July 1997 and commenced to trade on 31 August 1997. Its sole director and shareholder is Mr Simpson who is a computer consultant conversion specialist. Mr Simpson's skills are comparatively rare; in evidence which I accept Mr Simpson said that he knew of no more than forty other consultants with his expertise in conversion work.

12. Mr Simpson started working with a major bank in 1987 and trained as a computer programmer. He then became a senior programmer and later was promoted to team leader. In 1997 Mr Simpson left the bank. He personally sent his curriculum vitae to various companies seeking the position of analyst/programmer. Later in 1997 the Appellant was incorporated.

13. The Appellant then arranged through an agency for Mr Simpson to provide services to a building society for three months and then to an insurance company for six months. (Agencies make no initial charge for matching workers to clients but make a profit by entering into contracts with both the worker and the client under which the client pays an hourly rate to the agency and the agency pays a lower hourly rate to the worker). Mr Simpson continued to write personally to other companies seeking positions with them. He wrote from his home address giving the telephone numbers both of his home and of his current place of work.

14. After the initial six months the contract with the insurance company was extended but shortly thereafter the insurance company sold its business. Mr Simpson was given the

four weeks' notice provided for by his contract with the agency and, as a result of the recommendation of some colleagues with whom he had worked at the insurance company, was offered a contract with Better which commenced in December 1998. When that contract was complete Mr Simpson was offered another contract with Better. He continued to provide services to Better until and during the period the subject of the decisions under appeal.

15. The decisions under appeal relate to the period from 6 April 2000 to 29 June 2001. Throughout that time Mr Simpson provided his services to the Appellant, who in turn provided them to the agency Topper, who in turn provided them to Better. Better paid Topper; Topper paid a lesser sum to the Appellant; and the Appellant in turn paid Mr Simpson.

16. A contract was entered into between Topper and the Appellant in April 2000. The contract provided that, for the period mentioned in the schedule, the Appellant would provide an individual to perform consultancy services for a client of Topper; the services were to be performed by the individual named in the schedule but the Appellant might propose a replacement which had to be approved by the client. The services were to be performed at the location specified. The individual had to take all necessary instructions from the client and comply with all the client's rules, regulations and procedures. Travelling time and expenses were the responsibility of the Appellant. The individual had to record the hours worked on a Topper time sheet on a weekly basis and send it to Topper. The contract could be terminated immediately if the client terminated its agreement with Topper because of incompetence, unsuitability or unprofessional conduct by the individual. Otherwise the contract could be terminated by Topper with four weeks' notice. Clause 7 of the contract read:

> "7. It is clearly understood that in no circumstances can this contract be interpreted as a contract of employment and that it is a contract for the supply of services only, however no warranty is given or implied that the assignee is consider by Topper Recruitment to be self-employed."

17. The schedule to the contract of April 2000 was for the thirteen week period from 3 April 2000 to 30 June 2000. It provided that the specified consultant was Mr Simpson; that the client was Better; that the fee rate was £1,839 per week; that the hourly rate was £49.04 per hour (both exclusive of value added tax); that overtime rates were *pro rata*; and that the standard working week was 37.5 hours. The schedule was extended three times. The first extension was in June 2000 and ran for nine weeks from 3 July to 1 September 2000. The second extension was in September 2000 and ran for thirteen weeks from 4 September 2000 to 30 November 2000. And the third extension was in November 2000 and ran from 1 December 2000 to 29 June 2001. These are the periods in the decisions under appeal.

18. During the period under appeal Mr Simpson was working to a design co-written by himself and other consultants during a previous contract with Better. Mr Norman Brown, an employee of Better, was the project manager and the task was to develop systems to convert one information technology system to another. There were seven members in the team, of which five were employees of Better and two (including Mr Simpson) were consultants. Better identified its business requirements and the front end analysis work was done by the employees of Better. This analysis identified the code required and Mr Brown decided when

it was required. Mr Simpson and the other consultant designed the code and were free to design it as they thought fit. The work done by Mr Simpson and the other consultant included: breaking down the work into programs and sub-programs; providing design specifications; coding the programs and sub-programs; unit testing each program and sub-program; testing sections of the suite of programs and sub-programs if thought appropriate; testing the whole suite of programs and sub programs; providing operating instructions to Better on how to run each program and sub-program; and finally handing the suite of programs to Better with the operating instructions. The testing of the code was carried out by the employees of Better. Mr Simpson gave advice on all matters of coding and designing.

19. While working at Better Mr Simpson never acted as team leader and had no job title. He could not decide which employees of Better worked in the team and he could not "hire or fire" them; he could advise the employees but could not instruct them what to do. As project manager Mr Brown controlled what was to be done and when it was to be done but left it to Mr Simpson and the other consultant to determine how it was done. There was very little direction or control by Better over how Mr Simpson did his work. Although normally some quality control checks would be carried out by someone else within a team, I accept the evidence of Mr Simpson that, in practice, there were no quality control checks of his work at Better.

20. The equipment for the work was provided by Better at their site and involved access to a mainframe computer. Better also provided for Mr Simpson at their premises a desk in an open plan office, a telephone, a desk top personal computer and anything else that he needed for his work. Initially Mr Simpson worked at Better's premises, with occasional work at the premises of the Appellant. Later he worked at another of Better's sites as well. Ultimately the first site was closed down and all the work was done at the second site.

21. The actual hours worked by Mr Simpson were flexible. Mr Simpson recorded his time on a time sheet and billed Topper for the time he worked. The time sheet had to be signed by a representative of Better to verify the time worked. All Mr Simpson's work was paid for and none of his invoices remained unpaid. Prior notice of non-attendance was required and permission was also required before leave could be taken. When Mr Simpson wanted to take time off for holidays he told Better in advance and there were no difficulties.

22. The contract between the Appellant and Topper gave the Appellant the right to substitute Mr Simpson with another consultant who had previously provided consultancy of a high standard to Better. In fact, however, the right to substitute another consultant was never used. In evidence which I accept Mr Simpson said that he would only seek to substitute another consultant in certain circumstances, such as at the end of a contract if he had found something better and wanted to give notice or if he were ill for any length of time.

23. Mr Simpson left Better in June 2001 and now works for a building society. Although at the relevant time Mr Simpson was free, as a matter of contract, to undertake work for as many clients as he wished, in practice he only ever worked for one client at a time. The nature of the services he provided attracted large companies with mainframe computers and contracts of three months and over were normal for these clients.

The arguments for the Appellant

24. For the Appellant Mr Antell first argued that the effect of section 2(1)(a) with section 2(2)(b) of the 1992 Act was that it was necessary to find either a contract of service or a regulation which deemed Mr Simpson to be an employed earner. Mr Simpson had no contract of service with Better because: there had been a succession of contracts and there was no foregone conclusion that a contract would be renewed; Mr Simpson decided his own hours and took holidays when he wanted to; Mr Simpson took the risks of invoicing and of having late payments and debts; Mr Simpson received no holiday or sick pay; there was no obligation on Mr Simpson to provide his own personal services; he was not integrated into the team and was not part and parcel of the oganisation of Better; and he had no control over the employees of Better. Mr Antell relied upon *R (on the application of Professional Contractors Group Ltd and others) v Inland Revenue Commissioners* [2001] STC 631 at [48 (iv)] as authority for the view that it was necessary to consider the actual relationship and decide whether any obligation was owed by the client to the service provider. Also, Mr Simpson was not obliged to provide the work personally but could arrange for a substitute.

25. Mr Antell next argued that, in applying the 2000 Regulations, Topper had to be ignored because paragraph 5 provided that where an intermediary was a company the worker had to have a material interest in it; here Mr Simpson did not have a material interest in Topper. He then argued that in this appeal there was no obligation on Better to pay Mr Simpson. Better paid Topper who paid a reduced sum to Mr Simpson. He also relied upon *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318 where the Court of Appeal had applied the dicta of McKenna J in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 5151 which dicta identified the need for both the payment of a wage and the provision of work. Here the wage was not paid to Mr Simpson (but to Topper) and Topper had to be ignored.

26. Mr Antell's third argument was that the 1978 Regulations applied to Topper. He argued that the 1978 Regulations could not be ignored as they had been saved by regulation 12 of the 2000 Regulations. He went on to argue that Mr Simpson did not come within the 1978 Regulations. He referred to item 2 in column (A) of Part I of Schedule I to the 1978 Regulations for the test of supervision and control and argued that, although Better had some control over what Mr Simpson did and when, it had no control over the manner of the rendering of his services. He cited *Staples v The Secretary of State for Social Services* (CO/1073/84 15 March 1985 Unreported) as authority for the view that the test of supervision and control in the 1978 Regulations was whether an employee could be told how to do a job and not merely what job to do and that a person with considerable skill was not subject to direction as to how he should do his job.

27. Finally Mr Antell cited *Pepper v Hart* 65 TC 421 and relied upon Inland Revenue Leaflet IR 56 "Employed or Self-employed"; Inland Revenue Press Release PR162/99 "Personal Services Provided through Intermediaries- Preventing Avoidance: Preserving Flexibility" which, he argued, was referred to in Parliament; and Hansard Debates 3 May 2000 Col. 214.

The arguments for the Respondent

28. For the Respondent Mr Mitchell argued that *Pepper v Hart* could only be relied upon if the legislation was ambiguous, obscure or absurd and Regulation 6(1)(c) was quite clear. Within the meaning of that regulation the worker was Mr Simpson and the client was Better. Further, even if *Pepper v Hart* did apply it only permitted reference to Parliamentary material and not to Inland Revenue leaflets or press releases. He cited *McManus v Griffiths* [1997] STC 1089 as authority for the view that it was necessary to concentrate on substance and not form. He distinguished *Professional Contractors Group* on the ground that it concerned European Law and he argued that the evidence supported the view that Better had the complete right of control over the work of Mr Simpson, although the right may not have been exercised in practice. He compared the work done by Mr Simpson with that of a surgeon in the National Health Service, or an electrician, or a pharmacist, or a chemist. Such professional persons were not supervised but were still employees. Further, although there might have been a right of substitution there was in fact no substitution; as the expertise of Mr Simpson was rare it might not be possible to find a suitable substitute. He argued that the 2000 Regulations were silent on the subject of agency workers and that it was necessary to apply the wording of Regulation 6(1)(c).

Reasons for decision

29. In considering the arguments of the parties I have found it convenient first to summarise the legislation and the 2000 Regulations; then to consider each of the issues in the appeal, and finally to look briefly at the 1978 Regulations.

A summary of the legislation

30. The relevant definitions are contained in section 2 of the 1992 Act of which the relevant parts provide:

> **"2(1) In this Part of this Act and Parts II to V below-**
>
> **"employed earner" means a person who is gainfully employed ... either under a contract of service, or in an office ... with emoluments chargeable to income tax under Schedule E; and**
>
> **"self-employed earner" means a person who is gainfully employed ... otherwise than in an employed earner's employment ... .**
>
> **(2) Regulations may provide:**
>
> **(a) for employment of any prescribed description to be disregarded in relation to liability for contributions otherwise arising from employment of that description;**
>
> **(b) for a person in employment of any prescribed description to be treated, for the purposes of this Act, as falling within one or other of the categories of earner defined in subsection (1) above, notwithstanding that he would not fall within that category apart from the regulations."**

31. The 1978 Regulations were made under the provisions of section 2(2) and, so far as relevant in this appeal, provide for some earners to fall within the category of employed earner notwithstanding that the employment is not under a contract of service. The

relevance of the 1978 Regulations is that background to this issue is that Mr Antell, for the Appellant, argued that the 2000 Regulations applied where there was a service company (an intermediary) and that the 1978 Regulations applied where there was an agency. In this appeal there was both a service company and an agency and so the 2000 Regulations applied only to the arrangements with the service company and the 1978 Regulations applied to the arrangements with the agency.

32. In 1999 section 75 of the Welfare Reform and Pensions Act inserted a new section 4A into the 1992 Act to take effect from 22 December 1999. Section 4A is relevant to this appeal and the relevant parts are set out in paragraph 3 of this Decision. The Regulations made under the provisions of new section 4A are the 2000 Regulations which came into force on 6 April 2000. Regulation 6 is relevant in this appeal and the relevant parts of Regulation 6 are set out in paragraph 4 of this Decision. The decision under appeal refers to the provisions of Regulation 6(1)(c) of the 2000 Regulations which defines the issues in this appeal.

Issue (1) – Do "the arrangements" include those with Topper?

33. The first issue is whether "the arrangements" mentioned in Regulation 6(1)(c), and the arrangements mentioned in Regulation 6(1)(b), are those involving an intermediary (the Appellant) but not the arrangements involving Topper who was not an intermediary as defined.

34. Regulation 6(1)(c) refers to "the arrangements" and "the arrangements" are mentioned in Regulation 6(1)(b) as "arrangements involving an intermediary". The meaning of intermediary is set out in Regulation 5 of the 2000 Regulations which provides:

> **"5(1) In these Regulations "intermediary" means any person ... -**
> **(a) whose relationship with the worker in any tax year satisfies the conditions specified in paragraph (2), (6), (7) or (8), and**
> **(b) from whom the worker ....**
> **(i) receives, directly or indirectly in that year a payment or benefit that is not chargeable to tax under Schedule E, or**
> **(ii) is entitled to receive ... directly or indirectly, in that year any such payment or benefit.**
>
> **(2) Where the intermediary is a company the conditions are that:**
> **(a) the intermediary is not an associated company of the client ...; and**
> **(b) either-**
> **(i) the worker has a material interest in the intermediary, or**
> **(ii) the payment or benefit is received or receivable by the worker directly from the intermediary and can reasonably be taken to represent remuneration for services provided by the worker to the client."**

35. Topper is a company but it is not an associated company of Better; Mr Simpson has no material interest in Topper; and the payments were not received by Mr Simpson directly from Topper, although they were so received indirectly through the Appellant. For this reason I conclude that Topper is not an intermediary as defined by Regulation 5. The Appellant did not dispute that it was an intermediary as defined in Regulation 5.

36. The question, therefore, is whether "the arrangements" mentioned in Regulation 6(1)(c), and the arrangements mentioned in Regulation 6(1)(b), are those involving the

worker (Mr Simpson), the client (Better) and the intermediary (the Appellant) only and not the arrangements involving the non-intermediary (Topper).

37. To answer that question I look again at the wording of Regulation 6(1)(b). Applying Regulation 6(1)(b) to the facts of the present appeal the performance of the services by the worker (Mr Simpson) was carried out, not under a contract directly between the client (Better) and the worker (Mr Simpson) but under arrangements which involved an intermediary (the Appellant). The arrangements also involved a non-intermediary (Topper) but it seems to me that that fact does not prevent Regulation 6(1)(b) from applying in this appeal. It seems to me that the phrase "arrangements involving an intermediary" is wide enough to include arrangements involving both an intermediary and a non-intermediary; the phrase is not "arrangements with an intermediary" which would exclude arrangements with a non-intermediary.

38. As I do not find this interpretation of Regulation 6(1)(b) to be free from ambiguity I have consulted the non-statutory material referred to by Mr Antell. Neither the leaflet or the press release is Parliamentary material and so they do not come within the rule in *Pepper v Hart*. The press release says that the purpose of the Regulations is to remove opportunities for the avoidance of Class 1 contributions by the use of intermediaries such as service companies in circumstances where an individual worker would otherwise be an employee of the client. The rules would apply in the same way as they apply to individuals who operate without intermediaries. The leaflet describes the rules applicable to employment and self-employment and summarises certain special rules including work arranged through an agency. There is, however, nothing in either which states that the arrangements in Regulation 6(1)(b) do not include arrangements with a non-intermediary if there is an intermediary.

39. The Hansard Debates for 3 May 2000 are Parliamentary material. In the passage at Col 214, relied upon by Mr Antell, Dawn Primarolo said:

> "We are not talking about all service companies or IT contractors. The new rules will apply to people in service companies who would be employees of their clients if the service company did not exist. The usual case law tests will be used to determine whether someone would be an employee."

40. I do not read that passage as a clear and unequivocal statement that the arrangements in Regulation 6(1)(b) do not include arrangements with a non-intermediary if there is an intermediary.

41. I do not find this particular point to be entirely clear. However, it seems to me that the primary purpose of the 2000 Regulations is to consider the contract between the individual and the client in cases where there is a service company (an intermediary). There is no indication in the Regulations that that primary purpose does not apply in cases where, as well as there being an intermediary, there is also a non-intermediary. Accordingly, I conclude that when applying Regulation 6(1)(c) I have to decide whether the circumstances were such that, had the arrangements (involving the intermediary (the Appellant) but also involving a non-intermediary (Topper)) taken the form of a contract between the worker (Mr Simpson) and the client (Better) the worker (Mr Simpson) would be regarded as employed in employed earner's employment by the client (Better). This means that although

Better paid Topper, and not the Appellant or Mr Simpson, the payment of the remuneration is still part of the arrangements which require to be considered.

42. I have reached this view on the wording of Regulation 6 of the 2000 Regulations but the view is confirmed by a reference to the provisions of section 4A (the enabling section under which the 2000 Regulations are made). Section 4A(1)(b) provides for the performance of the services by the worker to be referable to arrangements involving a third person and not referable to a contract between the client and the worker.

43. My conclusion on the first issue is that "the arrangements" mentioned in Regulation 6(1)(c), and the arrangements mentioned in Regulation 6(1)(b), are those involving both the intermediary (the Appellant) and the arrangements involving Topper who was not an intermediary as defined.

Issue (2) - Would Mr Simpson be regarded as employed by Better?

44. The second issue is whether, had the arrangements taken the form of a contract between Mr Simpson and Better, Mr Simpson would be regarded as employed in employed earner's employment by Better.

45. The authorities establish the principle that the question as to whether a person is employed under a contract of service, or whether he is self-employed and provides a contract for services, is a question of fact in each case to be determined having regard to all the relevant circumstances.

46. In *Ready Mixed Concrete (South East), Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 the issue was whether a worker was within the class of employed persons under the National Insurance Act 1965 as being an employed person under a contract of service. At page 515C MacKenna J said:

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

47. At page 515F MacKenna J added:

> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done."

48. MacKenna J then went on to identify a number of factors to be taken into account in deciding whether a contract was a contract of service. These included: whether the contractor hired his own employees; whether the contractor provided and maintained his own tools or equipment; whether the contractor was paid by reference to the volume of work done; whether the contractor had invested in the enterprise and bore the financial risk;

whether the contractor had the opportunities of profit or the risk of loss; and whether the relationship was permanent.

49. In *Market Investigations Ltd v Minister of Social Security* [1968] 2 All E.R.732 Cooke J said that the fundamental test was whether a person performed services as a person in business on his own account. Although control was relevant it was not the sole determining factor; when one was dealing with a professional man, or a man of some particular skill and experience, there could be no question of the employer telling him how to do the work.

50. In *Hall v Lorimer* [1994] STC 23 the taxpayer was a vision mixer who undertook work for a number of different television production companies and whose engagements consisted of short term contracts lasting one to two days. In four years he worked on over 800 days. The Court of Appeal held that there was no single path to a correct decision. The question whether an individual was in business on his own account might be helpful but might be of little assistance in the case of one carrying on a profession or vocation. Factors which were critical in that appeal were the duration of the particular engagements and the number of people by whom the individual was engaged.

51. *McManus v Griffiths* (1997) 70 TC 218 established the principle that, in deciding whether a person was employed or self-employed, the task was to try to make legal sense of the arrangements made. Especially where the documents had not been drafted professionally, it was necessary to concentrate on the substance of the contractual arrangements rather then their form or the parties' labels.

52. Applying those principles to the facts of the present appeal I find that a number of factors point to the conclusion that, if Mr Simpson had been employed under a contract with Better, he would be regarded as gainfully employed under a contact of service. Such factors are:

- Mr Simpson did agree, in consideration of remuneration, to provide his own work and skill to Better and it was also part of the arrangements that the standard working week was 37.5 hours. Any absence of Mr Simpson had to be agreed and approved in advance by Better (although in fact there were no difficulties).

- Mr Simpson was a man of skill and experience and so it would not be expected that Better would tell him how to do his work; however, Mr Simpson was part of a team made up mainly of employees of Better and of which the project manager was an employee of Better. The project manager controlled what was to be done and when it was to be done although he left it to Mr Simpson to decide how it should be done. Also, the contract between the Appellant and Topper provided that Mr Simpson had to take all necessary instructions from Better and comply with Better's rules, regulations and procedures.

- In the performance of his work Mr Simpson was also subject to Better's control to the extent that the contract between the Appellant and Topper provided that it could be terminated immediately if Better terminated its agreement with Topper because of the incompetence, unsuitability or unprofessional conduct of Mr Simpson.

- Mr Simpson did not hire his own employees; the members of his team were mainly permanent employees of Better and one other consultant who had entered into his own contract with Better.

- Mr Simpson did not provide and maintain his own tools and equipment; he used the mainframe computer and other equipment provided by Better.

- Mr Simpson was not paid by reference to the volume of work done but by reference to the number of hours he worked.

- Mr Simpson did not invest in any enterprise and he did not bear any financial risk; he had no opportunity of profit and no risk of loss. All his invoices were paid.

- The relationship between Mr Simpson and Better had some element of permanency as it lasted for two and a half years from December 1998 to June 2001.

- While working for Better Mr Simpson only provided work for Better and for no other client. Before working for Better he worked for two other clients and since leaving Better he has worked for one other client but has never worked for more than one client at a time.

- Mr Simpson was integrated into the structure of Better to the extent that he worked closely with its employees; also the project manager was an employee. .

53. On the other hand, some other factors point to the conclusion that, if Mr Simpson had been employed under a contract with Better he would not be regarded as being gainfully employed under a contact of service but rather as providing services under a contract for services. Such factors are:

- The agreement between the Appellant and Topper provided specifically that it was not a contract of employment and was a contract for the supply of services only. However, such label given by the parties cannot be conclusive. Also it is significant that that contract was between the Appellant and Topper whereas regulation 6(1)(c) of the 2000 Regulations provides that it is the notional contract between Mr Simpson (the worker) and Better (the client) which is relevant.

- Better was not obliged to pay Mr Simpson while he was sick or on holiday;

- In theory Mr Simpson did not enjoy job security as the Appellant's contract with Topper could be terminated on four weeks' notice. However, in practice Mr Simpson worked for Better continuously for two and a half years.

- Mr Simpson was not part of the management at Better and did not

manage permanent employees of Better.

- The Appellant had the right to propose a replacement to substitute for Mr Simpson which replacement had to be another consultant who had previously supplied consultancy services to Better and had to be approved by Better. However, the right of substitution was never used.

- There was very little direction or control by Better over how Mr Simpson did his work and there were no quality control checks. On the other hand Mr Simpson was a man of skill and experience and it would not be expected that Better would tell him how to do his work.

54. Having considered all the relevant factors I conclude that those which point towards there being a contract of service outweigh the factors which point towards there being a contract for services. Concentrating on the substance of the contractual arrangements rather than their form, I therefore conclude that, if Mr Simpson had been employed under a contract with Better he would be regarded as being employed in employed earner's employment by Better.

The 1978 Regulations

55. I finally express very brief views about the arguments put forward by the Appellant about the 1978 Regulations. The 1992 Act was a Consolidating Act and its predecessor was the Social Security Act 1975 (the 1975 Act). Under the provisions of the 1975 Act, which corresponded to section 2 of the 1992 Act, the 1978 Regulations were made. Regulation 2 provided for the treatment of earners in one category as falling within another category and for the disregard of certain employments. Regulation 2(2) was relied upon by the Appellant and the relevant part provides:

> **"(2) ...every earner shall, in respect of any employment described in any paragraph in column (A) of Part I of Schedule I to these regulations, be treated as falling within the category of an employed earner in so far as he is gainfully employed in such employment and is not a person specified in the corresponding paragraph in column (B) of that Part, notwithstanding that the employment is not under a contract of service, or in an office (including elective office) with emoluments chargeable to income tax under Schedule E."**

56. Thus the effect of regulation 2(2) is that every earner described in column (A) of Part I of Schedule I is treated as an employed earner notwithstanding that the employment is not under a contract of service.

57. Column (A) of Schedule 1 of the 1978 Regulations lists employments in respect of which earners are to be treated as falling within the category of employed earner. Item 2 of Column (A) reads:

> **"2. Employment ... in which the person employed renders, or is under obligation to render, personal service and is subject to supervision, direction or control, or to the right of supervision, direction or control, as to the manner of the rendering of such service and where the person employed is supplied by or through some third person ... and-**
>
> > **(a) where earnings for such service are paid by or through, or on the basis of accounts submitted by, that third person or in accordance with arrangements made with that third person ... ."**

58. The effect of paragraph 2 of Column (A) is that workers supplied through a third person, (normally agency workers) are treated as employed earners if they render personal services and are subject to supervision direction or control, or to the right of supervision, direction and control as to the manner of rendering the service.

59. If I had to express a view on whether Mr Simpson came within the terms of the 1978 Regulations I would be bound by the decision in *Staples*. That case concerned a head chef and Glidewell J held that he was not subject to supervision, direction or control as to the manner of rendering his services within the meaning of the 1978 Regulations as he was not a person who was subject to direction by management as to how he should do his job. In this appeal Better could specify to Mr Simpson what had to be done and the time in which it had to be done but could not specify how it was to be done. On the other hand Mr Simpson was part of a project team of which the leader was employed by Better. I would not find this matter to be without difficulty but on balance would conclude that Mr Simpson was not subject to supervision, direction or control as to the manner of rendering his services.

60. I agree with Mr Antell that the 1978 Regulations remain in existence as Regulation 12 of the 2000 Regulations provides that nothing in the 2000 Regulations affects the operation of regulation 2 of the 1978 Regulations as that regulation applies to employment listed in paragraph 2 in column (A) of Part I of Schedule I. However, in my view, as the 2000 Regulations save the 1978 Regulations, both Regulations are effective and a decision can be reached on either or both Regulations. The decision in issue in this appeal was reached under Regulation 6(1)(c) of the 2000 Regulations.

Decision

61. My decisions on the issues for determination in the appeal are:

(1) that "the arrangements" mentioned in Regulation 6(1)(c) and the arrangements mentioned in Regulation 6(1)(b) are those involving both the intermediary (the Appellant) and the non-intermediary (Topper); and

(2) that, had the arrangements taken the form of a contract between Mr Simpson and Better, Mr Simpson would be regarded as employed in employed earner's employment by Better.

62. The appeal is, therefore, dismissed.

Nuala Brice

DR NUALA BRICE

SPECIAL COMMISSIONER

22 JAN 2002

NATIONAL INSURANCE CONTRIBUTIONS – intermediary ("IR 35") – whether worker would be employee if there were a contract between the worker and the client – no

THE SPECIAL COMMISSIONERS

LIME-IT LIMITED - Appellant

- and -

THE COMMISSIONERS OF INLAND REVENUE - Respondents

Special Commissioner: DR JOHN F AVERY JONES CBE

Sitting in London on 2 October 2002

David Smith, Accountax Consulting Limited, for the Appellant

Barry Williams, London Region Advocacy Unit, for the Respondents

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DECISION

1. This is an appeal against a Notice of Decision dated 11 February 2002 that the Appellant is liable to pay primary and secondary Class 1 National Insurance contributions in respect of Miss Lisa Fernley's earnings in respect of a particular contract under what has become known as the "IR35" legislation. The Appellant was represented by Mr David Smith of Accountax Consulting Limited, and the Commissioners of Inland Revenue by Mr Barry Williams.
2. In outline, Miss Lisa Fernley is the sole shareholder and director of the Appellant company, a new IT company formed on 4 April 2000 providing services and in connection therewith supplying both hardware and software. The Appellant's brochure describes the services it offers as: "IT solution design, implementation and support; IT support services; networking services; system tuning and optimisation; web design services; hardware and software sales." On 17 April 2000 (although the signature page indicates that it was executed by the parties on 2 and 8 May 2000 respectively) the Appellant contracted with Executive

Recruitment Services plc (ERS), an agent providing expert help and assistance to "End-users", the contract naming Alenia Marconi Systems (Marconi) as the End-user. The issue is whether, if the Appellant and ERS had not existed so that there was a direct relationship between Miss Fernley and Marconi, she would be an employee.

3. I heard evidence from Miss Fernley, and also from two officers of the Inland Revenue who had been concerned with the case, Mrs Wenn and Mr Justin. The Appellant, as appears from the correspondence, was unhappy with the Revenue's handling of the case and Mr Justin produced a lengthy note saying that he was not happy either with the way the case had been handled, and, with the guidance currently available, he would have tackled the situation differently, for which he apologised to the Appellant. In particular when he gave his initial opinion that IR 35 applied he was working on new unpopular legislation before Royal Assent finding himself swamped with work and operating under guidance that then concentrated on the documents without suggesting that he should have a meeting with, or obtain more information from, the Appellant and the End-user. Since the Appellant has been critical of the Revenue I should also record that when later the Revenue asked to meet Miss Fernley she refused the request. I appreciate Mr Justin's frankness in preparing this note, as I am sure the Appellant does, but his handling of the case is not ultimately relevant to the decision I have to make.
4. Schedule 1 to the contract between the Appellant and ERS describes the work as follows:

   "The project: to organise and manage PC desktop support within AMS Dynamics Division using a combination of permanent staff and contract resources to achieve measured improvements in quality of service and service level and report weekly to the end user on progress.

   Manage planning, implementation and migration to Microsoft Exchange email system

   Plan and implement remote access solution for mobile users.

   Produce research and plan for migration to Microsoft Windows 2000

   Site of Supply: Borehamwod/Stanmore or such other sites of the Client [not a defined expression but obviously referring to Marconi] or the Supplier [the Appellant] as may be agreed as expedient from time to time for performance of the Services."

   Schedule 2, headed "Term of Supply", is as follows:

   "Term of Supply from 10 April 2000 to 10 April 2001 (estimated date for completion of the project) or such alternate date as may be agreed from time to time by the parties as the date of completion of the project (end date) subject to the termination provisions in clause 4 [which should be clause 3, permitting termination on reasonable notice in various circumstances and on breach of the contract].

   1. The Agent [ERS] will pay the Supplier a fee at the rate of [the figures have been blanked out in my copy] per hour (plus VAT where applicable) [] per hour for overtime.

2. The Supplier shall provide the required services for 37 hours per week being the estimated number of hours per week for completion of the project within the contract term or such hours as are reasonably requested by the Client for the project.

3. Payment will be made against the Agent's timesheets which have been authorised by the Client, together with the Supplier's invoice."

5. Thus the work is for specific projects, such as organising and managing (rather than providing) a computer support function, introducing a new email system, organising remote access, and changing to Windows 2000. These projects were expected to take one year with the Appellant (meaning Miss Fernley as the only employee) working an estimated 37 hours per week at an hourly rate, but the contract would end on completion of the project.
6. Another relevant term of the contract is that there was a right of substitution that Miss Fernley negotiated and was not included as a standard condition, which is demonstrated by the reference to "Client" whereas the rest of the contract refers to the "End-user".

"In the event that the Supplier finds itself unable to provide the whole or any part of the Specified Services for whatever reason, the Supplier shall offer the Client a substitute ("the Substitute Supplier") of equivalent expertise to work in the Supplier's place. The Client has the right to refuse to accept the Substitute Supplier on any reasonable grounds. If the Client finds the Substitute Supplier acceptable, the Supplier shall provide an overlap period of up to (ten) working days during which time the Supplier shall ensure that the Substitute Supplier fully understands the requirements of the Client and progress made in providing the Specified Services. The Supplier shall not charge the Client any extra sum for this overlap period. Thereafter, the Supplier shall continue to invoice the Client and shall be responsible for the payments and expenses of the Substitute Supplier. In the event that the Supplier cannot provide an acceptable Substitute Supplier, the Client is entitled to terminate this Agreement forthwith."

The drafting shows that considerable thought went into this clause, for example the Appellant being obliged to provide free overlap time. This is a right for the Appellant to substitute another person in place of the Appellant rather than a right for Miss Fernley to substitute another employee of the Appellant for herself. That contract contemplates that various employees work on the contract and it contains provisions in clause 4 for ERS to specify in advance to the End-user the number, qualification and experience, and rate of payment of the personnel. I presume that Marconi fixed the hourly rate on the basis that Miss Fernley would do all the work herself. This would explain the reference to her name in the purchase order (see paragraph 7 below). I am therefore doubtful whether another employee of the Appellant could be used without Marconi's agreement, although the right to substitute another supplier of "equivalent expertise" for the Appellant existed, subject to Marconi's right to refuse to accept the substitute on reasonable grounds. In fact this right of substitution was never exercised and Miss Fernley did all the work personally. Another term of the contract is that the End-user was not entitled to direct the Appellant to perform any task other than that identified or implicit in the specification.

7. The only evidence of the contract between ERS and Marconi is a purchase order dated 8 May 2000 (the date on which ERS signed the agreement with the Appellant) which stated "To supply the services of Lisa Fernely (sic) for the period 10/4/00 until 6/4/01 [note that the other contract specifies 10 April 2001 as the expected termination date]." The hourly and overtime rate is then stated. Miss Fernley had not seen this document at the time. It was obtained by the Revenue from Marconi and a copy provided to her by ERS was only later seen by her. The contract between the Appellant and ERS contains the provision "The Agent [ERS] shall conclude an agreement with each End-user to whom Supplier's [the Appellant] details are sent which reflects the terms of this Agreement." In the absence of any evidence from Marconi I shall presume that this provision was carried out and that the ERS-Marconi contract was on the same terms as the Appellant-ERS contract. Accordingly, giving effect to both contracts, I shall assume that, although the ERS-Marconi contract required Miss Fernley's services in accordance with the wording on the purchase order as the hourly rate was based on her dong the work, Marconi were bound by the clause allowing substitution of another person of equivalent expertise with the benefit of the arrangements for a hand-over period, subject to their right to refuse to accept the substitute on reasonable grounds.
8. Marconi terminated the contract without notice on 3 April 2001, a few days before it was due to terminate, which, as I am assuming that the ERS-Marconi contract conforms to the Appellant-ERS contract, was on 10 April 2001. Miss Fernley said that there had been no disagreement with Marconi but she understood that they had outsourced the whole of their IT function and so the Appellant's services were no longer required. This came as a surprise as she had been in process of negotiating a further year's contract for a further specific project.
9. Regulation 6(1) of the Social Security Contributions (Intermediaries) Regulations 2000, made under sections 75 and 76 of the Welfare Reform and Pensions Act 1999 and the Social Security Contributions (Intermediaries) Regulations 2000, provides:

> "These Regulations apply where—
>
> a. an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client"),
> b. the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and
> c. the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act [the Social Security Contributions and Benefits Act 1992] as employed in employed earner's employment by the client."

"Intermediary" is defined in Regulation 5 and it is common ground that the Appellant is an intermediary for this purpose. "Employed earner's employment" is defined in section 2(1) of the Social Security Contributions

and Benefits Act 1992 to include a person who is gainfully employed under a contract of service (which is not further defined).

10. Paragraph (a) of Regulation 6(1) is satisfied; Miss Fernley did in fact personally perform services for the purposes of a business carried on by Marconi. Paragraph (b) is also satisfied; the intermediary is the Appellant. The real issue in the case is paragraph (c) which requires one to ask whether, had the arrangements taken the form of a contract between Miss Fernley and Marconi, she would be regarded as employed under a contract of service. In other words, one ignores for this purpose the existence of the Appellant (and ERS) and concentrates on what is actually done by Miss Fernley for Marconi in accordance with the arrangements made with the other parties. I heard evidence from Miss Fernley but no evidence was called from Marconi. Miss Fernley explained that as they had outsourced their entire IT work there was now nobody there who could speak to what was actually done while the Appellant was working for them. While I fully understand the difficulty the Appellant faced, it would have been very helpful if the former IT Manager could have been a witness so that I could have heard from both parties to the hypothetical contract. In future cases on this legislation (and its income tax equivalent) the Special Commissioners will wish to explore at a preliminary hearing whether it is possible to obtain evidence from the client.
11. Miss Fernley gave evidence, all of which I accepted, that the Appellant was then a new small business with no other employees. There is now one employee. It has its own web-site and markets its services to local businesses. During the Marconi contract the Appellant worked for 4 other clients. Miss Fernley worked at one of Marconi's offices, and partly from her office at her home where there is a room containing four computers dedicated to the Appellant's business. The Appellant paid for any travel between Marconi sites. She was left to do the Marconi job on her own, reporting weekly informally on progress to the IT manager. She did not work alongside Marconi employees; there were no Marconi employees doing her type of work and nobody with her type of expertise. Nobody told her how to do the job and nobody controlled her work, other than no doubt checking her time sheets. She did not work a regular 37 hour week as envisaged by the contract; her work varied from nothing to 52.5 hours in a week with considerable variations from week to week. For example, the number of hours worked in consecutive weeks in May and June 2000 were 49.5, 28, 44.5, 20.5, 52.5, 33.5, 0 hours. She worked the hours needed to get the job done. She described this variation of hourly figures as typical of the pattern during the contract. She was not treated as a member of Marconi's staff. She had a security pass but it named the Appellant and said "contractor" on it and it was a different colour from the employees' passes. The Appellant (not Miss Fernley) was listed in Marconi's internal telephone directory, and she had an email address there. She did not benefit from other usual employee benefits such as holiday pay, sickness pay or the use of sports facilities. The Appellant purchased a lap-top computer with the same specification as those used by Marconi costing £1,600 specially for the job, but there was no contractual obligation on it to do so. The Appellant invoiced monthly at the hourly rate with payment due in 30 days. On at least one occasion the Appellant had difficulty in being paid. Miss Fernley wrote to ERS on 24 April 2001 reminding them about two overdue invoices for a total of £6,563.84. On 24 May 2001 she wrote again threatening to sue for the debt plus interest, listing the two invoices as both being dated 6 April 2001 and stated to be due for payment on 16 April (I am not clear why as both contracts say 30 days, but this may have been varied). She wrote

again on 5 June, which was two months after the date of the invoice. The invoices were finally settled with interest.

12. The case law test of whether someone has a contract of service is difficult. It is even more difficult to apply the case law to a hypothetical contract. I am unclear about the extent of applying the hypothesis in relation to other work. On the face of it the hypothesis does not apply to other work performed by the intermediary, but in determining whether the hypothetical contract is an employment contract one needs to take into account other work done by the worker, which will actually be performed by the intermediary perhaps partly by other workers. I understood Mr Williams to contend that other work should not be taken into account. Fortunately in view of my findings in relation to the contract in isolation I do not need to pursue this aspect in this case. Mr Williams made clear that the Revenue accepted the genuineness of the Appellant's business, and that the Appellant was not avoiding National Insurance contributions by rewarding Miss Fernley by dividends; this case was purely concerned with applying the legislation to a hypothetical contract. The basic test of whether someone is employed or self-employed is to ask whether a person is "in business on his own account" (*Market Investigations v Minister of Social Security* [1968] 3 All ER 732). In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 498 D MacKenna J listed three conditions for a contract of service to exist:

    "(i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master, (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master, (iii) the other provisions of the contract are consistent with its being a contract of service."

13. A number of different factors for helping to determine this have been developed by the courts to determine whether a contract of service exists, as follows (I have not stated the authority for each one as they are well-known and were accepted by both parties):

    Control. Mr Smith contended that there was no control by Marconi as to the manner in which Miss Fernley carried out her activities. Mr Williams contended that control was not an important test where experts are concerned. The way the work was performed was that Miss Fernley planned the projects herself and then communicated the plan to Marconi. In addition if their server broke down she would need to go immediately to the premises where it was and fix it. She reported on progress informally to the IT Manager weekly. He was the person who checked that Marconi was getting value from the contract. She managed to fit in work for the Appellant's other clients when her presence was not required at Marconi by the nature of the project, informing the IT manager of her movements so that she could be contacted if necessary. The contract provides that the Appellant could not be required to perform any task other than those identified or implicit in the specification. I accept Miss Fernley's evidence that Marconi did not exercise any significant control as to the manner in which she carried out her activities, but, as Mr Williams contended, control may not be particularly important when one is dealing with an expert.

    Financial risk and ability to profit. Mr Smith pointed to the contractual limit of liability of £1m in the contract between the Appellant and ERS as showing that there was significant financial risk. Mr Williams pointed to the

fact that the work was charged at an hourly rate with overtime at a higher rate, as one expects for an employee. The only way for the Appellant to make more profit would be for more hours to be worked, which is exactly the same for an employee doing overtime. An hourly rate is indicative of employment, much more so than a fixed price contract, but there are self-employed who charge at an hourly rate. Mr Williams accepted the existence of the bad debt risk but said that employees also had to accept the risk of the employer's insolvency. There were some serious delays in payment of invoices, over two months delay on one occasion. The fact of invoicing and the 30 day (or even 10 day, if that is what was subsequently agreed) terms for payment, even ignoring the actual delays in payment, seem to me to point to self-employment. I presume that Marconi (assuming that they were responsible for the delays) did not keep its employees waiting for their salary. I do not think that the limit of liability in the contract is particularly important; employees, such as employed doctors, can incur liability too and are required to carry insurance.

Provision of equipment. Mr Smith points to the lap-top computer which the Appellant purchased for the Marconi job. Mr Williams said that there was no contractual obligation to provide this, and pointed to the desk and telephone she had at Marconi as slight indicators of employment. Miss Fernley said that it was more convenient to use her own computer equipment. It would be normal for her to down-load files from the lap-top to computers at Marconi. This factor does seem to me to point to self-employment. An employee does not normally provide a lap-top but a self-employed person may do so if it makes the work easier to do, regardless of any contractual requirement. I do not regard the provision of a desk and telephone at Marconi as particularly significant. The Appellant has an office including four computers at Miss Fernley's home.

Right to substitute. Mr Smith relied heavily on this provision. Although the right was never exercised it is not a provision which can be described as a sham. It was negotiated specifically at the Appellant's request. Although I did not have any evidence from Marconi there is no reason to suppose that they would not have been willing to pay the same rate for a substitute of "equivalent expertise" as the contract requires. Indeed it was very much in their interest that the Appellant would provide a free overlap period to inform the substitute about the state of the work. It seems to me that in the hypothetical contract with Miss Fernley, Marconi must be taken to have the benefit and burden of this provision. It is a strong indicator of self-employment. Indeed in *Express and Echo Publications Ltd v Tanton* (unreported 11 March 1999) the Court of Appeal held that where a person is not required to perform the work personally, as a matter of law the relationship could not be one of employment:

"…it is, in my judgment, established on the authorities that where, as here, a person who works for another is not required to perform his services personally, then as a matter of law the relationship between the worker and the person for whom he works is not that of employee and employer."

Mutuality of obligation. Mr Williams pointed to the difficulty of applying this test to a hypothetical contract. It seems to me that Marconi could require Miss Fernley to work 37 hours per week or for such hours as are reasonably requested and she could require payment for such work.

Personal factors. This test takes into account the number of separate engagements the person holds. *Hall v Lorimer* 66 TC 349 was concerned with numerous short-term engagements. Mr Williams contended that a series of short-term engagements which individually might have the appearance of employment might amount in total to self-employment He suggested that the longer the contract the less relevant are personal factors in determining status, and this was a one-year contract. But he recognised that an astute businessman may work for one favoured client because it was commercially advantageous to do so. It seems to me that the length of the contract is a slight pointer to employment.

Basis of payment, holiday and sick pay. Mr Williams contended that the obligation to work 37 hours a week pointed to an employment relationship. This is the normal working week for Marconi employees. There is no right to holiday or sick pay. Travel between Marconi's different locations was paid for by the Appellant and not reimbursed, as one would expect it to be for an employee. In practice Miss Fernley did not work a 37 hour week. The variations in the number of hours actually worked is more indicative of self-employment.

Termination of contract. The contract terminates when the work is complete; 10 April 2001 is described as the "estimated date for completion of the project." This would be an unusual feature of an employment contract and is a pointer to self-empoyment. The contract was in fact prematurely terminated by Marconi.

Part and parcel of the organisation. Mr Williams contended that Miss Fernley was integrated into the Marconi organisation, so that anyone meeting her would be unlikely to distinguish her from an employee. This does not seem to me to be the case. She had her own business cards; her security pass was different from an employee's, saying "contractor" and having the Appellant's name; she had a telephone extension under the Appellant's name in Marconi's internal directory, and an email address within the organisation; she could not use Marconi sports facilities.

Intention of the parties. Mr Williams submitted that this test was relevant only where the case was borderline or where the status is ambiguous. It is in any event difficult to see how to apply intention to a hypothetical relationship between two parties who never actually contracted with each other and consequently had no intentions. Even trying to infer intentions is difficult. As a minor example, the fact that the parties contract to allow VAT to be added to payments might indicate that they did not intend an employment relationship. Here the Appellant-ERS contract provides for VAT but since that is a contract between two companies it does not say anything about how different parties would view the hypothetical contract.

14. The pointers against the hypothetical contract being a contract of service are that Marconi contracted for particular projects. The end-date and the number of hours were both estimates of the time needed to complete those projects. Miss Fernley did not work a regular pattern of hours; the hours were dictated by the requirements of the work. The Appellant could not be required to do work outside the specification. The Appellant purchased a lap-top with a particular specification specially for use in the job, although there was no obligation on them to do so. The payment terms were 30 days after invoice and they suffered delays in being paid in the way that businesses do. There was a right for the Appellant to

substitute another supplier. Miss Fernley did not work alongside any other Marconi employees as part and parcel of the Marconi organisation. During the Marconi contract the Appellant operated as a normal small business with its own office working for four other clients.

15. The pointers towards the hypothetical contract being a contract of service are that the contract provides for a fixed number of hours weekly at an hourly rate for a one year contract. No doubt this is the aspect that Mr Justin primarily focussed on. The reality of the hours worked is very different from the contract, demonstrating the necessity of looking beyond the terms of the contract. The element of financial risk is low when payment is made on this basis, but the risk of delay in payment and bad debts is there. The Marconi purchase order refers to Miss Fernley doing the work personally but this is explained by the fact that the hourly rate was fixed with her expertise in mind, and in my view is not contrary to the right of substitution.
16. In assessing this evidence I bear in mind that I have heard no evidence from Marconi and it is always possible that the Appellant may be emphasising factors favourable to them. But even allowing for this possibility, and standing back and looking at all the factors there is very little to suggest an employment relationship. In essence Marconi was contracting for a particular IT job from a small business in the way one would expect an IT consultant to be engaged. In my view on the hypothesis that Miss Fernley had contracted directly with Marconi she would not have been employed under a contract of service; she would have been in business on her own account.
17. Accordingly I allow the appeal. Mr Smith said that he reserved the right to apply for costs, while recognising the limited jurisdiction of the Special Commissioners to award costs. If he wishes to pursue this he should apply to the Clerk to the Special Commissioners within 21 days of the date of release of this decision for a further hearing limited to the issue of costs.

DR JOHN F. AVERY JONES
SPECIAL COMMISSIONER

SC 3027/02
Authorities referred to in skeletons but not in the decision
Montgomery v Johnson Underwood 2001 EWCA Civ 318
Carmichael v National Power [1999] 4 All ER 879
WHPT Housing Association v Secretary of State for Social Services [1981] ICR 737
Battersby v Campbell [2001] STC (SCD) 189
FS Consulting v McCaul [2002] STC (SCD) 138
Morren v Swinton and Pendlebury Borough Council [1965] 1 WLR 576
Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612
Bank voor Handel en Scheepvaart v The administrator of Hungarian Property 35 TC 311
Massey v Crown Life Insurance [1978] 2 All ER 576

Case No: CH/2002/APP/0777

Neutral Citation No: [2003] EWHC 645 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28th March 2003

Before :

THE HONOURABLE MR JUSTICE HART

Between :

SYNAPTEK LIMITED **Claimant**

− and −

MR GRAEME YOUNG (HM IN$PECTOR OF TAXES) **Defendant**

Mr Conrad McDonnell (instructed by Bond Pearce) for the Claimant
Mr Clive Sheldon (instructed by Solicitor of Inland Revenue) for the Defendant

Hearing dates 27th and 28th February 2003
Handdown Judgment 28th March 2003

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

××××××××.
The Honourable Mr Justice Hart

Mr Justice Hart:

1. This is an appeal by way of case stated against the decision of the General Commissioners for the South Shields Division of Tyne and Wear dated 4th September 2002 dismissing an appeal by Synaptek Limited ("Synaptek") against a Notice of Decision of the Inland Revenue dated 30th April 2001 in the following terms:

> That the circumstances of the arrangements between Gordon Stutchbury and EDS for the performance of services from 1 May 2000 to 29 October 2000 are such that, had they taken the form of a contract between Gordon Stutchbury and EDS, Gordon Stutchbury would be regarded for the purposes of Parts I to V of the Social Security (Contributions and Benefits) Act 1992 as employed in employed earner's employment by EDS.
>
> That Synaptek Limited is treated as liable to pay primary and secondary Class 1 Contributions in respect of the worker's attributable earnings from that engagement."

2. The case concerns the application of what is popularly known as the IR35 legislation, the background to which is explained in the judgments of Burton J at first instance and Robert Walker LJ on appeal in *On the application of Professional Contractors Group Limited, R v IRC [2001] STC 659, [2002] STC 165.* That legislation (for income tax purposes contained in Finance Act 2000, and for social security purposes contained in the Social Security Contributions (Intermediaries) Regulations 2000) applies typically to small "service" companies which provide the services of a particular individual to a client who requires those services. This case concerns the latter regulations ("the Regulations"). In the present case Synaptek was the service company, Gordon Stutchbury ("Mr Stutchbury"), a software engineer, the individual whose services were supplied, and (subject to a wrinkle which I mention below) EDS the client to whom the services were supplied. The position is additionally complicated by the fact that there was no contractual relationship between Synaptek and EDS Synaptek's agreement to provide the services was made with NES Computer Services Limited ("NESCO"). EDS was itself providing services (as successor to the government IT Services Agency ("ITSA")) the Benefits Agency at the Inland Revenue site at Longbenton.

3. Regulation 6(1) provides as follows:

> (1) These Regulations apply where:−
>
> (a) an individual (‘the worker') personally performs, or is under an obligation personally to perform services for the purposes of a business carried on by another person (‘the client'),
>
> (b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under

arrangements involving an intermediary, and

(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Part 1 to V of the Contributions and Benefits Act as employed in employed earner's employment by the client"

4. It was common ground that Synaptek was an "intermediary" for the purposes of the Regulation, that Mr Stutchbury personally performed services, and that (subject to the wrinkle) those services were provided for the purposes of a business carried on by EDS. It was accepted by Synaptek that "the arrangements" included the terms of the contract between Synaptek and EDS and the terms of the contract between EDS and NESCO, and that "the circumstances" referred to in Regulation 6(l)(c) include the arrangements and the detail of the day to day performance of those contracts, including any matters not expressly stipulated in those contracts.

5. The General Commissioners, after reciting that Mr Stutchbury had given oral evidence to them and listing documentary material which had been placed before them, expressed their findings of fact as follows:

5.1 Mr Stutchbury is a consultant in software engineering and is in business on his own account. Following a number of employments, including a technical apprenticeship at NEI Reyrolle (switchgear manufacturers) and a period in the Police Force, he sought a career in computing. He qualified in 1987 and worked initially for a nuclear medicines company in Surrey.

5.2 In 1990 Mr Stutchbury purchased an off−the−shelf company Sisterfield Ltd, whose name he subsequently changed to Synaptek Ltd, the Appellant in this case. Mr Stutchbury and his wife are the only shareholders and directors. Mrs Stutchbury is also the Secretary of the Company and is responsible for the administration. This has involved visits from the Contributions Agency and from the VAT Inspector and contact with the company's accountants. Mr Stutchbury has made substantial investment in his company and the Accounts to 30.04.01 show the accumulated cost of Computer Equipment to be £29,835. The Appellant had in the past engaged a total of four employees and had undertaken work for many customers in its twelve year history.

5.3 EDS is an American Company which has a number of Government contracts including one to supply computer software and services to the Benefits Agency at Longbenton, Newcastle upon Tyne. EDS do not have sufficient permanent staff for this work and so recruit additional help. EDS do not deal directly with suppliers of consultancy services, particularly smaller businesses such as the

Appellant. When engaging suppliers, EDS use the services of agencies, for, example NESCO. The agency is responsible for payment to the Appellant and, if the agency goes into liquidation, the Appellant will not be paid.

5.4 On 15 December 1999 the Appellant entered into an agreement with NESCO under which Mr Stutchbury was to undertake work for ITSA - DSS at Longbenton, Newcastle upon Tyne. The role of ITSA was subsequently taken over by EDS through the terms of the agreement of 15 December 1999 continued to be observed without any material difference to the Appellant or to Mr Stutchbury. For the period referred to in the Notice of Decision, therefore, the work was to be undertaken for EDS.

5.5 The Agreement of 15 December 1999, applied to the relevant period, contained the following features:

(i) The Appellant would secure that Mr Stutchbury carried out the services required by EDS

(ii) The services were to be carried out at the DSS building at Longbenton though that location could be changed by agreement between the Appellant and NESCO at any time.

(iii) It was open to any of the three parties, NESCO, the Appellant or EDS, to terminate the agreement by four weeks written notice to other two parties. Further, it was open to EDS or NESCO to terminate the Agreement with immediate effect if Mr Stutchbury failed to carry out the services to the satisfaction of EDS.

(iv) Mr Stutchbury was to work for at least 37.5 hours per week and payment would be at the hourly rate of £42. There would be no sick pay or holiday pay. The cost of travelling to work was provided for in the hourly rate. Each week Mr Stutchbury was to complete a timesheet which had to be authorised by EDS and submitted to NESCO. Payment would only be made by NESCO on production of a duly completed timesheet and an appropriate invoice.

(v) In the interest of continuity, the Appellant was to procure that the work was undertaken by Mr Stutchbury personally. The Appellant could substitute alternative personnel but only with the approval of EDS.

(vi) The Appellant would remain the employer of Mr Stutchbury.

(vii) The intellectual property in the software developed by Mr Stutchbury was to belong to EDS.

5.6 Mr Stutchbury was an expert in his field. He worked on two projects at Longbenton. Subject to problems arising on either project, it was up to Mr Stutchbury how he did the work and when he did it. He did not take his own staff with him. For the most part he worked alongside employees of EDS. From time to time, when requested, he would go to the aid of employees of other firms on the site. He did not seek permission, though usually informed a co−worker or the job manager as a matter of courtesy. The time involved was included in his normal timesheet to NESCO, Mr Stutchbury did not work any fixed hours. He was inclined to work longer hours at the beginning of the week. Mrs H Docherty, an employee of EDS, was his Line Manager and she managed the projects

5.7 Site security was controlled by the Inland Revenue who had the ultimate say on who could enter, and this extended to everyone. Mr Stutchbury was issued with a Pass.

5.8 Mr Stutchbury did not use his own equipment on the site but he did take his own books for reference.

5.9 At various times during the course of his involvement with EDS, Mr Stutchbury undertook other work for unconnected parties including PTS Services and Ainleys This was in his own time, largely in the evenings and at weekends.

5.10 Although there was a right of substitution in the event, for example, of Mr Stutchbury's illness, consent was never sought. Any substitute would have had to be suitably qualified and meet with the approval of EDS. Mr Stutchbury would have been a good judge of suitable qualification since he had successfully introduced three individuals to EDS. Mrs Stutchbury could not have acted as a substitute for her husband.

5.11 The facts of this case bear a close similarity to the facts in F.S. Consulting Limited v Patrick McCaul. The principles set out by the Special Commissioners in that case would, therefore, be a useful guide."

6. They then set out (in paragraph 6) what Synaptek's contentions had been. These included a number of assertions of fact which were not the subject of express findings.

Then, after setting out the Inland Revenue's contentions, and listing some 23 authorities to which they had been referred, they proceeded to their conclusion in

the following terms:

> We the Commissioners who heard the appeals decided:−
>
> 1. Having considered all the elements of this case, and the recent decisions to which we have been referred, we have decided on balance that, if there had been a contract between Mr Stutchbury and EDS for the period 1 May to 29 October 2000, it would have been a contract of service with Mr Stutchbury as employee.
>
> 2. We have therefore decided that the circumstances fall within Regulation 6(1), Social Security Contributions (Intermediaries) Regulations, 2000, and that the Notice of Decision by the Inland Revenue dated 30.04.2001 should stand."

7. Mr McDonnell, on behalf of Synaptek, observed that there is very little in the way of reasoning in the Case Stated. Such reasoning as there is has to be inferred from their reference to the cases to which they were referred. I agree with the comment but do not think that it is a legitimate criticism. The General Commissioners' duty is to find the facts and state their conclusions see the General Commissioners (Jurisdiction and Procedure) Regulations 1994, regulations 13 and 20(2). The extent to which they may be under a duty, in a case where their findings depend on resolving issues of pure fact, to explain why they have arrived at particular findings is not a matter which I need to consider. In the present case their particular findings of fact are not (save as mentioned below) challenged as not being open to them on the evidence which was before them.

8. Deciding, in a borderline case, whether a particular contract is a contract of service or a contract for services is notoriously difficult. It arises in a number of contexts, most commonly today in an income tax or social security context or in the application of employment protection legislation. In general the question is regarded as one of fact, or as it is sometimes put, a question of mixed fact and law, the evaluation and determination of which is a matter for the fact−finding tribunal (see, e.g. *Cooke v Blacklaws* [1985] STC 1, *Sidey v Phillips* [1987] STC 87, *O' Kelly v Trust House* Forte [1983] IRLR 369, at 381−383, *Clark v Oxfordshire Health Authority* [1998] 1RLR 125). If, however, the question falls to be resolved solely by reference to the contents of a written contract, the question is regarded by the court as a question of law.

9. The distinction is illuminated by a passage from the speech of Lord Hoffmann in *Carmichael v National Power plc* [1999] 1 WLR 2042, where he said at pp. 2048D− 2049C):

> I add a few words only on the troublesome distinction between questions of fact and questions of law.
>
> The difficulties which have arisen in this area are, I think,

attributable to the historical origin of the distinction in trial by jury and the pragmatic way in which the courts have applied it. In his Hamlyn Lectures on *Trial by Jury* (1956), Lord Devlin said (at p.61):

The questions of law which are for the judge fall into two categories: first, there are questions which cannot be correctly answered except by someone who is skilled in the law; secondly, there are questions of fact which lawyers have decided that judges can answer better than juries."

Included in the second category is the construction of documents in their natural and ordinary meaning. An uninitiated person might have thought that, for example, the interpretation of a letter written by a layman stating the terms upon which he offered work to someone else, should be a question of fact, best decided by an employment tribunal (formerly an industrial tribunal: see the Employment Rights (Dispute Resolution) Act 1998), which was likely to be more familiar with the relevant background than a judge. But the opposite is the case: see *Davies v Presbyterian Church of* Wales [1986] 1 WLR 323. This rule may be part of the explanation for the otherwise remarkable fact that the Employment Appeal Tribunal has a majority of lay members although it has jurisdiction to hear appeals only on questions of law. As Lord Devlin explains (at pp. 97−98) the rule was adopted in trials by jury for purely pragmatic reasons. In mediaeval times juries were illiterate and most of the documents which came before a jury were deeds drafted by lawyers. In the eighteenth and nineteenth centuries the rule was maintained because it was essential to the development of English commercial law. There could have been no precedent and no certainty in the construction of standard commercial documents if questions of construction had been left in each case to a jury which gave no reasons for its decision. Thus the rule that the construction of documents is a question of law was well established when industrial tribunals were created and has been carried over into employment law.

It was this rule upon which the majority in the Court of Appeal relied as entitling them to say that the construction of the exchange of letters between the C.E.G.B and the respondents, together with any terms which could be implied be law into the contract which they created, was a question of law. I agree with my noble and learned friend the Lord Chancellor that even if this was the case, I would prefer the construction adopted by the industrial tribunal to that of the majority in the Court of Appeal. But I think that the Court of Appeal pushed the rule about the

> construction of documents too far. It applies in cases in which the parties intend all the terms of their contract (apart from any implied by law) to be contained in a document or documents. On the other hand, it does not apply when the intention of the parties, objectively ascertained, has to be gathered partly from documents but also from oral exchanges and conduct. In the latter case, the terms of the contract are a question of fact. And of course the question of whether the parties intended a document or documents to be the exclusive record of the terms of their agreement is also a question of fact."

10. It was submitted by Mr McDonnell that the question under Regulation 6(1) necessarily involved a question of law, since the Commissioners were not being invited to make findings of fact as to what were the actual contractual arrangements, but had rather to consider whether the rendering of services under the terms of a hypothetical contract should be regarded as employment in employed earner's employment by the client. In order to answer that question, the Commissioners had first to hypothesise, or construct, the terms of the relevant contract. Once that exercise had been done, the determination of the question whether the contract was one of service or for services was, he submitted, necessarily a question of law.

11. I do not accept that submission. The inquiry which Regulation 6(1) directs is in the first instance an essentially factual one. It involves identifying, first, what are the "arrangements involving an intermediary" under which the services are performed, and, secondly, what are the "circumstances" in the context of which the arrangements have been made and the services performed. The legal hypothesis which then has to be made is that the arrangements had taken the form of a contract between the worker and the client. To the extent that "the arrangements" are in the particular case to be found only in contractual documentation, it may be true to say that the interpretation of that documentation is a question of law. Even in that case, however, the findings of the fact−finding tribunal will be determinative of the factual matrix in which the interpretative process has to take place, and influential to a greater or lesser degree in enabling the essential character of the arrangements to be identified. Where, on the other hand, the arrangements cannot be located solely in contractual documentation, their identification and characterisation is properly to be described as a matter of fact for the fact−finding tribunal. The fact that the tribunal is then asked to hypothesise a contract comprising those arrangements directly between the worker and the client does not, by itself, convert the latter question from being a question of mixed fact and law into a pure question of law.

12. The significance of the point is, of course, that if the question is characterised as one of fact, or of mixed fact and law, this court can only interfere if it concludes that the decision reached by the Commissioners is an impossible one on the facts found by them or that they have misdirected themselves. If, on the other hand, it is

a question of law this court is free to substitute its own opinion. In a context where the answer to be given depends on the relative weight to be given to a number of potentially conflicting indicia, the distinction may be of critical importance: in the one case the decision of the Commissioners is conclusive and in the other it is not. As I understood his submissions, Mr McDonnell's argument that the question here was one of law was founded solely on the proposition that the hypothesis required to be made by Regulation 6(3) necessarily involved a point of law. Subject to that proposition his submissions appeared to me to assume that the task of the Commissioners was to make appropriate findings of fact and to evaluate their weight in the traditional manner in relation to the fundamental issue of service or services. Indeed the main thrust of his submissions was, not that the Commissioner's had been wrong so to approach the matter, but that insufficient weight had been given by the Commissioners to certain matters of pure fact (in particular the way in which Mr Stutchbury in fact conducted himself in providing the services). He did not, as I understood him, submit that the question before the Commissioners could be determined solely by reference to the Contractual documentation to which they were referred.

13. It is not clear from the stated case how the Commissioners approached the task of identifying the relevant "arrangements". As already indicated, in his written submissions Mr McDonnell argued that the "arrangements" encompassed the terms of the contract between ‘Synaptek' and NESCO (which were before the Commissioners) and the terms of the contract between NESCO and EDS (which were not). He further argued that the "circumstances" referred to in Regulation 6(1)(c) included the arrangements and also the detail of the day to day performance of those contracts, including any matters not expressly stipulated in those contracts. Although the case stated is not explicit, it appears to me that this analysis was adopted by the Commissioners.

14. On that analysis the starting point of the inquiry lay in the provisions of the contract between Synaptek and NESCO ("the NESCO agreement"). Its principal features are summarised in paragraph 5.5 of the stated case but for ease of exposition it is desirable to set out in extenso its provisions. In that agreement Synaptek is referred to as "the Company", Mr Stutchbury as "the Company Employee". The particulars annexed to the agreement were in the following form:

The Particulars (L9793)
15 December 1999

1.	**Client**	ITSA - DSS
2.	**The Subcontractor**	
2A	**Company**	Synaptek Limited
	Company Number	2475448
2B	**Company Employee**	Gordon Stutchbury
3.	**Reporting to:** .	David Cummings

4.	**Location:**		Longbenton
5.		**Services:**	Support Technician - Futures
6.	**Start Date:**	1 May 2000	
7.	**Finish Date:**	29 October 2000	
8.	**Notice Period:**	4 weeks	
9.	**Rate:**	42.00 per hour	
10.	**Hours per week:**	37.5	
11.	**Additional Services Rate:**	Pro rata	
12.	**Additional Info:**		

15. So far as material the provisions of the agreement itself included the following:

2 COMMENCEMENT

2.1 The Contract will commence on the Start Date and will expire automatically without notice being required from either party on the Finish Date (Particulars Sections 6 and 7) or earlier termination in accordance with Clause 8 below.

×.

3. CONTRACT

3.1 No variation of these terms shall be binding unless agreed in writing and signed by a Director of NESCO and of the Company and by the Company Employee.

3.2 Except as amended in accordance with sub−clause 3.1 these terms constitute the entire agreement between the parties and supersede all previous written and oral negotiations and representations.

3.3 In the event of conflict between these terms and any terms of business of the Company these terms shall prevail.

3.4 Should any of these terms be or become unenforceable the validity of the remaining terms will not be affected.

3.5. The Company will ensure that the Company Employee performs the obligations of the Company and of the Company Employee under this agreement.

4. THE COMPANY AND THE COMPANY EMPLOYEE

4.1 It is the client's responsibility to provide the Company and the Company's responsibility to provide the Company Employee with detailed and accurate description of the Services.

4.2 The Company shall supply to NESCO an up−to−date and accurate curriculum vitae and any supporting documents for the Company Employee.

4.3 The Client will allocate work to the Company and the Company will allocate work to the Company Employee. NESCO has no responsibility for supervising, directing or controlling the Company Employee.

4.4 The Company shall procure that the Company Employee carries out the services in a diligent and professional manner and in compliance with all instructions, rules, procedures, regulations, codes, laws and policy guidelines of the Client relating to conduct, health and safety at work, security, confidentiality and secrecy, fire and accident risk and all other matters which may affect the Company Employee at the Location.

×.

4. 11 The Company Employee agrees with each of NESCO and the Client that he will be bound by and comply in all respects with these terms.

5. LOCATION AND HOURS

5.1 The Location may be changed by agreement between the Company and NESCO at any time.

5.2 The normal working week for the company Employee is specified in the Particulars Section 10.

5.3 If at any request of the Client the Company Employee agrees to provide additional services outside the normal working week, details shall be included in the Company Employee's weekly time sheet and NESCO will pay for such services at the Additional Services Rate specified in the Particulars.

5.4 The Company will ensure that the Company Employee gives such notice as the Client may require to the Client and NESCO of proposed holiday leave.

6. TIMESHEETS/INVOICING/PAYMENT/VAT

6.1 The Company Employee must submit to NESCO a timesheet for each week worked signed by or on behalf of the Client to whom the Company Employee shall give one copy.

6.2 No payment will be made unless and until properly completed and counter−signed timesheet and appropriate invoice from the Company have been received by NESCO.

6.3 The Company will submit to NESCO such written information as NESCO requests in support of such invoices including but not limited to copies of its certificate of incorporation of the Company and VAT registration document where appropriate.

6.4 In any event no payment will be made by NESCO to the Company in respect of any contractual period not actually worked including notice periods.

×.

8. TERMINATION

8.1 NESCO, the Company or the Client may terminate this Contract at any time for any cause by giving written notice to the other two parties of the period set out in the Particulars Section 8 expiring at any time.

8.2 If the Company Employee

8.2.1 fails to supply the Services to the satisfaction of the Client or does anything detrimental to the interests of the Client or NESCO; or

8.2.2 shall be guilty of any criminal act;

then the Client or NESCO may given written notice to the Company terminating this contract and to the Company Employee terminating the provision of the Services with immediate effect and in either case this contract shall thereupon terminate.

8.3 If the Client cancels its requirement for the Company Employee on or before the Start Date NESCO may terminate this contract by notice in writing with immediate effect and without liability for compensation.

8.4 In the event of termination of this contract by the Client NESCO and the Company shall forthwith provide to each other full written particulars of the reason for the termination so far as the same are known.

8.5 If the Company or the Company Employee fails to observe these terms to (in the reasonable opinion of NESCO) a material and significant extent and fails to remedy the same within seven days of notice from NESCO requiring it to do so then NESCO has the right to terminate this contract forthwith and without any liability to the Company.

8.6. If NESCO fails to observe these terms to (in the reasonable opinion of the Company) a material and significant extent and fails to remedy this same within seven days of notice from the Company requiring it to do so then the Company has the right to terminate this Contract forthwith and without liability to NESCO of any kind.

8.7 Termination of this Contract shall take effect without prejudice to any accrued rights, and liabilities of either party.

9. SUBSTITUTION

9.1 In the interests of continuity the Company shall use its best endeavours to procure that the Services are provided by the Company Employee personally but may with the consent of the Client substitute alternative personnel subject to procuring that such alternative personnel are bound by the terms of this agreement.

9.2 The Company shall procure that the Company Employee shall not for a period of six months following the termination of this agreement for any reason without the prior written approval of a Director of NESCO be engaged directly or indirectly in the provision of services similar to those supplied by the Company hereunder to the Client or any associated or subsidiary personal company firm or organisation.

10 OFF−SITE FACILITIES AND TRAINING

10.1 The Company shall procure that the Company Employee has adequate computer facilities at its premises or the Company Employee's home or office and that the Company Employee spends such time there at no cost to NESCO as may be necessary for the provision of the Services to a proper and professional standard including preparation, testing and revision of any aspect of the Services provided at the Location.

10.2 The Company shall be responsible for ensuring that the Company Employee, and any other person provided pursuant to these terms, has the necessary qualifications and competence for the proper performance of the Services and the Company shall be responsible for the costs of all training which may from time to time be necessary to comply with the provisions of this clause.

.

15. EXCLUSIONS AND INDEMNITY

15.1 Save as herein provided NESCO shall not be liable to the Company or the Company Employee in any event in contract, tort (including negligence and breach of statutory duty) or otherwise howsoever and whatever the cause thereof.

15.1.1 for any increased costs or expenses;

15.1.2 for any loss of profit, business, contracts, revenues, or anticipated savings; or

15.1.3 for any special indirect or consequential damage of any nature whatsoever.

15.2 The Company will indemnify NESCO against all action proceedings claims or demands in any way connected with this contract brought or threatened as a result of any act or omission by the Company or the Company Employee and shall effect professional identify insurance for not less than £1 million in respect of any such act or omission."

16. For the purposes of Regulation 6(1) the respective obligations of Mr Stutchbury and EDS have to be identified and, on the hypothesis that there was a contract between them, a conclusion formed as to whether that contract is a contract of service or a contract for services. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 Q.B. Mackenna J. expressed that test in the following terms at p.515:

> A contract of services exists if these three conditions are fulfilled:
>
> (i) The servant agrees that in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
>
> (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
>
> (iii) The other provisions of the Contract are consistent with its being a contract of service."

17. The authorities show that there is no one test which is conclusive for determining into which category a particular contract falls. As Nolan L.J. put it in *Hall v. Lorimer* [1994] S.T.C. 23 at p.28: "In cases of this sort there is no single path to a correct decision. An approach which suits the facts and arguments of one case may

be unhelpful in another."

18. Mr McDonnell submitted that in the present case every relevant aspect of the circumstances and the arrangements was incompatible with employment and was indicative of the provision of services. He put at the forefront of his case the circumstances that Mr Stutchbury (through Synaptek) was, as found by the Commissioners, in business on his own account (see paragraphs 5.1 and 5.2 of the case stated) and continued to work for other clients during the period of his engagement with EDS (see paragraph 5.9*)* . In *Market Investigations Ltd v. Minister of Social Security* [1969] 2 Q.B. 173, Cooke J. said at pp 184−5.

> the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes," then the contract is a contract for services. If the answer is "no," then the contract is a contract of service. No exhaustive list has been. compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor, and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task"

19. Mr McDonnell submitted that once it is estab1ished that a person was in business on his account that is an extremely powerful pointer to the fact that the particular engagement by the individual is one for services rather than of service. For that proposition he relied on the decision of Rowlatt J in *Davis v Braithwaite* (1933) 18 T.C. 198. That case raised the question whether the earnings of an actress from a variety of engagements over three years of assessment were assessable as profits of her profession or vocation under Schedule D or as profits from her employment as an actress under Schedule E. The real point at issue was her liability to tax in respect of her American earnings, and on that question it was in her interest to argue that each separate engagement represented a separate contract of employment to which Schedule E applied. Rowlatt J. held on the particular facts that the argument could not succeed. In my view, nothing in his judgment can be read as authority for the proposition that there is anything like a presumption that any engagement entered into by a person who is in business on his account is a contract for services rather than a contract of service (and indeed Mr McDonnell did not suggest that the evidential burden shifted). As Pennicuik V−C said in *Fall v Hitchen* [1973] 1 WLR 66 at 74 (in a passage approved of by the Court of Appeal

in *Hall v. Lorimer* [1994] S.T.C. 23 at 31):

> [Rowlatt J in *Braithwaite]* nowhere says that if an actor enters into a contract in such terms as to amount to what he calls a post, then that actor, is not chargeable under Schedule E but under Schedule D. On the contrary, it is implicit in the whole of his judgment, it seems to me, that if a professional person, whether an actor or anybody else, enters into a contract involving what the learned judge calls a post, then that person will be chargeable in respect of the income arising from the post under Schedule E notwithstanding that he is at the same time carrying on his profession, the income of which will be chargeable under Schedule D."

20. The fact that Synaptek (and notionally Mr Stutchbury) was in business on its (notionally his) own account is no doubt an important contextual circumstance to be taken into account in determining whether the particular notional contract under which Mr Stutchbury was engaged by the client was one for services or of service. But it is no more than that. The weight to be given to it was, in my judgment, a matter for the General Commissioners. That they took it into account is clear from their reference to the point in paragraphs 5.1 and 5.2 of the stated case.

Mutuality of Obligation

21. The main point on which Mr McDonnell relied as showing that the Commissioners had misdirected themselves as a matter of law was their treatment of the question whether there was sufficient mutuality of obligation in the notional contract for it to be recognisable as a contract of service. In paragraph 6.7 of the stated case the Commissioners had recorded Synaptek's contention on this point in the following terms:

> 6.7 EDS were not obliged to provide work for Synaptek and Synaptek were not obliged to work EDS. A mutuality of obligation normally essential to a contract of service, was accordingly absent."

22. This passage appears to have been a reflection of written submissions made by Mr Stutchbury where similar words occur in the context of the comment that "At the end of this contract I will leave for another company, as I came to EDS from another company. When the job is complete I will move on as I have done for the past 10 years for something more interesting and/or more money;" and, following a reference to *O'Kelly v Trust House Forte* that "EDS will dispose of Synaptek's services once the contract with BA [Benefits Agency] expires. There is no obligation for Synaptek to continue working for EDS and EDS are not obliged to provide work. There is also a 4 week termination clause so EDS can terminate the contract early."

23. These passages suggest that the argument being advanced before the Commissioners related to the existence of any obligation on EDS to enter into the contract in the first place rather than to the question whether there was any obligation on EDS to provide work during the currency of the contract. The only way in which the Commissioners dealt with the argument was in the first sentence of paragraph 5.5 (iv) of the stated case, implicitly rejecting the submission.

24. Before me Mr McDonnell directed his fire at the question of EDS' obligations to provide work during the currency of the contract. He submitted that, on the true construction of the NESCO agreement (assuming equivalent provisions to be found in the notional contract between EDS and Mr Stutchbury) there was no such obligation on EDS. He submitted that the effect of the contractual provisions, properly construed, was that EDS was perfectly free during the currency of the contract not to provide Mr Stutchbury with any work.

25. There is now a considerably body of authority on the question whether an obligation on the employer to provide work is necessarily and in all cases an indispensable attribute of a contract of employment: see *Nethermere (St Neots) Ltd v Gardiner* [1984] 1RLR 240, *McLeod v Hellyer Brothers Ltd* [1987] 1RLR 232, *Clark v Oxfordshire Health Authority* [1998] 1RLR 125 and *Montgomery v Johnson Underwood Ltd* [2001] 1RLR 269. It is unnecessary in the present case to examine these since Mr Sheldon on behalf of the Inspector accepted that if, taking the period of the notional contract as a whole EDS was under no obligation to provide work, the necessary element of mutuality was indeed lacking for that period.

26. The argument that EDS was under no such obligation was founded entirely on the provision in Clause 6.4 of the NESCO contract that:

> In any event no payment will be made by NESCO to the Company in respect of any contractual period not actually worked including notice periods."

Mr McDonnell submitted that this provision had effect irrespective any contractual period had not been worked: it might be simply because EDS had been unable or unwilling to provide work.

27. In my judgment that is not the correct way to read this provision. Its purpose is to emphasise that payment is dependent not only on the completion of proper timesheets and invoices, but also on actual work having been done. It does not, in my judgment, detract from the obligation on the client reflected in Clause 4.3 to "allocate work to the Company." Moreover, if the contract is read as containing no obligation on the client to provide work, it is quite impossible to see what purpose is served by the termination provisions in Clause 8.

<u>The Right of Substitution</u>

28. In *Express and Echo Publications v Tanton* [1999] 1RLR 367, CA, it was held that a clause in a driver's contract providing that "[i]n the event that the contractor is unable or unwilling to perform the services personally, he shall arrange at his own expense entirely for another suitable person to perform the services" was incompatible with the contract having been one of employment. The E.A.T has subsequently held (see *MacFarlane v Glasgow City Council* [2001] 1RLR 7) that a more limited power of delegation is not necessarily inconsistent with a contract of employment. In the present case the provision in question (Clause 9.1 of the NESCO agreement) does not give Synaptek any *right* to perform the services by anyone other than Mr Stutchbury. The effect of the contract is that, unless and until agreed otherwise, the services do have to be performed personally by Mr Stutchbury. In addressing the question whether that provision pointed to the contract being one for services rather than of employment, the Commissioners were entitled in my judgment to regard it as simply one fact among others, and, in assessing the weight to be given to it**,** to take into account the extent to which the provision was utilised in practice.

Misplaced reliance on *FS Consulting Ltd v McCaul*

29. Mr McDonnell submitted that the Commissioners could be shown to have misdirected themselves by their invocation, in paragraph 5.11 of the stated case, of this decision of Special Commissioner Dr. Brice reported at [2002] SIC (SCD). The contractual arrangements in that case bore some similarity to those in the present case, but there were several distinguishing features. In particular the working hours of the "employee" in that case were less flexible than Mr Stutchbury's, there was a greater degree of control by the client over the services performed by the "employee," there was no obligation on the "employee" to maintain his own tools and equipment or undertake his own training, there was no provision for the "employee" to have professional indemnity insurance, and the "employee" had never worked for more than one "client" at a time.

30. Had there been anything ‘in the case stated to suggest that the Commissioners thought that the facts in *F.S. Consulting* were indistinguishable from those in the present case, there would have been a powerful argument for saying that they must have misdirected themselves. However, all that they say is that the facts "bear a close similarity" and that the principles set out by the Special Commissioner therefore provide "a useful guide." The relevant principles identified by Dr Brice are set out in paragraph 44 to 51 of her Decision. She there began by stating the principle that the question is one of fact to be determined having regard to all the relevant circumstances. She then went on to summarise the effect of *Ready Mixed Concrete, Market Investigations, Hall v. Lorimer* and *McManus v. Griffiths.*

31. In the present case no less than 23 authorities were cited to the Commissioners. Their reference to the principles set out in *F.S. Consulting* seems to me to have been no more than an efficient and economical way of encapsulating the relevant principles, and one which was justified by the close contextual similarity of the facts in that case to the present one. It does not in my judgment demonstrate that

they misdirected themselves.

Conclusions

32. If (as I have held) the Commissioners did not misdirect themselves in law, there plainly was evidence before them which made the conclusion which they reached a possible one. In support of the contention that the contract was one for services, reliance could be placed (1) on the fact that Synaptek (and notionally Mr Stutchbury) was in business on its (notionally his) own account, (2) the limited control by EDS of time at which and the manner in which Mr Stutchbury performed the services, (3) the right of substitution, (4) the fact that Synaptek was responsible for Mr Stutchbury's training and the provision of computer facilities at its own premises, (5) the express provisions in Clause 12 of the NESCO agreement in relation to intellectual property rights, (6) the requirement in Clause 15.2 of the contract for professional indemnity insurance, (7) the flexibility of the hours worked by Mr Stutchbury and (8) the use by him of his own reference books (as to which Mr McDonnell submitted that insufficient weight had been given to potential character as tools of his trade). On the other side of the coin, however, were the facts (1) that the minimum hours to be worked were broadly equivalent to a normal working week, (2) that the only risk borne by Mr Stutchbury was the insolvency of NESCO/EDS, (3) that the duration of the contract was for a fixed period (of 6 months) rather than in relation to the completion of a particular project, (4) that Mr Stutchbury worked alongside EDS employees and was sufficiently integrated with its workforce to have a line manager and (5) the requirement in Clause 4.4 of the NESCO agreement (not in fact expressly adverted to by the Commissioners) that he comply with all EDS instructions. The relative weight to be given to the various factors (all of which are either mentioned or alluded to in the case stated) was a matter for the Commissioners. It is not possible, in my judgment, to say that they were wrong in law in the conclusion at which they arrived.

Error in the Notice of Decision

33. There was one respect in which the Notice of Decision was erroneous, and the error was not corrected, by the Commissioners. This is the wrinkle to which I referred in paragraph 2 above. The Notice of Decision was directed to the arrangements between Mr Stutchbury and EDS during the period from 1st May 2000 to 29th October 2000. In fact, for the period from 1st May 2000 to 31st August 2000 the arrangements were not with EDS but with ITSA.

34. The error, such as it was, appears to have arisen from the way in which Synaptek described the arrangements in initial correspondence with the Inspector. Although the fact of the transfer of undertaking by ITSA to EDS as from 1st September 2000 was in evidence before the Commissioners no significance was attached to it by the parties, and no relevant finding made by the Commissioners. The facts are, however, not in dispute. The point has only come to be taken as an afterthought by Synaptek's present advisors in the course of the appeal process.

35. Had the point been taken before the Commissioners it is impossible to see what difference it would have made to the result save that they would almost certainly have thought it right to amend the Notice of Decision by the insertion of appropriate wording in relation to the period from 1st May 2000 to 31st August 2000. The only factual difference between the earlier (ITSA) period and the later (EDS) period is that in the former case the "right" of substitution was deleted from the NESCO agreement as from 6th May 2000. It is a fair inference that this was done at the prompting of ITSA which, as a government agency, did not wish to be associated with a contractual provision which lent colour to an argument that the arrangements should, for IR35 purposes, be interpreted as providing for services rather than for employment. However that may be, it is plain that Synaptek's separate arguments in relation to the earlier period would, if anything, have been weaker than in relation to the later period.

36. Had the point been taken before the Commissioners they would have had the power to amend the Notice of Decision in an appropriate manner and otherwise to confirm it: see Section 10 of the Social Security Contributions (Trustor of Functions,) Act 1999. Since the facts were not in dispute there is no point in remitting the case to them to consider the point. The Court has power to make the necessary amendments to the Commissioners' determination (see Section 56(6) of the Taxes Management Act 1970) and I propose to exercise that power.

Tilbury Consulting Ltd v Gittins (HMIT) (2003) Sp C 390

Stephen Oliver QC

Decision released 3 November 2003

National Insurance contributions – Earnings of workers supplied by service companies etc – Provision of services through intermediary – Company contracting to provide services of worker to independent information technology entity – Entity under contract to provide information technology services to UK motor manufacturer – Whether, if arrangements had taken the form of a contract between worker and motor manufacturer, worker would have been regarded as gainfully employed by the motor manufacturer – Social Security Contribution (Intermediaries) Regulations 2000 (SI 2000/727), reg. 6(1)(c).

HEADNOTE

A special commissioner held that a personal services company was not liable to pay National Insurance contributions (NICs) in respect of a worker's earnings attributable to an engagement with a third party to which the company had supplied his services. In the circumstances of the case, the worker would not have been treated as an employee if he had contracted directly with the client.

Facts

Throughout his working life T had been involved with IT and specialised in computer aided software engineering. In 1994 he became a freelance contractor. He sought engagements through an independent entity ('C') which made it a condition of taking T on its books that his services were provided through a limited company. Therefore, T caused the taxpayer to be incorporated with himself as a director and his wife as company secretary. From then on the taxpayer engaged T as an employee, issued its own invoices, and accounted for its own tax and National Insurance liabilities. The taxpayer effected insurances to provide it with funds should T be unavailable to work, as PI cover and to meet employer liability claims.

The taxpayer had various contracts. In 2000, F engaged the IT services of C; which undertook, over a 12 month period from 1 August 2000 (subsequently extended to 31 January 2002), to set up and take operational control of an application management center ('AMC') at F's premises. The AMC system, which was to belong to F, was designed to manage and maintain projects for F. The AMC was housed in F's premises and had a number of functions to facilitate F's business, e.g. finance, manufacturing and sales, accounting, purchasing, plant floor and product development. Each function had its 'application portfolio manager' under whom were 'application group managers' who exercised day-to-day management of the IT staff

such as analysts and development engineers. Exceptionally some of the personnel operating the AMC were F staff; the rest were provided by C.

C allocated its own workforce to meet the demands of the AMC project and the specific requirements made on C by F. On Thursday evenings C's management would hold an off-site meeting to deal with those demands and other management matters. Who the particular individuals were that C provided to operate the AMC project was not a matter of concern to F. C had committed itself to F to provide a system that functioned to the satisfaction of F; the particular individuals operating the AMC were C's responsibility. C was at liberty to make its own suitable substitutions.

On 1 November 2000, the taxpayer entered into the subcontractor agreement with C for the provision of T's services at F's premises at an hourly rate of £68.74. C engaged the taxpayer to provide 'general consultancy services and technical support'. The taxpayer was required to make T available but was at liberty to provide 'any named individual … as a suitably qualified replacement', subject to a 30-day trial period during which the replacement could be rejected by C. This substitution provision had been specially negotiated with C and over the negotiation period, payment by C to the taxpayer was suspended. The subcontractor agreement provided that the taxpayer was to invoice C monthly, that the taxpayer was to bear the costs of getting to the location of C's customers and that the taxpayer accepted liability for death or personal injury resulting from its negligence and for damage resulting from its negligence to a maximum of £500,000.

T worked on the AMC project concentrating on the development of two systems. Those two projects were headed up by an F employee ('B') who was not an IT expert. B in turn reported to a senior C project team leader. So far as the performance by T of his technical work was concerned, he did this as part of a team of three experts introduced by C. Between them they decided on hours of attendance so as to meet the 8.30-4.45 requirement on F's part. They processed change requests and dealt with other requests, usually at weekly meetings with their F counterparts, and they discussed progress on a day-to-day basis, usually with B who worked two floors apart from them.

B's duties included responsibility for the team that T was in; but it was no part of B's function to tell the members of the team how to do their work. In common with the other F employees involved in the AMC project, B had no detailed knowledge of the operation of the system. While the team's progress was discussed with B, the individual members of the team were left to get on with their work. The responsibility to 'deliver' the AMC project rested with C and it was down to C's staff and sub-contractors to see it through.

Much the greater part of T's work was done at F's premises. The work required access to F's main frame computer which could only be obtained through F's internal network. T lived some way from F's premises. His pattern of work was to start and leave earlier than normal F office hours. On Fridays he tried to get back to his home base after a morning's work. He had a standing arrangement with the others in his team to provide coverage for the periods required by F. One of the rooms at T's home base was partly occupied as the taxpayer's office. It housed a computer and

printer, the business records of the taxpayer and various computer manuals. The office was used by T when carrying out AMC business occasionally.

The taxpayer appealed against the decision of an officer of the Board, made for National Insurance contribution ('NIC') purposes under reg. 6(4) of the *Social Security Contribution (Intermediaries) Regulations* 2000 (SI 2000/727, known as the IR 35 legislation) and s. 8(1)(m) of the *Social Security Contributions (Transfer of Functions etc) Act* 1999. That decision was that the circumstances of the arrangements between T and F for the performance of services from 1 August 2000 to 31 January 2002 were such that, had they taken the form of a contract between T and F, T would be regarded for the purposes of Pt. I and V of the *Social Security (Contributions and Benefits) Act* 1992 as employed in employed earner's employment by F. Therefore the taxpayer was treated as liable to pay primary and secondary Class I NI contributions in respect of the worker's attributable earnings from that engagement.

Issue

Whether, as the officer of the Board had decided, T would have been an employee of F if there had been a direct contract between F and T.

Decision

The *Social Security Contribution (Intermediaries) Regulations* 2000, reg. 6(1)(c) applied and called for a two stage exercise. The first was to find the facts as they existed during the period covered by the decision. The facts to be found were those that served to identify the 'arrangements' involving the intermediary and the circumstances in which those arrangements existed and the nature of the services performed by the 'worker'. The second was to assume that the worker ('T') was contracted to perform services to the client ('F') and to determine whether in the light of the facts as found T would be regarded as F's employee.

The findings of fact which identified the arrangements involving the intermediary ('the taxpayer'), the circumstances in the context of which the arrangements were made and the nature of the services performed by T, showed that T would not have been regarded as F's employee (making the statutory assumption that he was contracted to perform services to F). The facts show that C and not F had operational control of the AMC project. F had engaged C to provide its IT services and to set up and operate the AMC project. C was engaged as principal and acted personally in the project. It equipped itself with its own specialised personnel to discharge its own obligation to F, either by employing them directly or by engaging outside subcontractors, such as the taxpayer which in turn provided T. F did not exercise control over the manner in which the C personnel carried out their duties. To the extent that control was exercisable over the performance of T's services, that lay with C. F accepted suitable substitutes from C and C was obliged to accept from the taxpayer a suitable substitute for T. At no time was T a part of F's business or undertaking. Those facts were inconsistent with an employer/employee relationship between F and T.

The findings of fact and the application of the statutory assumption to those findings did not support the decision appealed against. Therefore the appeal would be allowed.

Decision

1. Tilbury Consulting Ltd ('TCL') appeals against the decision of Margaret Gittins, officer of the Board, made for National Insurance contribution (NIC) purposes under reg. 6(4) of the Social Security Contribution (Intermediaries) Regulations 2000 (SI 2000/727) and s. 8(1)(m) of the Social Security Contributions (Transfer of Functions etc) Act 1999. (SI 2000/727 is colloquially known as the Inland Revenue 35 legislation.) The decision was given on 28 January 2003 and reads as follows:

'1. That the circumstances of the arrangements between Roger Tilbury and Ford Motor Company for the performance of services from 1 August 2000 to 31 January 2002 are such that, had they taken the form of a contract between Roger Tilbury and Ford Motor Company, Roger Tilbury would be regarded for the purposes of Parts I and V of the Social Security (Contributions and Benefits) Act 1992 as employed in employed earner's employment by Ford Motor Company.

2. That Tilbury Consulting Ltd is treated as liable to pay primary and secondary Class I contributions in respect of the worker's attributable earnings from that engagement.'

Short summary of issues

2. In essence the legislation referred to above cover situations of individual workers who contract services via an intermediary to an end user client in circumstances that would amount to direct employment by that client if it were not for the interposition of that intermediary. Where the legislation applies, its effect is to treat the worker as employed, for NIC purposes, by the intermediary.

3. Throughout the period covered by the decision:

(i)Mr Roger Tilbury, referred to in the decision as 'the worker', was a controlling shareholder and director of TCL (the 'intermediary');

(ii)Mr Tilbury worked on an information technology (IT) project for Ford Motor Company (' Ford', referred to as 'the client' in the decision) and substantially all that work was done at Ford's premises;

(iii)a company called Compuware Ltd ('Compuware') was under contract with Ford to set up, service and staff that IT project; and

(iv)TCL was engaged by Compuware to provide services and in particular to make available to Compuware Mr Tilbury's services (with the right, subject to conditions, to provide a replacement).

4. The issue is whether, as the officer of the Board has decided, Mr Tilbury would have been an employee of Ford in the circumstances of the assumed contract between Ford and Mr Tilbury the terms of which are to be inferred from the circumstances.

The statutory wording

5. The legislation, found in reg. 6 of SI 2000/727, applies and a worker will be treated as in employed earner's employment by a client (i.e. gainfully employed under a contract service: see Social Security Contributions and Benefits Act 1992, s. 2(1)) where:

'(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client"),'

(b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and

(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client'.

Introduction

6. The legislation calls for a two stage exercise. The first is to find the facts as they existed during the period covered by the decision. The facts to be found are those that serve to identify the ' arrangements' involving the intermediary and the circumstances in which those arrangements existed and the nature of the services performed by the ' worker'. The second is to assume that the worker (Mr Tilbury) was contracted to perform services to the client (Ford) and to determine whether in the light of the facts as found Mr Tilbury would be regarded as Ford's employee.

The arrangements and the circumstances

7. The findings of fact are drawn from the oral evidence of:

Roger Tilbury, the 'worker' in the decision appealed against.

Jim O'Neill, an employee of Ford, ‘ the client’, and, at the material time, manager in charge of Ford’s Application Management Centre (‘AMC’) explained below.

Christine Ansell, an employee of Compuware with responsibility for hiring Compuware’s employed staff and for engaging Compuware’s sub-contract staff.

Mr O'Neill was called to give evidence in line with the terms of the explanatory leaflet issued by the special commissioners. The leaflet states that since the question to be decided will be ‘whether the worker should be regarded as an employee of the client’, the special commissioners would expect to hear evidence from both the worker and from someone able to speak for the client.

8. Also in evidence were:

A ’sub-contractor agreement' of 1 November 2000 between Compuware and TCL (referred to in this decision as ‘the sub-contractor agreement’).

An agreement between the US parent companies of Ford and of Compuware dated 16 December 1998. It was not in dispute that the terms of this (referred to as ‘the Ford/Compuware agreement’) governed the relationship between Ford and Compuware as regards the AMC project.

Background history

9. Throughout his working life Mr Tilbury has been involved with IT. He started as a programmer then moved into the development and writing of software. He now specialises in computer aided software engineering.

10. In 1994 he became a freelance contractor. He sought engagements through an independent entity called Computer People. Computer People made it a condition of their taking Mr Tilbury on their books that his services were provided through a limited company. The reason for this apparently was because otherwise Computer People would, under the then Inland Revenue legislation, have had to account for income tax and NIC on the payments for his services. Mr Tilbury caused TCL to be incorporated with himself as a director and his wife as company secretary.

11. From then on TCL engaged Mr Tilbury as an employee, issued its own invoices, and accounted for its own tax and national insurance liabilities. TCL effected insurances (a) to provide it with funds should Mr Tilbury be unavailable to work, (b) as PI cover and (c) to meet employer liability claims.

12. TCL has had various contracts. One was with Texas Instruments which in its turn was providing services to Ford. TCL, through Computer People contracted with Texas Instruments and Texas Instruments in its turn agreed to provide services to Ford. TCL, through Computer People, contracted with Texas Instruments which then provided the services of Mr Tilbury to Ford. A succession of engagements, for 12 months or less, were entered into, usually through Computer People, with Ford. In about 1998, Computer People dropped out of the chain of supply and TCL’s share of the fees paid by Ford improved

correspondingly. Changes to the chain took place in 1999. All the time the end-user of Mr Tilbury's services was Ford.

The AMC project

13. In 2000, in pursuance of the Ford/Compuware agreement, Ford engaged the IT services of CW; so far as is relevant to the present appeal CW undertook, over a 12 month period from 1 August 2000 (subsequently extended to 31 January 2002), to set up and take operational control of an application management centre at Ford's premises in Basildon, Essex. The AMC system, which was to belong to Ford, as designed to manage and maintain projects for Ford. The AMC was housed in Ford's premises, an eight floor E-shaped building, known as Trafford House. The AMC and the personnel working on it occupied several floors at the middle limb of the E. Those personnel were, in the main, employees of, and IT specialists contracted in by, CW.

14. The CW organization, set up to operate the AMC, was headed by an overall director. He worked on site at Ford's premises. The AMC had a number of functions to facilitate Ford's business, e.g. finance, manufacturing and sales, accounting, purchasing, plant floor and product development. Each function had its 'application portfolio manager' under whom were ' application group managers' who exercised day-to-day management of the IT staff such as analysts and development engineers. Exceptionally some of the personal operating the AMC were Ford staff; the rest were provided by CW.

15. Ford liaised with the teams working on the AMC project. In overall charge of the Ford business management side was Mr Jim O'Neill who gave evidence. His opposite number with CW was the CW director referred to above. Management of the projects served by the various AMC functions was conducted through business teams. Those business teams consisted partly of Ford staff and partly of individuals contracted in by Ford from 'Cap Gemini', computer consultants.

16. The Ford business teams held weekly meetings with their CW counterparts. One outcome of such weekly meetings was ' change requests' made by Ford. Another outcome was re-prioritising of particular elements of the project. Ford staff also liaised with the CW AMC people as and when needs arose. While each floor of Trafford House was open plan, the AMC project personnel did not work alongside the Ford staff.

17. CW allocated its own workforce to meet the demands of the AMC project and the specific requirements made on CW by Ford. On Thursday evenings CW's management would hold an off-site meeting to deal with those demands and other management matters. Who the particular individuals were that CW provided to operate the AMC project was not a matter of concern to Ford. CW had committed itself to Ford to provide a system that functioned to the satisfaction of Ford; the particular individuals operating the AMC were CW's responsibility. CW was at liberty to make its own suitable substitutions.

18. Ford paid CW for each individual operating the AMC project, such fees being determined on an hourly basis. Ford required that those individuals should provide cover throughout Ford's own office hours, i.e. 8.30am to 4.45pm Monday to Friday with a 45 minute break for lunch. Particular CW teams working on the project were free as between

themselves to arrange their hours so that Ford obtained the required coverage. CW, through its individuals or through its teams, provided time sheets; these were passed to Ford for reconsideration and Mr O'Neill authorized payment to CW on the basis of these. No individual provided by CW was to work for more than a 371/2 hour week, save in exceptional circumstances where CW was allowed to charge overtime.

19. Ford issued passes to the CW personnel. These were of a different colour and gave more limited access than those issued to Ford's own staff; e.g. a contractor's pass did not give access to the Ford gymnasium. Ford's medical centre is open to all including contractors needing attention while on the premises. CW personnel working at Ford are each allocated a telephone extension and it identified for this purpose as a contractor.

The circumstances of Mr Tilbury

20. In early 2000 some previous IT contractors of Ford who had until then been engaged in TCL (via another IT company called Logica) had their contract terminated. At the same time TCL's hourly rates were seen to be too expensive; nonetheless TCL continued working for Logica providing services to Ford under contract until the end of July 2000. During that period CW and Ford were arranging to set up the AMC project. TCL, on 1 November 2000, entered into the Sub-Contractor Agreement with CW for the provision of Mr Tilbury's services at Ford's premises at an hourly rate of £68.74. CW engaged TCL to provide 'general consultancy services and technical support'. TCL was required to make Mr Tilbury available but was at liberty to provide ' any named individual … as a suitably qualified replacement', subject to a 30-day trial period during which the replacement could be rejected by CW. This substitution provision had been specially negotiated with CW and over the negotiation period, payment by CW to TCL was suspended. (No replacement was needed throughout the course of the contract, which lasted until 31 January 2002.) The TCL/CW sub-contractor agreement provided that TCL was to invoice CW monthly, that TCL was to bear the costs of getting to the location of CW's customers and that TCL accepted liability for death or personal injury resulting from its negligence and for damage resulting from its negligence to a maximum of £500,000.

21. Mr Tilbury duly worked on the AMC project concentrating on the development of two systems. One, 'Volume, Mix and Rates' was a forecasting system for future sales patterns in the retail car market; it covered the demand for optional extras added to cars when sold new. The other ' Preferred Price Maintenance' was a system involving the storage of pricing information and the development of pricing strategies. Those two projects were headed up by a Ford employee (Mr Ian Baker) who was not an IT expert. Mr Baker in turn reported to a senior CW project team leader. So far as the performance by Mr Tilbury of his technical work was concerned, he did this as part of a team of three experts introduced by CW. Between them they decided on hours of attendance so as to meet the 8.30–4.45 requirement on Ford's part. They processed change requests and dealt with other requests, usually at weekly meetings with their Ford counterparts, and they discussed progress on a day-to-day basis, usually with Mr Baker who worked two floors apart from them.

22. Mr Baker's duties included responsibility for the team that Mr Tilbury was in; but it was, as already mentioned, no part of Mr Baker's function to tell the members of the team how to do their work. In common with the other Ford employees involved in the AMC project, Mr Baker had no detailed knowledge of the operation of the system. While the team's progress was discussed with Mr Baker, the individual members of the team were left

to get on with their work. The responsibility to ‘ deliver’ the AMC project rested with CW and it was down to CW’s staff and sub-contractors to see this through.

23. Much the greater part of Mr Tilbury’s work was done at Ford’s premises. The work required access to Ford’s main frame computer and this could only be obtained through Ford’s internal network. Mr Tilbury lives some way from Ford’s premises at Basildon. His pattern of work was to start and leave earlier than normal Ford office hours. On Fridays he tried to get back to his home base after a morning’s work. He had a standing arrangement with the others in his team to provide coverage for the periods required by Ford.

24. One of the rooms at Mr Tilbury’s home base was partly occupied as TCL’s office. It housed a computer and printer, the business records of TCL and various computer manuals. The office was used by Mr Tilbury when carrying out AMC business ‘occasionally’ (Mr Tilbury’s word); at early stages of ‘change requests’, for example, Mr Tilbury found that he could process these by using the laptop in the TCL office.

25. TCL, as already noted, had the qualified right to substitute someone else for Mr Tilbury under the TCL contract with CW. This was never exercised. Correspondingly CW had the right to replace staff and sub-contractors working on the AMC project. There was no document covering this latter right but the arrangement between CW and Ford, as explained to us by Christine Ansell of CW, was that Ford had the right to reject a CW replacement within a 30-day trial period.

26. The evidence (in para. 18) was that Ford paid CW an hourly rate for each individual operating the AMC project : and CW paid TCL an hourly rate for the provision of Mr Tilbury’s services (paragraph 20). What, if any, other relationship the payments by Ford to CW and those by CW to TCL had to each other was something about which no evidence was adduced.

Conclusion

27. The findings of fact set out above, which identify the arrangements involving the intermediary (TCL), the circumstances in the context of which the arrangements were made and the nature of the services performed by Mr Tilbury, show that Mr Tilbury would not have been regarded as Ford’s employee (making the statutory assumption that he was contracted to perform services to Ford). The facts show that CW and not Ford had operational control of the AMC project. Ford had engaged CW to provide its IT services and to set up and operate the AMC project. CW was engaged as principal and acted personally in the project. It equipped itself with its own specialized personnel to discharge its own obligation to Ford, either by employing them directly or by engaging outside subcontractors, such as TCL which in turn provided Mr Tilbury. Ford did not exercise control over the manner in which the CW personnel carried out their duties. To the extent that control was exercisable over the performance of Mr Tilbury’s services, that lay with CW. Ford accepted suitable substitutes from CW and CW was obliged to accept from TCL a suitable substitute to Mr Tilbury. At no time was Mr Tilbury a part of Ford’s business or undertaking. Those facts are inconsistent with an employer/employee relationship between Ford and Mr Tilbury.

28. The findings of fact and the application of the statutory assumption to those findings do not support the decision appealed against. I therefore allow the appeal.

(Appeal allowed)

Usetech Ltd v HM Inspector of Taxes [2004] UKSC SPC00404 (12 March 2004)

NATIONAL INSURANCE CONTRIBUTIONS — intermediary rules ("IR35") — whether worker to be regarded as in "employed earner's employment by the client" — Social Security Contributions (Intermediaries) Regs 2000, reg 6 — yes — appeal dismissed

INCOME TAX — FA 2000, Sch 12 para 1 — whether worker to be regarded as an employee of the client — yes — appeal dismissed

THE SPECIAL COMMISSIONERS

USETECH LIMITED Appellant

- and -

GRAEME W YOUNG (HM Inspector of Taxes) Respondent

Special Commissioner: Colin Bishopp

Sitting in public on 22 January 2004

David Smith of Accountax for the taxpayer

The inspector in person

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DECISION

1. The taxpayer company, Usetech Limited, traded from 1996 to 2003. Its shareholders and officers were William Hood and his wife, but only Mr Hood was actively engaged upon the company's business, and there were at no time any other employees. The company ceased to trade when Mr Hood became seriously ill, and incapable of working. His skills lay in the production of design drawings of oil wells, rigs and similar equipment. In particular, he is, or was, a specialist in the use of a software product known as Pro-Engineer, which produces 3-D models of such equipment. The company's business was, in effect, the hiring out of Mr Hood to various companies engaged in the oil industry.

2. Between 1996 and 2000 Mr Hood undertook work for various companies; in his evidence he identified four engagements. The first was with ABB Vetco

Gray ("ABB"). The taxpayer's contract with ABB was effected through the medium of an agency, NES International Limited ("NES"). Mr Hood was interviewed by ABB before it agreed to engage him, although there was at no time any contract between ABB and Mr Hood, nor between ABB and the taxpayer. ABB contracted with NES which in turn contracted with the taxpayer for the provision of Mr Hood's services. The engagement lasted for about 8 months, from June 1996 to February 1997. From then until June 2000 Mr Hood undertook work for companies other than ABB, save for a period of about three months during which the taxpayer was unable to secure any work for him.

3. In May 2000 the taxpayer entered into a further contract with NES for the provision of Mr Hood's services to ABB. The contract was initially expected to be of quite short duration – a matter of weeks – but in fact Mr Hood remained for some 17 months. The taxpayer then secured a further short-term contract with another company before again agreeing with NES to supply Mr Hood's services to ABB; it did so from February 2002 until Mr Hood ceased work in May 2003.

4. I am concerned in this appeal only with the period from 1 June 2000 to 30 March 2001 inclusive, during the whole of which Mr Hood's services were supplied to ABB. The Revenue contends that the supply comes within what are colloquially referred to as the "IR35" rules, and are identified more specifically as regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000 (SI 2000/727) which deals with national insurance contributions, and Schedule 12 to the Finance Act 2000 which deals with income tax. Regulation 6 of the 2000 Regulations is in these terms:

> "6(1) These Regulations apply where —
>
> (a) an individual ('the worker') personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ('the client'),
>
> (b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and
>
> (c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the [Social Security] Contributions and Benefits Act [1992] as employed in employed earner's employment by the client.

Paragraph (1)(b) has effect irrespective of whether or not –

(a) there exists a contract between the client and the worker, or

(b) the worker is the holder of an office with the client.

(2) Where these Regulations apply –

(a) the worker is treated, for the purposes of Parts I to V of the Contributions and Benefits Act, and in relation to the amount deriving from relevant payments and relevant benefits that is calculated in accordance with regulation 7 ('the worker's attributable earnings'), as employed in employed earner's employment by the intermediary, and

(b) the intermediary, whether or not he fulfils the conditions prescribed under section 1(6)(a) of the Contributions and Benefits Act for secondary contributors, is treated for those purposes as the secondary contributor in respect of the worker's attributable earnings

and Parts I to V of that Act have effect accordingly.

(4) Any issue whether the circumstances are such as are mentioned in paragraph (1)(c) is an issue relating to contributions that is prescribed for the purposes of section 8(1)(a) of the Social Security (Transfer of Functions etc) Act 1999 (decision by officer of the Board)."

5. The corresponding provisions of Schedule 12 to the 2000 Act, so far as they are material, read:

"(1) This Schedule applies where –

(a) an individual ('the worker') personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ('the client'),

(b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ('the intermediary'), and

(c) the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client …

> (4) The circumstances referred to in sub-paragraph (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided …"

6. I omit the remaining provisions of Schedule 1. Although they are relevant to the taxpayer's liability, it was agreed by the parties that I need not concern myself with them since the appeal is to be resolved on narrower grounds.

7. Formally, this is an appeal against a decision made on 18 January 2002 under section 8 of the Social Security (Transfer of Functions Act) Act 1999 in respect of regulation 6, and a further decision of the same date made under regulation 49 of the Income Tax (Employments) Regulations 1993 (SI 1993/744) in respect of Schedule 12, the combined effect of which, if they are correct, is that Mr Hood is to be treated for national insurance and income tax purposes as if he were an "employed earner" of the taxpayer; the consequence will be that the taxpayer is required to account for national insurance contributions and income tax accordingly: see regulation 2(1) and Schedule 12 paragraph 2(1) respectively. I am not asked to consider the amounts of national insurance contributions and tax due, but merely the correctness of the decisions. Although, as the extracts I have set out show, the legislative provisions for national insurance and income tax differ slightly, the test and the relevant considerations to be adopted in applying it are essentially the same in each case.

8. It was accepted by David Smith, representing the taxpayer, that paragraphs (1)(a) and (1)(b) of each set of provisions were satisfied, that Mr Hood was "the worker" and that ABB was "the client", although it should be pointed out that he accepted, in relation to paragraph 1(a) of each set of provisions, only that Mr Hood in fact personally performed the work, and not that he was under an obligation to do so. He accepted too that if these provisions apply, the taxpayer is the "intermediary". The dispute between the parties was, in essence, whether the slightly different tests prescribed by paragraph (1)(c) of each set of provisions were satisfied. The wording of the provisions, requiring an examination of "the circumstances", indicates that the test is primarily factual, although the authorities show that there are also issues of law, and guidelines to be followed in evaluating the facts; in other words, I must examine the facts in the light of the existing case-law. I agree with the view expressed in *Lime-IT v Justin* [2003] STC (SCD) 15 that, while the "contract" between the client and the worker may be hypothetical, it is necessary to consider the actual, rather than any hypothetical, facts of the case. I turn, therefore, first to consider the evidence. I heard from Mr Hood, from Gerald Parker, a Revenue officer who made enquiries into the circumstances of Mr Hood's engagement, from Alexander Hunter, ABB's

human resources manager and from Paul White, ABB's engineering manager. I find the following facts.

9. ABB is in the business of providing equipment for the oil and gas industry. It has a core staff of 750 to 850 permanent employees, but supplements that staff, when demand requires, by taking on what Mr Hunter described as "sub-contract employees". The company's needs were identified by those (such as Mr White) in charge of its various activities and were notified to Mr Hunter and his team, who satisfied the need by taking on temporary staff. They did so, in every case, by means of specialist agencies of which NES was one. ABB would in no circumstances enter into a direct contractual relationship with a temporary staff member. As it happens, an offer of permanent employment (which would have been by way of direct contract between ABB and him) had been made to Mr Hood, but he declined it for family reasons. The fact that ABB had sufficient confidence in him to offer permanent employment did not alter the manner in which they were willing to engage him temporarily – he had to come through an agency. However, although temporary workers were always engaged through agencies, it was ABB's practice to interview them individually before they were accepted; Mr Hunter had himself interviewed Mr Hood before he was first taken on by ABB in 1996. A temporary worker did not need to be interviewed again before each engagement and Mr Hood had, therefore, undergone only one interview. The purpose of the interview is primarily to verify that the proposed temporary member of staff has the requisite skills for the work required of him; thus ABB relied on its own judgment and did not accept such temporary staff as the agencies offered.

10. The taxpayer's contract with NES was in a standard form prescribed by NES. Three versions of NES' terms and conditions, whose differences had been identified and analysed by the Revenue, were among the documents produced at the hearing. Although there are indeed differences, I do not find them of great significance for the purposes of this decision. Moreover, the evidence did not make it entirely clear which version governed the relationship between NES and the taxpayer, nor whether the terms as originally agreed had been varied during the course of his engagement. I was provided too with a copy of the contract between ABB and NES; it is not relevant for present purposes, save for one point to which I shall return. The contract between NES and the taxpayer, so far as relevant to this appeal, was set out in a letter of 22 May 2000, sent by NES to the taxpayer; the letter stated that it incorporated NES' terms and conditions. It began with these words:

> "We are pleased to offer you a contract to supply contract staff in a position as Pro-Engineer Designer in accordance with the following:

NAME OF CONTRACT STAFF: WILLIAM HOOD

CLIENT: ABB VECTO GRAY REPORT TO: Mr Sandy Hunter

RATE: £30.00 Per Hour TIME: N/A

COMMENCEMENT DATE: 30TH May 2000 NOTICE PERIOD: 7 Days"

11. As ABB's needs continued, the contract between NES and the taxpayer was renewed by letters in an similar form, save that Mr Hood's name did not appear in the letter in order to identify the contract staff to be supplied.

12. Neither the letters nor NES' terms and conditions specified the hours of work – that is, the starting and finishing times, or the number of hours of work required each day, week or month. By contrast, ABB's agreement with NES stipulated that ABB would provide not less than 37.5 hours of work per week. I recognise the force of Mr Smith's argument that neither Mr Hood nor the taxpayer was a party to that agreement, and would not be bound by it – indeed they may have been quite unaware of its terms – and I recognise that the stipulation about hours of work was not repeated in NES' contract with the taxpayer. Mr Hood's evidence was that he determined himself the hours he would work, starting and finishing at times to suit himself and taking holidays when he wished, although as a matter of courtesy he told ABB in advance of his intentions. Flexibility was of some importance to him since he lives in Newcastle but was working at ABB's offices in Aberdeen, staying in lodgings. He stayed in Aberdeen for some weekends, working at ABB's offices, but would otherwise travel home. On some occasions he was asked to work at the weekend, but declined as he had planned to travel home. Conversely, he had no guarantee of work; if, unexpectedly, work he had intended to perform at a weekend was cancelled, or for some other reason there was no work for him to do (he gave the example of ABB's computers crashing), he was sent home or to his lodgings and, unlike permanent, employed staff, he was not paid in those circumstances: he was paid only for the hours he actually worked. Similarly, he did not receive sick pay, or holiday pay.

13. In substance, that evidence coincided with what I was told by Mr Hunter and Mr White, though each said that, while Mr Hood had some flexibility about the hours he decided to work, he was expected to agree those hours with Mr White or the technical manager to whom he reported and, within reason, to keep to those hours. Mr White's evidence went rather further: he said that staff, both permanent and temporary, were normally expected to begin work at 8am and finish at 5pm, but those hours could be extended and Mr Hood had, in fact, worked longer hours on occasion. As a general rule, temporary staff were expected to work 50 hours a week, and Mr Hood did

so. If he wanted time off, or to take a holiday, he was expected to seek agreement in advance to his doing so in the same way as would be required of an employee. If the workload were heavy, Mr White said, he might refuse permission but he accepted that if Mr Hood insisted on taking a holiday he could not, in practice, prevent him from doing so, although the situation had never arisen. Both Mr Hunter and Mr White accepted that Mr Hood could be sent home without pay though, without ruling the possibility out, neither recalled an occasion on which it had happened. He would certainly be laid off, with minimum notice, if the project on which he was working came to an end and no other work was available; as Mr Hunter explained, it was ABB's ability to adopt that course which had led it to engage temporary staff through agencies.

14. Some comment was made at the hearing about the fact that Mr Hood was required to complete time sheets, recording the hours he worked, and to have them signed by a suitable member of ABB's permanent staff. I regard that as a matter of no real significance. It seemed to me to be no more than the means by which both he and ABB could record the hours for which he was to be paid, and by which NES could be notified of the hours for which payment was due, since it was through NES that the taxpayer was remunerated.

15. It seemed to me from the evidence that, apart from his not being an employee of ABB, any temporary member of staff was treated, on a day-to-day basis, in a manner barely distinguishable from an employee. He was required to carry a security pass (albeit one identifying him as a temporary, rather than permanent, member of staff) and to attend safety briefings, though these two requirements are not, in my view, of any significance; they seem to be no more than common sense demands. Likewise I find it of little significance that (even if after some time had passed by) Mr Hood became a user of ABB's email system. The fact that he was engaged only temporarily did not diminish the need for communication with him. I also read no significance into the fact that the intellectual property rights in the designs produced by Mr Hood were retained by ABB. Whatever his status, it would in my view be quite remarkable if ABB, having paid Mr Hood (if only indirectly) to produce such designs, had then left him at liberty to sell them to its competitors.

16. More important, to my mind, were the manner in which work was allocated, performed and checked, and the working hours expected of Mr Hood. The evidence showed that work was allocated to the total complement of about 60 engineers and designers available to Mr White at weekly meetings, at which the staff were assigned to project teams. Those teams were led by technical managers, who reported to Mr White. Mr Hood reported to the technical manager to whose project team he was assigned at any given time.

Mr Hood was thus expected to, and did, accept those tasks allocated to him at weekly meetings. ABB provided all the necessary equipment including particularly working space at its own premises (where Mr Hood was required to undertake the work) and the computer and software necessary for its performance. Although nominally Mr Hood was engaged on a project-by-project basis, it was apparent from the evidence that he did whatever was required of him, within his skills, as the demands of ABB's business dictated. His work was checked in the same way as that of ABB's own employees, but I do not regard that as a significant factor since the stringent safety requirements ABB and its own customers imposed rendered careful checking inevitable. Mr Hood was at pains to point out that, although he was told what he was required to produce, he was not told by ABB how he should go about doing so. He described his own skills as unique, a view which Mr White did not share although he did accept that Mr Hood needed no instruction and was a highly competent user of Pro-Engineer. I accept that Mr Hood, once allocated a task, was able to accomplish it without guidance or instruction and that none was given or offered by ABB. The point was made that Mr Hood had little or no contact with ABB's customers but since it was not explained whether ABB's employees doing similar work might have had such contact I leave this factor out of account.

17. Mr Smith drew my attention to the requirement in NES' terms and conditions that the taxpayer should take out employers' liability, public liability and professional indemnity insurance, a course which Mr Hood told me he had adopted. Mr Hunter's evidence was that ABB obtained its own insurance, and did not expect temporary staff to provide their own. There was some suggestion, to put it no higher, that NES' conditions were drafted, and adapted as time went by, in order to counter possible arguments by the Revenue that those subject to them came within the IR35 rules, and that the insurance requirement was included as part of that strategy. Even if that is correct, it is in my view unsurprising that NES required a sub-contractor (as it was described) such as the taxpayer to obtain such insurance, for its rather than ABB's protection. I accept it as a factor which points to the conclusion that the taxpayer had some obligations beyond the mere supply of Mr Hood's services, but I do not regard it as a matter of great importance in itself.

18. Of greater potential significance, I think, is the provision in the taxpayer's contract with NES which allowed for the substitution, by the taxpayer, of an alternative worker. The three versions differ slightly in their wording, though in substance all three seem to me to be identical. One version reads as follows:-

> "14.4 The Sub-Contractor shall be entitled to substitute alternatives for the Personnel, with the prior written consent of the Company – such consent not to be withheld if the proposed replacement has the appropriate skills, qualifications and abilities in the reasonable opinion of the Client."

The "Company" is NES. The "Personnel", as I have indicated, was identified in the first of NES' letters as Mr Hood, but was not identified in the later letters. Mr Hunter's evidence was that ABB's intention was to secure Mr Hood's services. If he had become unavailable, for example because of prolonged illness, ABB would have heeded his recommendation of a replacement, but the replacement would have been interviewed, as Mr Hood himself and all other temporary staff had been, and taken on by ABB only if he was considered suitable. ABB would have regarded his being taken on not as a mere variation, still less a continuation, of the arrangements by which Mr Hood had been engaged, but as a new contract which, in common with all other engagements of temporary staff, would have been effected by means of an agency. I will return later to the significance of this point, as I perceive it.

19. Mr Hood told me that while he was engaged by ABB he had also undertaken work for two other companies. He had a computer with a copy of Pro-Engineer installed on it (which the taxpayer kept up to date at considerable expense) at his home and he was able to use the computer and the software both in order to undertake work for other clients of the taxpayer, and also to maintain his own skills. He had undertaken the work required by the other companies in the evenings and at weekends. It was apparent that the value of these contracts (in each case, as I accept, entered into by the taxpayer, rather than by Mr Hood personally) was fairly modest – the fee had been about £800 in each case. Mr Hunter told me that he would not have approved of Mr Hood's doing significant amounts of work for other companies while he was engaged by ABB, which wanted his services full-time, but he would not disapprove of his undertaking small contracts, such as these, in his spare time.

20. Mr Parker's role had been to investigate Mr Hood's and the taxpayer's contractual relationships with NES and ABB. He identified many of the matters with which I have already dealt in this decision but since I am required to make my own findings of fact, and am in no way restricted by Mr Parker's conclusions I do not think there is anything to be gained by reciting the detail of his evidence.

21. The legislative provisions which I have set out require me to consider a fiction, that is a notional contract between ABB and Mr Hood from which the taxpayer is absent: see also *R (Professional Contractors' Group Ltd and*

others) v Inland Revenue [2001] STC 629. It was agreed that the use of a third party agency, NES in this case, must be left out of account; see also *F S Consulting Ltd v McCaul (Inspector of Taxes)* [2002] STC (SCD) 138 at 146. The test is, therefore, had there been a direct relationship between ABB and Mr Hood, would it have been a contract for services, or a contract of service? If the former, there can be no question of employment and the appeal must be allowed; if the latter the inevitable consequence is that the third condition in each of the statutory provisions is satisfied and the appeal must fail.

22. The distinction between a contract for services and a contract of service has been the subject of many decisions of the courts and the Special Commissioners over the years, and I was referred by the parties to several such cases, and provided with copies of a great many more some of whose relevance seemed tenuous at best. The cases show that it is, essentially, a question of fact and, to some extent, of impression. The essential criteria were most clearly identified by McKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*[1968] 2 QB 497 at 515 when he said:

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service".

23. These criteria have been accepted and adopted in the context of employment law as well as the law of tax and national insurance, and I treat them as criteria of general application. I will deal also with the separate, if perhaps overlapping, consideration identified in *Market Investigations Ltd v Minister of Social Security* [1968] 2 QB 193 and *Young and Wood Ltd v West* [1980] IRLR 201 that regard must be had to whether the "worker" is, in truth, in business on his own account, for which purpose it will be necessary to treat the taxpayer and Mr Hood as one and the same if the test is to be capable of application.

24. I turn to the third of McKenna J's criteria first. It is true that the contractual relationship between ABB and Mr Hood was specifically not that of employer and employee, but that, of course, will always be the case in a situation of this kind, and is why I am required to approach the matter on the hypothesis that such a relationship is not precluded merely because of the absence of a direct contractual relationship. ABB, as I accept, would not

have entered into a direct contractual relationship with the taxpayer nor, as I am also willing to accept, with Mr Hood. (I leave out of account ABB's offer to him of full-time, permanent employment since that was not the relationship between the parties which needs to be examined in this case). I am not, however, persuaded by Mr Smith's argument that the fact that the parties did not intend to enter into a contract of service is an important factor. He relied on *Express and Echo Publications v Tanton* [1999] IRLR 367 and *Stoddart v Calder Golf Club* [2001] EAT/87300 but these were cases about employment law in which the fiction I am required to assume did not arise. I must proceed upon the basis that, whatever the intentions of the client and the worker, there was a direct contract between them. I accept that other terms of the contracts which were, in fact, entered into cannot be disregarded, but the intention not to enter into a direct contractual relationship must, as part of the fiction, be set aside. It is necessary to examine the substance of the relationship, rather than the label the parties put on it: *Massey v Crown Life Assurance Company* [1978] 1 WLR 676; *McManus v Griffiths (Inspector of Taxes)* [1997] STC 1089. The test I must apply, as it seems to me, is not whether the contractual arrangements are consistent with a relationship of employer and employee, but whether, after applying the fiction that there is a direct contract between "client" and "worker", there is anything in that notional contract which is incompatible with the relationship between them of employer and employee.

25. In this case, whatever the contractual relationship, the reality, as I am satisfied, is that ABB required Mr Hood's services. It was not contracting, indirectly, with the taxpayer for the supply of a person competent in Pro-Engineer; it required Mr Hood. It would not have accepted a substitute, if Mr Hood had sent one, without interview and certainly not on the basis that Mr Hood or his substitute might attend as the taxpayer elected from day to day. Mr Hunter's evidence, which I accept, can lead to no other conclusion than that the arrangement was personal to Mr Hood. I do not go so far as to say that the right to substitute was a sham – Mr Hunter agreed that, if Mr Hood had become unavailable and suggested someone to continue in his place, that suggestion would be given some weight – but Mr Hood and the taxpayer could not dictate, at will, who would perform the work: it had to be Mr Hood. In my view, the "right" of substitution was largely illusory.

26. While I accept that Mr Hood retained some control over the hours he worked, I am satisfied from the evidence that the degree of control he could exercise in practice cannot be materially distinguished from that which one would expect in any fairly senior employee. It was apparent to me that he was, as a rule, expected to work the "core" hours from 8 am to 5pm. Mr Hunter, in particular, made it clear that Mr Hood was expected to work full time for ABB; while the two small contracts he undertook at weekends or in the evening were acceptable, it would not have been acceptable to ABB if

he had decided to work on, say, only three days of the week while undertaking other work on the remaining days. I accept that Mr Hood was left largely to his own devices in the manner in which he carried out his work, but that too seems to me to be no more or less than one would expect of any skilled and trusted employee. Mr Hood was taken on by ABB precisely because he knew how to do the work, without the need for instruction or supervision. This is not a factor inconsistent with a contract of service: see *Morren v Swinton and Pendlebury Borough Council* [1965] 1 WLR 576.

27. The evidence showed clearly that Mr Hood was expected to undertake the work allocated to him by ABB and to do so in accordance with its directions and at times of its choosing. Although in theory he could decide whether or not he would work on any particular project, the reality was that he either accepted the work which was allocated to him, or his engagement was terminated. In that, too, he was in materially the same position as an employee. As I have indicated, I regard the fact that Mr Hood attended safety meetings and office meetings as neutral - it is not, in my view, in any way remarkable that a temporary member of staff, working (as Mr Hood did) in a team should attend such meetings – but, overall, it seems to me that there is no difference of substance between the measure of control exercised over his work by ABB and that it would have exercised over an employee of his status.

28. Mr Smith argued that the element of mutuality of obligation was absent here: Mr Hood may have been required to supply his labour, but ABB was under no obligation to provide work. That, he said, pointed to this being akin to a contract for services rather than a contract of service in which the employer is expected to provide work and, if there is none to provide, must pay the employee regardless. He relied particularly on what was said by Hart J in *Synaptek Ltd v Young (Inspector of Taxes)* [2003] STC 543 at paragraph 25, and on the concession made by the Revenue in that case "that if, taking the period of the notional contract as a whole, [the client] was under no obligation to provide work, the necessary element of mutuality was indeed lacking for that period". However, because of the concession, the point was not fully argued. Mr Young's response was, in essence, that Mr Smith's contentions overstated the effect of the authorities and, particularly, what was meant by Hart J in *Synaptek*. I agree. Certainly there must be mutuality of obligation, but that does not imply that the "employer" is required to provide work: so much was made clear by Stephenson LJ in *Nethermere (St Neots) Ltd v Taverna and another* [1984] IRLR 240; the requirement of mutuality may be satisfied by the obligation, on the one hand, to work and, on the other, to remunerate. That was also the position in the *Market Investigations* case, to which I have referred, in which the company engaged an interviewer to undertake market research. Work was

allocated to her for each of a series of engagements, each engagement being co-terminous with a survey undertaken by the company. The interviewer, though under the general control of the company, could work hours of her own choosing; she was, in effect, required to perform a task rather than work set hours. There was no provision in her contracts of engagement for sick pay or holidays. She was held to be an "employed person"; she was, as Cooke J put it, "employed by the company under a series of contracts of service".

29. Mr Smith accepted that payment by the hour, which was the arrangement in this case throughout, was a neutral factor. On the whole I think that is right, although it might be expected that an employee, in the conventional sense, doing Mr Hood's work would be paid a salary rather than by the hour whereas an independent contractor, such as a professional man, would be paid an hourly rate. However, payment by the hour is common in contracts of employment and I do not think this factor points one way or the other. I have already indicated that I see no significance in the completion of time sheets. Likewise I see no significance in the fact that the taxpayer charged VAT; that was merely the inevitable consequence of the contractual arrangements into which it entered.

30. I turn next to consider whether it can reasonably be said that Mr Hood, or the taxpayer, was in business on his or its own account. In doing so, it seems to me that I must focus on the arrangements with ABB between 1 June 2000 and 30 March 2001. While I should not disregard the pattern of the taxpayer's working before and after that period (see *Hall v Lorimer* [1994] STC 23) the essential question must be whether the notional contract between ABB and Mr Hood for that period was one entered into by him in the course of carrying on a business on his own account (as I have said, I equate Mr Hood and the taxpayer for this purpose). Although, as Cooke J said in the *Market Investigations* case ([1968] 2 QB 173), no exhaustive list of relevant factors has been, or probably can be, compiled, several have been identified as possible matters of relevance which should be taken into account. I have already dealt with two – control and substitution – and there is nothing to be added in the context of this different test. Other criteria which seem to me to be relevant here are the provision of equipment, financial risk and the opportunity to profit by sound management.

31. It was not in dispute that ABB provided all the equipment Mr Hood needed to carry out his work. I accept that the taxpayer maintained equipment at Mr Hood's home, and that its doing so points to its having its own business activity; but the equipment was not used in undertaking ABB's work, and is, in my judgment, irrelevant to the issue I must decide. Risk and the opportunity to profit are, in many cases, opposite sides of the same coin. Here, it seems to me, they were almost entirely absent. There was a risk that

ABB would fail to pay, or that NES would fail to pass on payments; but those risks do not seem to me to be of a different character from those run by an employee. More importantly, the taxpayer was not risking its capital, nor (beyond the risk of non-payment) was there any prospect of its making a loss. Conversely, the only means of making additional profit was for Mr Hood to work more hours. He could not augment the profit by working more efficiently.

32. In my judgment, whether one asks if the taxpayer, in the context of this engagement, was pursuing a business on its own account, or considers the distinction between a contract of service and a contract for services – tests which in any event overlap to a great extent – the answer is the same: had there been a direct contract between ABB and Mr Hood it would have been a contract of service. I am left in no doubt that ABB was in close control of the work, that it was Mr Hood personally who was required to undertake it and it is quite unrealistic to suggest that, in the relevant period and on the assumption that there was a direct relationship between ABB and Mr Hood, he or the taxpayer was in the course of carrying on a business on his or its own account. The conclusion must be that the notional contract between ABB and Mr Hood was one of service. I can find no factor in the case which is inconsistent with that conclusion.

33. The appeals are dismissed.

COLIN BISHOPP
SPECIAL COMMISSIONER
Release Date:

SC 3021/02

APPENDIX

Cases referred to in the skeleton arguments but not mentioned in the decision

Tilbury Consulting Ltd v Gittins (Inspector of Taxes) [2004] STC (SCD) 1

Montgomery v Johnson Underwood Ltd [2001] IRLR 269

Carmichael v National Power PLC [1999] 1 WLR 2042

Propertycare Ltd v Gower [2003] EAT

Staples v Secretary of State for Social Services (1985 unrep)

Battersby v Campbell (Inspector of Taxes) [2001] STC (SCD) 189

O'Kelly v Trusthouse Forte PLC [1983] 3 All ER 456

WHPT Housing Association Ltd v Secretary of State for Social Services [1981] ICR 737

MacFarlane and another v Glasgow City Council [2001] IRLR7

Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property [1954] AC 584

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CH/2004/APP/0271, Neutral Citation Number: [2004] EWHC 2248 (Ch)
IN THE HIGH COURT OF JUSTICE
IN THE CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday 8th October, 2004

B e f o r e:

THE HONOURABLE MR JUSTICE PARK

– – – – – – –

USETECH LIMITED

Appellant

− v −

GRAEME YOUNG (HM INSPECTOR OF TAXES)

Respondent

– – – – – – – – –

Simon Devonshire (instructed by Nelsons) for the Appellant
Akash Nawbatt (instructed by the Solicitor of Inland Revenue) for the Respondent

J U D G M E N T

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.

Abbreviations, dramatis personae, etc

1. These are as follows.

ABB	ABB Vetco Gray (UK) Limited, the ‘end user' of the services of Mr Hood; a company which provided a range of equipment to the oil and gas industry.
Mr Devonshire	Simon Devonshire, counsel for Usetech.
EAT	Employment Appeal Tribunal.
Hood, Mr	William Hood, specialist in a software system used by ABB, called Pro−Engineer; shareholder in and director of Usetech.
IR35	The reference number of an Inland Revenue Press Release of 2000, which led to the enactment of the legislative provisions which are in point in this case.
Nawbatt, Mr	Akash Nawbatt, counsel for the Inspector of Taxes, the respondent to this appeal.
NES	NES International Limited, a company described as an agency company which provided technical recruitment services.
NICs	National Insurance Contributions
Usetech	Usetech Limited, the appellant on this appeal; ‘one man company' owned by Mr Hood, which provided his services to end users.

Overview

2. This is a tax and NICs appeal by the taxpayer, Usetech, against a decision of a Special Commissioner, Mr Colin Bishopp, dated 12 March 2004. The decision determined a question of principle concerning the liability to tax and NICs of Usetech and its principal shareholder and director, Mr Hood. Usetech was a ‘one man company' whose business consisted of making the services of Mr Hood available to third party users. By transactions entered into in May 2000 Mr Hood's services were

made available to ABB, and he worked in the business of ABB for about 17 months from 1 June 2000. The transactions involved not only Mr Hood, Usetech and ABB, but also, in a manner which I will describe later, another company, NES. Mr Hood had no beneficial interest in NES. The question of principle is whether the transactions attracted the operation of provisions introduced, both for tax and for NICs, in 2000 and commonly referred to as the IR35 legislation. IR35 was the reference number of an Inland Revenue Press Release which had foreshadowed the legislation.

3. If the IR35 legislation applied its effect would be to treat payments received by Usetech for the provision by it of Mr Hood's services (the payments being received, not from ABB directly, but from NES) as if they had been personal income of Mr Hood from an employment with ABB. For income tax they would be treated as emoluments taxable under Schedule E, rather than as receipts of Usetech's trade which would be taken into account in computing its profits liable to corporation tax. For NICs they would be treated in a similar way as employment income of Mr Hood. The liabilities both to income tax and to NICs would fall to be met by Usetech, not by Mr Hood. Thus it is Usetech which is the appellant taxpayer.

4. The Inland Revenue issued formal decisions that the IR35 provisions applied, and Usetech appealed to the Special Commissioners. In form there were two decisions and two appeals, one for tax and one for NICs, but they turned on two sets of almost identical legislation and stood or fell together. The appeals were heard by Mr Bishopp on 22 January 2004, and by a reserved decision dated 12 March 2004 he dismissed the appeals, thus affirming the decisions which the Inland Revenue had issued. Usetech now appeals to me. It is clear that an appeal can only succeed if the decision was wrong in law. There is no appeal on a question of fact: see s.56A(1) and (4) of the Taxes Management Act 1970.

5. Mr Devonshire, who appears for Usetech, has helpfully limited his submissions to two specific respects in which he says that the Special Commissioner erred in law. I will describe them fully later in this judgment. The first respect involves an argument that the IR35 legislation cannot apply because of a contractual provision between Usetech and NES (not between Usetech and ABB or between NES and ABB), which Mr Devonshire submits must be taken into account, entitling Usetech to provide the services of a substitute in place of Mr Hood. I will refer to this as the right of substitution argument. The second respect in which Mr Devonshire says that the Special Commissioner erred involves an argument that ABB was not obliged to provide work for Mr Hood to do (although in fact it did do so). Therefore, it is argued that, even after applying the hypotheses required by the IR35 provisions, there was insufficient mutuality of obligation for an employer/employee relationship to exist, with the result that the provisions did not apply. I will refer to this as the want of mutuality argument.

6. I have considered Mr Devonshire's arguments carefully, but my conclusion is that I cannot accept either of them. The issues are too complex for me to encapsulate the essence of my reasoning in this overview at the beginning of my judgment. I shall explain it as the judgment progresses. The result is that I respectfully agree with the decision of the Special Commissioner. Therefore I shall dismiss the appeal.

The IR35 legislation

7. For income tax and corporation tax (income tax so far as concerns Mr Hood and corporation tax so far as concerns Usetech) the legislation is contained in section 60 of and Schedule 12 to the Finance Act 2000. The critical provisions are those which identify the cases to which Schedule 12 applies. If the Schedule applies there is not, if I understand correctly, any dispute as the consequences. The dispute is whether it applies at all. The case revolves around provisions in paragraph 1 of the Schedule. I will now set out the relevant parts of the paragraph, interpolating in italicised square brackets the actual identities in this case of the parties referred to in general terms in the paragraph.

> 1 (1) This Schedule applies where -
>
> (a) an individual (‘the worker') *[Mr Hood]* personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person (‘the client') *[ABB]*,
>
> (b) the services are provided not under a contract directly between the client *[ABB]* and the worker *[Mr Hood]* but under arrangements involving a third party (‘the intermediary') *[Usetech]* , and
>
> (c) the circumstances are such that, if the services were provided under a contract directly between the client *[ABB]* and the worker *[Mr Hood]* , the worker would be regarded for income tax purposes as an employee of the client *[ABB]*.
>
> (2), (3) ×
>
> (4) The circumstances referred to in sub−paragraph (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided.

8. In the quotation of sub−paragraph (1)(b) above I have identified ‘the intermediary' in this case as being Usetech. As I will explain later, on the facts NES might also be regarded as an intermediary in the general sense of the word, but it is clear from paragraph 3 of Schedule 12, which I need not set out verbatim, that only Usetech counts as an intermediary for the purposes of paragraph 1. However, the ‘arrangements involving × the intermediary' (referred to in sub−paragraph (1)(b)) may involve other persons as well as the intermediary. If they do the respects in which the other persons are also involved may affect the application or non−application of paragraph 1. In the present case this could be relevant to the participation of NES in the entire transaction: NES was neither ‘the worker' nor ‘the client' nor ‘the intermediary', but it was involved in the arrangements in which ‘the intermediary' (Usetech) was involved, so its part in those arrangements falls to be taken into account as well as Usetech's part in them.

9. A more general point of construction is worth spelling out at this stage. The conditions of sub−paragraphs (a) and (b) involve an analysis of the actual facts and

legal relationships, but when that analysis shows that those two sub−paragraphs are satisfied sub−paragraph (c) involves an exercise of constructing a hypothetical contract which did not in fact exist, and then enquiring what the consequences would have been if it had existed. There may be room in some cases for dispute about what the hypothetical contract would contain, and in the present case there is. The dispute arises in connection with the right of substitution argument which is advanced by Mr Devonshire on behalf of Usetech. I will explain how precisely the issue arises at a later stage in this judgment.

10. The comparable provisions for NICs are contained in regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000. They are not quite identical to the provisions in the Finance Act 2000, but they are similar in all relevant respects. For completeness I will set out the specific wording.

> 6 (1) These Regulations apply where -
>
> (a) an individual (the worker) *[Mr Hood]* personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person (the client) *[ABB]*,
>
> (b) the performance of those services by the worker *[Mr Hood]* is carried out, not under a contract directly between the worker *[Mr Hood]* and the client *[ABB]* , but under arrangements involving an intermediary *[Usetech]* , and
>
> (c) the circumstances are such that, had the arrangements taken the form of a contract between the worker *[Mr Hood]* and the client *[ABB]* the worker *[Mr Hood]* would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client *[ABB]*.

As in the Finance Act 2000 there is a provision (regulation 5) under which ‘the intermediary' is, so far as this case is concerned, Usetech (and not NES). However, the same point applies in that, to the extent that NES was involved in the arrangements, its participation may have to be taken into account in determining whether regulation 6 applies notwithstanding that it was none of the parties (‘the worker', ‘the client', or ‘the intermediary') specifically identified in the regulation. Curiously regulation 6 does not contain a provision like paragraph 1(4) of Schedule 12 to the Finance Act 2000, expanding on what is covered by ‘the circumstances' referred to in sub−paragraph (c) of regulation 6(1). However, no−one has suggested to me, nor do I consider, that that or the other minor differences between the two statutory provisions affects this case or opens a possibility of the case being decided one way for NICs and another way for income tax and corporation tax.

The facts

11. Mr Hood has now retired but at the time when this case arose he worked in connection with the production of design drawings of oil wells, rigs and similar equipment. He was a specialist in the use of a software product called Pro−Engineer, which produced 3−D models of such equipment. He started to operate through his one man company, Usetech, in May 1996. There was no evidence before the Special Commissioner about his arrangements before then, so the Commissioner inevitably decided the case on the basis of the Usetech arrangements alone, uninfluenced by what Mr Hood's tax and national insurance status may have been in earlier years.

12. Usetech had several engagements for the provision of Mr Hood's services to ‘end users' over its trading life from 1996 to May 2003 (when Mr Hood was obliged to retire by reason of ill health). Some of the engagements were pursuant to direct contracts between Usetech and the end users, but engagements with ABB were not, since, as I explain in more detail in the next paragraph, NES was interposed between Usetech and ABB (the end user). There were three different periods when Mr Hood was working in the business of ABB at its premises in Aberdeen. The present case is specifically about the period of 17 months beginning in June 2000. (In fact the Special Commissioner was only strictly concerned with the period from 1 June 2000 to 31 March 2001, but I assume that that was for some procedural reason to do with tax years or companies' accounting periods or something of that nature. The Commissioner's decision would undoubtedly govern the whole period of the engagement for Mr Hood to work in the business of ABB.)

13. ABB is a United Kingdom subsidiary of a world−wide group which provides a range of equipment to the oil and gas industry. It has a core staff of 750 to 850 permanent employees, but it supplements them when demand requires by taking on what its Human Resources Manager described as ‘sub−contract employees'. This was done by means of companies described as ‘agencies', of which NES was one. There was no evidence from NES, but on its letter heading it describes itself as ‘Europe's largest technical recruitment agency'. As will appear, NES sometimes acted contractually as a principal rather than as an agent in the strict legal sense.

14. The way in which Mr Hood was engaged to work in the business of ABB, which I assume was typical of how ABB and NES operated, was as follows. Management within ABB identified that ABB had a need for another specialist in Pro−Engineer, but did not wish to have another permanent employee recruited. The Human Resources manager contacted agencies, including NES. NES knew about Mr Hood, and contacted him, or more strictly contacted his personal company, Usetech. Mr Hood was obviously willing to go and work in Aberdeen in ABB's business, because the matter proceeded. If ABB had not already known Mr Hood it would have required to interview him first, and had in fact done so for the earlier occasion when he had been provided to it through NES. However, since it already knew him it did not require an interview on this occasion. Two contracts were entered into, one between Usetech and NES and one between NES and ABB. Each contract appears to have been made on 22 May 2000, to commence on 1 June 2000, although the documents which were before the Special Commissioner are a little confusing about this. The system of having two contracts is quite common (or so I understand), and

contracts of these kinds are sometimes referred to as ‘the lower level contract' and ‘the upper level contract'. However, I will refer to them in this judgment as ‘the Usetech/NES contract' (the lower level) and ‘the NES/ABB contract' (the upper level). There must also have been a contractual relationship (at the lowest level) between Mr Hood and Usetech, but it appears that there was no written contract of service. At least no such written contract was produced in evidence.

15. As regards the Usetech/NES contract (the lower level contract) there appear to have been two contractual documents: a one page letter of offer by NES signed by way of acceptance by Mr Hood on behalf of Usetech, and a longer set of ‘Terms and Conditions' in standard form. A complication here is that the documents before the Special Commissioner appear to have included three versions of the first document and three of the second. This may have had something to do with variations in the anticipated duration of the engagement, but there are aspects of the duplication or triplication of documents which puzzle me. However, I do not think that they are fundamental to the issues in the case.

16. The first of the three offer letters is dated 22 May 2000. It is from NES and is addressed to Usetech at Mr Hood's home address. It includes the following: ‘*We are pleased to offer you a contract to supply contract staff in a position as Pro−Engineer Designer in accordance with the following: NAME(S) OF CONTRACT STAFF: WILLIAM HOOD. CLIENT: ABB VECTO GRAY.'* Certain brief other details follow, covering such matters as the hourly rate of payment, the commencement date, and the notice period. Mr Hood signed to indicate acceptance. For completeness I mention that the other two offer letters have slightly different periods of service, do not mention Mr Hood personally and are not signed by him by way of acceptance. I do not follow what their relevance to the appeal is or what their function was, and I have concentrated on the letter dated 22 May 2000.

17. I turn to the longer form document, the standard form headed ‘*Terms and Conditions for the supply of services to NES International Ltd (performed by a limited company sub−contractor'.* There are three versions of this document in the documents which were before the Special Commissioner and which are now before me. None of them mentions Usetech (or any other specific sub−contractor for that matter), and none of them is signed by or on behalf of either NES or Usetech (or any other person). The evidential status of the three documents in the bundle is not clear to me, but I will assume that at least one of them was supplied by NES to Usetech (in common, I assume, with all other subcontractor companies which had similar relationships with NES), and that it did in general regulate the contractual relationship between the two companies. The Special Commissioner said, and I agree, that although the three versions of the Terms and Conditions are not quite identical, the differences between them do not appear to be material to this case.

18. The Terms and Conditions are quite long documents. They are in no sense tailor−made for the particular relationship being entered into between Mr Hood, Usetech, NES and ABB. They are standard form documents plainly intended to be used by NES across the spread of arrangements which it makes with companies like Usetech to enable the services of employees of such companies to be provided to outside clients like ABB. It would be disproportionate for me to set out one of the

documents in this judgment or to attempt a full summary of it. In the broadest of terms it provides for ‘the sub−contractor' (in this case Usetech) to agree with NES that it will provide ‘the Services' to the reasonable satisfaction of ‘the client', that is the end user, being ABB in this case. The agreement which the sub−contractor has, however, is between it and NES, not between it and the end user. ‘The Services' (which Usetech agreed with NES to provide to the reasonable satisfaction of ABB) are defined as *‘the work or project identified in the contract letter and/or notified to the sub−contractor by the Client'*. I assume that the contract letter referred to is the letter of 22 May 2000 (or possibly all three letters) by which NES offered the engagement to Usetech and Usetech accepted it. On that basis it appears that (in so far as the matter is affected by the 22 May 2000 letter, which was the only document which appears to have signed on behalf of Usetech by way of acceptance) ‘the Services' were the services of Mr Hood as Pro−Engineer Designer.

19. The Terms and Conditions cover a range of matters which I need not describe in this judgment. They include matters such as payments of fees (to be made to Usetech by NES, not by ABB), use of motor vehicles, trade secrets, and non−competition by the sub−contractor with the end user (NES's ‘client'). There is, however, one provision which I should set out in full, since it provides the basis for Mr Devonshire's right of substitution argument. The final clause is headed ‘General', and contains a number of different provisions. One of them reads as follows:

> The Sub−Contractor shall be entitled to substitute the named Personnel for an alternative, with the prior written consent of the Company - such consent not to be withheld if the proposed replacement has the appropriate skills, qualifications and abilities in the reasonable opinion of the Client.

I specifically point out that ‘the Company', which can give prior written consent to a substitution, is NES, and is not ‘the Client': in this case it is not ABB. Further, the only parties to this agreement are the sub−contractor (Usetech in this case) and NES. The client (e.g. ABB) is not a party. I will examine the argument which Mr Devonshire bases on this provision at a later stage in this judgment.

20. So much for the contractual relationship between Usetech and NES. There was also a contractual relationship between NES and ABB. I should state at the outset that Usetech and Mr Hood did not know the detailed content of that relationship. If they thought about the matter they must obviously and correctly have assumed that there would be a contract of some sort between NES and ABB, that it would provide for NES in some way to cause Usetech to provide the services of Mr Hood to ABB, and that ABB would make payments to NES for the services. But I doubt that Usetech and Mr Hood would have known or assumed anything more detailed about the NES/ABB contractual relationship.

21. There was indeed an NES/ABB contract (an upper level contract), and it was placed before the Special Commissioner. I understand that the copy of it was obtained from ABB. It takes the form of a letter agreement, signed on behalf of both parties, dated 22 May 2000, which was also the date of the offer letter made by NES to Usetech and signed by way of acceptance by Mr Hood. The letter which constitutes the NES/ABB contract is from NES to ABB. It is headed: *‘Sub−Contractor - Usetech Ltd. Contract Staff - Mr William Hood.'* It begins: *‘We confirm that the above Contract*

Staff supplied by the above sub−contractor will be available to commence work on 30th May 2000 to perform the services of Pro−Engineer Designer.' A number of other detailed matters were covered, including the hourly rate payable by ABB to NES for the services (a little higher, as one would expect, than the hourly rate payable onward by NES to Usetech), a seven days notice period, and a minimum number of weekly hours (37.5 hours). Two pages of detailed Terms and Conditions are attached, but they do not appear to me to add anything relevant (except for condition 3.2, to which I refer in paragraph 63 below).

22. There is nothing in the NES/ABB contract about the provision of a substitute for Mr Hood, and in my view that contract is solely one for the provision of his services, not one for the provision of the services of him or a substitute who is reasonably acceptable to ABB.

23. Moving on from the contracts as such, there are some other factual points which might have a bearing on the right of substitution argument and which I ought therefore to mention. The question of a substitute for Mr Hood never arose. For the 17 months of the engagement which began on 30 May (or 1 June) 2000 the services were provided entirely by Mr Hood himself. Mr Hood did, however, say in his witness statement that there were other Pro−Engineer specialists whom he knew and whom he could have sent. I should also quote the following findings from paragraph 25 of the Special Commissioner's decision.

> [T]he reality × is that ABB required Mr Hood's services. It was not contracting, indirectly, with [Usetech] for the supply of a person competent in Pro−Engineer; it required Mr Hood. It would not have accepted a substitute, if Mr Hood had sent one, without interview and certainly not on the basis that Mr Hood or the substitute might attend as [Usetech] elected from day to day. Mr Hunter's evidence, which I accept, can lead to no other conclusion than that the arrangement was personal to Mr Hood. I do not go so far as to say that the right to substitute was a sham - Mr Hunter agreed that, if Mr Hood had become unavailable and suggested someone to continue in his place, that suggestion would be given some weight - but Mr Hood and [Usetech] could not dictate, at will, who would perform the work: it had to be Mr Hood. In my view, the ‘right' of substitution was largely illusory.

24. So far as the right of substitution argument is concerned I do not think that there are any other specific aspects of the facts which I need to describe. However Mr Devonshire also advances the want of mutuality argument, and there are some other factual points which I ought to mention, since they could be of some relevance to that argument. The Special Commissioner, having heard evidence from Mr Hood and from two witnesses from ABB, found that any temporary member of staff (like Mr Hood) was treated, on a day to day basis, in a manner barely distinguishable from an employee. One of the ABB witnesses said that as a general rule temporary staff were expected to work 50 hours a week, and Mr Hood did so. Mr Hood's own evidence was that he typically worked for 58 hours per week. He also said that, if there was no work for him to do, he could be sent home. He could recall at least three or four occasions when the computer crashed and he was sent home without payment. The Special Commissioner recorded this aspect of Mr Hood's evidence, but did not make a specific finding of his own on it. I confess that I have some reservations about it, and I will return to this later when I discuss the want of mutuality argument.

The Special Commissioner's decision

25. In a careful and comprehensive reserved decision the Special Commissioner, Mr Bishopp, set out the statutory provisions and reviewed the facts. He noted that the IR35 provisions (both for tax and for NICs) require a notional contract between Mr Hood and ABB to be assumed, and that the critical question was whether that contract would have been a contract of employment. He considered a number of factors which might bear on the question, and in the course of doing so he quoted a well−known passage from the judgment of McKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515:

> A contract of service exists if these three conditions are fulfilled: (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control to a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.

The Special Commissioner considered condition (iii) first, and concluded that there was nothing in the notional contract which was 'incompatible with the relationship between them [ABB and Mr Hood] of employer and employee' (paragraph 24 of the decision). It was at this point that he considered the issue of substitution, doing so in the terms which I quoted in paragraph 23 above and concluding that in his view 'the right of substitution was largely illusory'. (As will appear later I would put the matter rather differently, but I would not change the 'bottom line' conclusion that the provision for substitution in the Usetech/NES contract does not lead to a decision in favour of Usetech.)

26. Moving on, the Special Commissioner compared Mr Hood with normal employees of ABB who had similar skills to his own, and saw little outward difference. I quote a few extracts from paragraph 27 of the decision:

> Mr Hood was expected to undertake the work allocated to him by ABB and to do so in accordance with its directions and at times of its choosing. × In that, too, he was in materially the same position as an employee. × [O]verall it seems to me that there is no difference between the measure of control exercised over his work by ABB and that it would have exercised over an employee of his status.

27. The Special Commissioner considered that, in so far as there was a requirement for mutuality of obligation to exist for a relationship to be a contract of employment, the requirement was in any event satisfied by the obligation on the one hand to work and on the other to remunerate. (In my view there may be rather more to be said on this point, but as I will explain I do not disagree with the Commissioner's conclusion.)

28. The Commissioner also considered whether Mr Hood or Usetech could realistically be seen to have been in business on their own account, and was of the opinion that they could not. For that and the other reasons which I have summarised and which he

examined more fully he decided: *'The conclusion must be that the notional contract between ABB and Mr Hood was one of service. I can find no factor in the case which is inconsistent with that conclusion.'*

The appeal to this court

29. In the overview at the beginning of this judgment I observed that Mr Devonshire has limited the grounds of appeal to two issues, which I am calling the right of substitution argument and the want of mutuality argument. Points about the right of substitution and points about the alleged want of mutuality were made on behalf of Usetech before the Special Commissioner, but, as it seems to me, they were made not so much as self−contained arguments either of which would be sufficient entirely by itself to conclude the appeal in favour of Usetech, but rather as items in a comprehensive view of the interconnecting relationships between Mr Hood, Usetech, NES and ABB. I think that the Special Commissioner perceived the main case advanced on behalf of Usetech as being one which looked at all aspects of the case together and in the round. Those aspects included the provision in the Usetech/NES contract about substitution and also what was contended to be a want of mutuality between Usetech and ABB. But they also included points made about the degree of control exercised by ABB over the work done by Mr Hood, about alleged differences in practice between Mr Hood's position in the operations of ABB and the positions of full time employees, about other activities altogether carried on by Mr Hood through Usetech, and so on.

30. In the thorough skeleton argument which Usetech's advocate placed before the Special Commissioner he wrote: *'On the evidence it is submitted that the hypothetical contract in this case would show a genuine substitution right, a lack of control over Mr Hood, project based work on an hourly basis, a clear lack of mutuality of obligations, flexibility of hours, no significant integration of Mr Hood into the ABB organisation and several practical differences between Mr Hood and regular ABB employees'.* That was in the nature of a global synopsis. It should be apparent from the previous section of this judgment that the Special Commissioner did not accept several of the elements in the synopsis. In the result he was not persuaded that, looking at everything in a global way, the overall picture which emerged was that, if Mr Hood had been engaged by a direct contract between himself and ABB, he would have been an independent contractor and not an employee.

31. It may be worth adding that there appears to have been no significant argument advanced to the Commissioner that, before Mr Hood established Usetech and provided his services to end users through Usetech (with or without the interposition of an agency company like NES), he carried on some sort of self−employed profession which involved him having a series of engagements with a succession of clients. (Compare, for example, the observations of Rowlatt J about theatrical actors and actresses in *Davies v Braithwaite* [1931] 2 KB 628 at 635 to 636.) Certainly there was no argument before me that the present case could be affected by an established tax treatment or NICs treatment which had been applied to Mr Hood in the earlier years of his working career. I can, however, imagine other cases in which arguments of that sort could be material.

32. Mr Devonshire, realistically in my opinion, has not invited me to approach the appeal on the basis that I should take all the circumstances into account and conclude that Mr Hood would indeed have been an independent contractor, not an employee. An argument of that sort was entirely appropriate for the first instance hearing before the Special Commissioner, but in the High Court the decision of the Commissioner can only be effectively challenged on grounds that it was wrong in law. In *Synaptek Ltd v Young* [2003] STC 543, [2003] EWHC 645 (Ch), at page 553 Hart J said (in a case which arose under the same IR35 statutory provisions as the present one): *'Deciding, in a borderline case, whether a particular contract is a contract of service or a contract for services is notoriously difficult. × In general the question is regarded as one of fact, or as it is sometimes put, a question of mixed fact and law, the evaluation and determination of which is a matter for the fact−finding tribunal.'* The judge had been invited to reverse a decision of General Commissioners that, if there had been a direct contract between the individual involved in that case and the end user of his services, it would have been a contract of employment. He declined to do so, essentially on the ground that the Commissioners' decision had been one of fact which it was not open to him (the judge) to alter on an appeal limited to questions of law.

33. It is against that background that Mr Devonshire has restricted his challenge to the Special Commissioner's decision in this case to the right of substitution argument and the want of mutuality argument. Each argument is to the effect that, because of the item focused on (the alleged right of substitution in the first case and the alleged want of mutuality in the second), the postulated relationship between Mr Hood and ABB was legally incapable of being the relationship of employee and employer. Therefore in this judgment I consider only those two arguments. In a sense the starting point for me is that, but for the alleged right of substitution and the alleged want of mutuality, it is common ground in this court that, if Mr Hood had been engaged directly by ABB, he would have been an employee. That is not to say that the Special Commissioner could not possibly have taken a different view. I have not been asked to consider whether he could have done that, and I have not done so. I say a little more about this at the end of this judgment.

The right of substitution argument

34. In paragraph 25 above I said that I agreed with the Special Commissioner's conclusion that the inclusion of a substitution provision in the Usetech/NES contract did not mean that the appeal should be allowed, but I also said that I would myself put the matter rather differently from how he put it. He said in paragraph 25 of his decision that 'the "right" of substitution was largely illusory'. I follow what led him to say that, but in my view there is a logically prior question which ought to be considered. Would there have been any right of substitution at all in the notional contract between Mr Hood and ABB which the IR35 provisions require to be assumed? In my view, for reasons which I will explain, there would not, and that is in itself sufficient to exclude Mr Devonshire's right of substitution argument.

35. As regards income tax and corporation tax FA 2000 Schedule 12 paragraph 1(1)(c) poses a hypothesis expressed as: *'had the arrangements taken the form of a contract between the worker [Mr Hood] and the client [ABB]'*. As regards NICs the

hypothesis under the Social Security Contributions (Intermediaries) Regulations 2000 regulation 6(1)(c) is expressed as: '*if the services were provided under a contract directly between the client [ABB] and the worker [Mr Hood].'* The two wordings are not identical, but the meanings are. There was not in fact a direct contract between Mr Hood and ABB, but the provisions require it to be assumed that there was. What would it have contained? Mr Devonshire's argument assumes that it would have contained a provision permitting Mr Hood to substitute himself by an alternative Pro−Engineer specialist, subject only to ABB's consent which could not be withheld if the substitute had the appropriate skills. If that assumption is wrong the right of substitution argument falls away altogether.

36. The factor which complicates the issue in this case is that in the chain of contracts NES is interposed between Usetech and ABB. The structure primarily contemplated by the legislation seems to me to be one where there are two contracts: the first is a contract of service, written or oral, between the worker and his one−man service company (the equivalent of Usetech), and the second is a contract between the service company and the end user (the equivalent of ABB) for the service company to furnish the personal services of the worker to the end user. In a case which is as straightforward as that I think that the contents of the notional contract between the worker and the end user will be fairly obvious: they will be based on the contents of the second contract between the service company and the end user, but with the worker himself agreeing that he will provide his services to the end user on, as near as may be, whatever terms are agreed between the service company and the end user.

37. In the actual case with which I am concerned there were three contracts, not two, which have to be subsumed into one notional contract:

a) First there was the actual contract between Mr Hood and Usetech. It appears that this did not take the form of a written service agreement: at least none was produced in evidence before the Special Commissioner. But there must have been a contractual relationship of some sort, however informal. It is not suggested, and could not realistically be suggested, that that relationship contained any term whereby, while Mr Hood agreed generally to work as an employee of Usetech (or as a working director of Usetech), he was entitled to provide a substitute for himself.

b) Second, there was the actual contract between Usetech and NES. That contract did contain the substitution provision which I have quoted in paragraph 19 above. Even so the provision was a standard form provision which, I assume, was always (or at least usually) part of the agreements which NES entered into with all one−man companies with which it did business. The provision appeared in a clause headed 'General' at the end of the contract, and was obviously not specially negotiated for Mr Hood and Usetech. It was, no doubt, binding between Usetech and NES, but it would not be binding upon a third party, like ABB, to which NES agreed to provide the services of Usetech's employee and director, Mr Hood, unless it or an equivalent

substitution provision was expressly included in the onward contract between NES and the third party.

c) Third, there was the actual contract between NES and ABB. As I described in paragraphs 21 above it took the form of a letter agreement for NES to provide the services of Mr Hood to ABB, with some standard terms and conditions attached. There was no provision for substitution included in the NES/ABB contract. In my definite opinion the NES/ABB contract was simply one for the services of Mr Hood, not for the services of Mr Hood or of a suitably skilled substitute.

38. In those circumstances, should the hypothetical direct contract between Mr Hood and ABB include the substitution provision or not? The Special Commissioner did not specifically decide that question, but I think that I should decide it myself. I believe that I can do that: it is not a question of fact such that I ought to remit it to the Commissioner to decide. Alternatively, if it is to any extent a question of fact, it is one of what inference should be drawn from the primary materials before the Commissioner. In my judgment there is only one tenable inference which can be drawn, and I see no point in remitting the case to the Commissioner for him to draw it.

39. In my judgment the hypothetical contract between Mr Hood and ABB would not have contained a substitution provision. That is, as it seems to me, the common sense of the matter; it is in accordance with the Special Commissioner's findings of fact; and it is also supported by the absence of evidence which one might have expected if there was a substantial case that the hypothetical contract would have contained a substitution provision. Suppose that there had been no interposition of NES, but that Usetech had itself contracted with ABB to provide the services of Mr Hood. I do not believe that a Usetech/ABB contract would have included a substitution provision, and there was no evidence from Mr Hood (the director of Usetech) that it would. The actual terms on which Mr Hood's services were provided to ABB (by NES under the NES/ABB contract) did not contain a substitution provision, and there would be no justification for assuming that, if he had contracted directly with ABB, he would have provided his services on any different basis. If, given the actual contracts between Usetech and NES and (separately) between NES and ABB, someone had turned up at ABB one day and said that he was being provided by NES as a well−qualified substitute for Mr Hood (already a far−fetched and unrealistic assumption), and ABB had sent the man away, Usetech might have had a contractual complaint against NES, but it would certainly have had no contractual complaint against ABB. Let me take the hypothetical assumptions a stage further. Suppose again that Usetech contracted directly with ABB but that (improbably) Usetech tried to have inserted in the contract a provision that it could from time to time provide a substitute for Mr Hood. Would ABB have agreed? There was no specific evidence on the point, but I believe that the strong probability, which Usetech needed to adduce strong evidence to refute, is that ABB would not have agreed. I assert that the only realistic form which the hypothetical direct contract between Mr Hood and ABB could have taken would have been one without a substitution provision.

40. My assertion is in accordance with the Special Commissioner's findings, and a contrary assertion would be inconsistent with them. He found that 'the reality × is that ABB required Mr Hood's services.' He went on to observe that *'ABB was not contracting indirectly with [Usetech] for the supply of a person competent in Pro−Engineer: it required Mr Hood'* . I have taken those particular findings from paragraph 25 of the decision. I have quoted much of that paragraph in full in paragraph 23 above, and the whole of it is consistent only with a conclusion that a hypothetical contract between ABB and Mr Hood would have been one for the specific services of Mr Hood and no−one else. There are also points to be made about evidence which is absent from the case. Mr Hood's witness statement does touch on the substitution provision in the Usetech/NES contract, but he does not suggest that it was of practical importance to him. There was no evidence that, in years before he started to operate through Usetech and may have had one or more direct contracts with end users of his services, he insisted on having substitution provisions in his contracts. It is inherently improbable that he would have done that, and, if he had, I can, I think, realistically assume that he would have said so.

41. At the risk of labouring the point I repeat that the substitution provision in the Usetech/NES contract was a standard form provision at the end of NES's standard form contract. I cannot imagine that it was a provision which Usetech asked to be included, and I doubt that any particular notice was taken of it when the contract was entered into. At any rate there was no evidence that particular notice was taken of it. In contrast, the main clause of the contract, on which Mr Hood might realistically have focused his attention, was clause 3, headed 'Provision of the Services'. By clause 3.1 Usetech agreed with NES that it would carry out 'the Services', and by clause 3.3 it agreed (still with NES) that it would 'provide the Services to the reasonable satisfaction of the client [ABB]'. As I have pointed out earlier (see paragraph 18 above) 'Services' was a defined term. It meant 'the work or project identified in the contract offer letter'. In the contract offer letter from NES to Usetech dated 22 May 2000 the work identified was the supply of Mr Hood as Pro−Engineer Designer to ABB; it was not the supply of Mr Hood or of a qualified substitute.

42. In all the circumstances I consider that, if there had been a real direct contract between Mr Hood personally and ABB for him to provide his skilled services to ABB, the contract would not have included a substitution provision. If, contrary to what I believe likely, Mr Hood had raised in negotiation the possibility of such a provision, ABB would in my view not have agreed to it, and I do not believe that Mr Hood would have pressed the point. Rather he would have proceeded to agree to provide his services without any provision for him to be entitled to provide a substitute. Of course if, in the events that happened, he became unable to provide his services under the assumed direct contract between himself and ABB (for example because of illness), he might have drawn on his contacts to suggest to ABB a possible replacement for himself. Mr Hunter of ABB said that the company would have given some weight to Mr Hood's suggestion. That, however, is a far cry from the direct contract between Mr Hood and ABB containing an express provision which conferred on him an entitlement to substitute someone else for himself, subject only to the substitute having the required skills.

43. There is one other point which I should consider before I move on. Mr Devonshire makes the point that, although Mr Hood and Usetech knew the detailed provisions of

the Usetech/NES contract, or at least had full access to those detailed provisions if they wanted, they did not know the terms of the NES/ABB contract. So, while they knew, or could have known, that there was a substitution clause in the first of those contracts, they did not know and had no means of knowing that there was no corresponding substitution clause in the second of those contracts. From this it is said to follow that the hypothetical contract must have been one which did contain a substitution clause, because that was a feature of the contract of which Mr Hood and Usetech had personal knowledge. It is further argued that the conclusion is reinforced by the self−assessment nature of the tax system. How, Mr Devonshire asks, could Usetech be expected to make a self−assessment of its liability to corporation tax under the IR35 provisions of FA 2000 on the footing that there was no substitution clause in the NES/ABB contract, when it did not know the contents of that contract?

44. I do not accept that argument, which to me has an air of unreality and formalism about it. I take it for granted that Usetech did not submit a self−assessment return which showed itself as liable to corporation tax under the IR35 provisions, but I do not suppose for a moment that, if it had known the detailed contents of the NES/ABB contract, it would have assessed its own liability on the basis that those provisions applied. In any case the self−assessment provisions are a matter of tax machinery and were not intended to affect substantive principles of tax liability. If, as the Special Commissioner held and as I believe, Usetech would have been liable to corporation tax under the IR35 provisions had there been no self−assessment system in operation, then it was still liable to corporation tax under those provisions notwithstanding that there was a self−assessment system in operation.

45. Usetech did not know the detailed content of the NES/ABB contract, but it did know that there must have been an NES/ABB contract, and it had itself entered into the Usetech/NES contract in order to enable NES to conclude its contract with ABB. Usetech had no reason to suppose that the NES/ABB contract would contain a substitution clause. If it had speculated about it the likely speculation would have been that there would have been no such clause. Usetech took no steps to request or require NES to include such a clause in the onward contract between itself and ABB. I do not think that Usetech and Mr Hood can successfully argue that, because they did not have specific knowledge that the NES/ABB contract did not contain a highly improbable provision, therefore they escape the operation of the IR35 provisions.

46. I also draw attention to certain observations of Burton J in *R (on the application of the Professional Contractors Group Ltd and others) v IRC* [2001] EWHC Admin 236, [2001] STC 629 at page 651. The case involved an unsuccessful challenge under human rights law and Community law to the whole concept of the IR35 provisions. In the course of the judge's discussion of certain guidance material which had been prepared by the Revenue he touched on arrangements which, like the one in this case, involved a lower level contract and an upper level contract: the lower level contract being between the worker's personal service company (like Usetech) and an agency (like NES), and the upper level contract being between the agency and an end user (like ABB). He said this:

> Equally, in so far as the inspector has access to something not available to the service contractor [the worker, the equivalent of Mr Hood], such as the contract between the agency [the equivalent of NES], which recruited him,

> and the client [the equivalent of ABB], which is or may be relevant, then it should clearly be supplied by the agency or the client or by the inspector. × It appears to me clear that the Revenue must bear in mind that under IR35 they are *not* considering an actual contract between the service company [the equivalent of Usetech] and the client [ABB], but imagining or constructing a notional contract which does not in fact exist. In those circumstances, of course the terms of any contract between the agency and the client as a result of which the service contractor will be present at the site are important, as would be the terms of any contract between the service contractor and the agency. But, particularly given the fact that, at any rate at present, a contract on standard terms may or may not be imposed by an agency, or may be applicable not by reference to a particular assignment, but on an ongoing basis, and may actually bear no relationship to the (non−contractual) interface between the client and the service contractor, such documents can only form a part, albeit an important part, of the picture.

47. It seems plain that Burton J was of the opinion that all relevant circumstances would fall to be taken into account in determining the contents of the hypothetical contract between the worker and the end user, including the provisions (or the absence of particular provisions) of a contract between an agency like NES and an end user like ABB. And he took that view whether or not the worker and his personal service company knew what the detailed provisions of the contract between the agency and the end user were. I would respectfully agree, and I would only add that it is by no means unknown for a person's liability to tax to be affected by a transaction which he knew was going to happen between other parties even if he did not know the details of it. For an example see *Emery v IRC* (1980) 54 TC 607.

48. For all of the foregoing reasons I do not accept the starting point of Mr Devonshire's right of substitution argument: I do not accept that the hypothetical direct contract between Mr Hood and ABB would have contained a substitution clause under which it would have been open to Mr Hood not to provide his services personally but instead to provide a suitably skilled substitute. That being so, I do not strictly need to consider whether I agree with the next step in Mr Devonshire's argument, which is that, if the contract had contained such a provision, it would as a matter of law have been incapable of being a contract of employment. That matter was, however, fully argued, and I think that I ought to say something about it, although I hope that I will be forgiven if I do not go into the arguments as comprehensively as I would otherwise have done.

49. The right of substitution argument is based largely on the decision of the Court of Appeal in *Express and Echo Publications Ltd v Tanton* [1999] IRLR 367. The underlying issue was whether Mr Tanton was an employee entitled to the various protections provided by the Employment Rights Act 1996 and associated legislation. He was a driver who agreed to provide his services to the company. The contract included this provision:

> 3.3 In the event that the contractor is unable or unwilling to perform the services personally he shall arrange at his own expense entirely for another suitable person to perform the services.

The Court of Appeal held that, because of that sub−clause, the relationship was incapable of being an employment. I accept that there are sentences in the judgment

of Peter Gibson LJ which, taken by themselves, suggest that any contract for services which contained any right for the worker to provide a substitute can never be a contract of employment. However, the *Tanton* case needs to be evaluated together with other cases, including two later decisions of the EAT (the Employment Appeal Tribunal) which considered the ambit of it.

50. An earlier case which the court cited in *Tanton* is *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497. I have already quoted one passage from the judgment of McKenna J in paragraph 25 above. Shortly after that passage His Lordship said this (with my italics identifying wording to which significance has been attached in the recent cases before the EAT):

> Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, *though a limited or occasional power of delegation may not be* : see Atiyah's Vicarious Liability in the Law of Torts (1967) pp. 59 to 61 and the cases cited by him.

I move on to the two recent EAT cases. *MacFarlane v Glasgow City Council* [2001] IRLR 7 (in which the President of the Tribunal was Lindsay J) concerned gym instructors who worked for the Council. If for any reason they were unable to take a class they were to arrange replacements from a register of coaches maintained by the Council. The EAT reversed a decision of the tribunal below that that provision, read in the light of *Tanton* , meant that the instructors could not be employees of the Council. Lindsay J referred to *Tanton* and to the passage in the *Ready Mixed Concrete* case which I quoted above. In paragraph 13 of the judgment he went on to say:

> The relevant clause in *Tanton* was extreme. The individual there, at his own choice, need never turn up for work. He could, moreover, profit from his absence if he could find a cheaper substitute. He could choose the substitute and then in effect he would be the master. Properly regarded, *Tanton* does not oblige the tribunal to conclude that under a contract of service the individual has, always and in every event, however exceptional, personally to provide his services.

The actual decision in *MacFarlane* was that the case should be remitted to the first instance tribunal for it to decide by reference to all of the circumstances whether the gym instructors were employed or self−employed, but not to proceed on the basis that, because there was a substitution provision in the terms of service, that conclusively established that there could not have been an employment relationship.

51. The second EAT case to which I refer is *Byrne Brothers (Formwork) Ltd v Baird* [2002] IRLR 96, in which both *Tanton* and *MacFarlane* were considered by a tribunal presided over by Mr Recorder Underhill QC. The applicants were building workers who were engaged under contracts which plainly set out not to be contracts of employment. The applicants nevertheless argued that on a proper understanding they were entitled to holiday pay under the Working Time Regulations 1998. The matter did not turn solely on whether in truth they were employees, but the observations of the EAT on that issue are instructive. The agreements included the following provision:

> 13. Where the subcontractor is unable to provide the services, the subcontractor may provide an alternative worker to undertake the services but only having first obtained the express approval of the contractor.

I quote some extracts from the Tribunal's judgment:

> In our view it is plain that the contracts do require the applicants personally to perform work or services for Byrne Brothers. As a matter of common sense and common experience, when an individual carpenter or labourer is offered work on a building site, the understanding of both parties is that it is he personally who will be attending to do the work. In our view that consideration is admissible as part of the factual matrix. × But even if that were not so × clause 13, which concerns the use of additional or substitute labour, only makes sense against the background of an understanding that, subject to its provisions, the services are to be provided by the subcontractor personally. It is of course true that the effect of the provisions of clause 13 is that in certain circumstances the services may be provided by someone other than the subcontractor himself. But the clause falls far short of giving the subcontractor a blanket licence to supply the contractual services through a substitute.

The Tribunal then reviewed the authorities which I have mentioned. One thing which it did was to cite the passage in Professor Atiyah's book on Vicarious Liability which was alluded to but not specifically cited by McKenna J in the *Ready Mixed Concrete* case (see the extract quoted in the previous paragraph of this judgment). The passage is to the effect that an employment requires the performance of 'at least part' of the work by the employee himself. That does not suggest that, if the person concerned can provide a substitute for any part of the work, the relationship is legally incapable of being an employment. The EAT in *Byrne Brothers* concluded by agreeing with the tribunal below that the essential facts brought the case within the ratio of *MacFarlane* rather than *Tanton.* So despite the existence of the substitution clause the workers were employees.

52. I have one other case to mention. My attention has been drawn to it by Mr Nawbatt. *Narich Pty Ltd v Commissioner of Pay−Roll Tax* [1984] ICR 286, was an Australian appeal to the Judicial Committee of the Privy Council. It concerned lecturers for Weight Watchers classes. Their contracts included a clause for substitution of other lecturers approved by the company. The lecturers who were the parties to the contracts were held to be employees. It is true that, as Mr Devonshire pointed out, there was no discussion of whether the existence of that clause affected the status of the lecturers as employed or self−employed. However, the Privy Council was undoubtedly aware of the clause. Indeed Lord Brandon, delivering the advice of the Board, listed it among clauses which required particular consideration. The conclusion was: '*The effect of the contract as a whole is to create between Narich and the lecturer the relationship of employer and employee.'* The *Narich* case was not cited to the Court of Appeal in *Tanton* : it may be relevant to note that Mr Tanton had appeared in person on the appeal and that the judgment was, I believe, an unreserved one. If the case had been cited I do not suppose for a moment that the decision in *Tanton* would have been any different, but perhaps the court might have expressed itself somewhat differently when considering the effect of substitution clauses.

53. As it seems to me the present state of the law is that whether a relationship is an employment or not requires an evaluation of all of the circumstances. In the words of Hart J in *Synaptek Ltd v Young* [2003] STC 543 at 554−555, the context is one *'where the answer to be given depends on the relative weight to be given to a number of potentially conflicting indicia'*. The presence of a substitution clause is an indicium which points towards self−employment, and if the clause is as far−reaching as the one in *Tanton* it may be determinative by itself. In this case, however, if, contrary to my view, the hypothetical direct contract between Mr Hood and ABB has to be assumed to have contained a substitution clause similar to that in the Usetech/NES contract, in my opinion (agreeing with the Special Commissioner) it would not be sufficient to override the effect of all the other considerations which led the Commissioner to decide that the relationship would have been that of employee and employer.

54. For all of the foregoing reasons I do not accept Mr Devonshire's right of substitution argument.

The want of mutuality argument

55. I am unable to accept the want of mutuality argument either. The argument is that a contract cannot be a contract of employment unless there is mutuality of obligation: an obligation of the employee to provide his service to the employer, and conversely an obligation or obligations of the employer - certainly an obligation to remunerate the employee for work done, and (a less clear cut matter) an obligation to provide work for the employee to do, or at least an obligation to pay the employee for times when he is available for work but no work is provided. It is argued in this case that, if a direct contract had been in force between Mr Hood and ABB, it would not have obliged ABB to provide work for Mr Hood, and therefore it would have lacked the element of mutuality which would have been essential for it to be a contract of employment. Mr Devonshire relies in that connection on evidence from Mr Hood that he was at times sent home (or back to his lodgings) by ABB at short notice (e.g. when the computer crashed or when work was not available). Mr Hood recalled 'at least three or four occasions when the computer crashed and I was sent home without payment'. He also said that Usetech 'did not receive any payment whatever for the down time'. However, as I read his witness statement, that last sentence relates to occasions when he had been planning to work over weekends but it turned out that there was no weekend work available.

56. The Special Commissioner addressed the want of mutuality argument briefly in paragraph 28 of his decision. He did not accept it, principally because he considered that the requirement of mutuality might 'be satisfied by the obligation, on the one hand, to work and, on the other, to remunerate'.

57. For myself, while I agree with the result which the Special Commissioner reached on this issue, and certainly I consider that it was a result which it was open to him to reach, I would be inclined to put the matter in a more detailed way. If there is a relationship between a putative employer and employee, but it is one under which the 'employer' can offer work from time to time on a casual basis, without any obligation

to offer the work and without payment for periods when no work is being done, the cases appear to me to establish that there cannot be one continuing contract of employment over the whole period of the relationship, including periods when no work was being done. There may be an ‘umbrella contract' in force throughout the whole period, but the umbrella contract is not a single continuing contract of employment. See *Clark v Oxfordshire Health Authority* [1998] IRLR 125 (Court of Appeal); *Carmichael v National Power PLC* [1999] 1 WLR 2042 (House of Lords); *Stevedoring & Haulage Services Ltd v Fuller* [2001] EWCA Civ 651, [2001] IRLR 627 (Court of Appeal).

58. That leaves open the possibility that each separate engagement within such an umbrella contract might itself be a free−standing contract of employment, and it was, I believe, that concept which the Special Commissioner had in mind as covering this case. That is consistent with his referring in the same paragraph of his decision to the decision in *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, in which part time interviewers for a market research company were held to be engaged under a series of separate contracts of employment. The judgment of Cooke J in that case contains a valuable and much cited discussion of principles which are relevant to distinguishing between contracts of employment and contracts for services rendered in a self−employed capacity (see especially pages 184G to 185E). I confess that I have doubts about the factual conclusion which the learned judge reached when he applied the principles to the facts of the case. For myself, I see considerable force in the alternative analysis, namely that the interviewers provided their services on a free lance or casual basis and not as employees. See for an example of an analysis of that nature *O'Kelly v Trust House Forte Plc* [1984] QB 90.

59. However that may be for a case where the argument is that there has been a succession of separate contracts of employment, this case is not really of that nature. In contrast to a case like *Market Investigations* (or so it seems to me), the facts lend themselves readily to the conclusion that, if Mr Hood had been working for ABB under a direct contract, it would have been a contract of employment. The engagement lasted for 17 months. Viewed realistically there was nothing casual about it. On Mr Hood's own evidence he worked for an average of 58 hours a week. The Special Commissioner found that ‘he was, as a rule, expected to work the "core" hours from 8am to 5pm'.

60. I would accept that it is an over−simplification to say that the obligation of the putative employer to remunerate the worker for services actually performed in itself always provides the kind of mutuality which is a touchstone of an employment relationship. Mutuality of some kind exists in every situation where someone provides a personal service for payment, but that cannot by itself automatically mean that the relationship is a contract of employment: it could perfectly well be a contract for free lance services. However, in this case it was at the lowest open to the Special Commissioner to form the view that, if there had been a direct contract between Mr Hood and ABB for him to provide his services to ABB, it would have fallen to be regarded as a contract of employment, not as contract for free lance services. Mr Devonshire argues that that was not the case because ABB was not obliged to provide work for Mr Hood to do. The argument is unconvincing on the facts. At the cost of repeating myself I say again that ABB provided work for Mr Hood over a continuous period of 17 months, and provided enough work for him to be working for 58 hours

in a typical week. As to the occasions mentioned in Mr Hood's witness statement when he says that he was sent home because there was nothing for him to do, the occasions must have been highly exceptional. The evidence of the engineering manager from ABB was that ‘as a general rule, temporary staff were expected to work 50 hours a week, and Mr Hood did so' (decision paragraph 13). Neither witness from ABB recalled an occasion on which Mr Hood was sent home without pay, though they did accept that that could have been possible.

61. However, I have some reservations (as I said in paragraph 24 above) about the evidence from Mr Hood that he was sent home without payment. There are two points which make me cautious about the evidence in that respect, and I remain cautious notwithstanding that the ABB witnesses accepted that for Mr Hood to be sent home without pay was a possibility. The first point is: how could Mr Hood know whether, if he was sent home because there was no work, there would be no payment for his unused time? Whether ABB would pay for any time when Mr Hood was available for work but his services were not needed was a matter between ABB and NES. In connection with the right of substitution argument Mr Devonshire said that Mr Hood and Usetech did not know what the contents of the NES/ABB contract were. So how could Mr Hood say that, on the occasions when he was sent home, there was no payment made by ABB for his availability?

62. The second point is that, if Mr Hood's evidence is that ABB only paid for hours of actual work, that is inconsistent with a provision in the NES/ABB contract. As I have said in paragraph 21 above, the letter agreement of 22 May 2000 between NES and ABB specified an hourly rate of payment, and also specified ‘Minimum Hours: 37.5 hours'. If ABB sent Mr Hood home in a week when he worked for fewer than 37.5 hours, ABB was liable to pay for unworked time up to a total number of 37.5 paid hours for the week. The minimum hours provision in the NES/ABB contract was underpinned by a provision that seven days notice had to be given by either party to terminate the contract. I cannot be sure, but I think it unlikely that these provisions were present to the minds of the ABB witnesses when they accepted that it would have been possible for Mr Hood to be sent home without payment.

63. The minimum hours provision in the contract is important in another respect, because it presents a fundamental objection to the whole of the want of mutuality argument. The starting point for that argument is that, under the hypothetical contract between ABB and Mr Hood, ABB would have had no obligation to provide work. But I believe that ABB would have had an obligation to provide work. The letter agreement of 22 May 2000 between NES and ABB (see paragraph 21 above) incorporated a set of printed Terms and Conditions. One of them was condition 3.2:

> The Client [ABB] shall provide the Minimum Hours of work to each member of the Contract Staff.

Mr Hood was the only member of the Contract Staff, so the effect of the letter and the Terms and Conditions in combination was that ABB agreed with NES that it would provide a minimum of 37.5 hours of work a week for Mr Hood. Even if it failed to do that, it would plainly have to pay NES for 37.5 hours.

64. The cases indicate, and (as I recall) Mr Devonshire accepted, that the mutuality requirement for a contract of employment to exist would be satisfied by a contract which provided for payment (in the nature of a retainer) for hours not actually worked. It is only where there is both no obligation to provide work and no obligation to pay the worker for time in which work is not provided that the want of mutuality precludes the existence of a continuing contract of employment. See especially the *Clark* and *Stevedoring & Haulage* cases referred to in paragraph 57 above.

65. For the reasons which I explained in connection with the right of substitution argument I believe that the hypothetical contract between ABB and Mr Hood would contain provisions reflecting those in the actual NES/ABB contract. It would therefore provide that ABB was to provide a minimum of 37.5 hours of work a week, and to pay for the hours actually worked (with payment for a full 37.5 hours if the hours actually worked fell short of the required 37.5). There would have been both an obligation to provide work and an obligation to pay for a minimum of 37.5 hours a week. On that basis the mutuality requirement would in any event be satisfied. This particular point is not, I think, made by the Special Commissioner, but it is, as it seems to me, a further and decisive refutation of the want of mutuality argument.

Conclusion

66. For the foregoing reasons I conclude that this appeal falls to be dismissed. I would like to repeat the point, implicit if not explicit in earlier parts of this judgment (especially paragraphs 32 and 33), that my decision does not necessarily mean that the Special Commissioner was bound to reach the decision which he did. He looked at the entire circumstances in the round (as I believe that both the Inspector and the advocate for Usetech invited him to do), and he came to the conclusion that, if there had been no Usetech, a direct contract between Mr Hood and ABB would have been a contract of employment. Suppose that he had looked at the case in a similar way (perhaps also taking account of Mr Hood's earlier history of being a specialist in his particular field), and had reached the opposite conclusion: that a contract between Mr Hood and ABB would not have been a contract of employment but rather would have been an ingredient in a self−employed profession. My present decision should not be understood as meaning that such a decision by the Special Commissioner would have been wrong in law. It might or might not have been, and I have heard no argument on the question. However, given that decisions of Commissioners in tax appeals are generally final on questions of fact rather than law, the grounds on which I could now reach a decision in favour of Usetech are much narrower than those on which the Special Commissioner could have reached such a decision.

67. Mr Devonshire has appropriately limited his submissions to me to grounds on which it can be said that the Commissioner made a clear error of law, rather than that he came to one conclusion rather than another on a question of fact and degree which arguably might have gone either way. I have, I hope, examined carefully and comprehensively the two grounds which Mr Devonshire has advanced. I am unable to agree with either of them. The result therefore can only be that I dismiss the appeal.

Future On Line Ltd. v HM Inspector of Taxes [2004] UKSC SPC00406 (31 March 2004)

National Insurance – Income tax – Earnings of workers supplied by service companies etc – Provision of services through intermediary – Worker establishing personal service company – Company contracting with agency for provision of services of client of agency – Whether company liable for national insurance contributions on payments made by client to agency and then by agency to company – Whether, if arrangements had taken the form of a contract between worker and client, worker would have been regarded as employed in employed earner's employment by the client – Yes – Social Security Contributions (Intermediaries) Regulations 2000, SI 2000/727, reg 6(1) – Appeal dismissed

THE SPECIAL COMMISSIONERS

FUTURE ON LINE LTD Appellant

- and –

S K FAULDS

(HM INSPECTOR OF TAXES) Respondent

Special Commissioner: STEPHEN OLIVER QC

Sitting in London on 23 March 2004

David Allen, JSA Services Ltd, for the Appellant

A J Mear, Inspector of Taxes, for the Respondent

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DECISION

1. Future Online Ltd ("FOL") has appealed against a decision that arrangements under which Mr Shane Roberts (Mr Roberts) provided his services to Electronic Data Systems Ltd ("EDS") are subject to the legislation relating to the provision of services through an intermediary, usually referred to as the "IR 35 legislation".

2. The decision was made for National Insurance Contributions purposes under Regulation 6(4), SI 2000 No 727 and Section 8(1)(m) Social Security Contributions (Transfer of Functions etc) Act 1999 and covers the period from 6 April 2000 to 5 April 2002. Additionally FOL has appealed against determinations made under Regulation 49 of the Income Tax (Employments) Regulations 1993, SI 1993 No. 744 for the years ended 5 April 2001 and 5 April 2002.

3. It is enough to summarize the legislation contained in SI 2000 No.727. Regulation 6 sets out the circumstances in which the IR 35 legislation will apply. These are where –
    - "An individual (the worker) personally performs, or is under an obligation personally to perform, services for another person's business" [Regulation 6(1)(a)];
    - "the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and" [Regulation 6(1)(b)];
    - "the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client." [Regulation 6(1)(c)].

4. Mr Roberts gave evidence. Mr Chris Elder gave evidence for the Inspector. Mr Elder had been employed by EDS from 1995 to 2003 as a project manager with the key role as the "delivery manager" which involved running the project (described below) at an operational level on a day-to-day basis.

The factual background

5. Mr Roberts is an IT specialist with an expertise in testing systems comprised in computerized projects.

6. Since 1997 Mr Roberts was employed as consultant by FOL, a company owned 50/50 by Mr Roberts and his wife. FOL had been providing services under contract within the IT industry.

7. From 1 July 2000 until 30 May 2003 Mr Roberts worked with EDS. Mr Roberts had seen the job advertized on the Internet. He communicated his

requirements through the Internet on the basis that the system would automatically send him an e-mail if a suitable position was advertized. An e-mail arrived on a Friday from an agency called Elan Computing Ltd ("Elan"). Mr Roberts spoke to Elan. An interview was fixed for the next day in Newcastle with an EDS contractor. From then on Mr Roberts was not aware of Elan playing any part in the process. In the course of the interview Mr Roberts and the EDS contractor discussed and between them redefine the project. Mr Roberts was offered the contract. He accepted and started work the next week carrying out the functions of a test leader.

8. Two contracts were created. One was between FOL and Elan (referred to as "the FOL/Elan contract"); the other was between Elan and EDS (referred to as "the Elan/EDS contract"). The FOL/Elan contract states that FOL will provide the services of Mr Roberts (or such other consultant of FOL that FOL may provide in accordance with clause 1.4) to EDS at "the Site" (i.e. Washington or Longbenton in Durham) for "the Term" (3 months). Clause 1.4 enables FOL to provide a substitute consultant with the written consent of EDS. In return Elan agrees to pay FOL £45 per hour for 37.5 hours a week plus travelling expenses plus, where EDS has approved and signed the Work Progress Form, amounts for work done in hours in excess of 37.5 a week – so long as these work hours have been agreed in advance with EDS. The FOL/Elan contract is terminable by Elan in certain events such as FOL's failure to provide Mr Roberts' services to EDS and in any event on four weeks written notice.

9. In the Elan/EDS agreement Elan agrees to supply the services of various contractors on submission by EDS of a "Purchase Order" in respect of that contractor setting out the relevant details as to payment, job description, location, duration, line of reporting etc. Elan agrees to procure that the contractor will maintain the required standards of professional behaviour; and any breaches will result in termination of the Purchase Order. Elan also undertakes to require the contractor to comply with any reasonable terms and conditions specified in relation to any particular Purchase Order.

10. The Purchase Order dated 21 July 2000 is for the "Professional services of Shane Roberts to work as a systems engineer". It requires that "any hours to be worked to be carried out in accordance with instructions by Heidi Gillard or nominee" and that "time sheets must be attached to all invoices and sent to Accounts Payable Department in order for payment to be made."

11. The Purchase Order dated 12 December 2000 is for the "Professional services of Shane Roberts to act as a systems test team leader based at EDS Longbenton". It requires that "any hours worked over the standard 7.5 hours a day must be with the prior agreement and authorization of the EDS project manager" and that "all work to be carried out in accordance with the

instructions from Simon Young or nominee." The same requirements appear on later purchase orders. The Purchase Order dated 5 June 2001 differs only in that the services are described as "Build Manager".

12. The professional services to be provided by Mr Roberts to EDS related to EDS's agreement with the Department of Work and Pensions (DWP) to install the Child Support Reform (CSR) programme. The previous programme had been found to be unreliable. This one, originally to be installed over five years, was required to be implemented within three years. Mr Roberts' work was directed at the testing stage.

13. At the start of the engagement Mr Roberts' position was as system test team leader. Within a few weeks Mr Roberts was "promoted" (to use Mr Roberts' word) to "build manager" with responsibility for a particular phase of the project.

14. Mr Roberts said that he had been the first person employed in this role. His first task had been to create templates required for the testing system. These had been designed as a temporary measure but remained in use throughout the project. It had been left to Mr Roberts to monitor and record testing progress. Mr Roberts was given no specific guidance as to the carrying out of this work. The CSR system had to be tested to meet the requirements catalogued by the DWP. Mr Roberts saw his role as ensuring this objective no matter how unpopular this made him with the development team whose output was being tested.

15. In the course of the project Mr Roberts assembled a team to carry out the necessary testing and personally interviewed some 160 staff. Mr Roberts shared his expertise with those members of the team and made himself available to advise and assist them when they met technical problems. He allocated work between team members and ensured that the team as a whole met its objectives.

16. The CSR project was under the overall management of the chief executive. In his capacity as system test team leader Mr Roberts' project line manager was the test manager. As build manager Mr Roberts had work allocated to him and his team following discussion with the EDS project line manager. At all times Mr Roberts was deputy to the test manager.

17. Mr Roberts' name appeared on the organization chart for the CSR project as "systems test operational manager". EDS, Mr Roberts told us, did not want to have consultants appearing on the organizational chart; they asked him to take up a permanent position, but he refused.

18. Mr Roberts in his test management role attended weekly meetings with the DWP to report on progress. Present at those meetings were the Minister, on occasions, a senior civil servant, the user's acceptance test manager for the DWP and two EDS managers (responsible for design and development). Each night at 9.00pm and every morning at 8.00am Mr Roberts reported to the EDS programme manager on the work done by the test team.

19. The purchase orders issued by EDS to Elan relating to Mr Roberts' services were, Mr Roberts said of no concern to him. He did not see them. He received no instructions from either Heidi Gillard or Simon Young referred to in those orders.

20. Mr Roberts regularly put in working hours well over the 37.5 hours per week. He accrued timesheets and submitted them in batches for authorization. He never sought prior approval from EDS for working hours in excess of 37.5 hours a week. Because of the tight time limits for the CSR project there was, Mr Roberts understood, a general authorization from EDS to work excess hours without prior approval. Mr Chris Elder's understanding was that working excess hours required approval from the relevant EDS line manager. I accept that, while there was a strict legal obligation on Mr Roberts to obtain prior approval to working excess hours, it was not EDS's practice to require this of him. Had EDS wished to insist on the strict position, they could have done so but on giving reasonable notice to Mr Roberts.

21. Mr Roberts did some work on the CSR project when at home. He used his own laptop and had "remote access" to the EDS local network. Because of firewalls surrounding the CSR project information, Mr Roberts' remote access was limited. Mr Roberts understood that only he of all those involved in the CSR project had remote access from home.

22. At no time did FOL seek approval from either Elan or EDS to provide a substitute for Mr Roberts.

Conclusions

23. I have to identify "the arrangements involving an intermediary" (i.e. FOL) under which the services are performed. I then have to address the question whether, had those arrangements taken the form of a contract between Mr Roberts and EDS, Mr Roberts would be regarded as employed in the relevant sense.

24. I turn first to the arrangements. From the summary of facts set out above, it will be seen that, throughout the periods covered by the disputed decision, EDS obtained the personal professional services of Mr Roberts. That

appears from the purchase orders. Moreover neither FOL nor Mr Roberts had any right to substitute someone to take his place. All Mr Roberts or FOL could do was to offer a substitute, but EDS was not obliged to accept.

25. Mr Roberts' contribution to the CSR project was at a high technical level and of great importance to its success. Nonetheless the work was carried out at Longbenton and Washington because that was where EDS required it to be performed; a small amount of work may have been carried out at Mr Roberts' home through remote access. Mr Roberts had a large measure of control over how he conducted the testing procedure; but there was a test manager with overall direction and with responsibility for testing procedures. And work was allocated to Mr Roberts and his team following discussion with the EDS line manager. In law, though not actually in practice, the purchase order required Mr Roberts to carry out work in accordance with instructions. The FOL/Elan agreement specified 37.5 hours each week as the standard hours and in law, though again not in practice, Mr Roberts required permission from EDS before working more hours in a week. Also relevant is the fact that Mr Roberts was required, under the FOL/Elan agreement, to adhere to EDS's rules and regulations.

26. Entitlement to payment for Mr Roberts' services was comprehensively covered by the FOL/Elan agreement. There was a fixed entitlement to an hourly rate for 37.5 hours a week: and payment for excess hours under the terms of the agreement, which were never changed despite the fact that Mr Roberts habitually worked excess hours without approval, depended on the prior approval of EDS.

27. Save for his laptop (which most individuals with qualifications similar to those of Mr Roberts possess) Mr Roberts provided no capital equipment for the work that EDS required him to perform. Mr Roberts referred to PI indemnity cover being held by FOL. I had no further details of this.

28. Mr Roberts, throughout the period covered by the disputed decision, played a pivotal part in EDS's taskforce working on the CSR project. He was, as noted, accountable to a line manager. He was directly involved in recruiting and managing the members of his team.

29. If those arrangements had been embodied in a contract between Mr Roberts and EDS, would the circumstances have been such that Mr Roberts would have been regarded as employed by EDS? No, argued Mr David Allen for Mr Roberts. There was no control in an employer/employee sense by EDS of Mr Roberts' activities. Mr Roberts had been engaged by EDS at the time when it had the challenge of putting in place a system in a much shorter period that would normally have been required. Mr Roberts was, Mr Allen urged, given a wide remit and not tied down by instructions or rules. He was

the expert and he wrote the templates. While I fully recognize the exceptional experience and essential functions performed by Mr Roberts in the CSR project, I also have to recognize that there were constraints, legal and practical, governing Mr Roberts' work at the sites. I have identified certain arrangements in the previous paragraphs which show that, in essence, EDS controlled Mr Roberts in his work. EDS was able, on a continuing basis, to direct when and where the work was to be done; and, while I accept that Mr Roberts' work involved an especially high level of skill and independence of judgment, EDS were through their organizational structure able to control how the work was to be done. Mr Roberts' position was deputy to the test manager; he continued in this position full-time for nearly three years. Throughout that period the position was integrated into EDS's overall structure set up to carry out the project. Looking at the matter with the question of whether Mr Roberts was subject to EDS's control to a sufficient degree to make EDS Mr Roberts' "master", I have to conclude that, had there been a contract between EDS and Mr Roberts, Mr Roberts would have been employed rather than in business on his own account.

30. Then it was argued by Mr Allen that the actual obligations between EDS and Mr Roberts was so limited as to fall short of the "irreducible minimum of obligation on each side" required to create a contract of service. Those words come from the decision of Stephenson LJ in *Nethermere (St Neots) Ltd v Gardiner & Another* [1994] ICR 612 at 623; the judgment refers back to the words of MacKenna J in the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*:

> "I do not quote what he says of (i) and (ii) except as to mutual obligations:
>
> > "There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract in any kind. The servant must be obliged to provide his own work and skill."
>
> There must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service. I doubt if it can be reduced any lower than the sentences I have just quoted."

Here it will be recalled that the services of Mr Roberts were engaged by EDS through FOL as intermediary and Elan as agent for a three month period which, in pursuance of the purchase order mechanism in the Elan/EDS agreement, were extended to cover the 153 weeks to the end of March 2002. The arrangement could be terminated by EDS by allowing the period covered by the purchase order in question to run its course without being renewed or on giving four weeks' notice. Until termination by EDS

therefore there was an obligation on EDS to provide paid work at a place of work and a corresponding obligation to EDS for the provision of Mr Roberts' services coupled with Mr Roberts' obligation to conform with EDS's rules and working practices including the requirement to submit timesheets. It seems to me on that basis that the mutual obligations that actually existed between Mr Roberts and EDS were well above the irreducible minimum. Had there been a contract directly between EDS and Mr Roberts its mutual obligations would have been such as to establish an employer/employee relationship.

31. Finally I am satisfied that Mr Roberts, throughout the time he worked for EDS, was part and parcel of the organization. In the particular circumstances of the present arrangements Mr Roberts was well integrated into EDS's structure assembled to carry through the CSR project. He had a manager to whom he was accountable. Mr Roberts in turn worked as part of a team managing other people. He was involved in discussions as to work allocation with EDS's project line manager. He was expected to be available to advise and assist other members of the team. He attended meetings with interested parties alongside other EDS managers. Although Mr Roberts' role in the organization will not necessarily be determinative, it is clear that in the present circumstances he was an integral part of the EDS organization dedicated to the CSR project. This feature is in line with the conclusions I have reached based on the control over Mr Roberts' work and the presence of mutual obligations of an employer/employee nature existing between EDS and Mr Roberts.

32. For all those reasons I think that the Inland Revenue are correct in contending that, if the services provided by Mr Roberts had been provided under a contract directly between him and EDS, the terms of that hypothetical contract would have been such that for income tax purposes he would have been regarded as an employee of EDS and for NIC purposes he would have been regarded as employed in "employed earner's employment" by EDS. I therefore decide that the Regulation 49 Determination for the year ended 5 April 2001 should be confirmed in principle. The Regulation 49 Determination for the year ended 5 April 2002 should also be determined on the basis that Mr Roberts was an employee of EDS; I leave the precise amount of tax due to be determined. The Section 8 Decision Notice for the period 6 April 2000 to 5 April 2002 should be determined on the basis that Mr Roberts is regarded as employed in employed earner's employment by EDS; I leave the precise amount of contributions due to be determined.

STEPHEN OLIVER QC

SPECIAL COMMISSIONER

SC 3095/03

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IN THE HIGH COURT OF JUSTICE APP/317/2004

CHANCERY DIVISION

[2004] EWHC 2597 (Ch)

Royal Courts of Justice

Friday, 22nd October 2004

Before:
SIR DONALD RATTEE
(Sitting as a Judge of the High Court)

B E T W E E N:

FUTURE ON-LINE LIMITED
(A Firm) Appellant

- and -

S K FOULDS Respondent
(H.M. INSPECTOR OF TAXES)

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MR. J. ANTELL (instructed by Messrs. Druitts of Bournemouth) appeared on behalf of the Appellant.

MR. A. NAWBATT (instructed by the Solicitor for the Inland Revenue) appeared on behalf of the Respondent.

JUDGMENT
(As approved by the Judge)

SIR DONALD RATTEE:

1 This is an appeal against a decision dated 31st March 2004 of a Special Commissioner, Mr. Stephen Oliver Q.C. It concerns the application of what is commonly called the "IR35" legislation relating to liability for income tax under Schedule E, and National Insurance contributions of an individual who provides services to a client through the medium of a service company owned by the individual, in circumstances in which, had the individual provided these services under a direct contract with the client, he would have been regarded as an employee of the client. The effect of the legislation in such circumstances is to treat fees paid by the client to the service company, not as income of that company, but as earnings of the individual subject to income tax under Schedule E and National Insurance contributions.

2 The IR35 legislation is contained in the Finance Act 2000 so far as concerns income tax and the Social Security Contributions (Intermediaries) Regulations 2000 so far as concerns National Insurance contributions. I must read some of the relevant provisions. Income Tax: The material provisions applicable at the time relevant to this appeal are in Schedule 12 to the Finance Act 2000. Paragraph 1 of Schedule 12 provides:

> "1-(1) This Schedule applies where:
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purpose of a business carried on by another person ("the client").
>
> (b) the services are provided, not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and
>
> (c) the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client.
>
> "(2) In sub-paragraph (1)(a) "business" includes any activity carried on –
>
> (a) by a government or public or local authority (in the United Kingdom or elsewhere), or

(b) by a body corporate, unincorporated body or partnership.

" (3) The reference in sub-paragraph (1)(b) to a "third party" includes a partnership or unincorporated body of which the worker is a member.

"(4) The circumstances referred to in sub-paragraph (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided.

"(5) The fact that the worker holds an office with the client does not affect the application of this Schedule."

3 Paragraph 2 provides as follows:

"(1) If, in the case of an engagement to which this Schedule applies in any tax year –

(a) the conditions specified in paragraph 3, 4 or 5 are met in relation to the intermediary, and

(b) the worker, or an associate of the worker –

(i) receives from the intermediary directly or indirectly, a payment or other benefit that is not chargeable to tax under Schedule E; or

(ii) has rights entitling him, or which in any circumstances would entitle him, to receive from the intermediary, directly or indirectly, any such payment or other benefit,

the intermediary is treated as making to the worker in that year, and the worker is treated as receiving in that year, a payment chargeable to income tax under Schedule E ("the deemed Schedule E payment").

"(2) The deemed Schedule E payment is treated as made at the end of the tax year, unless paragraph 12 applies, (earlier date of deemed payment in certain cases).

"(3) A single payment is treated as made in respect of all engagements in relation to which the intermediary is treated as making a payment to the worker in the tax year.

"These are referred to in this Schedule as the relevant engagements in relation to a deemed Schedule E payment."

4 In the present case the relevant conditions for the purposes of para.2(1)(a) are those set out in para. 3, since the relevant intermediary is a company. I need not read those provisions. It is sufficient for present purposes to say that the conditions are satisfied with certain exceptions if the individual providing the services concerned has the beneficial ownership of more than 5 per cent. of the ordinary share capital of the company intermediary.

5 It is common ground in this case that the relevant conditions are satisfied in relation to the intermediary service company concerned. Part 2 of Schedule 12 sets out the process to be adopted in computing the amount of the Schedule E payment deemed to be received by the individual where para.1 applies. Their detail is not relevant for present purposes.

National Insurance Contributions

6 The equivalent provisions relating to National Insurance contributions applicable at the time relevant to this appeal are in the Social Security Contributions (Intermediaries) Regulations 2000, Statutory Instrument 2000 No.727, Regulation 6. These are in similar but not identical terms to the income tax provisions, which I have read, but it is common ground between the parties to this appeal that the effect of the two sets of provisions is the same, and that nothing turns on the differences in drafting, so I need not read the National Insurance provisions.

The Facts

7 The basic relevant facts are very simple. One Shane Roberts ("Mr. Roberts") is an information technology ("IT") specialist with a particular expertise in testing computer systems. From 1997 he has been employed as a consultant by the appellant which was, at all material times, a company whose issued shares were owned equally between Mr. Roberts and his wife. The appellant provided services under contract with persons within the IT industry. From 1st July 2000 until 30th May 2003 Mr. Roberts worked with a company called Electronic Data Systems Ltd ("EDS") pursuant to two contracts.

8 One was a contract between the appellant and a computer services agency company called Elan Computing Ltd ("Elan"). Under that contract the appellant undertook to provide the services of Mr. Roberts, or such other consultant as the appellant and EDS might agree to EDS at one or other of two specified locations. The other contract was between Elan and EDS and by it Elan undertook to supply the services of various contractors to EDS on submission by EDS to Elan of "a purchase order" in respect of the contractor EDS required. EDS submitted a series of such purchase orders to Elan for the "professional services" of Mr. Roberts. Mr. Roberts provided his services as required by EDS pursuant to the two contracts and purchase orders. In fact, the work he did was in relation to the installation of a computer system referred to as the Child Support Reform Programme pursuant to a contract between EDS and the Department of Work and Pensions.

9 The Inland Revenue determined that by virtue of the IR35 legislation the appellant was accountable to the Inland Revenue for tax under PAYE and Class 1 National Insurance contributions on the footing that both were payable in respect of the amounts received by the appellant for Mr. Roberts's services for EDS as though those amounts were salary paid by the appellant to Mr. Roberts. It is against those determinations by the Inland Revenue that the appellant appealed to the Special Commissioner. The Special Commissioner upheld the Revenue's determinations on the basis that they represented proper applications of the IR35 legislation to which I have referred. I will explain the Special Commissioner's decision and the argument before me by reference to the income tax provisions of Schedule 12 and not also the National Insurance contributions provisions of the Social Security Contributions (Intermediaries) Regulations 2000 because, as I have said, the parties are agreed that the effect of both sets of provisions is, for present purposes, the same.

10 The Special Commissioner upheld the Revenue's determinations on the basis that in the terms of para.1(1) of Schedule 12:

(a) Mr. Roberts (the worker) personally performed services for the purpose of a business carried on by EDS (the client).

(b) The services were provided not under a contract directly between the client (EDS) and the worker (Mr. Roberts) but under arrangements involving an intermediary (the appellant); and

(c) The circumstances were such that, if the services had been provided under a contract directly between the client (EDS) and the worker (Mr.Roberts) Mr. Roberts would have been regarded for income tax purposes as the employee of the client (EDS).

In reaching his conclusion that condition (c) was satisfied, the learned Special Commissioner made a very detailed and comprehensive analysis of the terms of the actual contractual arrangements under which Mr. Roberts's services were provided to EDS and the manner in which Mr. Roberts performed those services.

11 The appellant now makes two lines of attack on the Special Commissioner's decision. The first line of attack is based on a new argument not canvassed before the Special Commissioner, but one which I allowed counsel for the appellant to put without objection from counsel for the Inland Revenue. The new argument is that it is wrong to regard EDS as the client for the purposes of the conditions in para. 1(1) of Schedule 12. The client for that purpose is Elan and not EDS. It is clear that the reason the appellant makes this submission, albeit at this late stage, is that it would clearly be impossible on the facts found by the Special Commissioner to find that condition (c) of para.1(1) of Schedule 12 was satisfied, if the relevant client were the agency company Elan rather than EDS.

12 Mr. Antell, for the appellant, submitted that in the circumstances of this case the proper construction of para.1 of Schedule 12 was clearly to the effect that Elan is the relevant client, because all one is directed by the paragraph to ignore for the para.1(1)(c) test is the contract between the worker (Mr. Roberts) and the intermediary (the appellant). This means that the hypothetical contract for the purpose of para.1(1)(c) is one between Mr. Roberts and Elan. Elan can properly said to be a client because Mr. Roberts provided his services for the purposes of Elan's agency business.

13 Alternatively, Mr. Antell submitted that, if such construction of para 1(1) was not clear then the provisions are ambiguous and under the doctrine in Pepper v Hart [1993] A.C. 593 I should look at reports of Parliamentary proceedings in Hansard to ascertain the true intent of the legislature. Counsel took me to various passages in Hansard which he submitted made clear that the legislative intention was to give para.1 of Schedule 12 the effect for which he contends. I reject both these submissions. In my view it is clear that it was EDS who required the services of an IT specialist for the purposes of its business of supplying computer systems to its customers. I do not think it can sensibly be said that Mr. Roberts performed those services for the purposes of the business of Elan, which appears to have been the business of a recruitment agency.

14 As appears from the Special Commissioner's findings of fact to which I have referred, the contract entered into between the appellant and Elan was for the provision of the services of Mr. Roberts to EDS specifically. In my judgment the only person for the purposes of whose business it can realistically be said that Mr. Roberts was performing services was EDS. However, even if I am wrong in this view, and it can be said that Mr. Roberts also provided his services for the

purpose of the business of Elan, which business consisted of making such services available to its client, EDS, this in my judgment is immaterial for the purposes of the application of para.1 of Schedule 12 in the circumstances of the present case. On this basis there would be two clients within the meaning of the paragraph, Elan and EDS. One would then have to see whether the para.1(1)(c) test was met in respect of either of them.

15 On the Special Commissioner's findings of fact that test was met in respect of EDS. I accept Mr. Antell's submission that it is not met in relation to Elan. Therefore, the Revenue would still have been correct to apply para.1 in the way in which they have done. Mr. Antell submitted that to construe para.1 of Schedule 12 in a way which would allow the possibility of there being more than one client for the purposes of the paragraph would be objectionable, because it would enable the Revenue to choose which of the two or more it should treat as the relevant client, with possibly different tax results depending on which they chose. The identity of the notional employer may be material to the process of determining what deductions are allowed in computing the amount of the workers deemed receipt under the process set out in Part 2 of Schedule 12.

16 In this context, Mr. Antell relied on a dictum in the case of Vestey v Inland Revenue Commissioners [1980] A.C. 1148 in which, at p.1172 E of the report, Lord Wilberforce said this:

> "Taxes are imposed upon subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined. A proposition that whether a subject is to be taxed or not or, if he is, the amount of his liability, is to be decided even though within a limit by an administrative body represents a radical departure from constitutional principle. It may be that the Revenue could persuade Parliament to enact such a proposition in such terms that the courts would have to give effect to it. But unless it has done so, the courts acting on constitutional principles not only should not, but cannot validate it."

17 I accept the submissions of Mr. Nawbatt for the Inland Revenue that the principle there expressed by Lord Wilberforce has no relevance to the present argument. To construe para.1 of Schedule 12 in a manner which could produce two different persons as clients within the meaning of the Schedule would not give the Revenue any such unconstitutional discretion as that referred to by Lord Wilberforce. For on such a construction the Revenue can only treat as the relevant client a person as to whom the test in para. 1(1)(c) of Schedule 12 can be said to be satisfied. In the present case, even if either of Elan or EDS can be said

to be the client, the test in para.1(1)(c) is clearly satisfied only in relation to EDS. On the facts as found by the Special Commissioner it cannot be said that, if the services provided by Mr. Roberts were provided under a contract directly between Mr. Roberts and Elan, Mr. Roberts would be regarded for income tax purposes as an employee of Elan as opposed to an employee of EDS. This is rightly accepted by the Revenue.

18 Thus, even on the basis, which I do not think is the correct one, that Elan can be treated as a client within the meaning of para.1(1)(a) of Schedule 12, as well as EDS, the Revenue has no discretion as to which client to choose for the application of Schedule 12. It can only be EDS because that is the only client in respect of whom the para.1(1)(c) test is satisfied.

19 Despite Mr. Antell's submission to the contrary it seems to me highly unlikely that there could be circumstances in which, even if there can be more than one client within para.1(1)(a) of Schedule 12, there could be more than one in respect of which the para 1(1)(c) test is satisfied. However, whether or not in other circumstances it might be possible to find more than one client within the meaning of para.1(1)(a) of Schedule 12 as I have said, in my judgment, this is not such a case. On the facts of this case EDS is the only person of whom it can be said with any sense of reality that Mr. Roberts performed services for the purposes of its business.

20 Before leaving the appellant's first line of attack on the Special Commissioner's decision, I should say that in his submissions Mr. Nawbatt referred me to a recent unreported decision dated 8th October 2004 of Park J. on the application of the IR35 legislation in Usetech Ltd. v. Young (Inspector of Taxes) 2004 EWHC 2248 Chancery. That, like this, was a case in which the relevant worker's services were provided to a client, not only through an intermediary within para. 1(1)(b) of Schedule 12, but also through another company (the equivalent of Elan) acting as agent for the end user client. Park J. saw no difficulty in applying Schedule 12 on the footing that the end user of the worker's services was the relevant client, despite the position of its agent.

21 However, as Mr. Nawbatt accepted Mr. Antell's new point in this case was not argued in Park J's case, so that his decision cannot be said to be any authority on the point. On the other hand Park J's decision is authority against the further objection made by Mr. Antell for treating EDS as the client for the purposes of para.1 of Schedule 12, and that was that it would mean that the appellant's liability to the Revenue would depend on facts relating to the contractual arrangements between Elan and EDS not within the knowledge of the appellant. A similar argument was considered by Park J. in paras 43 to 47 of his Judgment.

I reject Mr. Antell's submission for the same reasons as those given by Park J. for rejecting the argument in his case.

22 I also reject Mr. Antell's Pepper v Hart argument, because I am not satisfied that there is any ambiguity or obscurity in the meaning of the provisions of Schedule 12 which would justify looking at Hansard, or any other Parliamentary material as an aid to construction. Thus, in my judgment, the appellant's first line of attack on the Special Commissioner's decision fails and I must turn to the second, which is that the Special Commissioner misdirected himself as to the law in considering whether the employment test in para. 1(1)(c) of Schedule 12 would be satisfied by the hypothetical contract between Mr. Roberts and EDS required to be assumed for the purposes of that test. I accept the Revenue's submissions that the question whether, had there been such a contact directly between Mr. Roberts and EDS, Mr. Roberts would have been properly regarded for income tax purposes as an employee of the client, must be determined in the light of the current common law test of employment explained in Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance [1968] 2Q.B. 497. That case was an appeal against the decision of the Minister of Pensions and National Insurance that an individual ("L") was, for the purposes of the National Insurance Act, 1965 an "employed person" under a contract of service to the appellant company.

23 At p.512H to 513B of the report in the case, MacKenna J. held that:

> "Whether the relation between the parties to the contract is that of master and servant or otherwise is a conclusion of law dependent on the rights conferred and the duties imposed by the contract."

At p.515A the learned Judge said:

> "…it is the right of control that matters, not its exercise."

Then at p.515C to H he said this:

> "A contract of service exists if these three conditions are fulfilled: (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.

"I need say little about (i) and (ii).

"As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation my not be: (See Atiyah's Vicarious Liability in the Law of Torts (1967) pp.59 to 61 and the cases cited by him).

"As to (ii). Control includes the power of deciding a thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.

> 'What matters is lawful authority to command as long there is scope for it. And there must always be some room for it, if only in incidental or collateral matters – see Zuijs v Wirth Brothers Proprietary, Ltd [1955] 93 C. L. R. 561 (p.571).'"

24 The appellant's first complaint about the way in which the Special Commissioner applied the test under para.1(1)(c) of Schedule 12 is that he wrongly accepted a submission of the Revenue to the effect that in applying the employment test, it is the right of control of the worker by the client and not whether such control was actually exercised that is significant. This submission of the Revenue before the Special Commissioner is clearly supported by the dicta of MacKenna J. in the Ready Mixed Concrete case which I have quoted earlier. However, the question before the court in that case was whether the worker was to be regarded as employed under an actual contract of service. In other words, was the actual contract between him and his "employer" one of service. The question to be answered in applying the test in para.1(1)(c) of Schedule 12 is not the same question. Here the question is whether: "The circumstances are such that if the services were provided under a contract directly between the client and the worker" the worker would be regarded as an employee of the client. Thus the relevant contract concerned is not an actual contract but a notional one to be assumed in the context of all the other actual circumstances of the case.

25 This point was adverted to by Burton J. in a case in which the court had to consider whether the IR35 legislation conflicted with the European Convention on Human Rights and European Community Law. At para.48 of his Judgment in

R (On the Application of Professional Contractors Group Ltd and Others) v Inland Revenue Commissioners [2001] Simon's Tax cases 629 at p.651 Burton J. said this:

> "It appears to me clear that the Revenue must bear in mind that under IR35 they are *not* considering an actual contract between the service company and the client, but imagining or constructing a notional contract which does not in fact exist. In those circumstances, of course the terms of the contract between the agency and the client as a result of which the service contractor will be present at the site are important, as would be the terms of any contract between the service contractor and the agency. But, particularly given the fact that, at any rate at present, a contract on standard terms may or may not be imposed by an agency, or may be applicable not by reference to a particular assignment, but on an ongoing basis and may actually bear no relationship to the (non-contractual) interface between the client and the service contractor, such documents can only form a part, albeit obviously an important part of the picture."

25 In my view it is necessary to take account not only of the terms of the actual contractual arrangements between the appellant and Elan and Elan and EDS, but of all the other circumstances in which Mr. Roberts performed his services for the purposes of EDS's business in order to test whether, had those circumstances been different only to the extent that the services were provided pursuant to a contract directly between Mr. Roberts and EDS, Mr. Roberts could properly be regarded as employed by EDS. In my judgment this is precisely what the Special Commissioners did. He did not restrict his consideration to the terms of the actual contractual arrangements between the appellant and Elan and Elan and EDS. He did also consider the actual way in which Mr. Roberts performed his services for EDS. He made a very full and careful analysis of both the contractual arrangements and the actual manner and circumstances in which Mr. Roberts's services were performed. He rightly regarded the actual contractual arrangements as an important but not exclusive element in the test to be applied under s.1(1)(c) of Schedule 12. I consider this criticism of the appellants quite unfounded.

26 The appellant's second criticism under this head is that the Special Commissioner, and I quote from the appellant's grounds of appeal:

> "…placed too much emphasis on the part and parcel of the organisation test and when applying that test failed to distinguish between part and parcel of EDS team who was assembled to carry out the CSR [Child Support Review] Project and being part and parcel of EDS itself."

In this context Mr. Antell relied on a dictum of Mummery J. (as he then was) in Hall (Inspector of Taxes) v Lorimer [1992] Simon's Tax cases 599 in which case the court heard an appeal from a decision of a Special Commissioner that a tax payer was not employed under a contract of service but carried on business on his own account for the purchase of an assessment of income tax. At p.612 of the report Mummery J. said:

> "The decided cases give clear guidance in identifying the detailed elements or aspects of a person's work which should be examined for this purpose. There is no complete exhaustive list of relevant elements. The list includes the express or implied rights and duties of the parties; the degree of control exercised over the person doing the work, whether the person doing the work provides his own equipment and the nature of the equipment involved in the work, whether the person doing the work hires any staff to help him; the degree of financial risk that he takes, for example as result of delays in the performance of the services agreed; a degree of responsibility for investment and management and how far the person providing the service has had an opportunity to profit from sound management in the performance of his task. It may be relevant to consider the understanding or intentions of the parties; whether the person performing the services has set up a business-like organisation of his own; the degree of continuity and the relationship between the person performing the services and the person for whom he performs them; how many engagements he performs and whether they are performed mainly for one person or for a number of different people. It may also be relevant to ask whether the person performing the services is accessory to the business of the person to whom the services are provided or is 'part and parcel' of the latter's organisation."

27 In the present case Mr. Antell submitted that Mummery J. made it clear that the "part and parcel of the organisation test" (as Mr. Antell called it) was only one factor that in some cases might be relevant, whereas in this case he submitted the Special Commissioner placed far more significance upon it and used it as an overall test to determine whether Mr. Roberts could be said to be employed by EDS. I do not accept this submission. The Special Commissioner dealt with the point in para.31 of his decision:

> "Finally, I am satisfied that Mr. Roberts throughout the time he worked for EDS, was part and parcel of the organisation. In the particular circumstances of the present arrangements Mr. Roberts was well integrated into EDS's structure assembled to carry through the CSR project. He had a manager to whom he was accountable. Mr. Roberts in turn worked as part of a team managing other people. He was involved in

> discussions as to work allocation with EDS's project line manager. He was expected to be available to advise and assist other members of the team. He attended meetings with interested parties alongside other EDS managers. Although Mr. Roberts's role in the organisation will not necessarily be determinative, it is clear that in the present circumstances he was an integral part of the EDS organisation dedicated to the CSR project. This feature is in line with the conclusions I have reached based on the control over Mr. Roberts's work in the presence of mutual obligations of an employer/employee nature existing between EDS and Mr. Roberts."

28 It is, in my judgment, clear from this that the Special Commissioner was not treating the part and parcel of the organisation feature of the circumstances of the present case as a test of employment in its own right, or as anything other than one of the features of all the circumstances he was properly considering under para. 1(1)(c) of Schedule 12. He regarded it only as confirming the conclusion which he had reached on the other factors of the case. (See the last sentence of para.31 of his decision that I have just quoted). This he was perfectly entitled to do.

29 The second part of this ground of appeal is that in considering the part and parcel of the organisation factor, the Special Commissioner fell into error in that he failed to distinguish between being part and parcel of EDS's team working on the CSR project and being part and parcel of EDS itself. In support of this submission Mr. Antell relied on a distinction drawn by the Special Commissioner in the decision under appeal in Hall v Lorimer in which the Special Commissioner said this:

> "Being one of a team to produce a programme does not in my view lead to the conclusion that in the taxpayer's case he is part and parcel of the organisation... A violinist in an orchestra may be part and parcel of the orchestra for the performance being given but it does not follow that he is part and parcel of the organisation which runs or manages the orchestra."

I do not consider this criticism of the Special Commissioner in the present case is justified. It is clear from what he said in para. 31 of his decision (which I have already quoted) that he found that Mr. Roberts:

> "…was an integral part of the EDS organisation dedicated to the CSR project. This feature is in line with the conclusions I have reached based on the control over Mr. Roberts's work and the presence of the mutual obligations of an employer/employee nature existing between EDS and Mr. Roberts."

30 I consider that on the facts that he found and set out in his decision the Special Commissioner was well entitled to reach the conclusion that Mr. Roberts was part and parcel of the organisation of EDS's business and that that fact was consistent with the Special Commissioner's view based on all the other circumstances of the case, that the relationship between EDS and Mr. Roberts was such that had it existed under a contract between them it would have been one of employer and employee.

31 Thus, in my judgment, the appellant has failed to make good any of its criticisms of the Special Commissioner's decision and I shall dismiss this appeal.

MR. NAWBATT: My Lord, you should have a costs' schedule, but I have another copy in case you have not.

SIR DONALD RATTEE: I have it here.

MR. NAWBATT: There is just one addition, that is today's costs. It is £80 for my attendance today plus £14 VAT, so the total will be £3481.

SIR DONALD RATTEE: So you are asking me to dismiss the appeal with costs in that sum?

MR. NAWBATT: My Lord, yes.

SIR DONALD RATTEE: Any objection to that, Mr. Antell?

MR. ANTELL: My Lord, I cannot object in principle, but I would query one particular item on the schedule of costs and that is the attendances by solicitors on documents which amounts to over six hours. It is not clear what was involved in that since the skeleton argument was drafted by counsel.

SIR DONALD RATTEE: Well what is the answer?

MR. NAWBATT: My Lord, I believe the answer is this, it is that if one looks at the appellant's cost schedule you will see that my learned friend's brief fee ----

SIR DONALD RATTEE: Well I have not seen one of those, I do not have one. Anyway, just tell me what it says.

MR. NAWBATT: Well he will correct me if I am wrong. The fees put in by my learned friend exceed mine by some distance, and so if you added my learned friend's and his solicitor's fees, and then you compared them to my instructing solicitors and my fees the appellant's costs far outweigh the respondent's, and

that I think is the explanation for the difference in costs. Those instructing me have spent more time on this case than my learned friend's instructing solicitors and that is reflected in my reduced brief fee. You have seen Mr. Antell's skeleton argument ----

SIR DONALD RATTEE: It is quite difficult to see how you spend six hours on them, there are very few documents, what do you with them for six hours?

MR. NAWBATT: My Lord, I think the answer is this. You will see Mr. Antell's skeleton argument; it is quite a weighty document.

SIR DONALD RATTEE: Yes.

MR. NAWBATT: So even before instructing me that was received, so they would have to go through the Special Commissioner's decision and then go through my learned friend's skeleton argument, and then there is the preparation of the brief, and then also you have seen the authorities and the statutory material as well.

SIR DONALD RATTEE: Yes. Yes, thank you. Do you want to say anything else, Mr. Antell?

MR. ANTELL: My Lord, only that it would normally be counsel who would go through the appellant's skeleton argument when drafting the skeleton argument in response.

SIR DONALD RATTEE: No. I think the costs are reasonable. I shall dismiss the appeal, order that the appellant pay the respondent's costs in the sum of £3,481. Anything else?

MR. ANTELL: No, my Lord.

SIR DONALD RATTEE: Thank you both for your help.

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SPC00425

National insurance - earnings of workers supplied by service companies etc. - provision of services through intermediary - worker establishing information technology company - company contracting with agency for provision of information technology services to client of agency - whether company liable for national insurance contributions on earnings of worker - whether, if arrangements had taken the form of a contract between worker and client, worker would have been regarded as gainfully employed by the client - Social Security Contributions (Intermediaries) Regulations 2000 SI 2000/727, Reg 6(1)(c) - Social Security Contributions and Benefits Act 1992, section 4A

THE SPECIAL COMMISSIONERS

ANSELL COMPUTER SERVICES LIMITED **Appellant**

- and -

DAVID RICHARDSON
(HM INSPECTOR OF TAXES) **Respondent**

Special Commissioner: G AARONSON QC

Sitting in London on 23 March and 16 April 2004

David Smith, Accountax Consulting Limited, on behalf of the Appellant

Kevin Gleig, HMIT, Regional Appeals Unit on behalf of the Respondents

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DECISION

The nature of these appeals

1. These appeals are brought by Ansell Computer Services Limited ("ACSL") which has its registered office in St Albans, Hertfordshire. ACSL has been in business since 1986.

2. From that time until the present Mr Michael Ansell has been a director and shareholder in ACSL and, quite clearly, is its key asset.

3. Mr Ansell is a very experienced, and very highly regarded, computer software engineer, with particular expertise in the defence sector. For several years he has been working on the software elements of weapons and other defence systems, acting as part of a large team of specialists given the overall task of designing, developing and testing the relevant electronic systems.

4. In the periods in question Mr Ansell worked at the premises of two different companies working in the defence sector. The first was Alenia Marconi Systems Limited ("Marconi") and the second was BAe Systems Avionics Limited ("BAe"). Mr Ansell's work for both of the companies was at the same premises (BAe had taken over some of the work previously carried out by Marconi following the acquisition in 1999 of the defence electronics business of GEC and the Marconi group by British Aerospace PLC).

5. As a matter of form ACSL's appeal is against Decision Notices given by Mr M Justin, an officer of the Board of Inland Revenue, under section 8 Social Security Contributions (Transfer of Functions, etc.) Act 1999. The Decision Notices in question relate to the officer's opinion as to whether ACSL is liable to pay National Insurance Contributions in respect of the payments made by Marconi and BAe for the work performed by Mr Ansell. This potential liability arises from what is commonly referred to as the "IR35" legislation - i.e. the Schedule E and NIC rules first announced in the Inland Revenue Press Release No 35 following the Spring Budget of 2000. In brief, these rules apply where a person (described as "the worker") is made available to work for some other person (described as "the client") by a third party (usually the worker's own limited company and referred to as "the intermediary"). Applying those terms to the present case, Mr Ansell is "the worker", his company ACSL is "the intermediary", and Marconi and BAe were "the clients".

6. I will in due course refer to the legislation, the contractual arrangements (so far as they can be ascertained or inferred), the nature of Mr Ansell's work and the way in which he provided it. I will also summarise the guidance given in the case law. I have used the word "summarise" advisedly, as the alternative would be to write

7. a decision of inordinate length, given the fact that the parties' skeleton arguments together run to about 90 pages and cite well over 30 authorities. I mention this not to criticise the parties, whose arguments were very helpful and well presented. The point I am making is simply that cases of this sort have to be decided upon an overall view of the facts in the light of the guidance given by earlier cases.

8. At the heart of the dispute is the question whether Mr Ansell would have been employed under a contract of service if (contrary to the actual contractual arrangements) he worked for the clients under a direct contract. To put it another way, supposing that Mr Ansell had worked for Marconi and BAe under a direct contract between him and them, would he have been their employee?

9. Both parties agree that what might be referred to as the onus of proof (i.e. satisfying me that the supposed relationship would have been a contract for the provision of services (i.e. as an independent contractor and not as an employee)) rests upon the Appellant, ACSL.

10. For the reasons which I shall explain, I have formed the view that Mr Ansell would, on the supposed direct contractual relationship with Marconi and BAe, have worked for them in the periods in question as an independent contractor, and not as an employee.

The Decision Notices

The appeals against the Decision Notices

11. In January 2001 Mr Ansell asked the Inland Revenue for formal decisions on two periods of work which he performed. The first was from 1 July 2000 until 30 September 2000, when he worked for Marconi. The other was from 2 October 2000 to 30 March 2001, when he worked for BAe. The Inspector gave his opinion on 27 December 2002. This was disputed by the Appellant whose representatives asked for formal Decision Notices to be issued. These were made on 16 May 2003.

The relevant legislation

12. Section 75 of the Welfare Reform and Pensions Act 1999 inserted, with effect from 22 December 1999, a new section 4A into the Social Security Contributions and Benefits Act 1992.

13. That new section enabled the Treasury to make Regulations which would give effect to the IR35 proposals for NIC purposes. The key provisions of section 4A are as follows –

> "(1) Regulations may make provision for securing that where –

(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client"),

(b) the performance of those services by the worker is (within the meaning of the regulations) referable to arrangements involving a third person (and not referable to any contract between the client and the worker), and

(c) the circumstances are such that, were the services to be performed by the worker under a contract between him and the client, he would be regarded for the purposes of the applicable provisions of this Act as employed in employed earner's employment by the client,

relevant payments or benefits are, to the specified extent, to be treated for those purposes as earnings paid to the worker in respect of employed earner's employment of his.

(2) For the purposes of this section –

(a) "the intermediary" means –

(i) where the third person mentioned in subsection (1)(b) above has such a contractual or other relationship with the worker as may be specified, that third person, or

(ii) where that third person does not have such a relationship with the worker, any other person who has both such a relationship with the worker and such a direct or indirect contractual or other relationship with the third person as may be specified; and

(b) a person may be the intermediary despite being –

(i) a person with whom the worker holds any office or employment, or

(ii) a body corporate, unincorporated body or partnership of which the worker is a member;

and subsection (1) above applies whether or not the client is a person with whom the worker holds any office or employment.

(3) Regulations under this section may in particular, make provision –

(a) for the worker to be treated for the purposes of the applicable provisions of this Act, in relation to the specified amount of relevant payments or benefits (the worker's "attributable earnings"), as employed in employed earner's employment by the intermediary;

(b) for the intermediary (whether or not he fulfils the conditions prescribed under section 1(6)(a) above for secondary contributors) to be treated for those purposes as the secondary contributor in respect of the worker's attributable earnings."

14. The expression "employed earner's employment" in subsection 4A(1)(c) is explained in section 2 of that Act as meaning employment either under a contract of service or in an office with emoluments chargeable to income tax under Schedule E.

15. The Regulations empowered by section 4A of the 1992 Act are the Social Security Contributions (Intermediaries) Regulations 2000. The key passage in the Regulations is to be found in paragraph (1) of Regulation 6 which is in very similar (but not identical) terms to the provisions of subsection 4A(1) of the 1992 Act. The differences are accounted for by the fact that some of the expressions are terms defined elsewhere in the Regulations. Regulation 6(1) reads as follows –

"(1) These Regulations apply where –

(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client"),

(b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and

(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client.

(2) Paragraph (1)(b) has effect irrespective of whether or not –

(a) there exists a contract between the client and the worker, or

(b) the worker is the holder of an office with the client.

(3) Where these Regulations apply –

(a) the worker is treated, for the purposes of Parts I to V of the Contributions and Benefits Act, and in relation to the amount deriving from relevant payments and relevant benefits that is calculated in accordance with Regulation 7 ("the worker's attributable earnings"), as employed in employed earner's employment by the intermediary, and

(b) the intermediary, whether or not he fulfils the conditions prescribed under section 1(6)(a) of the Contributions and Benefits Act for secondary contributors, is treated for those purposes as the secondary contributor in respect of the worker's attributable earnings,

and Parts I to V of that Act have effect accordingly.

(4) Any issue whether the circumstances are such as are mentioned in paragraph (1)(c) is an issue relating to contributions that is prescribed for the purposes of section 8(1)(m) of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 (Decision by Officer of the Board)."

16. There is no dispute that Mr Ansell is "the worker" for the purposes of Regulation 6 (and also section 4A of the 1992 Act). Likewise there is no question that Marconi (and, subsequently, BAe) is "the client" for the purposes of Regulation 6 (and the "third person" referred to in section 4A).

17. The dispute turns solely upon the question whether the circumstances are those described in sub-paragraph 6(1)(c) of the Regulations (corresponding to subsection 4A(1)(c) of the 1992 Act), which I have italicised for ease of reference.

The Evidence

18. Three witnesses gave evidence. The first was Mr Michael Ansell, "the worker" in relation to each of the two contracts under dispute.

19. The second was Mr Paul McIntosh, who was an employee of BAe, and was the Project Software Manager for the particular project on which Mr Ansell worked. This project involved the development of certain radar systems. Evidence as to the nature of the systems, and the particular elements of it on which Mr Ansell and others worked was given in sufficient detail for me to form a broad understanding of it. Given that the work relates to elements of defence systems I do not think it appropriate to go into any more detail than is necessary in this written Decision. Accordingly, for present purposes I shall simply describe this project as "the D Project".

20. The final witness was Mr David Coulbeck. At the material time he was employed by Marconi as Software Project Manager on the earlier of the two defence projects on which Mr Ansell worked. For the same reason as applies to the D Project I think it sufficient to note that the Marconi project involved the software for part of a guidance system, and I shall refer to it simply as "the B Project".

21. Each of these witnesses produced a witness statement, upon which they were examined and cross-examined. Mr Ansell was called as witness for the Appellant, represented by Mr David Smith. He was cross-examined by Mr Kevin Gleig for the Inland Revenue. Mr McIntosh and Mr Coulbeck were witnesses for the Inland Revenue, and were called by Mr Gleig and cross-examined by Mr Smith.

22. I consider that each of the witnesses gave evidence to the best of their recollection. For the most part the evidence of each of them was consistent with the evidence given by the others, and also with the (fairly scant) relevant documentation. There was, however, one significant point on which the evidence of Mr Ansell was inconsistent with that of Mr Coulbeck (while, on the same point, Mr Ansell's evidence was consistent with the evidence given by Mr McIntosh). This related to the question whether Mr Ansell could be required to work on any given occasion during the period of his contract (as Mr Coulbeck thought was the case) or whether, on the other hand, Mr Ansell was free to take time off to suit his own convenience without seeking the permission of Mr Coulbeck in his capacity as Project Manager. I shall discuss this in a little more detail later on, but on this point I have formed the view that Mr Ansell's evidence is to be preferred as representing the true contractual state of affairs. Mr Coulbeck, I believe, assumed that he had the power to require Mr Ansell to work on any specified occasion. But since he was not involved in making the contractual arrangements and the issue had not come up in practice he probably did not know what the true position was.

The Contractual Chain between Mr Ansell and Marconi

23. From the evidence before me the contractual chain linking Mr Ansell with Marconi was as follows. On 30th June 2000 ACSL ("the intermediary" for the purposes of the IR35 rules, and "the supplier" as described in the contract) entered into a contract with a company called Centre Dynamics Limited ("CDL") (described in the contract as "the agent"). Under this agreement CDL would find an "End-user" for the services supplied by ACSL. The contract was expressed to be for an unlimited period, until terminated by breach or mutual consent. It included terms entitling CDL to terminate the agreement if the supplier fails to perform the tasks required for any End-user with reasonable skill.

24. The agreement also contained a detailed provision enabling ACSL to withdraw from part of the work placed by CDL with the End-user, provided (i) that the End-user was given reasonable notice, (ii) that the absence would not interfere with the

overall achievement of the work programme or its agreed timetable, and (iii) if appropriate ACSL would offer a suitably qualified substitute to continue the work for the End-user.

25. One other significant term needs mentioning. The contract included a provision which required CDL to conclude an agreement with each End-user which itself reflects the terms of the agreement between ACSL and CDL. It was specifically provided that such an agreement would include, inter alia, a substitution clause in the form contained in the ACSL-CDL agreement, the effect of which is summarised above.

26. So far as payment is concerned, the agreement provided that CDL would pay ACSL £40.20 per hour for the work performed by ACSL, subject to a maximum number of hours set out in a schedule (which specified the services to be rendered to the End-user). That schedule stated that the total number of hours would not be expected to exceed 550.

27. Applying the provisions of that agreement to the known facts in the present case, the agreement was as follows. ACSL would provide the services of Mr Ansell to Marconi for the purpose of carrying out work of a particular nature, for what was expected to be a maximum of 550 hours; CDL would pay ACSL at the rate of £40.20 per hour. The agreement does not control the amount of money which CDL would charge Marconi, which would be a matter for negotiation between CDL and Marconi. The difference between the price paid by Marconi to CDL and the price paid by CDL to ACSL would represent CDL's profit margin.

28. To continue the contractual chain, it is clear that some arrangement was entered into by CDL with Marconi, under which Mr Ansell would be provided as a contractor to work on the B Project. There is, however, no signed contract to this effect, nor was any evidence on this given by CDL which, I was told, is no longer in business. Regrettably there is also no clear evidence as to this contractual link from Marconi itself, as Mr Coulbeck made it clear that he was not responsible for the contractual terms governing the engagement of contractors. The problems that can arise by imposing the tax or NIC liability under the IR35 legislation upon an intermediary (ACSL), while providing no means of enabling the intermediary to require "the client" (Marconi in this case) to explain its contractual arrangements with another party (CDL in this case) has been commented on by the Special Commissioner Dr Avery Jones in *Lime-IT Limited -v- Justin* [2003] STC (SCD) 15 at page 20a; and, more extensively, by the Special Commissioner Dr Brice in *Tilbury Consulting Limited -v- Gittins* No 1 [2004] STC (SCD) 1. I share their concern; but in the present case I consider that the material before me is sufficient to enable me to form a view as to the nature of this particular link in the contractual chain.

29. The relevant documents, much relied on by Mr Gleig, take the form of amendments to purchase orders raised by Marconi on CDL. They are barely

legible, and are cryptically expressed. For instance, one of them refers to extending the "L of L". From the witness evidence it is tolerably clear that "L of L" stood for the "limit of liability" of Marconi, and the amount of the LoL represented the maximum number of hours at an agreed hourly rate (£42 in the case of one of the documents) for which Marconi would engage the services of Mr Ansell. Following extensive discussion and questioning the witnesses on this, it seems that this really did represent the *maximum*, and was not a fixed number of hours for which Marconi was agreeing to engage Mr Ansell's services.

30. On the evidence which I have heard it seems that the parties were, in practice, able to get on with the arrangement in a practical way and without difficulty. I conclude that the practical arrangement agreed between CDL and Marconi was that Mr Ansell would work at Marconi on the specified project for a number of hours which was not expected to exceed 550. Because of the absence of clear evidence on the point, I have not been able to conclude whether or not Marconi had been made aware by CDL of the key terms of the agreement between ACSL and CDL. Specifically I do not know whether Marconi had been made aware of, and agreed to, the substitution provisions in the ACSL-CDL contract. However, I infer from the evidence of the witnesses that the practice of substitution was recognised by Marconi (and also BAe), even though it would rarely arise in practice.

The framework in which Mr Ansell worked in practice at Marconi

31. I have already described the written contractual links, so far as they can be found. I shall now flesh out the relationship between Mr Ansell and Marconi from the witness evidence given before me.

32. Mr Ansell, together with a few other individuals, was engaged as a contractor to work on the B Project. There were in fact four teams, each comprising approximately six individuals, with each team devoting itself to a particular element of the software package involved in the B Project. Although his engagement (as the personnel provided by CDL to Marconi) was for the 3 months beginning July 2000, this was in fact a renewal of similar arrangements which had started 2 years earlier. It was explained to me that the B Project had a number of stages, with different elements being involved in each stage. The policy of Marconi was to use permanent employees for the majority of the work, with specialist contractors being added to the teams where necessary to ensure that the teams could accomplish their respective tasks as each stage of the B Project came to be worked upon. The non-employee contractors were, in a sense, "buffer stock", being personnel who would supplement the teams with the necessary expertise, but on the basis that they could be dispensed with without the complications which employment law imposes in respect of employees. Indeed, Mr Coulbeck was of the view that he could dispense with the services of Mr Ansell, and other contractors in his position, on as little as one day's notice if, for

whatever reason, he did not consider that their contribution was needed to complete any given stage of the project.

33. So far as working hours were concerned, Mr Ansell was adamant that he was not obliged to work any particular number of hours in any given day or week, that he could turn up when he liked (subject only to safety considerations, which I shall expand upon in a moment). He was also adamant that he could take time off at his own choosing, say to play golf if he wished; and in such case he did not have to seek permission from Mr Coulbeck or anyone else, and would merely inform them as a matter of courtesy. While Mr Coulbeck did not share this view I have, as noted earlier, concluded that Mr Ansell's evidence is to be preferred on this point, particularly since it coincided with the views of Mr McIntosh (who was Mr Coulbeck's opposite number in the BAe contract).

34. As it happens, Mr Ansell was as diligent as he was skilled, and he did in fact work fairly conventional hours, so that his perceived freedom to turn up or not as he wished was a matter of principle rather than practice. There were also a number of significant factors which encouraged Mr Ansell to work at conventional times. First, he was part of a team which worked on particular elements of a particular phase of a weapon development programme. If his work lagged behind that of his colleagues, or raced too far ahead of them, there would be problems in co-ordinating their output. Secondly, as his computer programming work was wholly involved in secret defence projects it was inevitably the case that it had to be carried out on a secure computer system housed in a secure building. This meant that he had to use a particular computer at a particular workstation, and therefore could not do any of the actual work at home or elsewhere using a laptop etc. Thirdly, some of the non-computer equipment which he had to use from time to time was extremely expensive (certain items costing over £1 million) and therefore obviously having to be located in secure premises; but some of it could also be quite dangerous to use. Mr Ansell's evidence on this was graphic: when asked why he would not be permitted to work late at night in the secure premises, he explained that this was for "safety reasons. The company did not want people getting electrocuted whilst using expensive equipment". It seems that the chances of catastrophic events of that sort occurring would considerably increase if he, or any other contractor or employee, was permitted to work alone long before or long after normal working hours.

35. Although, for the reasons described, Mr Ansell was not permitted to carry out his work anywhere outside the designated secure premises, and using the designated secure computer system, he did in fact spend a few hours each week at home keeping himself abreast of new thinking and developments in his field. His evidence was that he would spend up to 5 hours a week doing this without any remuneration from Marconi and, insofar as it involved books or journals etc., at his own expense. This contrasted with the position of an employee, who would ordinarily expect to do this work during paid time, and with any out of pocket expenses borne by the employer.

36. As regards the number of days or hours worked on each particular phase of the project, Mr Ansell agreed that he did in fact work consistently throughout the 3 month period of the contract; but explained that this was so for the reasons described above - essentially to ensure that his work dovetailed with the work of colleagues in his team, and also with the work of the other teams working on the same phase of the development. He was clear in his own mind, however, that he was providing his services to achieve a particular task in the allotted timeframe, and that he had no right to expect that he would be offered the opportunity to work on the next phase. As it happened, however, he was re-engaged at the end of each phase until completion of the B Project.

37. So far as supervision and control was concerned, the evidence was that Mr Ansell had considerable expertise and therefore did not need instruction or control, in the traditional sense, as to how he carried out his responsibilities. However, he was working as part of a team which was working in conjunction with other teams, and consequently his work, like that of everyone else, had to be overseen by the project manager. Mr Ansell was also expected to take part in peer discussions, and did so regularly and diligently.

38. Finally, in a number of practical respects Mr Ansell, like other contractors, was treated differently by Marconi from its employees. For example he was not entitled to join the employee social club, or to use employee on-site parking facilities. He did not have any entitlement to a company pension plan, or share options, or company-related bonus payments, or healthcare or a company car. So far as pay was concerned, he did not receive sick pay or holiday pay, was not entitled to statutory paternity pay or redundancy payments if his particular work was curtailed. These were some of the practical consequences of being (as a matter of general law) a contractor, and not an employee, and hence falling outside the legislation and the non-statutory practices which benefited and protected employees. Indeed, avoiding the need to make these protections and benefits available to contractors was one of the commercial reasons that led Marconi to engage people like Mr Ansell as contractors and not as employees. This was a genuine commercial advantage sought by Marconi, and the corresponding disadvantage was something which Mr Ansell was genuinely prepared to accept in order to attain the greater element of flexibility and independence which contractor status conferred.

The contract with BAe in practice

39. Mr Ansell explained that by the end of September 2000 the B Project was just about complete and, so far as he was concerned, “my packages of work were complete”.

40. Shortly beforehand he had a chance meeting with Mr McIntosh in the car park of the building where Mr Ansell was working on the B Project. At that time Mr McIntosh was the project software manager for the D Project (relating to certain radar systems). He was responsible for building the team to run the project, and had already engaged four BAe employees, some of whom had extensive experience. However, he considered that there was a need for the particular expertise which someone like Mr Ansell could bring, and wanted him to join the team.

41. The contractual arrangements involving Mr Ansell and BAe were very similar to those which I have described earlier in relation to Marconi. On 30th September 2000 ACSL entered into an agreement with CDL, in terms which are not materially different from the 30th June agreement described above. The services to be provided would be for a total number of hours not expected to exceed 1,000, and the rate of payment (as in the earlier agreement) was to be £40.20 per hour.

42. Again, as with the Marconi agreement, there is no evidence as to the arrangements entered into by CDL with BAe. Given that the arrangement seemed to work perfectly well in practice, I infer that BAe were broadly aware of CDL's agreement with ACSL (or, at least, with Mr Ansell). I also conclude that BAe were generally aware of the possibility of substitution if Mr Ansell would for some reason be unable to complete his work.

43. As to the practical aspects of the BAe arrangement, the evidence of Mr McIntosh (who, as noted above, was called as a witness by the Inland Revenue) was wholly consistent with that given by Mr Ansell. So far as concerned Mr Ansell's hours of work, holiday arrangements, notification of prospective absence etc., Mr McIntosh was quite clear that the arrangements concerning Mr Ansell were significantly different from those which applied to employees. For example, so far as holiday arrangements were concerned, the cross-examination was as follows -

> Question: "I am more concerned with the process of him [Mr Ansell] having to get permission or not."
> Answer: "There is no defined process in our company that I am aware of that requires contractors to ask for permission to take holiday."
> Question: "Is it fair to say that, in that regard, he would be different from an employee -"
> Answer: "He was different, definitely, in that area."

44. On another significant point Mr McIntosh echoed the evidence of Mr Coulbeck. So far as BAe was concerned, the only problems that would arise with the payment to Mr Ansell would be if his work *exceeded* the estimated and budgeted time. The time in this context was the six month period beginning 1st October, during which Mr Ansell was expected to work for no more than the specified number of hours for a total cost (to BAe) of approximately £51,480. If, for

whatever reason, there was insufficient work for Mr Ansell to do to justify that cost, then he would simply do less and the money would be saved. As Mr McIntosh put it "That is not a problem if I do not need his services, if we underspend; the only problem would occur if we exceeded that time." This was consistent with the general policy relating to contractors. When asked why he did not hire Mr Ansell for 18 or 24 months (being the estimated length of time to complete the D Project) he replied:

> "Because the policy in the company would be that contractors are hired for the shortest period of time and then when their services are no longer required, you get rid of them. But of course you would look at the end of a period if you still have tasks to carry out, you would resubmit the form, resubmit the justification, explain why you need someone and effectively start the process of recruitment again. But the company does not really encourage project managers to keep contractors longer than they need to be kept."

45. At this point (which has relevance to Mr Smith's argument based on mutuality of obligation) it is worth recalling the comments of Mr Coulbeck. In re-examination Mr Gleig asked Mr Coulbeck the following:

Question:	"Mr Smith asked if you had an obligation to provide work for Mr Ansell. In the period that is under review, which is the three month period, did you have an obligation to provide work throughout that period?"
Answer:	We had taken him on because we wanted him to do something, so if we suddenly found we no longer had any work, the project was cancelled or some such, then we would have closed the contract. He would have left us."
Question:	"How would you have given him notice?"
Answer:	"I believe, it was very short, like a day, I could give; whereas with a permanent member of staff I could not do that. It would be a much bigger issue because it was then redundancy."

46. As to the question of substitution, Mr McIntosh stated that the contracts manager of BAe informed him that he was in principle prepared to allow a substitution, providing of course that a suitable candidate could be found. On that aspect the evidence was that it would be hard but not impossible to find suitable candidates, and that Mr Ansell might know some suitable individuals with the requisite level of security clearance.

47. As with the Marconi arrangement, BAe did not give Mr Ansell rights relating to parking, car, pensions, share options, healthcare etc. There was no material difference between this aspect of his engagement with BAe and his engagement with Marconi.

48. As with the Marconi arrangements, Mr Ansell was in fact re-engaged on the D Project by BAe at the end of the six months, and has subsequently been further re-engaged so that he was still working on the project shortly before the hearing.

Overall impression as to bona fides

49. Standing back and taking the evidence of all three witnesses together, I am satisfied that the contractor relationship was seen by the respective parties (i.e., Mr Ansell on the one hand and Marconi and BAe on the other) as being significantly different from employment, and as having commercial advantages which were perceived by each of them to outweigh the disadvantages. I am satisfied that the arrangements were entirely bona fide, and were not designed to disguise or re-label what in reality would be thought of as employment.

Guidance from the cases

50. Having reached my conclusions on the evidence, I now turn to consider the guidance given by previous decisions in this and related areas.

51. As I mentioned at the outset, each of the written skeleton arguments given to me by Mr Smith and Mr Gleig referred very extensively to cases which have considered the difference, in various contexts, between employment and independent contractor status. I appreciate their diligence, and I have in reaching my conclusion taken account of the comments which they have made in relation to those cases.

52. However, the path which needs to be followed, while occasionally presenting new and unexpected vistas, is by now fairly well trodden, and I do not mean to belittle the effort of Mr Smith and Mr Gleig by confining myself to a handful of cases that seem to me to raise the relevant points.

53. I shall start with a very recent decision on the IR35 legislation, and the first (so far as I am aware) that has reached the High Court. This is the case of *Synaptek -v- Young* [2003] EWHC 645 (Chancery), a decision of Hart J. The case concerned the provision of computer software services through an intermediary company. The General Commissioners had decided that, on balance, under the hypothetical contract between the worker and the client the worker would have been an employee. Hart J held that the Commissioners' conclusion was clearly a possible one, and that they had not misdirected themselves in law, and accordingly he dismissed the appeal against their decision.

54. Hart J's judgment is a convenient place to recall the basic principles that have been developed over the years by the courts to differentiate between a contract of employment and a contract for the provision of services. At paragraph 16 he referred to the test propounded by MacKenna J in *Readymixed Concrete (South East) Limited -v- Minister of Pensions and National Insurance* [1968] 2 QB 497

at 515. This test has been cited on countless occasions. MacKenna J expressed the test in the following terms:-

> "A contract of service exists if these three conditions are fulfilled.
>
> (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
> (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
> (iii) The other provisions of the contract are consistent with its being a contract of service."

55. This is clearly an important authority, although I would respectfully comment that I do not find this test to be invariably helpful. Expressions such as "for his master" and "control in a sufficient degree" can in some situations raise questions as to how one can tell whether those words are applicable to the case in hand; and the third requirement, to the effect that the other provisions of the contract have to be consistent with its being a contract of service, involves, as it seems to me, an element of circularity.

56. In paragraph 17 of his judgment Hart J refers to the judgment of Nolan LJ in *Hall -v- Lorimer* [1994] STC 23 at 28-29, where he said -

> "In cases of this sort there is no single path to a correct decision. An approach which suits the facts and arguments of one case may be unhelpful in another."

57. At paragraph 18 of his judgment Hart J referred to the judgment of Cooke J in *Market Investigations Limited -v- Minister of Social Security* [1969] 2 QB 173 at 184-185. Cooke J said that -

> "… The fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'Yes', then the contract is a contract for services. If the answer is 'No', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the service provides his own equipment, whether he hires his own helpers, what degree of financial risk

he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

58. I accept that, on the facts of the present case, Mr Ansell did little of the particular things which Cooke J enumerated as factors which may be of importance. Mr Ansell did not hire his own helpers; he provided his own equipment only for a few hours a week at home; he did not take on any great financial risk (although he was dependent for his remuneration upon payment by CDL to ADSL); and he did not have any significant opportunity to profit from sound management in the performance of his task, whether with Marconi or with BAe. Indeed, Mr Gleig emphasised these very points in urging me to conclude that Mr Ansell should be regarded, on the hypothetical contractual arrangement between himself and Marconi/BAe, as an employee.

59. However, as Cooke J made clear, those particular factors *may* be of importance; but, on the facts of any particular case, they may not. In the present case I consider that they are not of sufficient importance. This is because the very nature of Mr Ansell's work, shrouded as it has to be in secrecy and performed in isolation from anyone apart from other individuals with similar levels of security clearance, does not permit him to exercise his profession in the entrepreneurial way that would be available to someone working in less sensitive areas of activity (whether in the I.T. field or elsewhere).

60. In this situation it seems to me appropriate to look more to other factors to help decide on which side of the line the hypothetical contractual arrangement would fall. The factors which appear to me to be of greater significance in the present case are:-

(i) the absence of any obligation on Marconi or BAe to keep Mr Ansell in work throughout the 3 months/6 months period of his respective engagements;

(ii) the absence of any obligation by Mr Ansell to put in a particular amount of work, whether each day or each week or in aggregate during his period of engagement;

(iii) the ability which Mr Ansell had to take time off at his own choosing, without seeking permission from the team leaders at Marconi or BAe; and

(iv) the ability to withdraw and suggest a substitute individual (which both Mr Ansell and Marconi/BAe regarded as genuine, even though it was very unlikely that the situation would in fact arise); and

(v) the various other practical matters (no company car, sick pay, holiday pay, social club etc.) which differentiated contractors from employees at a daily practical level.

61. I should mention one additional point which Mr Smith put forward very forcefully. He urged that Mr Ansell could not as a matter of law be regarded as an employee, because there was no obligation on Marconi or BAe to continue to use his services, and hence no "mutuality of obligations". He referred me to the case of *Montgomery -v- Johnson Underwood Limited* [2001] WCA Civ 318. This case concerned a claim for unfair dismissal by a telephonist who worked at a local company, but was given that job by an employment agency. The question arose as to whether she should be regarded as an employee of the local company or of the employment agency. The Court of Appeal held that the employment tribunal had erred in holding that the applicant was employed by the employment agency, notwithstanding that there was little or no control, direction or supervision of the applicant by the agency. The tribunal also considered that the absence of mutuality of obligation appeared to them to be largely irrelevant to the specific engagement. Longmore LJ said this:-

> "Whatever other developments this branch of the law may have seen over the years, mutuality of obligation and the requirement of control on the part of the potential employer are the irreducible minimum for the existence of a contract of employment: see *Nethermere (St Neots) Limited -v- Gardiner* [1984] IRLR 240, 245 per Stephenson LJ approved in *Carmichael -v- National Power PLC* [2000] IRLR 43, 45 per Lord Irvine of Lairg LC."

62. Given this clear statement by Longmore LJ, I see considerable force in Mr Smith's submission. Certainly the evidence given by Mr Ansell and Mr Coulbeck suggests that Marconi could have been entitled to terminate Mr Ansell's activities at virtually no notice; and Mr McIntosh's evidence likewise indicated that BAe might have considered itself able to terminate Mr Ansell's work at a time of its choosing.

63. I also note that Hart J in *Synaptek* referred to a number of cases which consider the issue as to whether mutuality of obligation is, as a matter of law, an irreducible requirement of a contract of employment. At paragraph 25 he said this -

> "There is now a considerable body of authority on the question whether an obligation on the employer to provide work is necessary and in all cases an indispensable attribute of a contract of employment: see *Nethermere (St Neots) Limited -v- Taverna and Gardiner* [1984] IRLR 240, *McLeod -v- Hellyer Bros Limited* [1987] 1 WLR 728, *Clark -v- Oxfordshire Health Authority* [1998] IRLR 125 and *Johnson Underwood Limited -v- Montgomery* [2001] EWCA Civ 318."

64. However, for myself I find that the question as to what elements of an arrangement are themselves critical to the existence of that mutuality is not always straightforward. I have reached the clear conclusion on all the evidence that Mr Ansell would not have been an employee in the hypothetical contract which the IR35 legislation requires us to construct. Accordingly, it is unnecessary for me to decide whether, as a matter of law, there would be insufficient mutuality of obligation to support an employee relationship.

Conclusion

65. In his Notice of Decision given on 16th May 2001 Mr Justin on behalf of the Board of Inland Revenue stated -

> "1. That the circumstances of the arrangements between Mr M J Ansell and Aliena Marconi Systems Limited for the performance of services from 1 July 2000 to 30 September 2000 are such that, had they taken the form of a contract between Mr M J Ansell and Aliena Marconi Systems Limited, Mr M J Ansell would be regarded for the purposes of Parts I to V of the Social Security Contributions and Benefits Act 1992 as employed in employed earner's employment by Aliena Marconi Systems Limited.
>
> 2. That Ansell Computer Services Limited is treated as liable to pay primary and secondary Class I Contributions in respect of the worker's attributable earnings from that engagement."

A similar decision was given in respect of the arrangements between Mr Ansell and BAe from 2nd October 2000 to 30th March 2001.

66. I disagree. Having considered the evidence I have concluded that the circumstances of the arrangements between Mr Ansell and Marconi/BAe are such that, had they taken the form of a contract between Mr Ansell and those companies, that contract would have been one for the provision of services and not of employment.

67. Accordingly the appeals succeed.

GRAHAM AARONSON QC
SPECIAL COMMISSIONER

Release Date: 29 July 2004

SC 3061/03

CASES REFERRED TO IN SKELETON ARGUMENTS

Bank voor Handel en Scheepvart NV v The Administrator of Hungarian Property 35 TC 311

Barnett v Brabyn [1996] STC 71

Battersby v Campbell [2001] STC 189

Carmichael v National Power [1999]1 WLR 2042

Clark v Oxfordshire Health Authority [1998] IRLR 125

Davis v Braithwaite (1933) 18 TC 198

Express and Echo Publications Limited v Tanton [1999] IRLR 367

F S Consulting Limited v McCaul [2002] STC (SCD) 138

Global Plant Limited v Secretary of State of Social Security [1971] 1 QB 139

Hall (HM Inspector of Taxes) v Lorimer CA [1994] STC 23

Lee Ting Sang v Chung Chi-Keung [1990] IRLR 236

Lime-IT Limited v Justin [2003] STC (SCD) 15

Market Investigations Limited v Minister of Social Security [1968] 3 AER 732

Massey v Crown Life Insurance [1978] 1 WLR 676

McLeod v Hellyer Brothers Limited [1987] IRLR 232

McManus v Griffiths (1997) 70 TC 218

McMeechan v Secretary of State for Employment [1997] IRLR 353

Montgomery v Johnson Underwood [2001] EWCA Civ 318

Morren v Swinton and Pendlebury Borough Council (1965) 1 WLR 576

Mrs MacFarlane & Mrs Skivington v Glasgow City Council [2001] IRLR 7 EAT

Narich Property Limited v Commissioner of Payroll Tax [1984] ICR 286

Nethermere (St Neots) Limited v Gardiner [1984] ICR 240

O'Kelly v THF [1983] 3 All ER 456

Professional Contractors Group v CIR [2001] STC 629

Propertycare Limited v Gower 2003 EAT/547

Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2 QB 497

Stevedoring & Haulage Services Limited v Fuller [2001] EWCA Civ 651

Stoddart v Cawder Gold Club [2001] EAT/87300

Stuncroft Limited v Havelock 2001 EAT (unreported)

Swan Hellenic Limited v Secretary of State for Social Services 1983 QBD (unreported)

Synaptek Limited v Young [2003] EWHC 645 (Ch)

Tilbury Consulting Limited v Gittins (No 2) [2004] STC (SCD) 72

WHPT Housing Association Limited v Secretary of State 1981 ICR 737

SPC00457

NATIONAL INSURANCE CONTRIBUTIONS – IR35 – computer services heading a team supporting and maintaining a computer system under a series of six monthly contracts – whether hypothetical contract would be an employment contract – yes – appeal dismissed

THE SPECIAL COMMISSIONERS

NETHERLANE LIMITED **Appellant**

- and -

SIMON YORK **Respondent**

Special Commissioner: DR JOHN F. AVERY JONES CBE

Sitting in public in London on 15 and 16 December 2004

A D Robertson FCA CTA for the Appellant

Mike Faulkner, HM Inspector of Taxes, Inland Revenue Southern England Regional Appeals Unit, for the Respondent

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DECISION

1. This is an appeal by Netherlane Limited against a decision letter dated 9 September 2003 that the circumstances of the arrangements between Mr M J Renshaw and AMP UK (formerly NPI) for the performance of services from 6 April 2000 to 23 February 2001 were such that the "IR35" legislation applied to National Insurance contributions. The parties have agreed that the decision will be applied to the period to 28 September 2001. The Appellant was represented by Mr A D Robertson FCA ATII; and the officer by Mr Mike Faulkner.

2. Both Mr Robertson and Mr Faulkner had put in a tremendous amount of work in preparing the case for which I am grateful. Mr Robertson's written case ran to 74 pages; and Mr Faulkner's skeleton to 25 pages very helpfully cross-referenced to the documents. The bundle of documents ran to 364 pages and the witness statements to 32 pages. In spite of all this I regret to say that I thought that much of the efforts on the Appellant's side were misdirected and at the end of this decision I shall make some observations which I hope will be of assistance to others in the preparation of IR35 cases.

Findings of fact

3. There was the following statement of facts not in dispute

(1) Mr Martin J Renshaw left University in 1979 and became employed by Hambro Life (which later became Allied Dunbar) as a trainee computer programmer. He remained employed by Allied Dunbar until 1997 at which time he had attained the status of IT Project Manager.

(2) The Appellant company was incorporated on 10 June 1997. Throughout its existence Mr Renshaw has been the sole director and has held 60% of the shares. Mr Renshaw's wife holds the remaining 40% of the shares.

(3) For the purposes of this appeal, and subject to any amendment to returns necessitated by the Commissioner's decision, it is agreed that, with the assistance of a chartered accountant, the Appellant has complied with its obligations under company, business and taxation law. In particular it has done the following:

(a) Prepared annual accounts in compliance with company law and accounting standards;

(b) Submitted its accounts to Companies House and to the Inland Revenue;

(c) Prepared and submitted corporation tax returns each year;

(d) Written up payroll records, prepared payslips and submitted PAYE/NI returns to the Inland Revenue;

(e) Maintained a register of its fixed assets;

(f) Registered for VAT and submitted VAT returns;

(g) Required MJR to submit formal expense claims in respect of company business expenses incurred by him on NL's behalf;

(h) Prepared and submitted to the Revenue forms P11D and P11D(b);

(i) Invoiced its services to clients such as RML on credit terms using formal VAT invoices;

(j) Maintained a sales ledger to control the collection of customer debts;

(k) Maintained insurance cover for employer's liability, public liability, products liability and professional indemnity risks.

(4) The Appellant was offered a contract by a company called Resource Matters Ltd (RML) which required NL to provide IT services at the Cardiff premises of their client NPI Limited (NPI) (which later became AMP).

(a) The first contract commenced around 1 September 1997 and was for a period of 26 weeks.

(b) Shortly before the end of this term, a fresh 26 week contract was agreed and this pattern continued until June 2001.

(c) AMP notified Mr Renshaw in June 2001 that they would not have any further use for his services after 28 September 2001 and would not be prepared to offer a further 26 week contract as in the past but offered a 4 week contract instead. The reason given was that it was the policy of AMP (having taken over NPI) to use company employees to perform these services.

(5) AMP worldwide restructured in 2003. The UK operations are now part of HHG plc.

(6) The contract between Mr Renshaw and the Appellant for the 26 week period to 25 August 2000 and signed by Mr Renshaw on 9 February 2000 consisted of a double sided sheet of A4 paper. One side is headed "Resource Matters Ltd Contract for Services by I.T. Consultant". The other side is headed "Contract Assignment Schedule" and contained details of the actual assignment.

(7) Subsequent contracts consisted of a seven page "Contract Supply Agreement" that, other than the date and signatories, did not change from contract to contract plus a single page "Assignment Schedule" similar, but not identical, to the "Contract Assignment Schedule" of the old contract. The first new contract between Mr Renshaw and the Appellant also covers the 26 week period to 25 August 2000. It is dated 3 April 2000 but signed by the Appellant on 3 May 2000 and by RML on 8 May 2000.

(8) RML made a corresponding series of 26 week contracts with NPI to supply Mr Renshaw's services to NPI. Each contract consisted of 2 pages

that, other than the date, did not change from contract to contract together with a single page schedule that contained the details of the assignment.

(9) Summaries of the information on the Mr Renshaw/the Appellant and NPI/RML schedules for the relevant period are attached [not included as these are summarised below].

(a) Although the schedule to the 20 July 2000 NPI/RML agreement shows the rate per working day inclusive of VAT paid RML to be £664.53, the rate actually paid was £650.95.

(10) A decision under S8 of the Social Security Contributions (Transfer of Functions, etc) Act 1999 for the period 6 April 2000 to 23 February 2001 was made on 9 September 2003 and appealed, with an election for the appeal to be heard by the Special Commissioners, on 25 September 2003.

4. I heard oral evidence from Mr Renshaw, Mr Jonathan Summers (RML), Mrs Quinn (RML) by telephone conference call arranged on the second day's hearing, and from the officer who made the decision, Mrs Sue Gibb. I also had a witness statement from Mr Michael Clark (formerly of NPI) and I have read some correspondence with HHG plc, and Mr J W Turner formerly of NPI. I find the following facts:

(1) In 1997 Mr Renshaw decided to seek higher potential rewards by setting up as a freelance IT consultant finding work through recruitment agencies who expected him to operate through a company. He formed the Appellant of which he is the sole director and owner of 60 % of the shares, the other 40% being owned by his wife. At its peak he would earn two or three times what he would earn as an employee (although I imagine that this figure did not take fringe benefits into account).

(2) The recruitment agency the Appellant used in the relevant period was RML who from the beginning in 1997 found work with NPI. During the period in question the Appellant entered into the following contracts with RML (the lower level contracts): (a) 26 February 2000 to 25 August 2000, (b) from 26 August to 23 February 2001, (c) 24 February 2001 to 24 August 2001, and (d) a final one month contract 27 August 2001 to 28 September 2001. Strictly, only contracts (a) and (b) are in issue but as the parties have agreed that the decision will apply up to 28 September 2001 I have included information about the whole of the period.

(3) As stated above, there are two versions of contract (a) covering the identical period, one signed on 9 and 17 February 2000 but undated at the start, and the other signed on 3 and 8 May 2000, and dated 3 April 2000 at the start. The second version seems to have arisen from changes, which are set out in a letter to Mr Renshaw, made to the standard form on account of the IR35 legislation. The changes include that the Appellant will not engage in any conduct detrimental to the RML or the client, instead of that it will give priority to the Services over all other business activities; that the Appellant may (rather than shall) provide services at the location of the client; changing references to time sheets to work sheets; deletion of a clause requiring the Appellant to obey all lawful and

reasonable directions of RML or the client; addition of a new provision that the Appellant will provide at its own expense any training that Mr Renshaw may require in order to perform the consultancy, that that it will provide all necessary equipment as is reasonable for the adequate performance by Mr Renshaw (subject to any agreement to the contrary specified in the Assignment Schedule) [which there is not]; the restriction of the Appellant's limitation of liability to £1m rather than its being unlimited; the addition of the type of insurance cover required; addition of a disclaimer that RML makes no representation and takes no responsibility for ensuring that the terms of the contract are an accurate reflection of the relationship between the client and the Appellant, and also that RML accepts no liability for any liabilities "whether by reason of tax or other statutory or contractual liability to any third party arising from the Assignment." In the Assignment Schedule, 35 hours per week is replaced by 5 professional working days; under payment terms on invoice is changed to 7 days/weekly; references to a notice period of 4 weeks (which does seem to relate to anything in the contract) and to overtime are deleted. No changes were made to the upper level contract (see paragraph 4(5)) at the same time. In what follows, references to contract (a) are to the later version, although the earlier version was in force until the amendment. Mr Summers said (and I accept) the amendment was agreed in principle in March 2000 but he did not say that it was agreed by the Appellant, and Mr Renshaw merely said that that it was varied with effect from 3 April 2000 although signed later. Since the amended version was sent to him with a covering letter of 17 April 2000 explaining the changes I find that the amendment was made at the date of signature on 3 and 8 May 2000.

(4) The lower level contracts were in standard form with an "Assignment Schedule" specific to the particular work. Each contract provides for the Appellant to start on a specified date and continue to provide the services for the duration of the assignment with the contract automatically terminating on completion of the assignment. In other words it envisages a specific assignment. However the Assignment Schedule does not refer to a particular assignment but describes the assignment as "consultant" (contract (a)) or "software consultant" (the other contracts) and also specifies an end date. The Schedule therefore seems to me to change the nature of the contract from carrying out an assignment to a fixed term contract for the provision of consultancy services. The contracts contain the following terms:

> (a) The Appellant is to provide the services set out in the Assignment Schedule, but the schedule does not refer to any services other than the assignment. The services are to be provided on the terms of the agreement and the terms of the upper level contract are incorporated "where applicable."
>
> (b) The Appellant is named as "consultant"; and Mr Renshaw is named as "Personnel". No changes are to be made to the personnel without RML's consent, which shall not be

unreasonably withheld. All personnel must be employees of the Appellant.

(c) They provide for "5 professional working days" (contract (a)) or 35 hours per week (the other contracts).

(d) NPI or AMP is named as the client. In each contract he is described as "reporting to" Mike Clark (contracts (a) and (b)) or Matthew Brown (contracts (c) and (d)).

(e) The Appellant is required to make good at its expense any services not carried out to the client's satisfaction. There is no evidence that this ever occurred and this provision is not reproduced in the upper level contract. It would mean that no payment would be made for the time spent on correcting work and it is not suggested that this occurred.

(f) The contracts can be terminated immediately by RML if the client no longer requires the Appellant to provide the services.

(5) During the period in question RML entered into the following contracts with National Provident Institution (NPI) (the upper level contracts): (a) 26 February 2000 to 31 August 2000, (b) 1 September 2000 to 23 February 2001, (c) 24 February 2001 to 31 August 2001, and (d) a final one month oral contract 27 August 2001 to 28 September 2001. Except for a few days difference in the dates there are therefore equivalent lower and upper tier contracts every six months, with a final month. They include the following terms:

(a) Mr Renshaw is named as the consultant.

(b) RML confirms that Mr Renshaw will obey any lawful instructions given by NPI.

(c) The supervising manager is named as Mike Clark (contracts (a) and (b)), or Matthew Brown (contract (c)) who were not based in Cardiff. Mr Clark provided a witness statement but did not give oral evidence. I accept his evidence but bear in mind that he was not cross-examined. He sets out a table of the differences between an employee who was IT Project Manager as an employee, and a Contract IT Project Manager such as Mr Renshaw adding "The roles themselves were essentially the same, requiring the same skills and experience and focused on the same objectives and deliverables." The differences in his table were that the employee had flexible start and finish times with the ability to build up credit and take off up to one day per month; was paid monthly; was paid holiday and sick leave; was a member of the company's non-contributory pensions scheme; had private medical insurance, performance related annual bonus and share option scheme; was employed under a permanent contract until resignation, redundancy, dismissal etc; and was subject to annual performance and competency review,

a personal development plan including company-financed training. In contrast Mr Renshaw worked a minimum 7 hours per day (I accept Mr Renshaw's evidence that there was some flexibility here in reality) and could not build up credit; was paid at a daily rate monthly against timesheets; had no paid holiday or sick leave; was not in the pension scheme; had no private medical insurance, bonus or share options; was engaged on typically a 6 months short-term contract, with the offer of a subsequent contract being dependant on business need, satisfactory performance and agreement of rates, contracted via an intermediary who put forward suitable candidates, assisted with rate negotiations and managed the time sheets and invoicing; there were no formal performance reviews, no personal development or training other than on-the-job training of company specifics to enable completion of agreed tasks.

(d) The assignment is described as team leader (contract (a)), or project management/leader (contract (c))

(e) The place of work is in NPI's office in Cardiff. The nature of his work on the computer system necessitated his being on site during normal working hours but occasionally it was necessary for him to visit other sites, for example to talk to accounts staff if action needed to be taken to computer systems affecting them. Some work such as writing reports would be done on the train or at home, and he would also make phone calls away from the office using his own mobile phone. He also used his own laptop computer to work on the train.

(f) A rate of pay per working day is given. Working day is defined as "A working day is normally 7 hours, but the Consultant may be required to work beyond 7 hours on any particular day to ensure the completion of an agreed task." Overtime was not in fact paid although the contract provides for this if requested by NPI, and contract (a) states after "term leader" "(including hours of work and reference to overtime, if applicable)". In practice he normally worked more than 7 hours, particularly when changes were needed, for example on the introduction of stakeholder pensions, or when severe problems needed fixing. There was some flexibility; for example, there was no problem about leaving early if the work was complete, and hours might be varied by agreement with Mr Clark. In practice he would be paid for a half-day of 3.5 hours; there are three examples of this in the summary of time sheets from 9 April 2000 to 6 April 2001. Weekly time sheets (later work sheets, which are virtually identical) were completed with 7 hours even if more were worked and certified by someone at NPI. There was a separate record of the true time spent of each job for planning purposes but I was not shown an example.

The only occasion when a separate additional payment was negotiated was over the Millennium when he had to cover New Year's eve.

(g) Payment was made against time sheets (the change to describing these as work sheets made in the lower level contract was not made in the upper level contract). Invoicing was monthly with payment within 30 days.

(h) The contract was terminable immediately by NPI during the first six weeks and thereafter on four weeks notice. I accept Mr Summers' evidence that this provision was something that RML negotiated for, which they did not need so far as the lower level contract was concerned as this was terminable immediately on termination of the upper level contract. Contact (c) was also terminable on four weeks' notice by RML.

(i) Although there is no provision for holidays, in practice during the period from 9 April 2000 to 6 April 2001 he did not work for five weeks plus a few additional days which were presumably holidays, as he said that he did not have any absence for sickness. He would give NPI notice if he were away and some of his work would be covered by a member of the team.

(j) Contract (c) envisages that NPI may novate the contract with AMP (UK) Services Limited.

(k) The final month, contract (d), was a hand-over period after NPI or AMP had decided and informed him in June 2001 that the function would in future be dealt with by permanent employees and run from another location. Mr Renshaw was offered the job but declined it as he did not want to be an employee.

(6) Mr Renshaw's work consisted of leading a team that supported and maintained (including updating to deal with legislative changes) two NPI mainframe computer systems dealing with group pensions, originally the West system and then the Alice system. The work was primarily "fix on fail." Users would report faults to a help desk which logged calls and initially categorised them into four levels of severity based on company guidelines, depending for example on whether the problem affected the whole system or only one person. Such reports might happen 20 times in a day. Mr Renshaw received the log, worked out what needed to be done and he might change the priority categorisation before passing it to a member of his team of six or seven technical programmers to take action (the team was smaller at the end of the period as more of the work was outsourced). The six monthly contracts did not coincide with any particular aspect of the work; there would be computer problems to fix at the beginning and end of each contract. He would give a statistical report every fortnight to Mr Clark, who would also be informed immediately of

problems falling into the most urgent category. Mr Clark might sometimes suggest that he copy reports to others who might be affected. Poor performance by a member of the team would in the last resort be discussed with Mr Clark. He discussed salary reviews of members of the team with management. He was not otherwise concerned with career development of members of the team which would be dealt with by a manager. He described as typical day as including considering a print-out of outstanding problems on the train; having an early morning meeting with representatives of the various departments to pick-up on problems; talk to his team to arrange priorities; attend meetings and deal with phone calls; progress problems to a result; negotiate with managers for a suitable time to fix software problems if this meant that the system would be unavailable; he would deal with paper work and phone calls on the train on the way home using his own mobile phone.

(7) Mr Renshaw had never seen the upper level contracts the terms of which are incorporated by reference into the lower level contracts until the papers were prepared for this appeal. He did not ask to see these at the time they were entered into. While I expect that RML might not want to show him the figures which would show their mark-up they could hardly have refused to show him the terms that were incorporated into the lower level contracts if he had asked. While accepting that he was unaware of them, as the Appellant entered into the lower level contract incorporating its terms I shall take it and Mr Renshaw as having agreed to these terms.

5. Mr Renshaw was an impressive witness and I accept all his evidence. He had been employed by Allied Dunbar for 18 years and he had decided to work in a freelance capacity, but through the medium of the Appellant company. He is a man dedicated to his work and serving his clients, being intent on achieving results for the client, if necessary by working long hours although without additional remuneration. He knew what it was like to be an employee in the past, and now did not have an employee mentality. He was prepared to take the risk of having a series of six-month assignments which might not be renewed in order to receive a higher rate of remuneration than he would receive as an employee, although he lost all fringe benefits. The additional risks he was taking were real. He is understandably indignant that the Revenue should treat him indirectly as an employee by the IR35 legislation.

6. Mr Summers gave evidence that he was employed by Resource Control and Management Limited (RCaM) until April 2002 (although his witness statement had originally said 2001) when he joined RML. RCaM monitored and controlled subcontractors and agencies providing them, such as RML, on behalf of, originally, Pearl Assurance and also AMP which took over both Pearl and NPI. RCaM lost that contract to RML in March or April 2001 following which RML wore two hats, their original agency hat, and the new supervisory role that was formerly carried out by RCaM. He said, and I accept, that during the period in question changes were being made to the contractual arrangements. I was shown a contract dated 9 May 2001 between AMP and RML having effect from 1 March 2001 which is the contract under which RML took over RCaM's role, although the copy I saw did not have signatures.

That contract provides in an Appendix for a draft agreement between AMP and an IT Services Agency. I also saw a contract dated 15 September 2002 between AMP and RML but without any signatures and with schedules uncompleted. Mr Summers said that there was an earlier similar verion which could not be traced. It seems that this contract was intended to be used rather than the actual upper level contracts entered into from about 1 March 2001 when RML took over RCaM's role. It is possible but I am unable to make any finding that a similar contract was in use when RCaM were carrying out the supervising function before that date. This evidence is insufficient, particularly as I heard nothing from AMP, for me to find that the 15 September 2002 contract better reflects the terms of the upper level contract from 1 March 2001 and so I am bound to take the contracts that were actually entered into. However, because Mr Robertson placed reliance on its terms I note that it differed from the upper level contracts in the following respects: RML may propose a substitute who needs to be approved in writing by AMP; RML must comply with any timetable or other targets or project requirements as is reasonably required by AMP; RML may exercise a degree of control as to the method of performance of the services and undertakes to use reasonable endeavours to ensure that industry standards are complied with; subcontractors may take leave only with the agreement of RML and AMP; if the contractor is unable to work both RML and AMP must be informed; AMP may terminate the contract on one week's notice during the first six weeks; all clauses are to be represented in the contract between RML and the contractor; the uncompleted schedule provides for an eight hour day and overtime when authorised in advance. I record that the differences would have made no difference to my decision.

7. Before Mr Summers' evidence and in particular before he changed the date mentioned at the beginning of paragraph 6 above I thought that I was being given evidence from RML about the contracts entered into with NPI. I realised that Mr Summers was not concerned with RML except in RCaM's supervisory capacity before 1 March 2001 and then not at all until April 2002 when he joined RML. Bearing in mind that Mr Renshaw was unaware of the terms of the upper level contracts I gave Mr Robertson the option of calling further evidence and in the circumstances I agreed to Mrs Quinn of RML giving evidence by conference call. Mrs Quinn confirmed the existence of the changes to the arrangements mentioned by Mr Summers but could not recall the contractual position.

Legislation

8. Regulation 6(1) of the Social Security Contributions (Intermediaries) Regulations 2000 provides:

> "These Regulations apply where—
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client"),
>
> (b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and

(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act [the Social Security Contributions and Benefits Act 1992] as employed in employed earner's employment by the client."

"Intermediary" is defined in Regulation 5 and it is common ground that the Appellant is an intermediary for this purpose.

Preliminary points

9. Mr Robertson raised four preliminary points. First that as the notice that the Regulations applied has not been sent to NPI, it was invalid. Secondly, that the client was RML and not NPI and the notice was invalid for naming the wrong client. Thirdly, it was the Revenue's duty to obtain evidence before making a decision on status. Fourthly, that the delay had prevented him from obtaining evidence from those at NPI.

10. Regulation 3 of the Social Security Contributions (Decisions and Appeals) Regulations 1999 requires that a decision "must state the name of every person in respect of whom it is made," who is the person who can appeal it. Regulation 4 states that notice of a decision referred to in regulation 3 must be given "to every person named in the decision." No notice was given to NPI which Mr Robertson contended invalidated the notice since NPI are named in the decision. Mr Faulkner contended that NPI were not affected by the decision and so it was not made in respect of NPI who were not required to be given notice. I agree with Mr Faulkner. The decision was made in respect of the Appellant and Mr Renshaw because it affected their national insurance contributions. Although NPI are named so as to make clear to what relationship the notice applied the decision is not made in respect of NPI and so there can be no purpose in requiring them to be given notice. The reference to persons named must be construed as persons affected by the notice who are named in it. Commercially the relationship with NPI may have been affected because if the Regulations applied the Appellant has to pay national insurance contributions that it was not expecting to pay. But legally NPI was in the same position whether or not it applied. It would continue to pay RML the same amount, although they might seek to renegotiate the amount in the next contract. I consider that the notice was valid.

11. On the question of who is the client, Mr Robertson contended that as RML acted as a principal they were the client. Before RML took over RCaM's supervisory role on 1 March 2001, by which time contract (c) was already in force, RML's role was only that of introducer. The lower level contracts name the client as NPI (or AMP in contracts (b) and (c)) as the "Client," defined as "the person, firm or company requiring [RML's] services." Mr Renshaw was working at NPI's premises managing a team dealing with their computer. His services were performed, in the words of Regulation 6(1)(a), for the purpose of NPI's business. It is therefore unarguable that the client can be anyone other than NPI (or AMP). While during the one month's duration of contract (d), RML had a far greater role in managing the agents introducing contractors to NPI (or AMP) the reality was that there was an oral continuation of the contracts naming NPI (or AMP) as the client and Mr Renshaw

continued to work on their premises. In my view it is clear that throughout NPI (or AMP) was the client referred to in the legislation.

12. On the third point, Mrs Gibb gave an informal ruling that IR35 applied after receiving the following information: the contracts between RML and the Appellant and Mr Renshaw's "explanation of contract terms." Although a return had been made on the basis that IR35 did not apply she was willing to give an informal opinion as to whether it applied to assist the making of future returns. Before making the decision appealed against she had in addition some further explanations by Mr Renshaw, written answers from Mr Clark and correspondence with Mr Robinson. Mr Robertson cross-examined her at length on the effect of the Inland Revenue manual which states:

> "The officer dealing with the case should establish all the facts necessary to form an opinion of the status. This fact finding exercise is likely to take a variety of forms and may include field visits, interview(s), and examination of documents and contracts."

Mr Robertson interpreted this as requiring the Revenue to obtain all the facts themselves. It seems to me that his contention is based on a misunderstanding of the law. If the taxpayer wants an opinion it is up to the taxpayer to provide all the information so that the Revenue can form an opinion. In the words of Bingham LJ in *R v IRC ex p. MFK Underwriting Agencies Ltd* [1989] STC 879, 892f, he must "put all his cards face upwards on the table." If Mrs Gibb did not have enough information to form an opinion she would merely have said that. She was given enough information that, in her view, she could give an opinion, and she was willing to receive more information. In doing so she was acting absolutely correctly. The situation is that the taxpayer knows everything, and the Revenue knows nothing, of the facts. The manual envisages that the Revenue will help by interviewing people but that is where the taxpayer requests the interviews. It is not for the Revenue to go looking for facts that are in the taxpayer's knowledge, particularly so in this case when Mr Renshaw declined to attend an interview (as he is perfectly entitled to do). Any other system would be unworkable.

13. Mr Robertson's point on the delay is really a continuation of his point about the Revenue being obliged to search for information. He says that because the Revenue did not approach RML or NPI in 2001 the information is no longer available because NPI's and AMP's UK operations were demerged and are now administered by HHG plc. It follows from my decision on who has the responsibility to obtain evidence that there is nothing in this point. If the Appellant wanted evidence it could have obtained it at the time.

Reasons for my decision on whether IR35 applies

14. The IR35 legislation requires one to establish the terms of a hypothetical contract between Mr Renshaw and NPI. Mr Robertson made detailed suggestions as to what the hypothetical contract would contain. Mr Renshaw controls the Appellant and, as is to be expected, there are no express terms setting out their relationship. Treating Mr Renshaw as being party to the Appellant's contracts is therefore straightforward. The lower level contract expressly incorporates the terms of the upper level contract (so far as applicable) and so there is limited scope for conflict between them, and it is

relatively straightforward to cut out RML. Doing this results in the following terms for the hypothetical contract between Mr Renshaw and NPI:

(1) A series of three six months' contracts and a final one month contract.

(2) Description of the work as team leader, or project management/leader in charge of managing a team, but with no stated assignment.

(3) Working at NPI's office in Cardiff.

(4) Reporting to a named supervising manager.

(5) Working on continuing computer support and maintenance rather than on a specific assignment with a finite life.

(6) Obliged to obey any lawful instructions of NPI.

(7) Paid a daily rate for days worked (in practice applied to half a day).

(8) Working at least 7 hours per day but may be required to work longer to ensure the completion of an agreed task.

(9) Paid against time sheets or work sheets monthly within seven days (the time limit in the lower level contract).

(10) Terminable by NPI on four weeks' notice after the first six weeks of each contract, and immediately during the six weeks. Although I have accepted that this was included at the insistence of RML who are not a party to the notional contract, I consider that it should be included in the notional contact as NPI had conceded it and commercially it is of benefit to Mr Renshaw. Since the lower level contracts provide for immediate termination if the client (NPI) does not require the services, the upper level contract must take priority because if NPI no longer required the services of the Appellant it would have to give RML the contractual notice in the upper level contract.

(11) Not containing any of the usual features of contracts with employees listed by Mr Clark (see paragraph 4(5)(c)).

15. A number of different tests have been developed by the courts to determine whether an employment relationship exists. I list below those relied upon by the parties and I shall briefly set out the contentions of the parties and my findings on how each of them applies to the hypothetical contract:

Mutuality of obligation. Mr Robertson contends that there was no obligation on the parties to renew the contracts at the end of each six months' term, which is common ground. Mr Faulkner contended that there was full mutuality here. It does not seem to me to be relevant that there was no obligation to enter into another contract on termination of each one. This factor may be relevant to determine whether someone is employed under a single contract where there is an umbrella contract but there are breaks in work when the employer is free not to offer work and not to pay, as in *Carmichael v National Power* [1999] 1 WLR 2042. In this case mutuality is satisfied by NPI's obligation to pay a rate for a working day throughout each of the upper level contracts subject to their being able to terminate it on four weeks' notice after the first

six weeks of each contract. The reality was that there was plenty of work requiring Mr Renshaw's continuing services in managing the team supporting and maintaining the computer system, and this factor points towards an employment relationship.

Personal service and right of substitution. Mr Robertson contends that there was a right of substitution in the lower level contact which should be treated as incorporated into the hypothetical contract. Mr Faulkner said that this fell short of being a right. Mr Renshaw was the only employee of the Appellant and is the named consultant in both the lower and the upper level contracts. Any change would require (a) the Appellant taking on another employee, (b) obtaining RML's consent (not to be unreasonably withheld) as envisaged by the lower level contract, and (c) renegotiation of the upper level contract. I do not consider that I should imply that the lower level contract term be included in the hypothetical contract because RML did not agree such a term with NPI, although it meant that the two contracts were different, and so there is no evidence that NPI would have agreed if the question had been put to them. More importantly, however, even if the same provision had been in the hypothetical contract it would not have amounted to a *right* of substitution; it was no more than a possibility envisaged by the contract to which NPI might or might not have agreed, although their consent was not to be unreasonably withheld, and if the Appellant had taken on another employee. The reality was that only Mr Renshaw would do the work. I have accepted Mr Summers' evidence was that even if the Appellant had proposed a substitute, RML would have tried to bring in its own substitute. Mr Robertson also made the point that the contracts did not provide for holidays but in practice these were taken and some of Mr Renshaw's work had to wait for his return, so this cannot be used as an argument in support of substitution. This factor points to an employment relationship.

Control. Mr Robertson contended that control could cover what, where, when and how the work was done. He contended that NPI merely set the objectives; the nature of he work required most of it to be done in Cardiff; there was no control over the days worked, or how the work was done. Mr Faulkner drew attention to the control clause in the upper level contract. The upper level contract provided that Mr Renshaw must obey any lawful instructions given by NPI and work a seven hour day at NPI's office in Cardiff. Mr Renshaw was left to arrange how his and his team's work would be done but he reported to Mr Clark fortnightly and Mr Clark was kept informed about serious computer problems. In this respect Mr Renshaw was similar to a senior employee who was not told how to do his work but made regular reports of the state of the work. Clearly some control over Mr Renshaw was necessary as he was in charge of a team of NPI's employees.

In business on own account. Mr Robertson contended that the Appellant was certainly carrying on business and had other letting activities. Mr Faulkner said that the Appellant's other activities would not be relevant to the hypothetical contract. I agree. Mr Renshaw did not do other work at the same time. His only work from 1997 to September 2001 was for NPI. This factor points to an employment relationship.

Business risk. Mr Robertson pointed to the need to renegotiate the rate of payment in each six monthly contract, Mr Renshaw might have been required to work additional hours without extra payment, there was a risk attached to 7 days credit, he took risks as a director of the Appellant, the contract might have been terminated, and he took out his own insurance. Mr Faulkner contended that these were minor risks. In my view as he could not earn more by working longer hours because the Appellant was effectively paid a daily rate, this is more like an employment relationship. The other factors are unusual for an employee (although an employee paid in arrears takes some risk of non-payment) and point towards self-employment.

Provision of equipment. This is not a factor that is relevant to this type of work as he was working on NPI's mainframe computer. However, he provided his own laptop and mobile phone, which is more indicative of self-employment.

Length and number of engagements, and exclusivity. Mr Faulkner contends that the contracts in question are continuous and follow other contracts between the same parties starting in 1997. Mr Robertson contends that lengthy engagements are neutral as long relationships are regularly found in self-employment. I accept that there are genuinely a series of separate contracts with no obligation to renew them. In this case, however, no work was done for other clients and the work does not consist of a series of finite assignments. This factor points towards an employment relationship under a series of separate contracts.

Payment terms. Mr Robertson contended that the rate of remuneration was higher than for an employee. Although there is no evidence of what an employee would have earned for the same work and one would need to know the cost to the employer of the fringe benefits that an employee would receive, I can accept that NPI paid more under the actual contract that it would have paid an employee because it had the flexibility of taking on the Appellant on a six-month basis as opposed to taking on a permanent employee. But I do not think that helps to categorise the hypothetical contract. Mr Renshaw was paid a daily rate when working and not paid for holidays and sickness which is indicative of self-employment. On the other hand, the daily rate was more similar to an employee in that he could not earn more by working longer hours, which a self-employed person would normally be able to do.

Provision of benefits. He did not receive any of the fringe benefits listed by Mr Clark. This is indicative of self-employment.

Rights of termination. I have explained above why I consider that the upper level contract notice period should apply to the hypothetical contract, which is accordingly terminable on four weeks notice after the first six weeks of each contract. This is a slight pointer towards an employment relationship because termination on notice is less usual in self-employment.

Intention of the parties. It is not possible for the parties to have any intention over a hypothetical contract. However, the actual contracts were necessarily not employment contracts.

Part and parcel of the orgainsation. Mr Robertson contended that working with NPI's staff was dictated by the nature of the work and so this factor was neutral. Mr Faulkner contended that Mr Renshaw was fully integrated in the NPI organisation working with a team and in reporting to a manager. It seems to me that Mr Renshaw was very much part and parcel of NPI's organisation being the in-house person in charge of a team of people, not only in carrying out the work but being involved with salary reviews and poor performance of members of the team, although not with their career development more generally. He was working on a continuous process of computer support and maintenance rather than being engaged for a particular assignment. The six monthly contracts did not coincide with any particular assignment. This factor is a strong pointer towards an employment relationship. The work was identical to that of an employee; as Mr Clark put it: "The roles themselves were essentially the same, requiring the same skills and experience and focused on the same objectives and deliverables." He was eventually replaced by an employee.

16. Standing back and asking myself would Mr Renshaw be an employee under such a hypothetical contract, the factors that I consider are important in the present case are that he was the person in charge of a team in the sense of having management responsibility for the team, and in turn he was regularly reporting to a manager; that he was carrying out continuous support and maintenance work rather than a specific assignment; that he was paid a daily rate and could not therefore earn more by working longer hours; that he did not work for other clients; and that the arrangement would be terminable on four weeks' notice, all of which point towards an employment relationship. Other factors point away from employment, such as the absence of any usual employee fringe benefits (although in practice he had a normal holiday entitlement), and the method of payment against invoices and work sheets. Some other factors do not seem to me to be important to this question, such as the provision of equipment, and the lack of control over how he did his work. Weighing these all up I consider that clearly he would be an employee. In coming to this conclusion I am fully aware of the different risks involved. Mr Renshaw had absolutely no security at the end of each six months term and the reason that his contract was renewed was no doubt because he was good at his job. But in return he was paid more although against this he received no fringe benefits. To him, the difference in risk of not being able to renew the contract was no doubt very important and made him completely unlike an employee. But IR35 does not seem to pay attention to this as it starts from the actual contractual position and asks one to assume that it is replaced by a hypothetical contract. One therefore looks at each separate six-month contract separately. But the fact that there was actually a continuous series of six monthly contracts unrelated to any particular assignment merely makes the case for looking at this as an employment relationship stronger.

Concluding remarks

17. I said earlier that I would make some final comments about the preparation of IR35 cases. As Sir Donald Rattee said in *Future-on-Line Limited v Foulds* [2004] EWHC 2597 (Ch) at [25]: "In my view it is necessary to take account not only of the terms of the actual contractual arrangements between the appellant and [the other parties], but of all the other circumstances in which [the consultant] performed his services for the purposes of [the client's] business in order to test whether, had those

circumstances been different only to the extent that the services were provided pursuant to a contract directly between [the consultant] and [the client], [the consultant] could properly be regarded as employed by [the client]." I found myself extremely short of real evidence particularly about the other circumstances in which Mr Renshaw performed his services. Mr Renshaw's witness statement devotes a mere nine lines to "nature of services." The rest of the witness statement is really argument or a description of the contractual position. When, having read all the papers, I started hearing the case all I had about the nature of the work were the two statements which Mrs Gibb had. After Mr Renshaw's evidence in chief I asked if he would describe a typical day as I still felt that I did not have a proper picture of what the case was about. While I appreciate all the work that went into the preparation of the case what would have helped me much more than a survey of employment law would have been a detailed description of the type of work that Mr Renshaw performed throughout the various contracts. By the end of his evidence I had a good idea about this but this type of basic factual evidence should have been available also to the Revenue before the case started. I was even more hampered by the lack of any evidence from NPI, which seems to be a recurring problem with IR35 cases. The client's interests are not the same as the Appellant's and in examining the terms of a hypothetical contract it is necessary to have oral evidence from both parties to such a contract in order to obtain a clear picture. This was particularly the case here where Mr Renshaw had never seen the upper level contracts and the only evidence I originally had from RML was from Mr Summers, who only joined RML in 2002, and the only evidence from the NPI side was Mr Clark's witness statement of less than one and a half pages. What was required was oral evidence to put some flesh on the upper level contract. That would be necessary in any appeal but here there were suggestions that NPI were using an old form of contract that did not reflect the true position and therefore I was being asked to pay attention to an upper level contract dated 15 September 2002 on the assumption that there was an earlier version that could not be found. The Revenue were under the impression that Mr Clark would be called as a witness; the tribunal directed on 14 September 2004 that if he had not consented to give oral evidence within 30 days of the direction the Appellant would make a request for a witness summons. It was also unfortunate that Mr Summers changed a vital date in his witness statement at the start of his evidence which meant that I would have heard no oral evidence from either party to the upper level contract. I gave the Appellant the opportunity of asking an adjournment. Having Mrs Quinn's evidence by telephone conference without any witness statement was very much a second best. I should like to say that I found Mr Faulkner's skeleton extremely helpful. It was clear, succinct and fully cross-referenced to the documents, and his use of different colour paper for different types of contract was most useful. He was faced at the end of the first day with the difficulty that Mr Summers had explained for the first time the relevance of the 15 September 2002 contract that quite reasonably he had treated as irrelevant. The procedural rules are designed to avoid any ambush and they did not work on this occasion.

18. Accordingly I dismiss the appeal.

JOHN F. AVERY JONES

SPECIAL COMMISSIONER
RELEASE DATE: 17 January 2005

SC 3125/03

Authorities referred to in skeletons and not referred to in the decision:
R v IRC ex p. Professional Contractors Group Ltd 74 TC 393
Express & Echo Publications v Tanton [1999] IRLR 367
FS Consulting Ltd v McCaul [2002] STC (SCD) 138
Future on Line v Faulds [2004] EWHC 2597
Hall v Lorimer 66 TC 349
Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173
Massey v Crown Life Insurance [1978] 1 WLR 676
McManus v Griffiths 70 TC 218
Morren v Swinton and Pendlebury BC [1965] 1 WLR 576
Mrs MacFarlane and Mrs Skivington v Glasgow CC EAT/1277/99
Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612
Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497
Secretary of State for Employment v McMeechan [1997] IRLR 353
Synaptek Ltd v Young 75 TC 51
Usetech v Young [2004] STC 1671
Global Plant Ltd v Secretary of State for Social Security [1971] 1QB 139
WHPT Housing Association v Secretary of State for Social Services [1981] ICR 737
Stevedoring & Haulage Services Ltd v Fuller [2001]EWCA Civ 651
Montgomery v Johnson Underwood [2001] IRLR 269
Propertycare Ltd v Gower [2003] EAT/547
Clark v Oxfordshire Health Authority [1997] EWCA 4792
Spring v Guardian Assurance plc [1995] AC 296
Ansell Computer Services Ltd v Richardson [2004] STC (SCD) 472
Narich Pty Ltd v Commissioner of Payroll Tax [1984] ICR 286
Byrne Brothers (Formwork) Ltd v Baird [2002] IRLR 96
Lime IT v IRC [2003] STC (SCD) 15
Horner v Hasted 67 TC 439
Tilbury Consulting Ltd v Griffiths [2004] STC (SCD) 1

Island Consultants Ltd v Revenue & Customs [2007] UKSPC SPC00618 (05 July 2007)

IR 35 – business and data analysis contractor working on a series of three-month contracts for a five-year computer project –whether would be an employee if engaged directly by the client – yes – appeal dismissed

THE SPECIAL COMMISSIONERS

ISLAND CONSULTANTS LIMITED Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS Respondents

Special Commissioner: DR JOHN F. AVERY JONES CBE

Sitting in public in London on 28 June 2007

David Smith LLB FTII, Accountax Consulting Limited, for the Appellant

Peter Death, HMRC Appeals Unit North West and Midlands, for the Respondents

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DECISION

1. This is an appeal by Island Consultants Limited against a Notice of Decision dated 20 August 2004 for National Insurance Contributions in respect of the period 6 April 2000 to 5 April 2003 and Notices of Regulation 80 Determinations to PAYE dated 20 August 2004 in respect of the three tax years 2000-01 to 2002-03. It concerns what is popularly known as the IR35 legislation. The Appellant was represented by Mr David Smith, and the Revenue by Mr Peter Death.

2. The appeal concerns the work performed by Mr Ian Hough as director and shareholder of the Appellant which contracted with Spring Limited, an IT agency, which contracted with Severn Trent Systems Limited ("STS") (only for periods until October 2001, after which STS did not form part of the chain of contracts) which contracted with the ultimate client, Severn Trent Water Limited ("STW") in connection with a project for a new computerised billing system known as Target. The issue is whether if Mr Hough had contracted with STW he would have been an employee of STW. There is also an issue about whether STS or STW (as stated in the documents under appeal) is the client for the purposes of the legislation.

Facts

3. I heard evidence from Mr Hough, and the Revenue called as witnesses Mr Robert Carson, then project manager of the Target project of STW, and Mr Anthony Sargent, then the person responsible for engaging contractors for capital projects of STW. I find the following facts:

(1) STW, a regulated water company, had a project changing their billing system, the new one called Target. This was a five year project running from the year 2000 involving 3m customers and annual billing of over £100m. It was therefore a large and sensitive project involving data conversion to the new system, replacement of the interfaces to a standard software system (CIS-OV), operational performance of the system, the impact on business processes, system testing and support, training of 1,200 staff in its use, business process changes, and communications to all key parties. Mr Carson managed the entire project. It required management of a mixture of internal staff who would be seconded to work on the project, people from an external software company, and external consultants. The Appellant was one of the external consultants who provided expertise that was not available in-house. STS was a fellow subsidiary of STW that provided software to STW and engaged external IT consultants for STW.

(2) Mr Carson would identify the need for an external contractor, and would prepare a description setting out the skills and experience required. This would be sent to the agencies that were on STW's (or STS's) preferred list of suppliers, which included

Spring, who would put forward candidates who would be interviewed by Mr Carson. STW preferred to have a staff level to cover their base requirements and would use external contractors for peaks of demand for staff even where these lasted for several years, as with the Target project.

(3) The chosen contractor, here the Appellant, would be engaged by contract between STW (or before October 2001, STS) and Spring on a standard form. A sample contract dated 4 April 2001 between STW and Spring relating to the period 9 April 2001 to 5 October 2001 provided for Spring to provide consultancy services which would be provided by its employee ("the Executive"). In fact, the intention of the parties was that Spring would provide the services of other contractors like the Appellant and not its employees. (If STW took over engaging contractors in October 2001 one would expect the party to this contract to be STS but it is STW; in the assignment summary of the Spring-Appellant contract (see paragraph 3(6) below) for the same period names STS as the client. I cannot explain this discrepancy and it is possible that the latter is wrong and the change in fact took place in April 2001, which would tie in with the statement in paragraph 3(7) below, in which case other references to STW taking over in October 2001 should be to April 2001, but the date is not material to this decision.) A later standard form contract applying from 1 January 2003 provides for Spring to supply IT contractor services through a contractor, which gives effect to the intentions of the parties. The standard form contract includes the following provisions:

(a) On control:

"[Spring's] method and timing of work is its own but [Spring] shall and shall procure that the Executive shall:

(i) comply with all reasonable requests of [STW] for information and statements as to progress as the case may require

(ii) co-operate with any of [STW's] personnel concerned with or other company appointed in connection with the project and

(iii) comply with all health and safety requirements and/or policies of [STW].

(b) Neither Spring nor the Executive were entitled to benefits such as holiday entitlement or sick pay.

(c) Either party could terminate the contract on 4 weeks' notice or immediately for cause. In addition Spring may terminate the contract forthwith without notice if STW requested Mr Hough to be removed.

(d) The contract stated that except as expressly provided in the agreement STW had no obligation to use or continue to use the services of Spring.

(4) There was no copy of the Appendix to that contract setting out the details of the particular engagement but a later one relating to 2 January 2004 to 31 March 2004, which I find is likely to have been in similar form to earlier ones, specifies Mr Hough's name; the project's name and phase; Mr Carson is named as project manager; the period of employment is stated; Spring is named as the consultant company; the daily rate is specified; a special condition states that incidental expenses are paid only when specifically authorised by STW; reasons for recruitment are given ("as internal support is not currently available, STW require an external consultant to work on Target Phase 3"); and the previous purchase orders for this contractor are set out.

(5) There were a continuous succession of contracts for three-month periods (or in two cases six-month periods), comprising a total of eleven or twelve separate

contracts (there were copies of 10 contracts up to 31 December 2002 in the documents and a reference to the existence of subsequent contracts for periods up to 31 December 2003). Contracts were often renewed at the last minute by Mr Carson approaching Mr Hough. Mr Hough hoped that the contracts would be renewed but did not necessarily expect this. Mr Carson would have been upset if the Appellant had not renewed the contracts and would have applied moral pressure to encourage it to do so, while recognising that they had no legal liability to do so. Outside the period under appeal Mr Hough worked for STW from February 1998 at least until 2006.

(6) Spring would in turn contract with the Appellant on the following terms:

(a) The contract names the Client: STS until the contract ending 27 October 2001, thereafter STW.

(b) Mr Hough is named as the individual who will provide the services. It states that the Appellant may propose a replacement for the individual but any such replacement shall only take place provided the Client [STW (or as the case may be STS)] is satisfied that the proposed replacement has the necessary qualifications, skills and experience and is suitable to perform services for the Client.

(c) The services are described as "Business Analyst/Data Analyst role."

(d) Time sheets to be provided within 10 days of the end of a month with payment due within the month.

(e) Spring has the right to terminate on 14 days notice for a contract between 8 and 26 weeks duration.

(f) The following is included under the heading Special Conditions:

"The Services Period is to be agreed with the Manager. The Contractor [the Appellant] will provide services at Aqua House Central Birmingham and other Client Midland sites if required. The Contractor will provide services for 4 days per week (32 hours per week) but his manager can request he works a fifth day if the project dictates."

(7) For the period up to October 2001 while STS was in the chain of contracts there was an agreement between STW and STS for STW to pay for STS's work on an arm's length basis as required by STW's water industry regulator. I did not see any copy of this. It was the regulator's insistence of a more formal relationship between the two companies from April 2001 that led to STW taking over engagement of contractors in place of STS in October 2001 (or it may be April 2001, see paragraph 3(3) above).

(8) Finally in the chain of contracts, there was no written contract between the Appellant and Mr Hough.

(9) Mr Hough is an expert in business and data analysis using information technology. Business analysis involves analysing the client's business processes including testing technology from the business perspective by talking to users and identifying and documenting their requirements; data analysis involves analysing the client's data to gain insight into the data used in the business and the data structures required to support the business.

(10) Mr Hough's areas of work on the project at the relevant time were in phase 1 of the project the design of the conversion of the data, including analysis of the data to be converted, definition of the software requirement, and liaison with the software provider and testing of the conversion software. He wrote the terms of reference and

the report into the way audit data would be moved to the new system, and implemented the audit. In phase 2 he was responsible for the design of the conversion of data requiring the merger of data from two old billing systems. He was then responsible for the planning and implementation of the conversion.

(11) In spite of the contractual provision for a four-day week, Mr Hough generally worked five days a week, occasionally six and even seven days during conversion weekends. His hours varied from 5 to 12 hours a day. He worked at the project location except that sometimes he would write a report at home by agreement with Mr Carson. Conversion work had to be done outside normal hours so as not to interfere with normal computer use, usually from 8pm to 10pm and sometimes at weekends. Mr Hough would coordinate this work from his home.

(12) Mr Hough was free to decide the times he attended, the number of hours worked in a day, when he took time off, and when he took breaks during the day. As a matter of courtesy he would agree absences with Mr Carson. Such absences included holidays of normally two weeks at a time taken at less busy periods to fit in with the project.

(13) Mr Hough was expected to correct errors at his own expense. Mr Carson was not aware of this occurring. Mr Hough said that it did occur during conversion when sometimes files would fail to convert properly.

(14) Mr Hough did not manage other people in the STW organisation.

(15) STW provided Mr Hough with a desk at the premises and a laptop for mobile working from other sites, including a dial-in from his home. On three or four occasions he used the Appellant's computer and scanner for this purpose.

(16) Mr Hough had an identity badge showing him as "contractor." He was able to use the canteen and park his car in the STW multi-storey car park. Unlike STW's employees the Appellant did not receive any increase in the rate of payment between April 2002 and January 2006. The Appellant did not receive any holiday pay, sick pay or pension in respect of Mr Hough. Unlike employees Mr Hough did not have a formal annual appraisal. He was in regular contact with Mr Carson. They worked in the same building and would have a formal meeting once a week together with other informal contacts.

(17) There were targets for the number of customers converted by certain times and Mr Hough would report to Mr Carson about progress. Mr Carson did not have IT expertise but could judge the Appellant's work by the progress compared with the targets and by whether the new billing system produced correct bills when tested.

(18) The Appellant billed Spring monthly accompanied by a time sheet on Spring's form specifying the number of days (or half-days) worked by Mr Hough. For three months' invoices the Appellant's VAT registration number was not included on the invoice and STW did not pay the VAT. It took about six months to resolve the problem and a further month to receive interest on the late payment.

(19) Mr Hough personally performed all the duties during the period under appeal. In February 2003 he met Mr Carson one evening and both signed a document headed "confirmation of arrangements between contractor and client." This is a form presumably provided by the Appellant's then advisers containing various alternatives for deleting those that do not apply. The document includes:

"5. The contractor [the Appellant] has the right/ ~~does not have the right~~ to send a substitute to carry our the services specified in the contract in the place of Ian Hough [Mr Hough's name is added in manuscript]

6. The contractor has the right/ ~~does not have the right~~ to subcontract the services to another party.

…

8. If the contractor has the right to subcontract the services and/or to send a substitute, the client [STW] agrees that he will accept that substitute or subcontractor if the latter has the skills to carry out the services specified in the contract…".

In 2005 Mr Carson signed a statement presumably at the Revenue's request, containing the following:

"If Mr Hough were unable to fulfil personally the contractual obligations of [the Appellant] [STW] would be prepared to consider a suitable replacement worker who was recommended and provided by [the Appellant]. This would be subject to [STW] being satisfied that the replacement had the necessary skills and experience to complete the contract."

(20) The 2005 document sets out the true understanding of Mr Carson, and the 2003 document does not. The 2005 document is also in accordance with the agreement between STW (or STS) and Spring. It also represents the obvious commercial reality that STW has an important and sensitive project and they contracted with the Appellant for Mr Hough's services on the basis of his special skills. Another person would find it difficult to pick up the project in the middle and it might take a couple of months to do so unless Mr Hough were directing him.

(21) Mr Hough did not work for any other clients during the period under appeal.

Legislation

4. Regulation 6(1) of the Social Security Contributions (Intermediaries) Regulations 2000 provides:

"These Regulations apply where—

(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client"),

(b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and

(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act [the Social Security Contributions and Benefits Act 1992] as employed in employed earner's employment by the client."

"Intermediary" is defined in Regulation 5 and it is common ground that the Appellant is an intermediary for this purpose.

5. Similar provisions applying for PAYE purposes are contained in Schedule 12 to the Finance Act 2000:

"1—(1) This Schedule applies where—

(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client"),

(b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and

(c) the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client."

Contentions of the parties

6. Mr Smith for the Appellant contends:

(1) The notices were bad for the period up to October 2001 in not naming STS as the client since the contract was with STS.

(2) The hypothetical contract between Mr Hough and STW would lack the irreducible minimum requirement for an employment contract as set out by MacKenna J in *Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance* [1968] 2 QB 497, 515 and approved by the House of Lords in *Carmichael v National Power plc* [1999] 4 All ER 897:

"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

Here control and mutuality of obligations are absent.

(3) On control the contractual provision quoted in paragraph 3(3)(a) above shows a lack of contractual control. In practice Mr Hough was not under STW's (or STS's) control in relation to where, when and how he worked.

(4) Mutuality of obligations must exist throughout the entire period under appeal, relying on *Synaptek Ltd v Young* [2003] STC 543 at [25] where counsel for the Inspector "accepted that if, taking the period of the notional contract as a whole, EDS was under no obligation to provide work, the necessary element of mutuality was indeed lacking for that period" Mutuality of obligation includes continuing the promises to provide and pay for work throughout the contract. The STW-Spring contract expressly stated that there was no obligation to continue to use Spring.

(5) The Appellant had a right in its 2003 agreement with Mr Carson to send a substitute for Mr Hough.

(6) The Appellant had business risk as demonstrated by the problem with obtaining payment of VAT. Mr Hough had to put right defects in his own time.

(7) The terms were not similar to other employees. Mr Hough was identified on his badge as a contractor. There was no intention that an employment relationship existed. While he did not provide any equipment his office at home had the normal equipment found for someone doing some work at home.

7. Mr Death for the Revenue contends:

(1) The notices correctly showed STW as the client as it was STW's project. STS was a supplier of some of the components for the project.

(2) The control test is of little relevance to an expert such as Mr Hough; see *Morren v Swinton and Pendlebury Borough Council* [1965] 2 All ER 349, 351 per Lord Parker CJ with whom the others concurred:

The cases have over and over again stressed the importance of the factor of control, but that it is not the determining test is quite clear. In *Cassidy v Minister of Health*, Somervell LJ referred to this matter, and instanced, as did Denning LJ in the later case of *Stevenson, Jordan & Harrison v McDonald & Evans*, that clearly superintendence and control cannot be the decisive test when one is dealing with a professional man, or a man of some particular skill and experience. Instances of that have been given in the form of the master of a ship, an engine driver, a professional architect or, as in this case, a consulting engineer. In such cases there can be no question of the employer telling him how to do work; therefore, the absence of control and direction in that sense can be of little, if any, use as a test."

(3) There was sufficient control over where and when Mr Hough worked for him to be an employee under the notional contracts. He was expected to attend during normal office hours and agree absence in advance.

(4) In *Synaptek* the statement that there had to be mutuality of obligations throughout the period of separate contracts was a concession by the Revenue which is not repeated here. It is sufficient that within each separate contract there was an obligation to provide work and payment, see *Cornwall County Council v Prater* [2006] EWCA Civ 102 in which a teacher was engaged to teach a particular pupil at the pupil's home under a succession of separate contracts relating to different pupils. Longmore LJ said:

"[43]…There was a mutuality of obligation in each engagement namely that the County Council would pay Ms Prater for the work which she, in turn, agreed to do by way of giving tuition to the pupil for whom the Council wanted her to provide tuition. That to my mind is sufficient 'mutuality of obligation' to render the contract a contract of employment if other appropriate indications of such an employment contract are present."

Here there was clearly mutuality of obligation within each contract.

(5) So far as the other factors are concerned, the financial risk demonstrated by the late payment of VAT was a minor one. In general the risk of non-payment was no greater than that of STW's employees. While payment by a daily rate is more common for self-employment, here the factor is more neutral as the client sets the rate. Mr Hough was paid a daily rate normally for a five-day week like an employee. He could not increase his remuneration by working harder; by working more than the contractual four-day week he was similar to an employee working paid overtime. He had no overheads and stood no risk of making a loss. Provision of equipment was a neutral factor in a case like this. While a series of short engagements may point to self-employment, here Mr Hough is not similar to a businessman offering his services in the market. A notice period is more consistent with employment; self-employment normally ends when the work is completed. The lack of employee-type benefits is not surprising in a contract between companies. Mr Hough was integrated into the STW organisation, although shown as a contractor. Mutual intention cannot apply to a hypothetical contract but the actual intention was for self-employment. Weighing up all these factors points towards employment.

Reasons for the decision

8. Mr Smith put forward a preliminary argument that the notices were bad in naming STW as the client throughout, rather than naming STS until October 2001. Mr Death contended that STS was merely another link in the chain to STW which was the real end-user since the Target project was in relation to STW's billing system and STS was merely the supplier of software and contractors to STW on an arm's length basis. I agree with Mr Death's analysis. For the legislation to apply the services must be performed "for the purposes of a business carried on by another person ('the client')." Here in the period before October 2001 the services were performed directly for STS which is named as the client in the Spring-Appellant contract but, as the Appellant knew, were performed ultimately for the benefit of STW under contractual arrangements between STW and STS. In my view it is correct for STW to be named as the client because the services were for the purposes of STW's business being an STW project. In my view the notices were valid.

9. Having found the facts of the actual relationship between the parties I have to apply the statutory hypothesis that Mr Hough worked for STW and ask whether he would be an employee. Collapsing the actual contractual arrangement leaves the following contract terms including how they were in fact operated:

   (1) A series of 3 (or in two cases 6) months contracts without any obligation on either party to continue, but which are in fact continued continuously for the three year period under appeal (and for periods before and after).

   (2) Services performed at STW's premises at Aqua House, Birmingham or other Midland sites of STW (or STS) if required. Mr Carson did agree to his doing some work from home.

   (3) Four days per week but Mr Carson can request that he works a fifth day if the project dictates. I understand "request" to be short of "require" but if the project did so dictate Mr Hough might find it morally difficult to refuse, at least if he wanted the contract to be renewed. If fact he always agreed.

   (4) Payment monthly within the following month on the basis of days worked (in practice measured in half days) on presentation of time sheets within 10 days of the end of the month.

   (5) Mr Hough was free to decide the times he attended, the number of hours worked in a day, when he took time off, and when he took breaks during the day. As a matter of courtesy he would agree absences with Mr Carson. Such absences included holidays of normally two weeks at a time taken at less busy periods to fit in with the project.

   (6) Mr Hough was required to perform the services himself but if he were unable to fulfil personally his contractual obligations STW (or STS) would be prepared to consider a suitable replacement worker who was recommended by Mr Hough. This would be subject to STW (or STS) being satisfied that the replacement had the necessary skills and experience to complete the contract. No proposal for a substitute was ever made.

   (7) Mr Hough would have to:

   (i) comply with all reasonable requests of STW for information and statements as to progress as the case may require

   (ii) co-operate with any of STW's personnel concerned with or other company appointed in connection with the project and

   (iii) comply with all health and safety requirements and/or policies of STW.

(8) No normal employee benefits such as holiday pay, sick pay or pension.

(9) STW (or STS) may terminate the contract on 4 weeks notice. Since the provision of the Spring-Appellant contract, under which Spring may terminate that contract immediately if STW requests Mr Hough to be removed, is not replicated in the STW-Spring contract it cannot form part of the hypothetical contract.

10. On whether such a contract contains the irreducible minimum for an employment contract, I find that so far as control is concerned, not much control is expected for an expert like Mr Hough as stated in the quotation above from Lord Parker's judgment in *Morren v Swinton and Pendlebury Borough Council*. There must still be some control and there was some control over where he worked; he could be asked to work at other Midland sites of STW (or STS), and working at home required Mr Carson's agreement. There was some control over when the work was performed were as performing conversion work on the computer outside hours of normal computer use. Mr Hough would have to comply with all reasonable requests of STW for information and statements as to progress, which is rather less than one would expect for an employee, and would have to cooperate with other personnel working on the project. There was something just short of contractual control over the number of days per week worked but if the project dictated that more than a four-day week was required Mr Hough did in fact agree to it. I consider that the totality of these amounted to sufficient control, though rather less than one would expect for a normal employee.

11. On mutuality of obligation, there was no obligation to renew the contract after each three (or six) period. This factor may be relevant to determine whether someone is employed during breaks in work, as in *Carmichael v National Power* [1999] 1 WLR 2042, where it was not in issue that they guides were employed while working. As in *Cornwall County Council v Prater* it is sufficient that within each contractual period there was an obligation on STW to provide work and pay the agreed rate; the contrary decision in *Synaptek* depends on a concession made by the Revenue in that case. There was such an obligation for 4 days work a week, or more days if worked at their request, subject to the possibility of STW terminating the contract on four weeks notice. The reality was that this was a five-year project and there was plenty of work requiring Mr Hough's continuing services. STW was obliged to and did provide and pay for work during each separate contract period.

12. So far as the right of substitution is concerned there was none. The most that STW agreed to was that they would consider a request. In practice this would require considerable scrutiny by STW. I think that the Appellant by asking Mr Carson to sign the 2003 "confirmation of arrangements between contractor and client" may have misled itself into thinking that there was a right of substitution in stronger terms than in the Spring-Appellant contract, and in spite of there being no such terms in the STW-(or STS)-Spring contract. Such a provision would not have made any commercial sense and Mr Carson signed the confirmation of arrangements trusting Mr Hough.

13. Accordingly I conclude that the hypothetical contract would have the necessary irreducible minimum to constitute an employment contract.

14. Although the argument at the hearing concentrated on the above factors, the parties' skeletons dealt with the need to stand back and look at the arrangements as a whole as in *Hall v Lorimer* (1994) 66 TC 349. The following factors have been identified in the authorities as relevant, and there is no need for me to cite authority for each well-known factor; my conclusions on each are as follows:

(1) In business on own account. Mr Hough could earn more by working more than four days a week but this depended on the project dictating it. In practice the project did normally dictate it and so he would effectively have a 5 day a week job in the hypothetical contract. He did not work for other clients or offer his services elsewhere

and could not increase his remuneration above the daily rate, which was set by STW. He had virtually no overheads and there was no possibility of making a loss.

(2) Payment terms. Payment within the following month after submitting time sheets within 10 days of the end of the month involves a longer period of risk than for normal employees.

(3) Financial risk. Within each contract the only risk was of non-payment during the period before payment but all employees take some risk of non-payment although with some statutory protection (which would be deemed to apply to the hypothetical contract if it is an employment contract). While defective work had to be put right in his own time, payment was calculated on days of varying length and any corrections were made within that flexibility. There was a delay in paying VAT on one occasion but this was caused by the Appellant not putting the VAT registration number on its invoices.

(4) Provision of equipment. This is not a factor that is relevant to this type of work as he was working on STW's mainframe computer and was provided with a laptop. On rare occasions (only three or four occasions in the three year period) he used the Appellant's computer and scanner while working at home.

(5) Length and number of engagements, and exclusivity. Here there was an expectation, but no legal obligation, that the contracts would be renewed. Both parties knew that this was a five-year project requiring Mr Hough's services as they were not available in-house. A series of short engagements is a slight pointer towards self-employment. Mr Hough did not work for anyone else in the period under appeal.

(6) Provision of benefits. He did not receive any of the fringe benefits received by normal employees. I assume that since he was satisfied with the rate of payment, including the fact that it was not increased during several years, it must have made up for the loss of benefits.

(7) Rights of termination. Termination on four weeks' notice is more usual for employment than self-employment.

(8) Intention of the parties. It is not possible for the parties to have any intention over a hypothetical contract. The actual contracts were necessarily not employment contracts.

(9) Part and parcel of the organisation. Mr Hough had a desk and computer terminal and had the same car-parking facilities and access to the canteen as normal employees, although his badge named him as a contractor (as he was). He was working on a particular project rather than as part of STW's organisation, although other employees were seconded to work on the project alone. He was no in charge of other staff.

15. Standing back and considering the position as a whole, the factors predominantly point towards employment, although a somewhat unusual one. The only factors pointing away from employment are the longer payment terms than normal for an employee, which is not important; and the intention of the parties, which is not directed to the hypothetical situation. Although the number of separate contracts would normally point away from employment, and there was a risk of the contracts not being renewed, while the project needed his services and he was satisfactorily performing his duties, this was not a real commercial risk, and it is inherent in IR35 that one must consider the contracts separately because one starts with the actual contracts.

16. Accordingly I conclude that Mr Hough would be an employee of STW under the hypothetical contract and dismiss the appeal.

17. By way of postscript I should like to thank the two STW witnesses for their witness statements and for attending when this as an additional burden which is of no benefit to them. I have commented in the past about there being either no or inadequate information from the client. In this case I had the fullest information which was most helpful to me.

JOHN F. AVERY JONES

SPECIAL COMMISSIONER

RELEASE DATE: 5 July 2007

SC 3213/06

Authorities referred to in skeletons and not referred to in the decision:

Bank voor Handel en Scheepvart v The Administrator of Hungarian Property [1954] 2 WLR 867

Market Investigations Ltd v Minister of Social Security [1968] 2 QB 173

Global Plant Ltd v Secretary of State for Health and Social Security [1971] 3 All ER 386

Massey v Crown Life Insurance [1978] 2 All ER 576

Nethermere (St Neots) Ltd v Gardiner [1984] IRLR 240

Barnet v Brabyn [1966] STC 716

McManus v Griffiths (1997) 70 TC 218

Express & Echo Publications Ltd v Tanton [1999] IRLR 367

Montgomery v Johnson Underwood [2001] EWCA Civ 318

Stuncroft v Havelock (2001) EAT/1017/00

Propertycare v Gower [2003] UKEAT/054703

Usetech Ltd v Young [2004] STC 1671

Tilbury consulting Ltd c Gittins [2004] STC (SCD) 72

FS Consulting Ltd v McCaul [2002] STC (SCD) 138

Lime IT Ltd v Justin [2003] STC (SCD) 15

Ansell Computer Services v Richardson [2004] STC (SCD) 472

Mal Scaffolding v HMRC [2006] STC (SCD) 253

Parade Park Hotel v HMRC [2007] UKSC SPC00599

Spc00656

INCOME TAX and NIC – IR 35 Legislation – If there had been a direct engagement would it have been an employment? In the circumstances No – appeal allowed

THE SPECIAL COMMISSIONERS **SC/3108/2006**

DATAGATE SERVICES LIMITED **Appellant**

– and –

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

Special Commissioner: ADRIAN SHIPWRIGHT

Sitting in public in London on 23 July 2007

John Antell, Counsel for the Appellant instructed by LawSpeed Limited

Michael Faulkner of Appeals Unit South, HM Revenue and Customs for the Respondents

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DECISION

Introduction

1. This decision concerns:

a. An appeal against a determinations under Regulation 80 Income Tax (PAYE) Regulations 2003 against Datagate Services Limited ("Datagate") in the amount of:

i. £ 8,895.46 for 2001-02

ii. £9,539.76 for 2002-03

iii. £10, 339.16 for 2003-04

b. An appeal against a decision under section 8 Social Security Contributions (Transfer of Functions) Act made on 21 July 2005 that Datagate is liable to pay primary and secondary class one National Insurance contributions of £17,482.87 in respect of the period to 6 April 2001 to 5 April 2004.

2. The parties are agreed that if the "IR 35" provisions applied, the amount shown in the determinations and decision is correct. I am also told that the Special Commissioner's decision will be followed for the years ended 5 April 2005 and 2006.

The Issue

3. The Parties agreed that the point at issue is whether, had the arrangements taken the form of a contract between Mr Barnett and MBDA, Mr Barnett would have been regarded as an employee of MBDA.

4. The Parties also agreed that the position was the same in these circumstances for both income tax and national insurance.

The Law

The Legislation

5. The Law for income tax purposes is found in Chapter 8 Part 2 ITEPA (re-enacting Schedule 12 FA 2000). It provides so far as is relevant:

"48 Scope of this Chapter

(1) This Chapter has effect with respect to the provision of services through an intermediary. ….

49 Engagements to which this Chapter applies

(1) This Chapter applies where—

(*a*) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),

(*b*) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and

I the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client.…

(4) The circumstances referred to in subsection (1)I include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided.

(5) In this Chapter "engagement to which this Chapter applies" means any such provision of services as is mentioned in subsection (1). …

56 Application of Income Tax Acts in relation to deemed employment

(1) The Income Tax Acts (in particular, the PAYE provisions) apply in relation to the deemed employment payment as follows.

(2) They apply as if—

(*a*) the worker were employed by the intermediary, and

(*b*) the relevant engagements were undertaken by the worker in the course of performing the duties of that employment.

(3) The deemed employment payment is treated in particular—

(*a*) as taxable earnings from the employment for the purpose of securing that any deductions under Chapters 2 to 6 of Part 5 do not exceed the deemed employment payment; and

(*b*) as taxable earnings from the employment for the purposes of section 232.

..."

6. The Law for Social Security Contributions purposes is found in the Social Security Contributions (Intermediaries) Regulations 2000.

The Authorities

7. I was provided with copies of the following authorities which I have read and considered carefully:

Hall v Lorimer [1992] STC 599

Ansell Computer Services v Richardson [2004] STC (SCD) 472

WHPT Housing Association v SOSS [1981] ICR 737

The Evidence

8. An agreed bundle of documents was produced. No objection was taken to any of them and they were all admitted in evidence.

9. I heard oral evidence from:

Bret Barnett, the Appellant's director and shareholder of Datagate;

Simon Wycherley of MBDA, the relevant Team Leader;

Nicole Hartland, formerly an HR Manager at MBDA's Stevenage office.

10. Witness statements were provided for all three. A witness statement was also provided for Roger Bartlett. Unfortunately, he was unable to give evidence and be cross-examined because his wife was having a baby.

11. A statement of facts not in dispute was also produced.

12. Ms Hartland's evidence was necessarily of a general nature and by reference to a generalised document concerning employment at MBDA. I found her an entirely honest and competent witness but unable to shed light on Mr Barnett's precise circumstances. Whilst I am grateful for the helpful way she gave her evidence it did not assist me in my task which is concerned with Mr Barnett's individual circumstances not the general employment position at MBDA.

Findings of Fact

13. From the evidence I make the following findings of facts:

(1) Mr Barnett is a person with wide experience of the design and development of computer software.

(2) Mr Barnett is the sole director and shareholder of Datagate. It is a closely held company under his control. He has no written Contract with Datagate.

(3) Datagate was incorporated on 2 February 1999 and began trading on 29 March 1999. The accounts describe its principal activity as computer consultants.

(4) Datagate entered into a contract with Technology Project Services International Limited ("TPS").

(5) The terms of this contract, an hourly rate plus VAT invoice.

(6) Clause 8 provided so far as relevant:

> 8.1 This Contract is a contract for the provision of Professional Consultancy Services; the relationship governed by this contract is neither that of agent-principal, nor that of the employer-employee. Any Consultants provided by you are and will remain employed by you; they are not employed by us, and during this Contract will not be employed by the Client. ...
>
> 8.5 This Contract is not exclusive, and you and your Consultants are and remain at liberty to also provide services of third parties.

(7) Clause 9 of the Contract restricted the provision of services to the Client other than through TPS for a period of six months. I find that this was not a restriction of a type normally find in an employment contract.

(8) TPS had an arrangement with MBDA for the supply of services.

(9) TPS entered into the initial arrangement on 10 January 2001 which ended on 10 April 2001. The arrangement was extended until the 30 September 2004.

(10) Work had to be carried out by a particular person because of security (cf Ansell)

(11) There was no provision for a minimum number of hours to be worked. There was also an ability to take time off.

(12) There was a right to provide substitute so long as suitable security clearance was obtained.

(13) Mr Barnett could arrive when he liked. He could leave when he liked. He tended to arrive after 0930 hours and leave before 1600 hours so as to suit his lifestyle.

(14) Mr Barnett could take time off when wanted to but of courtesy discussed it with the team leader.

(15) Mr Barnett worked with the relevant team but was provided with discrete sections of work. MBDA wish to learn from him.

(16) I find that Mr Barnett's relationship with the MBDA team was that of a professional consultant providing independent services when looked at as a whole.

The Submissions of the Parties

The Appellant Submissions in outline

14. In essence, the Appellant submitted that:

a. Mr Barnett was not an employee, he was like any other "self employed" consultant.

b. There was nothing in the documentation to show he was employed as an employee.

c. The rate was fixed with the agency by Datagate.

d. There was no Contract of Employment. What Mr Barnett did was act as Consultant, as an independent contractor.

e. The precise way this was done was for security reasons and the convenience of the parties. This did not make him employee.

f. Accordingly, the appeal should be allowed.

HMRC's Submissions

15. In essence, HMRC submitted Mr Barnett was effectively an employee.

16. This was because:

a. MBDA had a right of control.

b. The *Ansell* case was different (see particularly paragraph 24 of his decision).

c. Mr Barnett's obligations were those of an employee.

d. The Purchase Orders were the Contract.

e. The documents show this was the equivalent of a Contract of Employment.

f. All the evidence shows Mr Barnett was treated in the same way as employee. He worked in the same way.

g. The time he worked was agreed with MBDA.

h. The work he did was agreed with MBDA.

i. Mr Barnett took part in a trip to Portsmouth at MBDA's request.

j. The HR document showed he was an employee.

k. He wore a work badge.

l. The pay rates were employee pay rates.

m. There was a disciplinary procedure which was the same as the other employee.

n. Mr Barnett was integrated into MBDA's business because there were three in team producing an integrated product.

o. Accordingly, the appeal must be dismissed.

Discussion

Introduction

17. From *Ansell* it is clear that the question that I have to answer is "looking at the picture as a whole [do] I find as a primary fact that Bret Barnett was in business on his own account and was not a person working as an employee in someone else's business" in all the circumstances of the case. I also remind myself that the onus of proof is on the Appellant.

18. HMRC Manuals' draft letter sets out a list of relevant factors which I consider of use. These factors include:

a. Whether there is an ultimate right of control on the part of the engager over what tasks have to be done, where the services have to be performed, when they have to be performed and how they have to be performed.

b. Whether personal services required.

c. Whether the worker has the right to provide a substitute or engage helpers.

d. Who has to provide the equipment and/or materials.

e. Whether the worker has a real risk of financial loss.

f. Whether the worker has the opportunity to profit from firm management, for example by reducing overheads and organising work effectively.

g. The basis of payments.

h. Whether there are "employee type" benefits, for example, sick pay, pensions, holiday pay, etc.

i. Whether the worker works exclusively for the engager.

j. Whether the worker is part and parcel of the engager's business or organisation.

k. Whether there is a right to terminate the engagement by giving notice of a specific length.

l. Factors personal to the worker, for example, number of engagements in business organisation.

m. The intention of the engager and worker as regards employment status.

19. I have carefully considered these factors. In considering these factors I have borne in mind that there is a strong security requirement here.

20. I do not consider that there was an ultimate right of control on the part of MBDA of the type the Manual implies. The engager MBDA could have continued with the engagement had it chosen to, or chosen not to renew the engagement. I do not consider here the position was one of an ultimate right of control as would be the case of an employee. Even if there were I do not consider in the particular circumstances that this would be of the same nature as for an employee. If there was an ultimate right of control this was because of the security requirements and not anything akin to that underemployment law.

21. There is nothing in the documents requiring personal service.

22. The documentation allowed for a substitute to be provided or help us engage.

23. The equipment and materials were provided by MBDA but given the security context it would have been surprising had it been otherwise.

24. The requirement that the worker has a real risk of financial loss is somewhat circular. If the worker is in business on his own account there must be a risk of financial loss. Here, he risked not being continued to be engaged.

25. Mr Barnett was able to profit from sound management by organising his work effectively so as to save himself time and give himself more free time which he had told me was part of the reason that he organised his work in the way that he did.

26. The basis of payment was a fee basis. This is entirely consistent with self employment. On the evidence before me there was no employee type benefit such as sick pay or pensions provisions.

27. There was no requirement that Mr Barnett work exclusively for MBDA.

28. Whilst the position was that Mr Barnett was engaged in assisting MBDA's business I do not consider that he was "integrated" as an employee in the way that the Tort cases sometimes suggest. There was evidence that MBDA sought to give him specific projects which so far as possible which were self contained. I find as a fact that Mr Barnett was not integrated into MBDA's business or organisation.

29. The engagement could be terminated but I do not regard this as being the equivalent of being able to give notice under a contract of employment.

30. I do not find that the number or continuation of employment gives rise to employment status.

31. The intention of the parties seems to have been that there should be no employment. Why else would this structure have been set up? I find as a fact that the parties intention was that there should be no employment.

32. Standing back and "looking at the picture as a whole I find it a primary fact that Bret Barnett was in business on his own account and was not a person working as an employee in someone else's business on the hypothetical requirements that the legislation requires. He chose to do this through his company.

33. Accordingly, the appeal is allowed.

SPECIAL COMMISSIONER
RELEASE DATE: 20 December 2007

SC/3108/2006

Spc00655

Income tax – Worker supplied through intermediaries – "IR 35" – Schedule 12 FA 2000 – Whether circumstances were such that had the services been provided under a contract directly with the worker the worker would have been an employee – Held : yes

National Insurance – Worker supplied through intermediaries – "IR 35" – SI 2000/727 Regulation 6 – Whether circumstances were such that had the arrangements taken the form of a direct contract with the worker the worker would have been an employee – Held : yes

THE SPECIAL COMMISSIONERS

DRAGONFLY CONSULTING LTD **Appellant**

- and –

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

Special Commissioner: CHARLES HELLIER

Sitting in public in London on 20 and 21 September 2007

Dave Smith and Nicola Smith of Accountax Consulting Ltd, Chartered Tax Advisers, for the Appellant

Mike Faulkner of HMRC Appeals Unit for the Respondents

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DECISION

1. Dragonfly Consulting Ltd appeals against the following decision and determinations made by the Respondents under what are commonly known as the IR 35 provisions:

> (i) a decision issued on 30 April 2004 for the period 6 April 2000 to 5 April 2003 in respect of National Insurance Contributions; and
> (ii) determinations issued on 18 June 2004 in respect of PAYE for the same period.

By these determinations and this decision the Respondents seek some £99,000 from the Appellant.

2. In the relevant period Mr Jon Bessell who was the director of, and owner of 50 per cent of the shares in, the Appellant had, via arrangements between (1) him and the Appellant, (2) the Appellant and an agency, DPP International Ltd (DPP), and (3) between DPP and the AA, provided his services to the AA.([*])

3. In outline, the IR 35 legislation, which I shall describe later, provides that if the circumstances are such that, had Mr Bessell performed his services under a contract directly between him and the AA, that contract would have been one of employment, then the Appellant will be liable for NI contributions and PAYE calculated broadly on the basis that the payments it received were emoluments it paid to Mr Bessell. The Appellant contends that under such a contract Mr Bessell would not have been an employee.

4. The argument before me related to the nature of the hypothetical contract, and whether or not Mr Bessell would have been an employee in relation to it, and not to the amounts involved. This is therefore a preliminary decision.

5. In the remainder of this decision I shall first discuss the evidence and set out my findings of fact, then address the relevant law, and then reach my conclusions on the appeal.

Evidence and Findings of Fact

6. There was a joint bundle of documents. I heard oral evidence from Mr Bessell; from Jane Tooze, who had, through her own service company provided services to the AA in the relevant period and who had been responsible for part of the project on which Mr Bessell worked in the period October 2002 to April 2003; from Alan Palmer who was an employee of the AA in the relevant period acting as an IS Test Manager, and responsible for part of the projects on which Mr Bessell worked between February and July 2000, and between May 2002 and September 2002; and

[*] The AA was [acquired] during the relevant period by Centrica. I have used `the AA' to refer to companies in the combined group.

from Alan Kersley who in the relevant period was Head of Change Delivery at the AA. All of them provided witness statements. In the days before the hearing the Appellants produced a letter from Christine White who described herself as The AA Commerce Programme Manager. Ms White did not give oral evidence.

General Findings of Fact

7. I find the following facts:-

(i) Mr Bessell is a highly skilled IT system tester. His principal expertise is designing and implementing tests on IT systems software which will give the user of the software the required level of confidence that the software will work as intended or required. This work involves determining the expectations of the users translating those expectations into requirements of the system and testing the system (for example by creating a large number of test usings of the system) to assess whether it meets those requirements. Mr Bessell does this job well and his skills were appreciated by those with whom he worked at the AA. Those skills are both analytical and personal, for the first stage of the exercise in particular requires interaction with other people.

(ii) Mr Bessell is the sole director and the holder of 50 per cent of the shares in the Appellant.

(iii) Under the contractual arrangements which I shall describe shortly, in the period April 2000 to January 2003 Mr Bessell provided his services to the AA. These services were predominantly directed to the testing aspects of three IT projects then being undertaken by the AA:-

(a) the first project lasted 7 months from January 2000 to July 2000 and related to the replacement of an `Ingres' database with an `Oracle' database;

(b) the second project lasted 22 months from August 2000 until April 2002 and related to the AA.com website;

(c) the third project was concerned with the AA's travel insurance product, OATI, and Mr Bessell was involved in testing between May 2002 and the end of January 2003.

(iv) It was in October 1998 that the Appellant first contracted with DPP for the supply of Mr Bessell's services. In the period 1 April 2000 to 28 February a series of fixed term contracts were made between the Appellant and DPP. There were seven such contracts. With the exception of 1 April 2001, 29, 30 and 31 December 2001, 1 January 2002, and 28 and 29 September 2002, the combined period of these contracts includes every day in the period between 1 April 2000 and 28 February 2003. Each contract took the form of a schedule which specified inter alia the period of the contract, the rate of payment and invoicing arrangements, and annexed General Terms and Conditions which were materially the same for each contract (save in those respects I discuss

later). The schedule indicated that it set out the principal terms and conditions on which the Appellant would provide a consultant to perform services for DPP's client. The first and the seventh schedules indicated the name of the consultant to be provided by the Appellant: "Jonathan Bessell".

(v) DPP contracted with the AA to provide consultancy services and temporary staff to the AA. There was in the bundle before me a copy of such a contract dated 12 October 1998. Clause 2 provided that the contract should continue for no more than 12 months. This document provided for details of the services to be provided to be set out in a schedule. There were, in the bundle, copies of schedules (not to that agreement but conforming with its terms) covering the period 3 January 2000 to 2 July 2000. I find from the evidence of Mr Palmer and Mr Kersley and from the copy invoices from DPP to the AA that for the period under appeal Mr Bessell's services were provided through DPP. I find that it is more likely than not that those services were provided under agreements between DPP and the AA which, so far as is material, contained the same general terms as the agreement dated 12 October 1998. The two schedules I have mentioned state "Name of individual: Jon Bessell; Job Title: consultant", and set out rates of payment and the period of the contract.

(vi) There was no written contract between Mr Bessell and the Appellant.

(vii) During the relevant period Mr Bessell worked mainly at the AA's premises (but see also paragraph 28 below in relation to the AA.com project). In relation to all three projects it was necessary to spend time there to talk to those for whom the system was being tested (those who would use it) and other members of the development teams; in relation to the first and third projects it was also necessary to work mainly at the AA's premises in order to work on the AA's computer system. During the second project, the AA.com project, Mr Bessell could access the AA's computer from home. In this period he had an ISDN telephone line installed at home to access the AA mainframe computer and was provided with a customised laptop by the AA.

(viii) When working at the AA's premises (which changed from time to time) Mr Bessell was provided with a desk and computer and worked alongside other employees (and other contractors). He required a pass to enter the buildings. The pass bore a "C" which differentiated the bearer as a contractor rather than an employee. He was able to use the onsite canteen. He would be invited to events such as the project Christmas Party. Towards the end of the relevant period Mr Bessell provided at his own expense or that of the Appellant a special chair to use at the AA offices to help with problems with his back.

(ix) At home Mr Bessell had a designated office room with a desk, two laptop computers, fax, scanner and office furniture. The laptops were not

bought specifically for the AA work but the ISDN line referred to previously was, and was installed at the Appellant's expense.

(x) During the period of the second project the Appellant paid some £400 for a training course undertaken by Mr Bessell. The course was undertaken for the benefit of his work on the AA.com project. The cost was not reimbursed by the AA.

(xi) During the period under appeal the only other work undertaken by the Appellant was some assistance given to a nursery near Mr Bessell's home. Mr Bessell solved a problem it had with a software package and the Appellant was paid. I find that the sum paid was modest in comparison to the Appellant's annual income from DPP. After the end of the period under appeal, the Appellant, through Mr Bessell, embarked on a joint venture project with the nursery for the creation of a new software system which could be widely marketed to nursery operators.

(xii) During the relevant period, the Appellant would invoice DPP and DPP would invoice the AA for work done. The invoiced amounts were calculated by reference to an hourly or daily rate multiplied by the hours or days charged for.

(xiii) Mr Bessell would complete and submit to persons at the AA records of time worked and charged for. Two different records were submitted : one indicated the time Mr Bessell had actually been engaged on the work he was doing, and the other the time for which a charge would be made. The first record was used for the AA's control and forecasting purposes; the second for the authorisation of payment by the AA to DPP. The times could differ. From the evidence of Miss Tooze, and Mr Palmer I find that there was an understanding that generally the hours (or days) charged for would be those indicated in the schedule to the contract between DPP and the AA so that a few extra hours actually worked one week could cancel out a few fewer hours actually worked another week, but that it was expected that Mr Bessell would have worked on average for at least the time billed for. Where the work demanded substantially more time, then additional time could be, and was, billed.

Mr Palmer told me, and I accept, that those in the testing function were "tail end charlies" and that as a result it was rare that they would find themselves with nothing to do on a project. If one stage in the testing of a project had been completed more expeditiously than planned then Mr Bessell would not be expected to sit around and do nothing : there would always be something else to be done on the project, and Mr Bessell, I find, would set about that something and his billed time would reflect the time actually spent working (subject to the comments in the previous paragraph) rather than billing a fixed larger amount for the stage finished ahead of time.

(xiv) During the relevant period Mr Bessell took holidays. He did not submit time sheets for, nor did DPP or the Appellant bill in respect of the time spent on holiday. The times of holidays were agreed between Mr Bessell and those at the AA working on the project. Mr Bessell took care not to arrange holidays at busy times for the project. Sometimes plans could be remade and responsibilities reassigned but there was not a time when Mr Bessell took a holiday at a seriously inconvenient time for the project on which he was engaged.

(xv) Mr Bessell had problems with his back towards the end of the third project. He was unable to work. No payment was made to DPP or the Appellant in respect of this period.

(xvi) Mr Bessell occasionally travelled to visit suppliers. When he did so his expense of travel would be reimbursed by the AA.

(xvii) There was no evidence that Mr Bessell had made errors which he had had to rectify.

(xviii) The AA did not consider itself obliged, and Mr Bessell did not consider that the AA or DPP were obliged, to offer a new contract at the end of the term of any existing contract. Neither DPP nor the Appellant was obliged to accept any offer of a new term.

(xix) During the first project and part of the second project Mr Bessell's activities were contracted to be paid for at an hourly rate. During the second project this changed to a rate per day. At the time of this change Mr Bessell negotiated a higher daily rate than had initially been offered on the basis that, as he said to me, he should be "compensated for not being able to charge 60 hours per week." From an hourly rate of £50 per hour he moved to a daily rate of £480 per day. Later on, market rates for IT expertise fell, and the AA paid only £375 per day. Mr Bessell believed to have no contractual right to insist on the maintenance of the higher rate in subsequent contracts.

(xx) The Appellant submitted invoices by reference to the number of days worked at a daily rate. This was the case even when the contracts provided for hourly rates.

Substitution

8. At no time in the relevant period did the Appellant or DPP supply any other person in place of Mr Bessell.

9. I should now describe some of the evidence relating to the issue of whether or not in practice a substitute could have been provided for Mr Bessell by DPP and the

Appellant. I am here discussing the oral evidence and not the formal contractual documents.

10. The AA engaged a number of `contractors' – at times 50 or more people – who were not its employees. Jane Tooze and Mr Palmer recalled one such contractor who had been engaged under arrangements pursuant to which a substitute could be, and was provided in place of the original individual. I accept that evidence.

11. Mr Kersley said he was aware that substitutes had been used. He said that if a contractor wished someone to substitute his attitude would depend on the circumstances and upon who recommended the substitute; he would almost always want a second opinion from someone he trusted and would want to see a C.V. He said that he would be unhappy if a substitute turned up unannounced and unforeshadowed : that just would not happen. In any event to work on the premises a security card was needed. I accept that evidence.

12. Mr Palmer's evidence was that he expected Mr Bessell to do the work personally and would not have expected him to send a substitute. If Mr Bessell had been unable to perform then he thought that he would have been replaced by a worker engaged through the normal procedures including interviews with new workers. I accept that as evidence of what Mr Palmer would have done.

13. I also find that towards the end of the third project Mr Bessell and Miss Tooze discussed the staffing of the next phase of OATI. It was plain that Miss Tooze wished Mr Bessell to be engaged for it. But Mr Bessell had been having back problems and he agreed with Miss Tooze that he could provide a substitute for the period for which he was not available. (In the event the second phase was cancelled and this did not happen.)

14. Mr Bessell, when asked if Miss Tooze could have decided that she did not want a substitute, replied "absolutely".

15. The letter from Christine White offered in evidence by the Appellant indicated that on one occasion she was approached by one of the contractors in her team, and that it had been agreed that a substitute whose work the contractor had guaranteed could be provided while he was away. This she said had worked well in practice and she had been content to allow it again with other contractors. The letter did not indicate the dates or period when this was done. Given the evidence of Mr Kersley and Miss Tooze I accept that there was an occasion when a substitute was agreed but I do not regard this letter as compelling evidence that in the relevant period substitution was generally permitted or permitted without prior consent.

16. There was in the bundle a copy of a letter from Lyn Lake who was the IS Resource manager at the AA, and who administered the contracts with agencies for the supply of contractors. The letter was written to the Appellant and made various statements about the relationship between the Appellant and the AA. In the fourth paragraph she said that the Appellant "will vet and supply a suitable substitute for the

assigned consultant. [The Appellant] will manage the selection process with input from the assigned consultant. Any training costs … would be … at [the Appellant's] expense.". The letter was dated 28 April 2003, after the end of the period under appeal, and was in a form which had been used to send to a number of other contractors who had requested confirmation of the matters contained in it (for tax purposes or otherwise). Although the letter did not indicate that the AA would wish to approve the substitute first, it was not to my mind absolutely clear that the writer intended to say that the AA did not regard itself as being entitled to require that it approved the substitution or that it would in practice wish to do so in the relevant period. Ms Lake did not give oral evidence.

17. I conclude that, in the period under appeal, unless the Appellant could have shown that it (and DPP) was contractually entitled to send a substitute in place of Mr Bessell, the AA would have accepted (and paid for) a substitute only if the substitute's presence and person had been expressly agreed by it, and that the AA would not, unless as above, have acted as if it was bound to accept any substitute for Mr Bessell or even one who, when offered, was found to be acceptable.

18. Further it was clear to me that the AA regarded itself as having engaged the services supplied by Mr Bessell. He had been interviewed at the outset of his contracts with the AA. His services were highly valued. He was specifically sought by Miss Tooze and others. The AA did not want any competent tester, it wanted Mr Bessell.

Control

19. Mr Bessell was a skilled man engaged in a complex task. He was not subject to detailed instructions as to how he should undertake what he did.

20. In the first project he worked as part of a team of two testers, himself and Mr Palmer. The test manager was Alan Palmer. In the second project he worked as part of a team of 5 testers. In the third project he again worked as part of a team of testers reporting initially to Alan Palmer and later to Miss Tooze.

21. From Mr Palmer's evidence I find that at the outset of a test analyst's involvement with a project the first task would be to settle a plan for the testing of the application. The Test Manager would draw up an initial strategy, and the testers, having got to grips with what the organisation wanted from the application and the background to its implementation, would work as a team to improve and settle that plan, and plan the detailed testing programme. When the application was made available to the test team Mr Bessell would then undertake some of the planned tests. The allocation of tasks to the members of the team was usually done through a communal review taking into account what was available to test, what tests were to be done and who preferred to do which tests. It was a group effort under the co-ordinating influence of the team manager to determine the best division of labour to tackle the work to be done. If having decided on a timetable for testing the delivery

of part of the application was delayed, or if problems arose with parts of it then the tasks would be reallocated in the same way.

22. Thus, once the initial phase of settling the plan had been completed, on a typical day Mr Bessell would have had allocated to him in the project plan as modified by the group discussions a number of aspects of the application to test, and would continue testing those he had started to test and perhaps commence the testing of one or more other aspects of those parts of the application that had been made available. He was not told how to conduct the tests but he was expected to conduct the tests which had, in consultation with the team, been allocated to him.

23. The team manager would review the progress of the work being undertaken by members of the team. There were usually weekly team meetings to review progress. Mr Bessell attended those meetings. There were also ad hoc discussions to deal with more pressing issues. Mr Bessell participated in these.

24. Mr Bessell's progress through the tasks he was allocated would be monitored by the team manager. There was however no detailed review of the work he had undertaken. However it seems to me that Mr Bessell's reputation indicates that he worked effectively: he would not have had a high reputation if things he had tested and approved often turned out to be faulty, of if faults he identified were often found to be illusory. It seems to me that there was an ongoing informal appraisal of the quality of his work. Miss Tooze attended a meeting with HMRC on 10 May 2005. She approved a note of that meeting with her amendments. In those notes she indicated that work was not checked automatically but would be checked if there was a complaint. I accept that that would have been the case.

25. Mr Palmer said, and I accept, that as part of his management checks he would occasionally ask Mr Bessell to run a specific test so that he could be satisfied that his work was acceptable and to get a view on the quality of the application that was being delivered. It was clear however that Mr Palmer would not be involved in reviewing or approving the technical detail of what Mr Bessell was doing. Miss Tooze indicated that no one told Mr Bessell how to do his work although in the approved notes of her meeting with HMRC she indicated that she "could spot check Jon's work if she had reason to".

26. The findings I make above are drawn principally from the evidence of Mr Palmer and Miss Tooze. Neither of them were responsible for Mr Bessell in the period of the second project. There was no AA test team manager for this project. In the earlier stages of this project, its management was outsourced by the AA to Net Decisions, but in July 2001 the AA took over its development. The testing however was undertaken by people engaged or employed by the AA. There were five testers including Mr Bessell; one was an employee of the AA. In the earlier stages Mr Bessell would report to someone on Net Decisions' staff, and in the later stages to persons engaged or employed by the AA. Mr Bessell was the senior tester on this project.

27. There was no evidence before me to suggest that in this period the way Mr Bessell's activities were guided, monitored or determined was any different from the position I have described above. I conclude that it is more likely than not that it was the same.

28. I should however note that the arrangements in relation to the place where Mr Bessell worked during the second project were different from those for the first and third projects: I find that he worked from home for about 25% of his time during the AA.com project. In addition there were times when Mr Bessell made himself available in the late evening during the course of the project to discuss problems with the website on the phone with those to whom he reported at the AA.

The Statutory Provisions

29. For the relevant periods the legislation relating to direct tax was contained in Schedule 12 FA 2000. It provided so far as relevant to this appeal that where an individual or an associate receives from an intermediary (it is accepted that the Appellant is an intermediary for those purposes) or has rights to receive from an intermediary a payment or benefit not taxable under Schedule E then the intermediary is to be treated as making a payment chargeable to Schedule E of the amount of that payment or benefit. The provisions apply where para 1(1) Schedule 10 applies, namely where:-

> "(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client")".

Pausing there, this provision was clearly satisfied. Mr Bessell personally performed services for the purposes of the AA's business.

> "(b) the services are provided not under a contract between the client and the worker but under arrangements involving a third party ("the intermediary")."

Pausing again, this condition was also satisfied: Mr Bessell had no contractual relationship with the AA. His services were provided under arrangements involving the Appellant and DPP. Each of them were third parties.

> "(c) the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client."

It was this last condition which was in dispute in the appeal.

30. Before leaving the income tax provisions of Schedule 10, I should note the provision of paragraph 1(4):

> "(4) The circumstances referred to in sub-paragraph (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided."

31. The National Insurance provisions, to be found in regulation 6 of SI 2000/727, provide that a worker will be treated as in employed earner's employment and receiving benefits calculated in accordance with regulation 7 of that statutory instrument where the three conditions in regulation 6(1) are satisfied. Subparagraphs (a) and (b) of regulation 6(1) are identical to subparagraphs (a) and (b) of paragraph 1(1) Schedule 10 set out above. Paragraph (c), the third condition, is, strangely, phrased differently:

> "(c) the circumstances are such that, *had the arrangements taken the form of a contract* between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earners employment." (My italics).

32. There is to my mind a potential difference between the effect of paragraph 1(1)(c) Schedule 10 and regulation 6(1)(c). It is this: regulation 6(1)(c) appears to require the notional contract between the client and the worker to be constituted by the arrangements: "had the arrangements taken the form of a contract". Thus potentially there is no requirement to consider whether anything else would have been included in the notional contract. By contrast paragraph 1(1)(c) Schedule 10 may require a wider enquiry into what the terms of a direct contract between client and worker would have been had there been such a contract: there is no limitation in the words "if the services were provided under a contract directly between the client and the worker" to contract terms which are encompassed in the arrangements or the circumstances.

33. In *Usetech Ltd v Young (HM Inspector of Taxes*) 2004 TC 811, Park J did not however see any difference between the two formulations. At paragraph 35, after reciting the relevant extracts he said:

> "The two wordings are not identical, but the meanings are. There was not a direct contract [between the parties in that case] but the provisions require it to be assumed that there was. What would it have contained? …".

It seems to me that Park J is there saying that both provisions require a determination of what such a contract would have contained from a consideration of all the circumstances, rather than the construction of a contract where content was limited to the arrangements. Likewise at paragraph 9 he says:

> "subpara (c) involves an exercise of constructing a hypothetical contract which did not in fact exist, and then enquiring into what the consequences would have been if it had existed. There may be room in some cases for dispute about what the hypothetical contract would contain, and in the present case there is …".

34. On the other hand in *Synaptek v Young (HM Inspector of Taxes*) (2003) 75 TC 51, Hart J seem to adopt the more limited approach. That case however dealt only with the provision of regulation 6 and Hart J makes no reference to the corresponding provisions of Schedule 10. At paragraph 11 he says:

> "… The inquiry which Regulation 6(1) directs is in the first instance an essentially factual one. It involves identifying first, what are the "arrangements involving an intermediary" under which the services are performed, and, secondly what are the "circumstances" in the context of which the arrangements have been made and the services performed. *The legal hypothesis which then has to be made is that the arrangements had taken the form of a contract between the worker and the client."* (my emphasis).

This is potentially a different approach from considering what would the contract have contained. It seems to me that this difference exists at least in theory even when it is acknowledged that the `arrangements' are not limited to the words of the formal contracts between the relevant parties but include all relevant circumstances (see para 47 in *Usetech*). What actually happened will be part of the arrangements: the practice may indicate a variation in the formal agreements; it may also illuminate the formal agreements and be something which falls short of contractual rights and duties. But even where account is taken of all the actual arrangements there may be a difference between the notional contract formed by encapsulating those arrangements and the notional contract whose terms would be determined by asking "What would have been agreed?"

35. I shall return to this issue later but I note that Park J said, at paragraph 1(4): "However no-one has suggested to me, nor do I consider, that that [difference] or the other minor differences between the two statutory provisions affects this case or opens a possibility of the case being decided are way for NICs and another way for income tax and corporation tax."

<u>Employment – the Case Law</u>

36. I was referred to a number of authorities and there was some difference in the parties' approach to them. I set out below my understanding of the principles to be derived from these authorities. I hope that in doing so I will have dealt with the points made to me in relation to them by Mr Smith and Mr Faulkner.

37. In *Ready Mixed Concrete v Minister of pensions and National Insurance* (1967) 2 QB 497, MacKenna said that "a contract of service exists if these three conditions are fulfilled:

> (i) The servant agrees, that in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master;

(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master;

(iii) The other provisions of the contract are consistent with its being a contract of service.

38. In 2001 Buckley J in the Court of Appeal in *Montgomery v Johnson Underwood Ltd* (2001) EWCA Civ 318 indicated that this passage was the safest starting point in considering whether a person was an employee, and showed how it had been approved by the House of Lords and the Court of Appeal as setting out the irreducible minimum by way of legal requirement for a contract of employment to exist. He continued at paragraph 23:

> "It permits tribunals appropriate latitude in considering the nature and extent of `mutual obligations' in respect of the work in question and the `control' an employer has over the individual. It does not permit these concepts to be dispensed with altogether. As several recent cases have illustrated, it directs tribunals to consider the whole picture to see whether a contract of employment emerges. It is though important that `mutual obligation' and `control' to a sufficient extent are first identified before looking at the whole."

39. I shall refer to the three links of MacKenna's test as the `mutual obligations condition', the `control condition' and the `consistency condition'. Whilst the nature of the last two of these flow directly from the words of MacKenna J, there is possibly something in the use made in the cases and before me of the term `mutual obligations' which may encompass something more than the words of paragraph (i). I shall return later to discuss mutuality and control. But when I came to consider whether the notional contract was one of employment my first steps must be to consider whether `mutuality' and `control' are present in sufficient degree to be able to say that the contract could be one of employment.

40. In *Market Investigations Limited v Minister for Social Security* [1969] 2 QB 173 at 184-185 Cooke J said that the fundamental test to be applied was this: Is the person performing these services as a person in business on his own account? He said this after referring to the conditions laid out by MacKenna J set out above and noting that the first condition was in that case, fulfilled. He had then considered the `control' condition and found it was not determinative. His "business on his own account" test was the next step in his judgment. It is clear to me that, having considered mutuality and control, I should then address this test. It is in my view comparable with MacKenna J's consistency condition.

41. In *Hall v Lorimer* (1993) 66 TC 349 at 375F, Nolan LJ said:

> "In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity.

This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and making an informal, considered qualitative appreciation of the whole … Not all details are of equal weight … The details may also vary in importance from one situation to another."

42. The authorities indicate that the consideration of certain indicia which may point one way or the other may be helpful in considering that picture. (*Lee Ting Sang v Chung Chi-Keung* 2 AC 374, and *Hall v Lorimer*). Those indicia include those mentioned by Cooke J in *Market Investigations*. The following may be relevant:-

(a) does the taxpayer provide his own equipment?
(b) does the taxpayer hire his own helpers?
(c) what degree of financial risk does the taxpayer bare and what opportunity for profit does the taxpayer have?
(d) what degree of responsibility for investment and management does the taxpayer have?
(e) is the taxpayer part and parcel of his "employer's" organisation (see *Hall v Lorimer*);
(f) the degree of control to which the taxpayer is subject (rather than the mere existence of a right of `control');
(g) termination provisions – termination on notice may be a pointer towards employment in some cases (it was found to be so in *Morren v Swinton* (1965) 1 WLR 576 but found to be neutral in *McManus v Griffiths* 1997 70 TC 218);
(h) the intention of the parties.

43. I now turn to the mutual obligations condition and the control condition identified by MacKenna J.

Mutuality

44. There are two relevant aspects to the condition. The first flows directly from MacKenna J's words: does the putative employee agree to provide "his own work and skill". If he does not the condition is failed. But if he agrees to provide his own work and skill but also or in some circumstances alternatively that of another, then when does that cause the condition to be failed? I discuss that below under the heading "substitution".

45. The second aspect of this condition I need to discuss is the extent to which it can be regarded as imposing a precondition that there must be obligations imposed upon the employer other than merely to pay remuneration for what is done. There are statements in some of the cases which can be read as if they had that import, and that

was the stance taken by Mr Smith before me. I discuss this issue under the heading "Employer's obligation – Mutuality" below.

Substitution

46. Mr Smith drew my attention to Peter Gibson LJ's statement in his judgment in *Express Echo Publications v Tanton* 1999 IRLR 367 at paragraph 31:

> "It is in my judgment established … that where … a person who works for another is not required to perform his services personally, then as a matter of law the relationship … is not that of employee and employer."

However, following the setting out of his three conditions in *Ready Mixed Concrete* MacKenna J added some words of explanation. He said that freedom to do a job either by one's own hands or by another's is inconsistent with employment "though a limited or occasioned power of delegation may not be."

47. Mr Faulkner relied upon the review of the case law conducted by Park J in *Usetech*. Park J set out his conclusions at paragraph 53. He repeated that whether a relationship is one of employment depends upon all the circumstances: that the context is one where the answer depends upon the relative weight of a number of potentially conflicting indicia, and said:

> "The presence of a substitution clause is a indicium which points towards self-employment and, if the clause is as far reaching as the one in *Tanton* it may be determinative by itself."

Mr Smith cautions against taking this extract out of context. He says that in *Usetech* there was a relatively weak substitution clause: in that context Park J was saying that the clause was merely another factor to be considered.

48. It seems to me that if there is a right to substitution then that may be relevant at two stages. First one asks: is that right such that this cannot properly be treated as a contract for personal service? If the answer is yes, that is an end of the matter. If the answer is no, then, if the other precondition hurdles are surmounted, the existence of the right goes into the pot – or the overall picture – to be evaluated along with other relevant features.

Control

49. MacKenna J's test required a "sufficient degree" of control. Mr Smith took me to Buckley J's statement in the Court of Appeal in *Montgomery* at paragraph 23:

> "mutuality of obligation and the requirement of control are the irreducible minimum for the existence of a contract of employment."

I accept that there must be something in the contract which can reasonably be called a right for the employer to control the employee. But such a right need not be a right to control every aspect of what is done: what is done, how it is done, when and where it is done; instead a restricted right may be adequate. MacKenna J accepted that in many cases the employer or controlling management have no more than a general idea of how the work is done are no inclination to interfere, but "some sufficient framework of control most surely exist" (paragraph 19), and at paragraph 23 indicated that tribunals should exercise appropriate latitude in determining the question of control.

Mr Smith suggested that control exercised through an independent agent such as Ms Tooze was not sufficient. He pointed to the comments of the Special Commissioner in *MAL Scaffolding* at paragraph 49. But those comments were directed to whether site agents exercised control over scaffolders such as to make them employees; the Special Commissioner was not considering the position of agents generally. It seems to me that a company can only exercise control through the agency of real people and when considering whether or not the company has exercised control it matters not whether those people are agents because they are employees or agents because a specific power has been delegated to them. To my mind the actions of the company are those of its agent Ms Tooze. (See also *Morren* at page 351).

Employer's obligation – Mutuality

50. In *Ready Mixed Concrete* MacKenna J's first condition was:

> "The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master."

This first condition is often referred to as a requirement for mutual obligation, but as described by Mackenna J that mutuality is fairly one sided: his condition relates to an obligation of the employee to perform a service for a consideration. There is nothing in these words suggesting that the putative employer must be obliged to provide work or even to pay if there is no work to be done; all that is clear from condition (i) is that the employer must be bound to pay for the service performed.

51. In *Nethermere (St Neots) v Taverna* [1984] 1 RLR 240 the Court of Appeal considered the finding of an Industrial Tribunal that two women who worked as home workers sewing garments were employees. At paragraph 18 Stephenson LJ asked "does the law require any and what mutual obligations before there can be a contract of service?" At paragraph 19 he considers employers' obligations and says "[b]ut later cases have shown that the normal rule is that a contract of employment does not oblige the master to provide the servant with work in addition to wages". At paragraph 20 he considers employees' obligations and treats MacKenna J's three conditions in *Ready Mixed Concrete* as an expansion of the nature of a true employee's obligation to serve. At paragraph 22 he says that there must "be an

irreducible minimum on each side to create a contract of services. I doubt if it can be reduced any lower than the sentences I have just quoted …". In the judgments of Kerr and Dillon LJJ the need for mutuality is asserted but I can find nothing which points to either Lord Justice dissenting from or agreeing with its description by Stephenson LJ. Kerr LJ's dissenting judgment makes clear that in his view the absence of an obligation on the employee to work is fatal, but that much is also clear in the phrases I have quoted from Stephenson LJ.

52. Thus in *Nethermere* I find support for the three conditions in *Ready Mixed Concrete* as regards the employee's obligations but no clear indication as to the nature of the obligation which the employer must bear as a prerequisite of the contract being one of employment.

53. In *Carmichael and another v National Power plc* [1999] 4 All ER 897, the House of Lords agreed that Mrs Lease' and Mrs Carmichael's argument that they were employees "founder[ed] on the rock of mutuality". These ladies worked from time to time as part time guides at a Power Station. Lord Irvine noted that no issue arose as to their status when they were actually working as guides: the question was whether they were employees when they were not working. He held that there was no contractual relationship of any kind when they were not working, and it was on that rock that their case foundered. But in the course of his speech he considered whether a certain construction of particular documentation might determine the appeal and said that he construed it so that `no obligation on the part of the CEGB to provide casual work, nor on Mrs Lease and Mrs Carmichael to undertake it was imposed'. Referring to Stephenson LJ in *Nethermere* and to *Clark v Oxford Health Authority* he said that therefore on that basis there would be an absence of that irreducible minimum of mutual obligation necessary to create a contract of service.

54. It is clear to me that Lord Irvine considered the obligation of an employer to provide work (or to pay a retainer) as an important consideration, but given, in particular, his citation of Stephenson LJ in *Nethermere* – whose comments reproduced above indicate a lesser prerequisite for the employer's obligation than that of being obliged to provide work, it seems that Lord Irvine may not have considered such an obligation as a necessary condition for the existence of an employment.

55. In *Propertycare Ltd v Gower* 2003 UKEAT/0547/03, the EAT said at paragraph 9:

> "The cases, starting with *Ready Mixed Concrete* … show that mutuality of obligations means more than a simple obligation on the employer to pay for the work done; there must generally be an obligation on the employer to provide work and the employee to do the work. That is how we understand the first of MacKenna J's tests in *Ready Mixed Concrete*. In *Clark v Oxfordshire* … Sir Christopher Slade allowed of the possibility that paying a retainer when no work was available might give rise to mutuality of obligations, but there must be some mutuality of obligations. The principle

was affirmed by the House of Lords in *Carmichael* and subsequently by the Court of Appeal in *Montgomery* …" (my emphasis).

56. As can he seen from the discussion of *Ready Mixed Concrete*, *Carmichael* and *Montgomery* above, I cannot find in the judgments a statement of principle as wide as that which the EAT found in *Propertycare*. (The example given by Sir Christopher Slade in *Clark* was in relation to a `global' contract spanning periods of engagement.) It is clear to me that a condition is that the employee is obliged to render personal service for a reward, but the extent of the condition applicable to the employer's obligation is less clear. The fact that Lord Irvine considered that the CEGD's lack of obligation to provide work was, when coupled with the ladies' lack of obligation to perform, fatal suggests strongly that he puts the condition somewhat higher than did Stephen LJ in *Nethermere*. The formulation adopted by Buckley J in *Montgomery* suggest some flexibility in the application of this condition in any event.

57. In *Usetech* at paragraph 28 the tribunal said:

> "… certainly there must be mutuality of obligation, but that does not imply that the "employer" is required to provide work : so much was made clear by Stephenson LJ in *Nethermere* … the requirement of mutuality is satisfied by the obligation on the one hand, to work and, on the other to remunerate. That was the position in the *Market Investigations* case."

Park J commented thus at paragraph 11:

> "I would accept that it is an over simplification to say that the obligation of the putative employer to remunerate the worker for the services performed in itself always provides the kind of mutuality which is the touchstone of an employment relationship."

I note that Park J speaks of a "touchstone" rather than a necessary condition. He continues at paragraph 64:

> "The cases indicate … that the mutuality requirement for a contract of employment to exist would be satisfied by a contract which provided for payment (in the nature of a retainer) for hours not actually worked. It is only where there is both no obligation to provide work and no obligation to pay the worker for time in which work is not actually provided that the want of mutuality precludes the existence of a binding contract of employment."

58. That statement would I believe conclude the matter for me were it not for the observations of the Court of Appeal some 18 months later in *Cornwall County Council v Prater* [2006] EWCA Civ 102. The issue in this case was whether a home tutor engaged by the council to teach particular pupils was employed by the council. The teaching assignments were for particular pupils and were of durations from a few months to 5 years. The council maintained that she had a series of short fixed term discrete individual teaching engagements which individually lacked the requisite

irreducible minimum mutual obligations: the mutuality created by Mrs Prater being contractually obliged to work during each successive engagement was not enough for the irreducible minimum – there had to be a continuing obligation to guarantee and provide more work and an obligation on the worker to do that work (see para 30). Mummery LJ held that the tribunal was entitled to find that there was mutuality of obligation in the individual contracts between Mrs Prater and the council. Summing up, at paragraph 40, he said:

> "(5) Nor does it make any difference to the legal position that, after the end of each engagement the Council was under no obligation to offer her another teaching engagement or that she was under no obligation to accept one. The important point is that, once a contract was entered into and while that contract continued, she was under an obligation to teach the pupil and the Council were under an obligation to pay her for teaching the pupil made available to her by the Council under that contract. That was all that was necessary to support the finding that each individual teaching assignment was a contract of service …"

I accept that at paragraph 11 of his judgment Mummery LJ had said that the "Council was obliged to continue to provide that work [tutoring the particular pupil] until the particular engagement ceased", but in the summary set out above that factor is not treated as relevant to his conclusion. Longmore LJ, at paragraph 43, said he could not accept the submission that mutuality required an on-going duty to provide work and an on-going duty to accept work. He said:

> "There was mutuality of obligation in each engagement namely that the County Council would pay Mrs Prater for the work which she, in turn, agreed to do by giving tuition to the pupil for whom the Council wanted her to provide tuition. That to my mind is sufficient "mutuality of obligation" to render the contract a contract of employment if other appropriate inclinations of such an employment contract are present."

There is no hint here that "mutuality of obligation" required any obligation on the part of the Council other than to pay for work done.

Lewison J was yet more direct: "I would have thought that the question of mutuality of obligation goes to the question of whether there was a contract at all, rather than what kind of contract there was, if a contract existed." He agreed with Mummery and Longmore LJJ.

59. The sentiments expressed by the Court of Appeal in this case are to my mind more aligned with the approach taken by the tribunal in *Usetech* than the judgment of the EAT in *Propertycare*. In these circumstances it is with some diffidence that I set out my conclusions in relation to mutuality:-

> (i) For there to be an employment contract there must be a contract. That requires some mutual obligations.

(ii) That contract cannot be an employment contract unless the `employee' is obliged to provide his labour.

(iii) An obligation on the employer to provide work or in the absence of available work to pay is not a precondition for the contract being one of employment, but its presence in some form (such as for example an obligation to use reasonable endeavours to provide work, to allocate work fairly, or not to remove the ability to work e.g. by removing the pupil to be taught) is a touchstone or a feature one would expect to find in an employment contract and where absence would call into question the existence of such a relationship.

Discussion

60. I now turn to consider what the terms of the hypothetical contract between the AA and Mr Bessell would have been. I shall then consider whether, in the circumstances I have identified, had Mr Bessell been engaged under that contract, he would have been an employee.

61. It is important to consider the terms of the notional contract because some of the conditions for employment (e.g. control and mutuality) and other important indicia of employment or otherwise flow from the legal rights and duties of the parties rather than from the general relationship between them.

62. Mr Bessell was the sole director of the Appellant. It seems to me, as it did to the Special Commissioner in *Netherlane* SpC 457 that in the absence of any formal contract between him and the Appellant, straightforward to treat him as effectively a party to the Appellant's contract with DPP in conducting this exercise.

63. I approach this question by asking first, what would the contract have contained? and then I ask whether my answer would be any different if I simply reduced the arrangements to a contract (the embodied arrangements basis).

64. In my opinion the terms of the notional contracts would have been these:

(1) There would be a series of contracts each with a fixed term. The term of each contract would match the periods of the DPP/Dragonfly contracts. There would have been no requirement for the AA to offer renewal and no obligation for Mr Bessell to accept any offer of an extension.

I reach the same conclusion on the embodied arrangement basis.

(2) Each contract would be terminable before the end of its fixed term by 28 days notice in writing by either party.

I reach this conclusion because: (1) clause 9.2 of the DPP/AA agreement of 12 October 1998 (see para 7(v) above) provides that "either party may give the

other 28 days' notice to terminate this Agreement and/or any Schedule", and I have found that provision is likely to have applied for the whole of the period under approval; (2) clause 8.1 of the Dragonfly/DPP agreement provides that DPP may give Dragonfly 28 days notice, but Dragonfly has no clear right of early termination during an assignment; (The Special Terms in the Schedule to all the contracts bar one provide that 4 weeks notice may be given; but it is not clear by which party.); and (3) had there been a contract between Mr Bessell and the AA it seems very likely to me that it would have encompassed the 28 day termination right of the AA, and, given that the AA conceded such a right to DPP, it seems likely that the AA would have been conceded it to Mr Bessell.

On the embodied arrangements basis it is clear that the AA could give 28 days notice; but read together the arrangement would not permit that right to Mr Bessell.

(3) Each contract would also be terminable by written notice if Mr Bessell's performance was unsatisfactory. That is because (1) clause 8.2 of the AA/DPP agreement of 12 October 1994 provides that DPP shall on notification remove a staff member whose service is unsatisfactory or for misconduct, (2) clause 8.2.1 of the DPP/Dragonfly agreement permits that agreement to be terminated early if there is unsatisfactory performance, and (3) I would therefore expect such a provision to be included in the notional contract.

My conclusion on the embodied arrangements basis would be the same.

(4) Each contract would be for the services of Mr Bessell. The contract would provide that Mr Bessell could send a substitute in his place but only if the AA had given notice that that particular substitute was acceptable in place of Mr Bessell for such period as it should specify.

That is for the following reasons.

First, it seems to me that the DPP/AA agreement contains no right for DPP to supply a substitute, and the agreement or sub-agreement made via the Schedule is an agreement for the supply of a particular individual. Clause 3 of the Agreement sets out the framework for the supply by DPP of a person to the AA: the AA is to indicate its need; DPP sends CVs of persons it proposes to fill the need, and the AA selects the persons it requires. A schedule is completed to record the agreement in respect of the person selected. Where Mr Bessell's name appears on such schedules (and I have found it is more likely than not that it did throughout the relevant period) there was an agreement between DPP and the AA for the supply of Mr Bessell. There is no clause or provision of the agreement which deals with substitution. Clause 8.4 deals with the replacement of an unsatisfactory employee but that is a far cry from a right of any sort to substitute.

Clause 3.2 of the Dragonfly/DPP agreement provides that Dragonfly has the right to substitute a suitably qualified person. But clause 3.3.1 restricts that right to circumstances where DPP has given prior written consent (for contract up to 2 January 2002), or where the AA has been satisfied that the "new consultant is trained and suitable to undertake the services" (for contracts between 2 January 2002 and 1 January 2003), or without satisfying both DPP and the AA that the new consultant is suitable (thereafter).

In the first period it seems to me that the combined effect of these clauses is that DPP would not consent to a substitute unless it obtained the specific agreement of the AA – without which it would be in breach of its agreement. In the later periods Dragonfly could not substitute unless the AA were satisfied of the substitute's suitability. Given that DPP had no right to substitute it seems to me that a coalescing of these agreements into one could only be one wherein substitution was permissible only if the AA agreed to the substitute. And if one asks at this stage what would have been agreed? then, given what was agreed by the AA it seems to me that no right of substitution would have been conceded other than substitution with formal consent at the AA's discretion.

Second, it seemed to me that there was no course of conduct between DPP and the AA from which it could be concluded that the AA/DPP agreement had been varied. The evidence that there had been one or two substitutions was not enough to convince me that the AA permitted substitution at will rather than substitution in circumstances where it had agreed specifically to the substitute. Christine White's letter to my mind did not clearly indicate that specific agreement to a substitute was not required, and Lyn Lake's letter did not clearly relate to the period of the appeal nor to my mind unambiguously indicate that the consent of the AA to the person substituted would not be required. Without hearing their evidence in person I am unwilling to take a broader view of their statements.

Third, I concluded at paragraph [17] above, that in practice the AA would not have accepted a substitute unless either it expressly agreed to a particular substitution, or it could be shown it was contractually obliged to agree. I conclude above that it was not so contractually obliged.

Therefore if I ask the question what would the notional contract have contained? I answer: only a provision under which substitution could be made only with the express agreement of the AA. Coalescing the arrangements into a contract I come to the same conclusion.

(5) `Control'

The Schedule to the first agreement between Dragonfly and DPP provides at the top of the page:

> "This Schedule sets out the principal terms upon which we shall engage you to provide a consultant to perform certain services for you under your direct supervision and control." (my emphasis)

Mr Smith, in his skeleton argument, described this as "the engagement of [Dragonfly] to provide a consultant to perform the services under [Dragonfly's] direction supervision and control." I do not agree. The language is not clear, but the "you" for whom the services are to be performed is not [Dragonfly], and the "your" does not therefore suggest to me that [Dragonfly]'s control is intended. In my view what was intended by those words is what appears at the top of the next schedule in the sequence of engagements namely:

> "to provide a consultant to perform certain services for the Client under the client's direction."

The Client being the AA. This formulation appears in the second and third schedules. In the remaining four schedules (April 2001 onwards) the words "under the Client's direction" are omitted.

Mr Smith suggested that the first formulation clearly indicated where control lies namely with Dragonfly. I do not think it does, if anything these phrases suggest that at least in the early contracts control was to lie with the AA.

Clause 3.8 of the AA/DPP contract provides that the staff supplied by DPP "shall be under the full control and supervision of [the AA] on a day-to-day basis only regarding performance of duties".

Up until 2 January 2002 Clause 2.1.1 of the Dragonfly/DPP contract provided that Dragonfly would procure that the consultant would comply with the AA's customary rules and regulations and working procedures. For contracts on and after 2 January 2002, clause 3.1.1 merely requires that the consultant will comply with the AA's health and safety and similar regulations, adding "(the company's method of working shall be its own)".

It seems to me that for the period up to 2 January 2002 the effect of these arrangements was to give the AA an indirect contractual right to require that Mr Bessell comply with the AA's customary rules and regulations and working procedures. There was no evidence to indicate any variation in these contracts by conduct.

In the period after 2 January 2002 the provisions of the two sets of contracts do not give such an indirect right to the AA: although the AA/DPP contract gives control to the AA, the Dragonfly/DPP contract does not. Thus control cannot be spelt out of the words of the formal contracts.

In practice Mr Bessell worked as part of the team, undertaking the work on the project which was allocated to him as part of the team discussion and by the team manager. The engagement simply would not have worked if he did not do what was allocated to him. His work was also informally monitored.

Putting this together it seems to me that if there had been a contract between Mr Bessell and the AA it would have contained a provision that Mr Bessell undertake the tasks allocated to him with a specified but reviewable timeframe and accept the AA's reasonable directions in relation to what he was doing (rather than how he did it).

On the embodied arrangements approach I come clearly to the same conclusion as regards the period up to 2 January 2002. For the period thereafter it seems to me that the arrangements were that Mr Bessell should do the work allocated to him within the framework of the project timetable, and be subject to the guidance of the team and its manager. That requirement was part of the arrangements and would therefore form part of his notional contract notwithstanding the lack of a specific control provision in the Dragonfly/AA contract.

(6) Payment

Payment would be made for the number of days on which Mr Bessell worked at the relevant daily rate (for the engagements for which the schedules specified an hourly rate, the daily rate would represent 8 hours' work).

The schedule to the DPP/AA contract indicates:

"Hours per week	40 hours …
Other information	10% maximum overtime."

This is a schedule recording the details for the "supply [of] temporary staff". I read the contract as making provision for staff to be made available to the AA for at least 40 hours per week in return for payment. What the AA does with the staff made available is irrelevant: payment is made for making them available. The provision of a 4 week notice period suggests to me that the parties recognised that the work might run out and the AA would no longer wish to pay for the supply of staff it was no longer able to use. Taken together those provisions suggest to me that so long as Mr Bessell was present and available, the AA had to pay whether or not work was available for him to do. If however Mr Bessell was working for more than 40 hours then overtime payments would be due.

The Dragonfly/DPP contracts provided that Dragonfly should `provide the Services of a Consultant to the Client'. "Services" was defined by reference to the description in the schedule which normally read "specialist tester". The schedule specified "Standard Weekly Hours : 40 hours" and set an overtime

rate. It seems to me that the draftsman's use of the capitalised "Services" was a mistake or at best confusing, but that the intent was that payment should be made for the supply of Mr Bessell by reference to the time for which he was provided.

Putting these together it seems to me that the terms of the notional contract would (on the embodied arrangement approach – and at this stage considering only the formal contracts) have provided for payment for Mr Bessell's availability for work rather than simply for his working hours, together with payment when he worked overtime. That conclusion is in particular consistent with the notice periods in the relevant contracts – without an obligation to pay for availability what was the point of the notice periods?

It seems to me that in practice (see 7(xiii) above) Mr Bessell was very rarely left twiddling his thumbs and so payment was hardly ever made in respect of `availability' rather than work. His billed time generally reflected only time spent working although there may have been some flexibility or averaging in some weeks. Thus there was no conduct materially varying these formal contract terms.

In relation to this heading of the notional contract the two approaches lead me to different conclusions. If I ask: what would have been agreed? I conclude that Mr Bessell would have been paid only for the days (or hours) actually worked: he would have accepted that so both sides would have so provided in the contract.

But if I ask what the arrangements were I find that nothing in the practice varied the agreement between the parties because the requirement to pay simply for availability never arose and was never tested. Thus the "arrangements" included payments for availability rather than just for work done and the notional contract in that basis would have had the same provision.

(7) In relation to the first and third projects Mr Bessell would have been required to work most of his time at the AA's premises. To be there was necessary to make any of the contracts in relation to that period work. It would have been an implied term of the contracts and would on any view have been a term of the notional contract. For the AA.com project he would have been required to work at the AA's premises to the extent necessary to do the testing properly.

(8) There would have been no provision for pension, holiday pay or sick pay.

(9) There would have been no provision for appraisal.

65. I now turn to consider whether, under each of these notional contracts Mr Bessell would have been an employee.

Preconditions

66. I find that the first two *Ready Mixed Concrete* preconditions were satisfied:-

(i) the contracts would have been for the personal service of Mr Bessell in return for remuneration. The limited possibility of substitution would not have prevented them being for contracts for his services;

(ii) The right of the AA to direct through the operation of the team and the guidance of the team manager seems to me to be enough, in the case of a skilled professional man, to be able to say that there was sufficient control. Mr Smith argued that there is a difference between a right of control and simply co-ordinating the work of a worker. But I have found that the notional contract would contain provisions requiring Mr Bessell to be subject to the guidance of his team and team manager. That it seems to me is a sufficient right of control.

I therefore conclude that subject to the third condition it was possible for these contracts to be contracts of employment.

Mutuality

67. In relation to the question of mutuality in relation to any one of the series of notional contracts the question of obligations to offer or accept extensions or further contracts is irrelevant.

68. I concluded at para 59 above that the mutuality condition was satisfied by an obligation to work in return for an obligation to remunerate. That condition is satisfied by the notional contracts. I also concluded that a requirement to make work available (or to pay when it was not) was a significant pointer (a touchstone) towards employment. At paragraph 64(6) above I conclude on the embodied contract approach that such a requirement would have been included in the notional contract. Thus on that basis (and so far income tax purposes) there was a clear pointer towards employment.

But on the what-would-it-have-contained approach I concluded that the notional contract would have obliged the AA to pay only for work done. That may therefore point away from, or put a doubt over, whether it was a contract of employment. However in these circumstances it is not in my view a serious doubt because it is compensated by the fact that work always was available to the "tail end charlies" and that it was known that it would be available during the period of the contract.

69. I note that if I am wrong in my conclusion of law and an obligation on the employer to provide work or to pay where there is no work is a necessary condition for there to be employment, and if I am right at paragraph 64(6) above about what the contract would have contained, and if the what-would-it-have-contained is the right approach at least for income tax purposes, then for income tax purposes (but not for NI purposes) the condition for the application of schedule 12 FA 2000 would have failed.

70. I now turn to the other factors which may indicate employment or consistency or otherwise with employment:-

(i) the very limited right of substitution is not inconsistent with employment and does not point strongly away from it;

(ii) the degree of control was that which one would expect from a skilled professional employee and points towards employment;

(iii) the intention of the parties as regards whether or not there was to be an employment seems irrelevant;

(iv) the nature of the work required Mr Bessell to use the AA's computer and premises. That use therefore does not point to employment. Mr Bessell provided some of his own equipment. That points marginally away from employment;

(v) Mr Bessell, via Dragonfly, bore the costs of training and phone lines. These were not significant costs. They point only weakly away from employment;

(vi) Mr Bessell undertook work for only one other client, the nursery, in the period and that work did not provide a significant point of his income. This is a weak pointer away from employment.

(vii) Mr Bessell's ability to increase his profit during the period of a contract was limited. He suffered the risks associated with being paid on invoice but during the course of each contract in my view risked little economically and had little opportunity to increase his profit. He risked the costs associated with having no sick pay. He negotiated a higher daily rate of pay, and accepted lower rates when the market turned down. These factors point only weakly away from employment.

71. Overall I find nothing which points strongly to the conclusion that Mr Bessell would have been in business on his own account; by contrast when I stand back and look at the overall picture I see someone who worked fairly regular hours during each engagement, who worked on parts of a project which were allocated to him as part of the AA's teams, who was integrated into the AA's business, and who had a role similar to that of a professional employee. Mr Bessell did not get paid for, or go to

work to provide, a specific product; instead he provided his services to the AA to be used by them in testing the parts of a project which from time to time were allocated to him. He was engaged in relation to the work to be done on a specific project but not to deliver anything other than his services in providing testing in relation to that project. In my opinion he would have been an employee had he been directly engaged by the AA.

72. I therefore dismiss the appeal.

CHARLES HELLIER
SPECIAL COMMISSIONER

RELEASED: 11 December 2007

Authorities referred to in skeletons and agreed bundle of authorities and not referred to in the decision:-

Bank voor Handel en Scheepvaut NV v Administrator of Hungarian Property [1954] 2 WLR 867
Global Plant Ltd v Secretary of State for Health and Social Security [1971] 3 All ER
Massey v Crown Life Insurance [1978] 2 All ER 576
Barnet v Brakyn (HMIT) [1996] STC 716
McManus v Griffiths [1997] 70 C 218
Stuncroft v Havelock [2001] EAT/1017/00
Tilbury Consulting Limited v Giltens [2004] STC (SCD) 72
FS Consulting Limited v McCaul (2002) STC (SCD) 138
Lime-IT Limited v Justin (2003) STC (SCD) 15
Ansell (2004) UKSC SPC 425
Parade Park Hotel v HMRC (2007) UKSC SPC 599
Island Consulting Ltd v HMRC (2007) UKSC SPC 618

Spc00653

Income tax – Worker supplied through intermediaries – "IR 35" – Schedule 12 FA 2000 – Whether circumstances were such that had the services been provided under a contract directly with the worker, the worker would have been an employee – Held : yes

National Insurance – Worker supplied through intermediaries – "UR 35" – SI 2000/727 Regulation 6 – Whether circumstances were such that had the arrangements taken the form of a contract directly with the worker, the worker would have been an employee – Held : yes

THE SPECIAL COMMISSIONERS

M K M COMPUTING LTD **Appellant**

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS Respondents

Special Commissioner: CHARLES HELLIER

Sitting in public in London on 26 September 2007

Mr C Whittaker of Odos Consulting, for the Appellant

Mrs C D Cumming, Inspector of Taxes, for the Respondents

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DECISION

1. Martin Ellwood is the sole director of, and owner of 50 per cent of the shares of, MKM Computing Ltd ("MKM"). In September 1998 the Appellant agreed to make Mr Ellwood's services available to Proactive Appointments Ltd ("Proactive") a company engaged in the business of making contract workers available to its clients. Proactive agreed with London General Holdings Ltd ("LGL") to make Mr Ellwood's services available to LGL. Mr Ellwood rendered his services as a contract analyst programmer for the benefit of LGL under these arrangements. The arrangements continued as the result of a number of extensions until 2002.

2. On 11 June 2004 the Respondents made a Decision and two Determinations under what is commonly called the IR 35 legislation. They concluded that the circumstances were such that had Mr Ellwood been directly contracting with LGL the nature of the arrangements would have led to the conclusion that he was an employee and accordingly that, under the IR 35 legislation the Appellant was liable to NI and PAYE. The Appellant appeals against that Decision and those Determinations.

3. The Decision appealed against relating to National Insurance Contributions and is:

> "That Mr M Ellwood is treated as an employed earner in respect of his engagement with MKM Computing for the period 6/4/2000 to 5/4/2002. That MKM Computing Ltd is liable to pay primary and secondary class one contributions in respect of the earnings from that engagement.
>
> The amount MKM Computing is liable to pay in respect of this engagement is £6,316.45."

4. The Determinations appealed against relate to PAYE. The first is for the year 2000-01 and is for £8,086.40; the second is for the year 2001-02 and is for £13,012.00.

5. There was no dispute as to the amounts involved. The only issue before us was whether the conditions in the relevant pieces of legislation for the making of the Decision and Determinations were satisfied : in particular whether, had Mr Ellwood contracted directly with LGL, he would have been an employee.

<u>The Statutory Provisions</u>

6. For the relevant periods the legislation relating to direct tax was contained in Schedule 12 FA 2000. It provided so far as relevant to this appeal that where an individual or an associate receives from an intermediary (it is agreed that the Appellant is an intermediary for those purposes) or has rights to receive from an intermediary a payment or benefit not taxable under Schedule E then the intermediary is to be treated as making a payment chargeable to Schedule E of the amount of that

payment or benefit. The provision apply where para 1(1) Schedule 10 applies, namely:-

> "(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client")".

Pausing there, this provision was satisfied. Mr Ellwood personally performed services for the purposes of LGL's business.

> "(b) the services are provided not under a contract between the client and the worker but under arrangements involving a third party ("the intermediary")."

Pausing again, this condition was also satisfied: Mr Ellwood had no contractual relationship with LGL. His services were provided under arrangements involving the Appellant and Proactive. Each of them were third parties.

> "(c) the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client."

It was this last condition which was in dispute in the appeal.

7. Before leaving the income tax provisions of Schedule 10, I should note the provision of paragraph 1(4):

> "(4) The circumstances referred to in sub-paragraph (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided."

8. The National Insurance provisions to be found in regulation 6 of SI 2000/727 provide that a worker will be treated as in employed earner's employment and receiving benefits calculated in accordance with regulation 7 of that statutory instrument where the three conditions in regulation 6(1) are satisfied. Subparagraphs (a) and (b) of regulation 6(1) are identical to subparagraphs (a) and (b) of paragraph 1(1) Schedule 10 set out above. Paragraph (c), the third condition, is, strangely, phrased differently:

> "(c) the circumstances are such that, *had the arrangements taken the form of a contract* between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earners employment." (My italics).

9. There is to my mind a potential difference between the effect of paragraph 1(1)(c) Schedule 10 and regulation 6(1)(c). It is this: regulation 6(1)(c) appears to require the notional contract between the client and the worker to be constituted by the arrangements: "had the arrangements taken the form of a contract". Thus potentially there is no requirement to consider whether anything else would have been included in the notional contract. By contrast paragraph 1(1)(c) Schedule 10 may

require a wider enquiry into what the terms of a direct contract between client and worker would have been had there been such a contract: there is no limitation in the words "if the services were provided under a contract directly between the client and the worker" to contract terms which are encompassed in the arrangements or the circumstances.

10. In *Usetech Ltd v Young (HM Inspector of Taxes*) 2004 TC 811, Park J did not however see any difference between the two formulations. At paragraph 35, after reciting the relevant extracts he said:

> "The two wordings are not identical, but the meanings are. There was not a direct contract [between the parties in that case] but the provisions require it to be assumed that there was. What would it have contained? …".

It seems to me that Park J is there saying that both provisions require a determination of what such a contract would have contained from a consideration of all the circumstances, rather than the construction of a contract whose content is limited to the arrangements. At paragraph 9 he says:

> "subpara (c) involves an exercise of constructing a hypothetical contract which did not in fact exist, and then enquiring into what the consequences would have been if it had existed. There may be room in some cases for dispute about what the hypothetical contract would contain, and in the present case there is …".

11. On the other hand, in *Synaptek v Young (HM Inspector of Taxes*) (2003) 75 TC 51, Hart J seemed to adopt the more limited approach. That case however dealt only with the provision of regulation 6 and Hart J makes no reference to the corresponding provisions of Schedule 10. At paragraph 11 he says:

> "… The inquiry which Regulation 6(1) directs is in the first instance an essentially factual one. It involves identifying first, what are the "arrangements involving an intermediary" under which the services are performed, and, secondly what are the "circumstances" in the context of which the arrangements have been made and the services performed. *The legal hypothesis which then has to be made is that the arrangements had taken the form of a contract between the worker and the client."* (my emphasis).

This is potentially a different approach to considering what would the contract have contained? It seems to me that this difference exists at least in theory even when it is acknowledged that the `arrangements' are not limited to the words of the formal contracts between the relevant parties but include all relevant circumstances (see para 47 in *Usetech*). What actually happened will be part of the arrangements: the practice may indicate a variation in the formal agreements it may also illuminate the formal agreements or indicate something which falls short of contractual rights and duties. But even where account is taken of all the actual arrangements there may be a difference between the notional contract formed by encapsulating those arrangements

and the notional contract whose terms would be determined by asking "What would have been agreed?"

12. I shall return to this issue later but I note that Park J, at paragraph 1(4) said: "However no-one has suggested to me, nor do I consider, that that [difference] or the other minor differences between the two statutory provisions affects this case or open a possibility of the case being decided one way for NICs and another way for income tax and corporation tax."

13. I now turn to the facts to identify the "arrangements" involving the intermediary and the circumstances in which those arrangements existed and the nature of the services provided by Mr Ellwood.

The Evidence and Findings of Fact

14. I heard oral evidence from Mr Ellwood and from Paul Jarrett who was IT Director at LGL during the relevant period. Both provided witness statements. I also had before me a statement of facts not in dispute, copies of contracts and their extensions between the Appellant and Proactive, and between Proactive and LGL. There were also copies of invoices, of a note of a meeting between the Respondents' officers and Mr Jarrett, and of some correspondence between the Appellant on LGL in 2002. I set out below my principle findings of fact.

Mr Ellwood, the Appellant and LGL

15. Mr Ellwood was the sole director of the Appellant. He holds 50 per cent of its shares. His wife was the company secretary and the only other employee. She held the other half of its shares.

16. Mr Ellwood is a skilled analyst programmer. His particular expertise lies in programming mid-range computers. The services he performed at LGL related to those types of computer. His personality and skills were much appreciated by those at LGL.

17. LGL's business includes the provision of databases for the insurance business of its clients. There are entities such as Comet, Toyota or motor traders who provide warranty or insurance packages. Its business includes fronting calls for the public purchasers of their clients' products. The demands of its clientele changed rapidly and demands were often made for new and different services. The IT department had to react speedily to the clients' demands. This lead to peaks and troughs in the demand for the services of analysts and programmers. Its IT department had permanent employed staff. At times of greater demand these people were supplemented by external resource in the form of contractors. LGL used Proactive to obtain such contractors.

18. MKM advertised in yellow pages, had its own notepaper and website and prepared accounts which properly encompassed the income from LGL. From 25 February 2002 Mr Ellwood had the use of a laptop computer provided by MKM.

19. There was no evidence that MKM had undertaken any other material activity in relevant period other than providing Mr Ellwood to Proactive. MKM had no other employee with Mr Ellwood's skills.

The contracts

20. On 16 September 1998 Proactive wrote to LGL confirming that, on the basis of their attached Terms and Conditions they would provide the services of a Contract Analyst Programmer. The letter then set out the following:

"Name of Contractor:	Martin Ellwood
Position:	Analyst/programmer
Start Date:	21 September 1998
Finish Date:	19 March 1999
Contract period:	26 weeks
Notice period:	4 weeks from either party
Hours per week:	37½ hours
Hourly rate:	[£ a specified sum]"

The terms and conditions attached included the following provisions:-

> "3. … d) [Proactive] may terminate the Assignment of [LGL] is in wilful default … becomes insolvent or of a petition is appointed for its winding-up …
>
> (e) [Proactive] reserves the right to replace the Worker [defined as `staff assigned from time to time by [Proactive] to provide services for [LGL]] with another of similar ability and experience should for whatever reason the current worker be unable to complete the Assignment. The replacement Worker to be mutually approved by [LGL].
>
> (b) It is the responsibility of [LGL] to supervise and control the Worker; to ensure that the Worker undertakes the work for which he or she was hired; to make sure that safe working conditions are provided; to ensure that the Worker is adequately covered by insurance whilst the Worker is in the employ of [LGL]."

21. There are also provisions relating to timesheets, invoices, payments, confidentiality and the poaching of the Worker by Proactive's client.

22. Shortly before the end of the contract period set out above an extension of the contract for 26 weeks was agreed. Subsequent contiguous extensions of varying

lengths were agreed which ran until 29 March 2002. Neither of the parties were compelled to offer or accept any extension.

23. On 17 September 1998 (the day after the date of Proactive's letter to LGL described above) Proactive and the Appellant signed a written form of contract. The document was headed:

> "Contract between MKM Computing Limited
> for the services of Martin Ellwood
> and
> Proactive Appointments Limited"

The front page then provided:

> "This contract confirms [Proactive's] agreement with you that MKM Computing Limited … will provide services to and for the benefit of the undermentioned Client based on the Terms and Conditions below and attached.

Name of Company (the Client)	[LGL]
…	
Position ("The Assignment")	Contract Analyst Programmer
Report to	David Wainwright
Start Date	21 September 1998
Final Date	19 March 1998
Hourly Rate	£ [so much] per hour
Weekly Hours	37½ hours
Length of Contract	26 weeks
Notice Period	4 weeks from either party".

24. The attached Terms and Conditions appear to be in a standard form and to envisage more than the one Assignment described on the front sheet. There are provisions relating to the provision of time sheets signed by the Client and for the payment of fees – which "will be delayed no longer than 1 month." Payments may be withheld if MKM fails to work to the required standard or is unable to complete the assignment. MKM is required to have Employer's Liability and Public Liability Insurance. Clause 9(d) provides that Proactive may terminate with pay in lieu of notice in the event of unsatisfactory work by MKM's staff. There are restrictions upon MKM or its "staff" supplying other services to the Client.

25. Shortly before the Finish Date set out on the front sheet an extension of the contract for 26 weeks was agreed. Subsequent contiguous extensions were signed which ran until 29 March 2002. Neither party was compelled to offer or accept any extension.

The Work Done

26. In the period 8 April 2000 to 6 April 2002 MKM delivered, with 9 exceptions, weekly invoices to Proactive. The exceptions related to weeks when Mr Ellwood did not work because, for example, he was on holiday. The majority (55 out of 94) of the invoices were for 37.5 hours work with a normal range of between 30 and 39 hours. The arithmetic mean was 37.8 hours for those weeks he worked. The invoices were for `Programming Services' and specified the number of hours and rate per hour.

27. At LGL Mr Ellwood worked within a team. A team had a project manager. 6 project managers reported to Mr Jarrett, the IT director. Mr Ellwood was allocated tasks by his team manager. There tasks included: understanding the user requirements by speaking to client managers and employees, drafting requirement documents, writing software, developing software, testing software, carrying out quality assurance and installing the software. The allocation of the tasks did not include instruction as to how to perform them.

28. Mr Jarrett would generally use contract staff for particular projects. Permanent employees were allocated tasks more fluidly. Mr Ellwood worked on a succession of such projects in the relevant period. Each contractual period related to one or two projects only. The periods of renewal of the proactive/LGL contract sometimes did and sometimes did not encompass the time actually needed to complete a particular project.

29. Mr Jarrett, having decided that he needed extra contract staff would arrange for an agency like Proactive to supply them. Generally the nature of project for which he required staff would be communication to the agency. Towards the end of the period of a contractor's contract there would be a telephone conversation with the agency about renewing the contractor's contract. Mr Ellwood would hear formally from the agency if a renewal of the contract was being offered, but would as the result of informal conversations at LGL have some idea of whether it would be and what projects would be involved. In the relevant period the contract was extended some 13 times.

30. The period for any extension was fixed by Mr Jarrett by reference to his estimate for the time needed for the work he had in mind. He would reach that estimate by discussion with those involved at LGL including at times the contractor who might be involved in the project. Mr Ellwood was involved in some discussions for future projects in which he became involved. Where a project over-ran its estimate the contractor's contract might be extended. This happened with a number of the projects on which Mr Ellwood was involved.

31. If a project were to finish early or looked likely to do so Mr Jarrett would have contacted the agency and told it that he would find something else for the contractor to work on.

32. Although when working at LGL Mr Ellwood would spend his time principally on the project or projects which had been assigned to him he would occasionally be asked by people at LGL to help on other matters: for example if a problem arose in relation to something he had previously been involved in; and generally, after consulting Mr Jarrett or the project manager, he would supply the help required as part of his contracted hours.

33. As part of the discussion of a new project with Mr Ellwood there would be discussion of any holiday he wished to take in the projected period for the project. There would be some give and take bearing in mind the LGL time constraints and Mr Ellwood's need for a holiday. Having settled the period he would take as holiday the period for which the contract would be extended would be fixed. He did not submit invoices for those days on which he was on holiday.

34. Mr Ellwood generally attended LGL's premises on working days between 6.45am and 3.30pm. He liked to leave early to avoid the traffic. He said that the client "was sympathetic to traffic difficulties and would let me go early." It was necessary for his work that he was at LGL when others were there : there would be matters he would need to discuss and clarify with other people at LGL. He did not, and was not expected to wander in and out as he pleased.

35. The LGL computer systems were fairly reliable and crashed infrequently. If the system crashed then everyone including Mr Ellwood would sit around for a bit, perhaps read a technical magazine or twiddle their thumbs. Likewise if he arrived at LGL and the overnight back-ups were running late. If Mr Ellwood was in a good mood on such an occasion he said he would not count the downtime as hours to be billed; if he was in a bad mood he said he would charge. I accept that evidence. Given his regular working hours and the consistency of his billed hours I conclude that generally payment was made in respect of such down or unavailable time.

36. If Mr Ellwood's work was defective (he recalled only one such occasion) he would rectify it in his own time.

37. In the Autumn and early winter of 2001 Mr Ellwood was engaged under two 13 week contract extensions for which in each case one of the two specified projects was the EMS Australia Project. After the work had been done on the project in the UK Mr Ellwood went, at Mr Jarrett's instigation, to Australia to train the local personnel and to implement the system which had been written. His expenses of travel were paid by LGL. While he was there he had regular telephone contact with Mr Jarrett, reporting to him how the work was going, Mr Ellwood had prepared a plan and he let Mr Jarrett know how progress was being achieved by reference to that plan. Mr Jarrett said he saw his role as offering help, and, where necessary, the facilitation of help and assistance from elsewhere in the organisation. It was clear to me that Mr Ellwood had been asked rather than commanded to go to Australia, but also clear that Mr Jarrett was monitoring and would guide what he was doing.

38. If the approach of a deadline meant that it might be desirable that more than 37½ hours be spent on a project in a particular week, Mr Jarrett would discuss the need with Mr Ellwood. Mr Jarrett did not feel able to compel Mr Ellwood to work additional hours but would expect an amicable helpful result.

Control

39. Once Mr Ellwood had been given a project he would get on and do it. He was not subject to detailed orders as to how to do what and when. But he was part of a team: he reported his progress to Mr Jarrett or other project managers and discussed what he was doing with other members of the team. Although these interchanges did not consist of giving orders it was clear to me that they would have affected what he did, when he did it, and how he did it.

40. If Mr Ellwood wished to take an unscheduled holiday he would discuss it with the relevant personnel at LGL. Mr Jarrett said, and I accept, that there had been an occasion when he had refused a day off when they had been really up against a deadline.

41. Mr Ellwood's computer programme coding was not reviewed for quality and he was not subject to the employee appraisal system. If his work was deficient he would not be offered a new contract.

Substitution

42. Before the commencement of the first contract Mr Ellwood was interviewed by a member of LGL's staff. He was asked some technical questions. Mr Ellwood described part of the interview as a check that he had not yet two heads.

43. In a document prepared by Mr Ellwood on 2 April 2002 and signed by Mr Jarrett on 5 June 2002 the relationship between MKM and LGL was described thus:

> "[MKM] has the right to provide a substitution worker in addition to or in place of Martin Ellwood. If a substitute worker were to be proposed [MKM] would be required to satisfy [LGL] that the substitute has the necessary skills, qualifications and experience …"

In the relevant period there was no occasion when Mr Ellwood sent or proposed a substitute for himself.

44. In the course of a meeting with Respondents' officers Mr Jarrett, having been asked what would happen if one day Mr Ellwood said he was going on leave and would send someone in his place, replied that that conversation just would not happen. In cross-examination Mr Jarrett said that if the conversation started his response would depend on the circumstances. Generally he would expect a new contract to be entered into with the agency. If Mr Ellwood were not to turn up he would contact the agency. If the agency sent a Mr Smith and if, having met him, Mr

Jarrett decided that Mr Smith was OK he would expect a new contract with the agency for the provision of Mr Smith. In deciding whether or not to accept Mr Smith, Mr Jarrett said it would have been relevant that Mr Smith was from MKM because Mr Ellwood might well have communicated his knowledge of MKM to Mr Smith: it would give Mr Smith an advantage.

45. Mr Jarrett said that he would not have been concerned if Mr Ellwood had arranged for Mr Smith to conduct some of the work off LGL's premises: if it contributed to the project being done in time he would have been happy. If Mr Jarrett "was not paying it would be no cost" to him and he would not mind.

46. Mr Ellwood said in evidence that he regarded the right for MKM to substitute another person in place of himself as an implicit right in the contract between MKM and Proactive. If for example he had been ill and unable to go to LGL but had found a substitute he would have rung the agency, offered the substitute and proceeded from there.

47. My conclusion is that LGL's management regarded the arrangement it had with Proactive as being for the supply of Mr Ellwood's services only. That was whom they interviewed, and whom later they knew: that was who they thought they would get. Whilst they would consider any proposed substitute they did not regard themselves as being bound to do so, and even if a proposed substitute were interviewed and found acceptable they did not regard themselves as bound to accept him (although had Mr Ellwood been truly unable to perform the expected duties and an acceptable substitute been offered by Proactive I believe that they would have recognised their obligation under clause 3(d) of the Proactive/LGL contract to accept that substitute in place of Mr Ellwood). I found the demeanour and oral evidence of Mr Jarrett on this question more convincing that the statement quoted above signed by him on 5 June 2002: in particular his oral insistence that a substitute would be subject to a new contract indicated to me that he did not regard Proactive as having even a limited right of substitution (but that was without consulting the detailed terms of the Proactive/LGL contract).

48. I find that the highest that Mr Ellwood's expectation can be put at the relevant time is that he had a confident expectation that if he was ill and could find a suitable substitute it was very likely that that substitute would be accepted by LGL. As regards MKM's relationship with Proactive I find that Mr Ellwood would have regarded the question as determined by the terms of the Proactive/MKM contract properly construed.

49. <u>*Other Matters*</u>

(i) No payment was due or was made under any contract when Mr Ellwood was sick or on holiday.

(ii) LGL provided no training for Mr Ellwood. He kept abreast of technical developments by reading in his own time (apart from reading during

occasional downtime of the LGL computers) magazines MKM purchased, and on the internet.

(iii) There was no canteen at LGL. There was a vending machine which Mr Ellwood was able to use.

(iv) Free coffee was available to Mr Ellwood in common with other employees in the early morning.

(v) LGL had car parking facilities. These were limited in number. They were available only to employees once they reached the top of a waiting list. Mr Ellwood was not entitled to use the car parking facilities or to join the waiting list.

(vi) In common with other employees Mr Ellwood had an e-mail address at LGL.

(vii) Unlike employees Mr Ellwood had no right to use the social and sports club.

(viii) Mr Ellwood worked in an open plan office at LGL alongside other employees of LGL. The vast majority of his recorded time was spent working at LGL's premises, although he did work at home, and there was the trip to Australia.

(ix) Mr Ellwood was not required to provide and use a laptop by LGL nor did it provide one. But, latterly, he used a laptop provided by MKM.

(x) Unlike employees Mr Ellwood was not subject to the LGL appraisal process.

(xi) Mr Ellwood would have been invited as a guest to the Christmas office function but not automatically invited by the LGL HR function as an employee would have been.

(xii) Mr Ellwood completed weekly time sheets which were approved by a member of LGL's staff such as Mr Jarrett and then sent to Proactive. On the basis of the time sheets MKM would invoice proactive. Staff who were LGL employees were clearly not subject to these procedures, although, like contractors, they did record their time against projects for management accounting purposes. These records were reviewed by Mr Jarrett as part of his overall control of the projects.

(xiii) It would not have been possible for a substitute sent by Mr Ellwood in his place to get into LGL's building to go to work at Mr Ellwood's desk without the prior issue of a relevant pass.

(xiv) Mr Ellwood worked for no one else in the relevant period.

The Case Law Tests in relation to Employment

50. I was referred to a number of cases on the difference between a contract for service and a contract of services. I take from them the following principles:-

(i) There is an irreducible minimum for a contract of employment. That minimum was described in *Ready Mixed Concrete v Minister of Pensions and National Insurance* (1967) 2 QB 497, MacKenna J there set out three necessary conditions for a contract of services:

> "(i) [the mutuality test] The servant agrees that in consideration of a wage or other remuneration, he will provide his own work and shall in the performance of some service for his master;
>
> (ii) [the control test] He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master;
>
> (iii) [the inconsistency test] the other provisions of the contract are consistent with its being a contract of service."

These tests are a good starting point when considering whether a contract is one of employment and it is important that mutual obligation and control are identified before moving on to consider other factors (see Buckley J at paragraph 23 in *Montgomery v Johnson Underwood* Ltd (2001) EWCA Civ 318). Whilst the tests are necessary conditions for employment the nature and extent of the requirements for mutuality and control are not rigid but depend upon the circumstances. I discuss this below. MacKenna's third condition has to my mind much in common with the overall picture and in business on his own account tests I describe below. In particular the third test the inconsistency test seems to me to be capable of embracing the `overall picture' approach and the use of the various indicia. But the mutuality test and the control test require some further comment.

(ii) Mutuality. There are two aspects to this. First that there is some mutuality of obligation. Second that the contract is for "his own work" – for his personal service. The second aspect gives rise to the question as to whether a right for the taxpayer to substitute another person in his place can prevent a contract being one for service. I discuss that below. The first aspect clearly covers the requirement that there be an obligation on the one hand to work and on the other to remunerate. The more difficult question is whether there is or it also encompasses an obligation for the employer to provide work (or to pay when there is no work to be done). It seems to me that the former is a condition for there to be employment; the latter a strong pointer towards employment. (See *Cornwall County Council v Prater* 2006 EWCA Civ 102

per Mummery LJ at paragraph 40(5), Longmore LJ at paragraph 43 and Lewison J at paragraph 51; by contrast Park J in *Usetech* regards an employer's obligation to provide work or to pay if there is none as a "touchstone" of employment – see paragraph 60.)

(iii) Substitution. The contract must be for personal service. Nevertheless a limited or occasional power of delegation or right to substitute another person may be consistent with a contract of personal service. (*Usetech* : paras 49-52). In particular it seems to me that a contract containing a right to substitute if and only if the `employer' consents is, until consent is given a contract which plainly satisfies the personal service condition, although the presence of that right may be an indicium which points towards self-employment.

(iv) Control. MacKenna J says "control in a sufficient degree to make that other the master". That is no indication that absolute control is required. In *Morren v Pendlebury Borough Council* (1965) 1 WLR 576 Parker C J indicates that in the case of a professional person there can be cases where there is no question of the employer telling him how to do the work in the absence of control and direction "in that sense" can be little, if any use, as a test. It seems to me that something which can be called control is a necessary feature of an employment relationship even one for a skilled employee; but the nature of the power of control which suffices may differ with the nature of the job: the hospital will tell the surgeon to try to meet the targets; the company will tell the ship master where to take the ship; the school governors may tell the headmaster or headmistress how many staff he or she may engage.

(v) Having considered whether these conditions are satisfied, the tribunal should then consider all the circumstances and in doing so may use the following tests and guidance.

(vi) To ask whether the taxpayer is in business on his own account? (*Market Investigations Ltd* see below)

(vii) "In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and making an informal, considered qualitative appreciation of the whole … Not all details are of equal weight … The details may also vary in importance from one situation to another." (*Hall v Lorimer* (1993) 66 TC 349 at 375F.)

(viii) Nevertheless the consideration of certain indicia which may point one way or the other may be helpful in considering that picture. (*Lee Ting Sang v*

Chung Chi-Keung 2 AC 374, and *Hall v Lorimer*). Those indicia include those mentioned by Cooke J in *Market Investigations Ltd v Minister of Social Security* (1969) 2 QB 173. The following may therefore be relevant:-

(a) does the taxpayer provide his own equipment?
(b) does the taxpayer hire his own helpers?
(c) what degree of financial risk or opportunity for profit does the taxpayer have?
(d) what degree of responsibility for investment and management does the taxpayer have?
(e) is the taxpayer part and parcel of his "employer's" organisation see *Hall v Lorimer*);
(f) the degree of control to which the taxpayer is subject;
(g) termination provisions – termination on notice may be a pointer towards employment in some cases (it was found to be so in *Morren v Swinton* (1965) 1 WLR 576 but found to be neutral in *McManus v Griffiths* 1997 70 TC 218);
(h) the intention of the parties; and
(i) the extent of mutual obligations and of the "employer's" obligation to provide work or pay in lieu of so doing.

Discussion

47. I shall now consider first what the terms of the hypothetical contract between LGL and Mr Ellwood would have been, and then consider, against conditions for, and the indicia of, employment and self-employment developed in those cases whether, the circumstances were such that if that hypothetical contract were in existence, Mr Ellwood would have been an employee of LGL. I have endeavoured to take into account the submissions of the parties in the discussion below without rehearsing them in detail. Mr Ellwood was the sole director of MKM it seems to me as it did to the Special Commissioner in *Netherlane* [2005] SpC 457 proper in the absence of any form of contract between him or MKM, straightforward effectively to treat him as a party to the Appellant's contract in conducting this exercise.

The notional contract

48. It is important to consider the terms of the notional contract because some of the more important conditions for, and indicia of, employment or otherwise flow from the legal rights and duties of the parties rather than from the general nature of the relationship between the parties.

49. I start by asking myself the question posed by Park J at paragraph 35 of his judgment in *Usetech*: had there been a contract between LGL and Mr Ellwood, "What would it have contained?" but I note below when the alternative approach would give a different result. In my view there would have been a series of fixed term contracts each of which would have contained the following provisions:-

(1) It would be for a fixed term (mirroring for each engagement the term of the corresponding contracts between Proactive and LGL, and Proactive and MKM).

(2) It would be terminable early (a) on 4 weeks notice from either party. That is because the contract confirmation letter between Proactive and LGL provides for 4 weeks' notice from either party, and the front page of the Proactive/MKM contract made the same provision. There would also be provision for termination in other circumstances such as default, insolvency or misconduct.

(3) It would be for Mr Ellwood to work as an Analyst/Programmer on the projects specified for the assignment. This seems to me to be clear from (i) the definition of Assignment in the Proactive/LGL contract:

> "The Assignment – means the services which have been specified by [LGL] to [Proactive] and are allocated by Proactive to the Worker for performance",

(and the corresponding definition in the Proactive/MKM contract), together with (ii) my factual finding that LGL did indicate to Proactive, and Mr Ellwood knew, the project for which the worker was required. I come to that conclusion despite the absence of any express requirement in either contract that the Assignment be performed. That requirement is to my mind implicit in both contracts and was what happened in practice. The contractual requirement would be to work on the projects, not for the delivering of a completed project.

What I have said hitherto under this heading flows directly from the arrangements (reflecting the formal agreements and the obligations undertaken in practice) but if I am asking the question : what would have been contained in such a contract? There would in my view have been a further requirement namely for Mr Ellwood to provide assistance in such other matters as might arise from time to time within Mr Ellwood's competence but only for a small part of his working time.

(4) Except for periods of holiday specified in the contract or later agreed by LGL and periods of sickness Mr Ellwood would work on average for about 37½ hours each week. He would be paid at the hourly rate for the hours worked. (I deal at (8) below with the question as to whether he would be paid for working or being available to work.)

Whereas both the Proactive/LGL and Proactive/MKM contracts specify Hours Per Week of 37½, it was clear that these provisions had been varied by the conduct of the parties: holidays were factored into a contract renewal (and not treated as hours of work) and the actual hours varied around the 37½ hours figure.

(5) Mr Ellwood would work at LGL's premises using LGL's computer systems during hours when those computer systems were generally available and for hours which permitted the discussion and interaction with other people at LGL necessary for the projects he was assigned.

This term is not in the Proactive/LGL contract. (There is a requirement however in clause 7(a) of the Proactive/MKM contract to conform to LGL's normal hours of work.) But it was clear that Mr Ellwood could do the tasks assigned to him only if he was on LGL's premises during fairly normal working hours on most days. That is what was expected and what happened. It was a necessary term of the arrangements. As part of the arrangements it would have been part of a direct contract on either view of the legislative requirement.

Mr Ellwood could also work at home when he could do so effectively.

In relation to the REMS Australia project Mr Ellwood would be required to work in Australia for part of his time on the project.

(6) Mr Ellwood would submit weekly time sheets showing the hours worked in a particular week and would be paid at a fixed hourly rate for that work within 2 months of the end of each month worked. (This follows from clauses 4 and 8 of the Proactive/LGL contract and clauses 4 and 5 of the proactive/MKM contract and what happened in practice.)

(7) There would be no express contractual right to BUPA, PFI, Pension, Sick Pay, Holiday Pay, car parking benefits, or staff parties.

(8) <u>Periods when no work was available.</u>

There is no express provision in the Proactive/LGL of the Proactive/MKM contract dealing with this issue. Whilst those contracts provide for 37½ hours work per week it is clear that that provision was varied by conduct (see paragraph 26 above) so that somewhat more or less than those hours were worked and paid for. The contracts refer to an Assignment but do not expressly limit the work to be done to the assignment and in practice work was done (and the hours paid for) outside the particular assignment. The notice period of 4 weeks could be indicative of an obligation on LGL to continue paying so long as Mr Ellwood turned up even if the expected work had dried up. The evidence before me was that there had not been a situation in which the work had completely dried up so there was no practice to illuminate the agreement.

Mr Jarrett in his evidence gave me the impression that he saw the 4 week notice period as a protection available to LGL if the work dried up. That was indicative of a presumption that LGL would be liable to continue to pay so

long as Mr Ellwood turned up. Mr Ellwood's own fair and candid evidence that when LGL's computer was down he would sometimes charge for his time was an indication that to some extent he regarded the arrangements as providing for continuing payment even when the work dried up. On the other hand he said that if the work were to have dried up he would have `backed off' and agreed to early termination.

The early termination provision of the LGL/Proactive contract enabled LGL to terminate even if the work had not dried up but also provided a measure of protection for Mr Ellwood (and Proactive) in the 4 weeks' notice. It seems to me that the notice period together with the description of the essential terms of the contracts on the first schedules suggest that payment would continue to be made if Mr Ellwood was available to work even if no work was in fact available. On this basis and in view of the actual approach of the parties it seems to me that the arrangements provided for payment for a maximum of 37½ hours in a week so long as Mr Ellwood turned up and was available to do what was allocated to him.

And, if one asks Park J's broader question "What would the contract have contained?" then I believe that each of the fixed term contracts would have contained provision for payment if there had been no work to do. That was how Mr Jarrett appeared to view the contract – that was why he would have sought another project for a contractor if his assigned project ceased – and that was the importance of the 4 week notice period for him. If a direct contract had been negotiated that is what it would have contained.

(9) Control

Clause 7(a) of the Proactive/MKM contract provides that MKM agrees:

> "To co-operate with [LGL]'s staff and accept the direction supervision and instruction of any person in [LGL]'s organisation to whom it is responsible …".

Clause 3(b) of the Proactive/LGL contract provides that it is:

> "the responsibility of [LGL] to supervise and control the Worker …".

The evidence before me led me to the conclusion that Mr Ellwood had not in practice been given orders but in the course of a project to which he was assigned his interaction with others within LGL affected what he did, when he did it and how he did it.

Whilst the covenant in clause 7(a) above is given by MKM it seems to me that it can be taken as applicable to any person MKM supplied and would be applicable to Mr Ellwood as MKM's supplied worker.

Whether one considers simply a contractual embodying of the arrangement or what would have been included in a national contract, I conclude that at a very minimum the hypothetical contract would have required Mr Ellwood to report his progress regularly to persons at LGL, to discuss with such person the content and progress of his work, and to co-operate with them and to adapt the course of his work so as to ensure the most effective progress of the work he was doing as a result of those consultations and discussions.

(10) Substitution

Clause 3(e) of the Proactive/LGL contract provides that:

> "[Proactive] reserves the right to replace the Worker with another of similar ability and experience should for whatever reason the Current Worker be unable to complete the Assignment. The replacement Worker to be mutually approved by the Client."

This gives a limited right of substitution where the Worker is "unable" to perform.

The standard Terms and Conditions annexed to the Proactive/MKM agreement – the agreement bearing in its title the words "for the services of Martin Ellwood" – contain no express provision for the substitution of one worker for another. Those Terms and Conditions impose obligations on MKM to do certain things and impose restrictions on what its staff may do. Mr Whittaker says that the detailed terms and conditions of the MKM/Proactive contract refer to the work being done by MKM's staff (defined he says as employees and representatives of MKM), and that this indicates that it was agreed that persons other than Mr Ellwood could perform the services. I do not agree. The references to MKM's staff in that contract do not expressly refer to an obligation on MKM's staff to provide the services, rather they are restrictions and obligations imposed on the conduct of its staff and so to my mind are to be construed as restrictions and obligation applicable to the member of staff agreed to be supplied, namely Mr Ellwood. In my view the Terms and Conditions contain nothing which varies the terms specified in the front sheet which are for the provision by MKM of Martin Elliott. There is in this agreement no express or implied right for MKM to supply anyone else in his place however able he might be. There was no evidence of practice or conduct in the relevant period relevant to this contract which would indicate variation of the formed provisions of this contract. However, I believe it is likely that if LGL consented to a substitute Proactive would also have consented.

I concluded above that LGL regarded the arrangement as being for the services of Mr Ellwood only and that at the relevant time the most that Mr Ellwood had was an expectation that LGL would consider favourably a substitution introduced by him.

I conclude that if the arrangements had been incorporated into a contract between Mr Ellwood and LGL there would have been no provision under which Mr Ellwood could provide a substitute for his own personal service unless Mr Ellwood was unable to work for LGL and LGL approved the substitute in advance.

I now ask the alternative question: what would the contract have contained? Mr Whittaker says that the evidence showed that had the parties got together and discussed substitution a precise right to substitute would have been agreed and that such a right would therefore have been contained in the notional contract. I agree that if the question had been raised some agreement would have been arrived at. But I do not believe that LGL would have agreed to accept anyone sent along by Mr Ellwood : they valued Mr Ellwood and his abilities, they would have wanted to be sure that they were satisfied that any substitute was as good as Mr Ellwood and could take over what he was doing quickly and without disruption. In my view the right would have been very limited – it would have been to substitute only a person approved in advance by LGL.

A contract of or for services

50. I now turn to consider whether had Mr Ellwood been directly engaged by LGL on the terms of the contract I have discussed above, he would, in the circumstances I have found, have been engaged under a contract of service. I start by considering the various indicia from the case law.

51. Mutuality of obligation

(a) obligation

There was no obligation to renew any of the contracts at the end of their respective terms. But that is not relevant to whether there was mutuality during the period of each fixed term contract. I consider here whether there would have been mutuality during the course of each fixed term.

During each fixed term Mr Ellwood would have been obliged to work and LGL would have been obliged to remunerate him.

I have found, that on either approach to determining the terms of the notional contract that there would have been no obligation to provide work for Mr Ellwood but that there would have been an obligation to pay if work was not available.

(b) for personal service

I have concluded that the notional contract would contain only a very limited right of substitution. The finding that substitution would have been permitted only where LGL approved indicates to my mind that until LGL approved the notional contract was a contract for Mr Ellwood's personal service. In my view that limited right is not sufficient to prevent the contract being one for "his own work".

(c) conclusion

I conclude that the first of MacKenna J's conditions is fulfilled. Under the notional contract it can properly be said that Mr Ellwood would have agreed to provide his own work for consideration.

The lack of a substantial right of substitution in those circumstances is a position towards employment.

Control

52. Mr Whittaker says that although LGL monitored the progress of a project, there is a significant difference between monitoring a worker and controlling him. He points to the evidence of the time Mr Ellwood was in Australia when he reported back to Mr Jarrett but Mr Jarrett's role was to provide help and facilitation for Mr Ellwood not to tell him what to do. He accepts that Mr Ellwood worked fairly standard hours but that was necessary to do the work not because he was commanded to keep those hours. Overall he says that there was not that degree of control present which would have made Mr Ellwood the servant of LGL.

53. Mr Ellwood, in my opinion would have been subject to the kind of control which in the context of a professional employee would be sufficient to say that LGL was his master.

54. Under the notional contract LGL would have had a right to require him to undertake a project in co-operation with other persons at LGL and to adapt the course of his work to ensure the most effective progress as determined by internal discussions. That right would in my view be sufficient in the case of a professional skilled person to say that LGL had a right to control what Mr Ellwood did and, generally when he did it, or to say that he was so subject to LGL's control (albeit exercised through guidance and discussion rather than command) as to make LGL his master.

55. I therefore conclude that the second of MacKenna J's conditions is fulfilled. I also regard the nature of the constraints and guidance to which he was subject as an indication of employment.

Other factors consistent with a contract of service

56. I deal in paragraphs 59 to 69 below with the other indicia but none of them seem to me to permit the conclusion that the contract was inconsistent with a contract of service.

57. Had the contract been simply for the delivery of a particular project – the development, the code, and the implementation that it could have been inconsistent with a contract of service. But it was not, it was for expert time to be spent in the development and delivery of the project. Mr Ellwood was not in the position of a painter engaged to paint a room; he was in the position of a painter employed to paint such parts of the house as his employer would from time to time require.

58. I therefore conclude that none of MacKenna J's conditions was failed, and thus that it is possible for the national contract to constitute one `of service'.

Business Risk

59. Like an employee Mr Ellwood was financially dependent upon one payer. Whilst by working a few extra hours Mr Ellwood could earn more, the scope for extra work was limited. Mr Ellwood was at risk if his work was substandard and there was an occasion when he worked uncharged for hours to remedy a defect. A professional employee he accepted might also work unpaid overtime to remedy a defect, but overall I did think that Mr Ellwood was more at risk on this front than a normal professional employee. Mr Ellwood's wages would have been paid some time after each month and which would be unusual in the case of an employee.

Overall these factors pointed gently away from employment but not vigorously so.

60. Mr Whittaker pointed to the financial risk inherent in final term contracts some of which lasted for only four weeks. That was quite different he said from the position of a normal employee. I agree that it is different from the position of an employee on an indefinite contract, but an employee could also be engaged for a fixed term. If that term were long enough or if the term were extended the employee might acquire statutory employment protection which could fetter the employer's ability to determine the contract, but those statutory rights derive from being an employee and are not a feature of what it means to be an employee. I do not think therefore that the fixed term nature of the engagements is a pointer away from employment. If one views the succession of contracts as a whole then the effect of the arrangements is a continuing notional contract with irregular break points. That would be an unusual form of employment contract today (probably as a practical effect of the employment protection legislation) but it does not to my mind point strongly away from employment.

In business on his own account?

61. Do these financial considerations, the short term nature of the contracts and the other circumstances point towards Mr Ellwood being in business on his own account if engaged under the notional contracts? In my view they do not. Mr Ellwood would have had little opportunity to increase his profit and was not conducting any form of undertaking. His position was quite different from the mixer in *Lorrimer*: he worked for one company only for a succession of engagements over many years.

Equipment and expense

62. Mr Ellwood's work was mainly on LGL's computer. It had to be. This factor is neutral. A laptop was provided by MKM in 2002 – towards the end of the period under appeal – and it paid for Mr Ellwood's continuing education. These factors together point somewhat away from employment but not substantially.

On the other hand when Mr Ellwood worked in Australia on the Australian project his expenses of travel were met by LGL. It would, Mr Whittaker says not be unusual to pay a decorator for the wallpaper he uses in what would clearly be a contract of service. I also note that a professional firm may charge its clients separately for specific out of pocket expenses. Overall I find that in relation to that project this indicator did not point towards employment but did not point strongly towards self employment.

Benefits

63. The lack of contractual benefits such as holiday pay, sick pay, car parking or pension arrangements point towards self-employment.

Termination

64. Termination on notice is less usual in a contract for service although as Mr Whittaker pointed out there will be cases where a notice period will be included: he gave the example of a contract to build a house where there might be provision for early termination on notice if the parties fell out. But, in my view, the weeks' notice provision points more towards employment than self-employment.

Intention of the parties

65. The parties' intention as to whether there should be an employment relationship are clearly irrelevant. Their intention in relation to specific circumstances was in my view relevant to the consideration of the notional contract on the what-would-it-contain basis and has been considered elsewhere.

Part and Parcel

66. I had the impression that while he was working at LGL Mr Ellwood was part and parcel of the organisation. I accept that he was recognised as a contractor rather than as a permanent member of staff, but he sat alongside other members of staff discussed future projects, and was called upon for help in emergencies and worked along with them on the projects as would a permanent employee.

Conclusion

67. Standing back and looking at the whole picture I am left with the distinct impression that under the notional contract Mr Ellwood would have been an employee. He would have been providing his own work to do those tasks allocated to him and would have been paid broadly for a 37½ hour week. To me it appears that his job was working for LGL, not that he made his money by providing something to LGL. He was an expert skilled independently minded professional who worked at LGL and for no one else on terms (as to what he did, when he was there and how his work was organised) which were substantially similar (although not identical) to those applicable to an employee but on fixed term contracts.

68. Accordingly I find that the conditions in Schedule 12 FA 2000 and SI 2000/727 were fulfilled. On that basis I dismiss the appeal against the Determinations.

69. The Decision made in relation to National Insurance decided that Mr Ellwood was to be treated as "an employed earner in respect of his engagement with MKM Computing for the period 6/4/2000 to 5/4/2002. The contracts before me related only to the period up to 28 March 2002 and my decision therefore relates only to that period. This was recognised by the parties and in the agreed statement of facts it was stated that `if the appeal is not upheld, the period in the section 8 decision should be revised to "6 April 2000 to 29 March 2002". Regulation 10 of the Social Security Contributions (Decisions and Appeals) Regulations 1999 gives the tax appeal Commissioners power to vary a decision. Accordingly, given my conclusions as to the satisfaction of the conditions in SI 2000/727 I find that the Decision should be varied as described but otherwise shall stand.

CHARLES HELLIER
SPECIAL COMMISSIONER

RELEASED: 11 December 2007

SC 3029/2006

Authorities referred to in skeleton arguments and the agreed bundle of authorities not referred to in the decision:-

Nethermare (St Neots) Ltd v Gardiner and Another (1984) ICR 612
McManus v Griffiths (1997) 70 TC 218
Tilbury Consulting Ltd v Giltens (2003) SpC 390
Netherlane Ltd v York (2005) SpC 457

Spc00652

NATIONAL INSURANCE CONTRIBUTIONS – provision of services through intermediary – whether, if the arrangements had taken the form of a contract between the worker and the client, the worker would be regarded as employed by the client - no – appeal allowed - Social Security Contributions and Benefits Act 1992 s 4A; Social Security Contributions (Intermediaries) Regulations 2000 SI 2000 No. 727 reg 6(1)(c)

INCOME TAX – provision of services through intermediary – whether the circumstances were such that, if the services were provided under a contract directly between the individual and the client, the individual would be regarded for income tax purposes as an employee of the client - no – appeal allowed - FA 2000 s 60 and Sch 12

THE SPECIAL COMMISSIONERS

FIRST WORD SOFTWARE LIMITED

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Special Commissioner : DR A N BRICE

Sitting in London on 1 and 2 November 2007

Matt Boddington of Accountax, Chartered Tax Advisers, for the Appellant

Graham Conway, of the Appeals Unit, for the Respondents

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DECISION

The appeal

1. First Word Software Limited (the Appellant) appeals against three decisions of the Commissioners for Her Majesty's Revenue and Customs (the Revenue). All the decisions were dated 14 July 2006. The first decision related to the period from 4 September 2000 to 31 January 2002 and was that the Appellant was liable to pay national insurance contributions of £18,793.00. The second decision related to the year 2000-01 and determined that income tax under PAYE of £17,187 was due. The third decision related to the year 2001-02 and determined that income tax under PAYE of £27,264 was due.

2. The sole director and shareholder of the Appellant is Mr Neill Atkins who is a computer consultant. From 4 September 2000 to 31 January 2002 Mr Atkins supplied services to the Appellant who supplied them to an organisation called Plexus Personnel (Plexus) who supplied them to Reuters Limited (Reuters). The disputed decisions were made because the Revenue were of the view that the circumstances were such that, if the services had been performed under a contract between Mr Atkins and Reuters, Mr Atkins would be regarded as employed by, and as an employee of, Reuters. From that it followed that the Appellant, as an intermediary, was liable to pay national insurance contributions and income tax under PAYE in respect of the payments made to Mr Atkins. The Appellant appealed because it was of the view that, if the services had been performed under a contract between Mr Atkins and Reuters, Mr Atkins would not be regarded as employed by, or an employee of, Reuters and so the provisions about the supply of services through an intermediary did not apply.

The legislation

3, The legislation relating to the first disputed decision, about the payment of national insurance contributions, is contained in the Social Security Contributions and Benefits Act 1992 (the 1992 Act) which contains separate provisions applicable to employed earners on the one hand and self-employed earners on the other. After 22 December 1999 a new section 4A was inserted in the 1992 Act and provides that regulations may make provision for securing that, where a worker personally performs services for a client, and where the performance of those services is referable to arrangements involving a third person, and where the circumstances are such that the worker would be regarded as employed by the client, then relevant payments are to be treated as earnings paid to the worker.

4. The regulations made under the provisions of section 4A are the Social Security Contributions (Intermediaries) Regulations 2000 SI 2000 No 727 (the 2000 regulations). The relevant parts of regulation 6 provide:

> **"6(1) These regulations apply where –**
> **(a) an individual ("the worker") personally performs, or is under an obligation to perform, services for the purposes of a business carried on by another person ("the client"),**

(b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and

(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded, for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client."

5. Regulation 6 goes on to provide that, where the regulations apply, the worker is treated as employed in employed earner's employment by the intermediary.

6. The legislation relating to the second and third disputed decisions, about income tax under PAYE, was, at the relevant time, contained in section 60 of the Finance Act 2000 (the 2000 Act) which provided that, for income tax purposes, Schedule 12 had effect with respect to the provision of services through an intermediary. Paragraph 1 of Schedule 12 provided:

"1(1) This Schedule applies where –

(a) an individual ("the worker") personally performs, or is under an obligation to perform, services for the purposes of a business carried on by another person ("the client"),

(b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and

(c) the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client."

7. Schedule 12 went on to provide that, if the other conditions of the Schedule were met, and if the worker received from the intermediary a payment that was not chargeable to tax under Schedule E, then the intermediary was treated as making, and the worker was treated as receiving, a payment chargeable to income tax under Schedule E.

The issues

8. It was agreed that Mr Atkins personally performed services for Reuters within the meaning of section 4A(1) of the 1992 Act, regulation 6(1)(a) of the 2000 regulations and paragraph 1(1)(a) of Schedule 12 of the 2000 Act. Thus the issue for determination in the appeal was whether, had the arrangements taken the form of a contract between Mr Atkins and Reuters, Mr Atkins would be regarded as employed by, or as an employee of, Reuters.

The evidence

8. A bundle of documents was produced. There was a statement of agreed facts. Oral evidence was given on behalf of the Appellant by Mr Atkins. Oral evidence was given on behalf of the Revenue by Mr Khalil Ayub who is now the Technology Careers Manager at Reuters and by Mr Stephen John Turner, who is now the programme director for Reuters.

9. Also put in evidence was a letter dated 2 September 2003 written by Mr Richard Shaw, Director of Finance/HR Systems at Reuters, to the Appellant's previous advisers. Mr Shaw's letter contained answers to a number of questions raised by the Revenue. However, many of the statements in the letter conflicted with the oral evidence of Mr Atkins.

10. Mr Shaw did not give oral evidence at the hearing. Mr Turner's evidence was that Mr Shaw's letter was a true reflection of how contractors were managed at the time when Mr Atkins worked for Reuters. However, Mr Turner admitted that he had no specific knowledge of the contractual arrangements between Reuters and Plexus nor of the arrangements between Plexus and the Appellant nor did he have any specific knowledge of the work done for Reuters by Mr Atkins. The evidence of Mr Ayub was that, from information which he had obtained by talking to his colleagues, it was his opinion that Mr Shaw's letter was, for the most part, an accurate reflection of how Reuters managed its relationships with contractors. However, Mr Ayub admitted that he was only in a position to comment on how things operated since 2003 and could not comment on the arrangements for the period in issue in this appeal; also he had no specific knowledge of the Appellant or of the project on which Mr Atkins worked for Reuters.

11. I heard and saw Mr Atkins give oral evidence and I found him to be a credible witness. Where the evidence of Mr Atkins conflicted with the statements of Mr Shaw, I preferred the evidence of Mr Atkins. Mr Atkins spoke from his personal experience and was questioned on his evidence. Mr Shaw was not available to be questioned. Neither Mr Ayub nor Mr Turner were able to give direct evidence of events between 2000 and 2002.

The facts

12. From the evidence before me I find the following facts

Mr Atkins and the Appellant

13. In 1995 Mr Atkins ceased to be employed by an employer for whom he had worked for eight years. He decided to start his own business and established the Appellant. He then put all his efforts into the Appellant and has worked for many clients of the Appellant. Mr Atkins has a particular expertise in the migration of human resource and payroll systems.

14. The Appellant was incorporated on 11 April 1995 and commenced trading on 5 June 1995. Its principal activity is the provision of computer consultancy services. Its sole director and shareholder is Mr Atkins. The Appellant has an office at Mr Atkins' home. The Appellant has no written contract with Mr Atkins.

Reuters

15. In 2000 Reuters had a number of legacy computer systems in a large number of countries. They wished to merge these into one single, global system. As a representative of the Appellant, Mr Atkins heard that Reuters were looking for specialist skills, particularly in the area of the migration of human resource and payroll systems. The Appellant forwarded to Reuters a *curriculum vitae* describing the work previously done by Mr Atkins. Some time before September 2000 Mr Atkins, representing the Appellant, had an interview with a technical manager at Reuters. The

interview lasted for an hour and a half. All the questions were directed towards finding whether the Appellant could supply the technical skills necessary to achieve the required task. At the interview Mr Atkins was not asked about his personal interests or his ability to work with other employees.

The 1998 agreement between Reuters and Plexus

16. Meanwhile on 2 November 1998 Reuters had entered into an agreement (the 1998 agreement) with Plexus under which Plexus agreed to provide Reuters with software consultancy services in return for which Reuters would pay Plexus a fee. The agreement was stated to be effective from 2 November 1998 to 2 May 1999. In it Plexus agreed to supply the services of a named consultant to complete a stated task. The named consultant was not Mr Atkins, the task stated was not the task undertaken by the Appellant, and the duration of the agreement meant that it had expired before Mr Atkins worked for Reuters. Thus the 1998 agreement is not relevant to this appeal. I accept that some similar agreement was most probably in force because on 1 September 2000 Plexus entered into an agreement (the 2000 agreement) with the Appellant about the supply of services to Reuters. However, where the provisions of the 1998 agreement conflict with the provisions of the 2000 agreement or the oral evidence of the witnesses, I prefer the latter.

17. Clause 1.2 of the 1998 agreement provided that, at Reuters' option, Plexus was to submit a report to Reuters about the work done The report was to be to two stated employees of Reuters and clause 1.2 also provided that instructions were to be taken from the same named employees. Mr Atkins did not send his reports to the two employees named in the 1998 agreement but to a different manager in Geneva.

18. Clause 4 of the 1998 agreement provided that all works by Plexus or under its direction, including all developments in software, were the sole and complete property of Reuters and Plexus agreed to assign all proprietary rights in the works and developments to Reuters. This provision conflicted with clause 9 of the 2000 agreement which I prefer.

19. Clause 5.3 of the 1998 agreement provided that either party could terminate the agreement by giving the other party one month's notice. Clause 6.2 provided that neither party could assign its rights or obligations under the agreement without the prior written consent of the other party. Clause 6.3 provided that, should some of the services be performed by other employees or agents of Plexus, the prior consent of Reuters was required on their names.

The 2000 agreement between Plexus and the Appellant

20. On 1 September 2000 Plexus entered into an agreement with the Appellant under which it was agreed that Plexus would make payments to the Appellant and that the Appellant would supply specified services to Reuters. The specified services were stated to be "for the design, development and migration of Reuters' subsidiary human resource and payroll computer systems onto a single global instance of Oracle Applications III (Project Leapfrog) as required by Reuters". The project was to be based at Reuters' premises in London but involved consultation with customers on various other global Reuters' sites. The Appellant agreed to provide certain non-exclusive resources in support of the specified services. These included one or more consultants and it was agreed that Mr Atkins would lead the project on behalf of the Appellant. The

non-exclusive resources also included a personal computer based at the Appellant's offices. The consideration payable by Plexus to the Appellant was at a stated hourly rate for the actual time spent on the specified services. The total price was estimated to be £143,000 (which represented 2080 hours at the stated hourly rate).

21. The 2000 agreement provided that it was to commence on 4 September 2000 and was to run until completion of the project although the agreement could be terminated at any time by mutual consent. Under the agreement the Appellant agreed to take all reasonable steps to comply with any timetable or other targets for progress or delivery or completion of the specified services as agreed between the Appellant and Reuters.

22. Clause 6.1 of the 2000 agreement provided that the Appellant's method of work should be its own but that the Appellant would comply with all reasonable requests from Reuters to abide by procedural and quality standards documented on the project. I accept the evidence of Mr Atkins that the relevant standards were set by Oracle and that the work he did had to integrate with Reuter's overall system. For this reason those responsible for the overall system could be asked to comment on his finished job and at the user acceptance test stage he welcomed their views.

23. Clause 6.3 of the 2000 agreement provided that the Appellant might assign the obligations and benefits of the agreement provided that Reuters was satisfied within its absolute discretion that the proposed assignee possessed the necessary skills, expertise and resources to fulfil the specified services and that the assignee would comply with Reuter's rules on health, safety, security and confidentiality. Clause 7.1 provided that the Appellant warranted to Reuters that the specified services would be provided using reasonable care and skill and, as far as reasonably possible, in accordance with any agreed timetables or other targets.

24. Clause 9 of the 2000 agreement contained provisions about intellectual property. It provided that Reuters was to retain ownership of all intellectual property rights in the documents, data or other information provided to the Appellant and was not deemed to have granted the Appellant any right to use that information other than for the purposes of the agreement. Clause 9 also provided that the Appellant should retain ownership of all intellectual property rights in all documents, data or other information and devices or processes provided or created by the Appellant save that the Appellant was deemed to have granted Reuters a non-exclusive licence to make use of such information in the context of the specified services. This provision conflicts with clause 4 of the 1998 agreement and, for the reasons I have mentioned, I prefer the provisions of the 2000 agreement. I accept the evidence of Mr Atkins that he retained the right to re-use for other clients the processes which he devised for the purposes of the work he did for Reuters.

25. The 2000 agreement also provided, in Schedule 1, that additional services (that is, services not included within the specified services) would only be undertaken by mutual consent between the Appellant and Reuters before the commencement of the work; the Appellant had the right to negotiate a separate agreement for the provision of additional work for Reuters through Plexus. The schedule to the 2000 agreement provided that the contractor should charge a stated hourly rate for work performed and that time worked over 40 hours a week was to be by prior agreement.

Mr Atkins' methods of work

26. At the beginning of the project the Appellant worked out the requirements of the project and Mr Atkins designed a solution for Reuters' problem with the migration of human resource and payroll systems. The Appellant initiated its own plan for the development and completion of the project and provided Reuters with a way to migrate its information. Reuters told the Appellant that they wanted to migrate the information by a specified date and the Appellant was expected to manage its own project and was responsible for delivery, quality and timescales The Appellant set milestones and Mr Atkins was expected to meet them.

27. Because of the demands of the project, and the type of work being undertaken, Mr Atkins attended at the London offices of Reuters where he was provided with a desk and a computer. He could be accessed by email at Reuters. He was given a security identity card as a contractor so that he could access that part of the premises which contained his desk and also Reuters' computer systems. There was a team of about twenty people working on Project Leapfrog; some were employees but most were contractors. Mr Atkins described the whole of Project Leapfrog as "a big jig saw" of which his task was a small piece. Only he worked on the migration of the human resource and payroll systems. There was no hierarchy.

28. All who extracted data from the legacy systems had to work to timescales and provide information to the functional consultants and to a project manager. Mr Atkins sent his weekly up-dates to a manager based in Geneva. Communication was informal and could be by email or telephone and occasionally the manager would come to London for a meeting. I accept the evidence of Mr Atkins that all that the manager wanted to know was that "it was happening"; otherwise he adopted a "hands-off" approach. However, as the manager oversaw the whole of the project he had the final decision on tasks and the re-alignment of project plans. If Mr Atkins had a problem he would discuss it with a technical colleague and conversely he would assist his colleagues if they had a problem.

29. Mr Atkins had no interaction with the management of Reuters in the United Kingdom; he provided the Reuters manager in Geneva with weekly updates on progress. No-one at Reuters told him what to do or how to do it; he was expected to meet the time scales within the project plan. He did not ask permission to go on holiday. If he were going to take a holiday he let people know and sent an email to the manager in Geneva so that the manager did not expect an update during that period. Mr Atkins had no responsibility for managing others at Reuters.

Mr Atkins' hours of work

30. There was no agreement with Reuters about Mr Atkins' hours of work but Mr Atkins was expected to achieve the timescales and milestones relating to the project.

Mr Atkins' hours of work depended upon the demands of the project. Normally he started work between 8.00 am and 9.00 am and worked until 4.15 pm or 4.20 pm. Sometimes he worked longer or shorter hours. He did not have to ask permission to leave Reuters' offices. It was left to him to make sure that he delivered the project in time. When he wanted to finish early he said good-bye to the people working with him and left. He did not tell the manager in Geneva if he was to be absent for half a day.

31. Each week Mr Atkins completed a time sheet recording the number of hours he had worked; the timesheet was countersigned by any employee of Reuters. The Appellant submitted the time sheet with an invoice to Plexus showing the hours supplied the previous week, charged at the agreed hourly rate. The Appellant invoiced Plexus weekly. During the relevant period Mr Atkins worked for Reuters for seventy weeks. For a little more than one third of the total number of weeks he worked for forty hours; for a little less than a third he worked for less than forty hours; and for the remaining number of weeks he worked for more than forty hours. In the week that the project "went live" he worked for 109 hours and stayed in a London hotel that week.

32. In addition to the work he did on Reuters' site Mr Atkins also did work from home where he used the Appellant's computer and network to undertake work for Reuters. Also, on his journey home he worked on the train using a laptop computer belonging to the Appellant. Sometimes he worked in the evening using the Appellant's computer. During this time the hours spent by Mr Atkins working on the train or at home were not invoiced by the Appellant to Plexus. I accept the evidence of Mr Atkins that he achieved a lot on the train and that if he had not done that work he would have struggled to meet the timescales and milestones of the project. I also accept his evidence that he wanted to give a good impression to Reuters that he was meeting the milestones and not seeking to maximise the amount of money he claimed.

Mr Atkins' status at Reuters

33. Mr Atkins was identified as a contractor in Reuters' telephone directory. He did not receive holiday pay, sick pay or any pension benefit. He was not given a copy of any staff handbook He was paid for the hours he worked and no more. Unlike Reuters' employees he did not receive an annual salary. Unlike the employees of Reuters he did not receive any increase of pay each year after the annual review. Again, unlike the employees of Reuters, he did not receive a formal yearly appraisal. Insurance for professional indemnity, public liability and employer's liability was held by the Appellant.

Substitution

34. Mr Atkins had no official post or job title within the Reuters organisation and was free to work for other clients at the same time so long as he worked the hours needed to meet Reuters' requirements. In fact, he did not work for anyone else during the relevant period.

35. Clause 6.3 of the 2000 agreement between the Appellant and Plexus provided that the Appellant might assign the obligations and benefits of the agreement so long as Reuters were satisfied with the assignee. In practice there was no substitution. However, I accept the evidence of Mr Atkins that he could have assigned his work to a well-qualified contractor and he knew a number of contractors who would be able to

pick up the work with a hand-over period of two or three days. I accept the evidence of Mr Turner that, if an agency wished to replace one contractor with another, then Reuters would wish to interview the replacement contractor in order to establish their credentials and would look for a hand-over period. Reuters contracted with Plexus and they would negotiate the replacement with Plexus. I accept the evidence of Mr Ayub that Reuters did not contract with the contractor but with the agency.

36. Accordingly I find that, although Mr Atkins did in fact do the work personally, the intention of the parties was that the Appellant could assign the obligations and benefits of its agreement with Plexus so long as the assignee was acceptable to Reuters. In other words, the intention of the parties was that Mr Atkins did not necessarily have to do the work personally.

37. I also accept the evidence of Mr Atkins that if he had been unable at any stage to work on his part of Project Leapfrog he would not expect Reuters to find him other things to do; he was only there to work on the migration of the human resource and payroll systems. This evidence was confirmed by Mr Turner who said that if Project Leapfrog had been terminated then Reuters would have terminated the arrangements with the Appellant; Reuters did not find other work for contractors to do – that was why they used contractors.

October 2001 – the project "goes live"

38. The initial work for Project Leapfrog was completed by October 2001 when the project "went live". The work relating to countries outside the United Kingdom had been relatively straightforward but the work relating to the United Kingdom was more complicated and some further verifications were needed. Mr Atkins continued working for Reuters until 31 January 2002 on United Kingdom "support issues". The project was successful and the contract of 4 September 2000 ended on 31 January 2002.

39. From about mid-2001 there were problems with Plexus and the Appellant's invoices were paid late. Initially the delays were four weeks and then extended to six weeks. The Appellant used to chase up the late payments but I accept the evidence of Mr Atkins that it did not make any difference.

40. Between 1 September 2000 and 1 February 2002 the Appellant claimed for 2,644 hours worked by Mr Atkins and was paid £182,859.91.

Mr Atkins' work at Reuters after 1 February 2002

41. After 1 February 2002 Mr Atkins was asked to continue working for Reuters to resolve developmental and migration issues. The Appellant entered into a new contract with Plexus on 4 February 2002 at a reduced hourly rate. There was some uncertainty as to how long that contract lasted because Plexus became insolvent at about the same time. Thereafter, and until August 2002, Mr Atkins had a contract direct with Reuters and worked for Reuters exclusively from his home using the Appellant's computer. During this time the Appellant was connected to broadband and Mr Atkins could access Reuters' computer through the Appellant's computer and small network. During the period from about February or March 2002 to August 2002 the Appellant sent invoices direct to Reuters who paid them. The period after 1 February 2002 is not the subject of this appeal.

Later events

42 Some time in or about February 2002 Plexus became insolvent All the Appellant's invoices which had been sent to Plexus had been paid but two colleagues of Mr Atkins had not been paid and lost significant amounts.

43. Since the successful completion of the migration of data for Reuters Mr Atkins has undertaken similar work for other large national companies and two government departments. In about 2004 Mr Atkins and a business partner formed another company and started to trade through that company which now has a turnover of about £700,000 and seven employees. The Appellant is now no longer trading and is dormant.

The Revenue's enquiries

44. On 30 April 2003 the Revenue wrote to the Appellant's previous representatives asking a number of questions about the terms and conditions under which Mr Atkins had worked for Reuters. The letter requested the representatives to arrange for Reuters to supply the information. It was for this reason that Mr Shaw of Reuters wrote his letter dated 2 September 2003 to the Appellant's previous representatives.

The arguments

45. For the Appellant Mr Boddington cited *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497 for the principle that a person could only be regarded as an employee if he was obliged to give personal service (with no substitution); if the work provider had to offer work or pay if no work was available; if the worker was controlled; and if the other provisions of the contract were consistent with a contract of service. He went on to argue that Mr Atkins had not been obliged to perform the services personally; that there had been no obligation on Reuters to provide work for Mr Atkins or to pay him if there were no work; the Mr Atkins had not been subject to control by Reuters; and that the other arrangements were inconsistent with a contract of service.

46. Mr Boddington cited *Lime-It v Justin* [2003] STC (SCD) 15 for the principle that it was necessary to look at all the circumstances of the case; he also relied upon *Hall v Lorimer* 66 TC 349 at 376D and argued that Mr Atkins took the financial risk of bad debts and outstanding invoices and held his own professional indemnity insurance and public liability insurance. Mr Boddington cited *Market Investigations Limited v Minister of Social Security* [1968] 3 All ER 732 for the principle that it was necessary to

consider whether Mr Atkins would be considered to be in business on his own account; since 1995 Mr Atkins had worked for a number of clients of which Reuters was only one and had developed his business over the years; he had worked unpaid overtime for Reuters in order to promote his own business; Mr Atkins had not been part and parcel of Reuter's business. Finally Mr Boddington cited *Express & Echo Publications Limited v Ernest Tanton* [1999] EWCA Civ 949 and argued that the intention of the parties was relevant and in this appeal the intention of Mr Atkins and Reuters was that Mr Atkins was not employed by Reuters.

47. For the Revenue Mr Conway accepted the principles in *Ready Mixed Concrete*. However, he argued that Mr Atkins had been subject to "a sufficient degree" of control by Reuters, relying upon *Ready Mixed Concrete* at 515C and clause 6.1 of the 2000 agreement. He agreed that the arrangements, including the hours of work, had been flexible and informal but argued that that was appropriate for a senior, skilled employee. He relied upon clause 1.2 of the 1998 agreement and the provisions about reporting and taking instructions. The evidence was that Reuters' project manager had the final decision as to what work should be done when. He also relied upon clause 3.3 of the 2000 agreement and argued that Mr Atkins had to comply with the timetable as set by Reuters; Mr Atkins had to have his time sheets approved by Reuters and under Schedule 1 of the 1998 agreement needed permission to work more than forty hours a week; his arrangements for going on leave were the same as for a senior employee. The 2000 contract provided that Project Leapfrog was based at Reuters' London office and Mr Atkins in fact attended there on a daily basis. .

48. Mr Conway accepted that, if there were a right of substitution, then the fact that it was not exercised was not relevant. However, he argued that there was no right of substitution in either the 1998 contract or the 2000 contract. He accepted that clause 6.3 of the 2000 contract gave a right of assignment but argued that that was not the same as a right of substitution. If there were an assignment then the assignor would have no further interest in the agreement but if there were a substitution the rights would be retained but another person would perform the contract. In this appeal Reuters had specifically wanted Mr Atkins' personal services and they had interviewed him for one and a half hours to ensure that he had the specialised skills they needed. The evidence of Mr Ayub was that a proposed replacement would have had to be interviewed by Reuters. However, even if there were a right of substitution this was a far cry from a contractual right to send a substitute and was merely a pointer towards self-employment.

49. Mr Conway went on to argue that there was mutuality of obligation because the 2000 agreement provided that the Appellant had to supply the services of Mr Atkins and that Reuters would pay the Appellant. He cited *Cornwall County Council v Prater* [2006] EWCA Civ 120 at [40(5)] for the principle that the fact that a contract need not be renewed was not relevant; it was enough that, while the contract continued, the worker was under an obligation to work and the client was under an obligation to pay for the work made available by the client.

50. Finally, Mr Conway argued that Mr Atkins had not taken any financial risk as all his invoices had been paid and he could not increase his profit by good management. Mr Atkins was part and parcel of Reuters and used their equipment. Mr Atkins did not own all the rights to his intellectual property; Mr Atkins did send regular reports to Geneva; He cited *Netherlane Ltd v York* (2005) SPC 457 at 14 and

Island Consultants Limited v The Commissioners for Her Majesty's Revenue and Customs [2007] SPC 618 at 13 for the principle that it was not possible for the parties to have an intention over the hypothetical contract postulated by the statutory provisions.

Reasons for decision

51. The issue for determination in the appeal is whether had the arrangements taken the form of a contract between Mr Atkins and Reuters, Mr Atkins would be regarded as employed by, or as an employee of, Reuters.

The authorities

52. I start by considering the authorities cited by the parties to see what legal principles they establish.

53. In *Ready Mixed Concrete* (1968) the issue was whether a worker was within the class of employed persons under the National Insurance Act 1965 as being an employed person under a contract of service. McKenna J said at 515C:

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service, he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

54. McKenna J added at 515F:

> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done."

55. The judge then went on to identify a number of factors to be taken into account in deciding whether a contract was a contract of service. These included: whether the contractor was to provide at his own expense the necessary plant and material; whether the contractor hired his own employees; whether the contractor provided and maintained his own tools and equipment; whether the contractor was paid by reference to the volume of work done; whether the contractor had invested in the enterprise and bore the financial risk; whether the contractor had the opportunities of profit or the risk of loss; and whether the relationship was permanent.

56. In *Market Investigations* (1968) Cooke J said at 184G that the fundamental test was whether a person performed services as a person in business on his own account. No exhaustive list could be compiled of the considerations which are relevant in determining that question. At 185A he said that although control was relevant it was not the sole determining factor; when one was dealing with a professional man, or a man of some particular skill and experience, there could be no question of the employer telling him how to do the work. At 185B he said that a relevant factor could be whether a person who engaged himself to perform services

did so in the course of an already established business of his own but this factor was not decisive.

57. In *Hall v Lorimer* (1993) the taxpayer was a vision mixer who undertook work for a number of different television companies and whose engagements consisted of short term contracts lasting one or two days. In four years he worked on over 800 days. The Court of Appeal held that there was no single path to a correct decision. The question whether an individual was in business on his own account might be helpful but might be of little assistance in the case of one carrying on a profession or vocation. Factors which were critical in that appeal were the duration of the particular engagements and the number of people by whom the individual was engaged.

58. In *Cornwall County Council* (2006) the issue was whether a teacher engaged by a local authority was entitled to be regarded as an employee throughout the ten year period in which she was paid for her work as a home tutor in performing multiple individual teaching assignments of varying duration under a succession of separate contracts. The Council was under no obligation to offer pupils and the teacher was under no obligation to accept them. However, if the teacher took on a pupil she was obliged to teach that pupil, and the Council was obliged to provide that work, until that particular engagement ceased. At paragraph 33 of the judgment Mummery LJ said that the authorities did not support the argument that there was mutuality of obligation over and above the mutual obligations existing within each separate contract, namely the obligation on the teacher to teach the pupil and the obligation on the part of the Council to pay her for teaching the pupil whom they continued to make available for teaching by her.

The principles

59. From these authorities I derive the principle that the question as to whether a person is employed under a contract of service, or whether he is self-employed and provides a contract for services, is a question of fact in each case to be determined having regard to all the relevant circumstances. Relevant factors could be: (1) whether the worker has to provide his own work and skill or whether he may substitute the work and skill of another; (2) whether the worker is subject to "a sufficient degree" of control"; (3) whether there is mutuality of obligation so that there is an obligation on the worker to work and an obligation on the other party to pay him and to continue to make work available during the time of the contract; (4) whether the worker was in business on his own account; relevant factors here could be: whether the worker had to provide at his own expense the necessary plant and material, hire his own employees and provide and maintain his own tools and equipment; whether the worker has invested in the enterprise and bears the financial risk; whether the worker has the opportunities of profit or the risk of loss; and whether the worker engaged himself to perform services in the course of an already established business of his own; (5) whether the worker is paid by reference to the volume of work done; and (6) the duration of the particular engagements and whether the relationship is permanent and the number of people by whom the individual was engaged.

60. I now turn to apply the principles established by the authorities to the facts of this appeal.

(1) – Right to substitute

61. Beginning with substitution, I have already found that, although Mr Atkins did in fact do the work personally, the intention of the parties was that the Appellant could assign the obligations and benefits of its agreement with Plexus so long as the assignee was acceptable to Reuters. In other words, the intention of the parties was that Mr Atkins was not obliged to perform the services personally. This points to the conclusion that Mr Atkins would not be regarded as an employee of Reuters.

(2) - Control

62. In considering whether Mr Atkins was subject to "a sufficient degree" of control by Reuters I bear in mind that Mr Atkins was engaged for his specific expertise and was engaged only for a particular project. To the extent that the provisions of the 1998 agreement are inconsistent with the oral evidence and the 2000 agreement I prefer the latter. Clause 6.1 of the 2000 agreement provided that his method of work should be his own. The evidence was that Mr Atkins was engaged to provide "a small piece of a large jig saw" and the way in which that was done was left to him. Although Reuters decided the thing to be done, (namely the migration of the legacy computer systems) Mr Atkins decided the way in which the migration of the human resource and payroll systems was to be undertaken. He also decided on the means to be employed in doing it and the time when it was to be done so long as it met the overall requirements of the main project. Mr Atkins could, and did, choose his hours of work so long as he met the timescales and milestones of the project. During the period of the relevant contract Mr Atkins worked at Reuters' office in London because he needed to access Reuters' computer; however he also chose to do work on the train and at home. Although Mr Atkins sent up-dates to a technical manager in Geneva, the evidence was that the manager did not control Mr Atkins in the way he worked in the way that an employer controls an employee, even a senior professional employee. Finally, Mr Atkins was free to work for others at the same time as he worked for Reuters. The arrangements were consistent with the conclusion that Mr Atkins acted as a sub-contractor, with responsibility for part only of a larger project, and not as an employee.

(3) -Mutuality of obligation

63. As far as mutuality of obligation is concerned, the evidence of both Mr Atkins and Mr Turner was that if, for any reason, Mr Atkins had been unable to work on Project Leapfrog during the period of the agreement, then Reuters would not have to find him other work to do and would not have to pay him. Reuters were under no obligation to continue to make work available for the duration of the 2000 agreement. These arrangements point to the conclusion that Mr Atkins was not an employee of Reuters.

(4) – In business on his own account?

64. In considering whether Mr Atkins was in business on his own account it is relevant that he did in fact provide his own computer for work on the train or at home although the main work was done in London with Reuters' computer. Mr Atkins had also invested in his own enterprise by establishing the Appellant, which in 2000, was an already established business and had been so for five years. After his work for Reuters ceased Mr Atkins continued in business on his own account. During his time with Reuters Mr Atkins had some financial risk of unpaid invoices and bad debts

because Plexus became insolvent. Both before and after his work for Reuters Mr Atkins had the risk of an insufficient number of engagements. Also, although he was given work throughout the agreement with Reuters, he might not have been. These arrangements point to the conclusion that Mr Atkins would not be regarded as an employee of Reuters.

(5) - Volume of work done and other factors

65. Mr Atkins was paid by reference to the volume of work done inasmuch as he was paid an hourly rate which meant that some weeks he was paid less and some weeks more. Mr Atkins' relationship with Reuters was not permanent; it was temporary only and was always to terminate when the project was completed. As mentioned, Mr Atkins could have worked for others at the same time as he worked for Reuters. Other relevant factors are that Mr Atkins did not receive holiday pay, sick pay, or pension benefit. He did not get a weekly wages or an annual salary. And he was not treated like an employee by Reuters. All these factors point to the view that Mr Atkins should not be regarded as an employee of Reuters.

66. Finally, clause 9 of the 2000 agreement makes it clear that Mr Atkins brought his own expertise and intellectual property rights to the project and retained ownership of them. He also retained ownership of the processes he devised for the purposes of Project Leapfrog. This points to the conclusion that Mr Atkins would not be regarded as an employee of Reuters.

Conclusion

67. A consideration of the relevant factors in this appeal point to the conclusion that Mr Atkins would not be regarded as an employee of Reuters.

Decision

68. My decision on the issue for determination in the appeal is that, had the arrangements taken the form of a contract between Mr Atkins and Reuters, Mr Atkins would not be regarded as employed by, or as an employee of, Reuters.

69. That means that the appeal is allowed.

DR NUALA BRICE

SPECIAL COMMISSIONER

RELEASE DATE: 11 December 2007

Authorities referred to at the hearing but not mentioned in the Decision

Island Consultants Limited v The Commissioners for Her Majesty's Revenue and Customs (2007) SPC 00618

Montgomery v Johnson Underwood Limited [2001] EWCA Civ 318

Morren v Swinton and Pendlebury Borough Council [1965] 1 WLR 576

Propertycare Limited v Gower and others UKEAT transcript of judgment of 14 November 2003 at [9(3)]

*Synaptek Limited v Young (*2003) 75 TC 52 at 73E

Usetech Limited v Young (2004) 76 TC 811 at 836D and 841E

Wright v Redrow Homes (Yorkshire) Ltd [2003] 3 All ER 98 at [35] and [36]

Spc00685

INCOME TAX & NATIONAL INSURANCE – IR35 - ***Worker supplied through intermediaries – whether circumstances were such that had the services been provided under a contract directly with the worker the worker would have been an employee –Ye s– Appeal dismissed***

SPECIAL COMMISSIONERS

ALTERNATIVE BOOK COMPANY LIMITED **Appellant**

- and -

HER MAJESTY'S REVENUE and CUSTOMS **Respondents**

Special Commissioner: MICHAEL TILDESLEY OBE

Sitting in public in Cardiff on 22 and 23 January 2008 with final representations by 27 February 2008

John Antell counsel instructed by Lawspeed Limited for the Appellant

Susan Jones and Colin Williams, HM Inspectors of Taxes for the Respondents

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DECISION

The Appeal

1. The Appellant was appealing against determinations requiring it to pay tax for the years 2000-01 and 2001-02 and national insurance contributions for the period 6 April 2000 to 5 April 2002 on deemed payments to Keith Shepherd, the Appellant's sole director and shareholder, in respect of his work for Gerling NCM (now known as Atradius). The notices of the determination under regulation 80 of the Income Tax (PAYE) Regulations 2003 and section 8 of the Social Security Contributions (Transfer of Functions) Act 1999 were made on 9 December 2005.

2. The determinations were made under what is commonly known as the IR35 legislation which was enacted for the purpose of curbing the tax advantages enjoyed by some individuals who supplied their services through a personal service company to a client. Under the IR35 legislation if it was found that the services provided by the person were given as an employee rather than genuinely as an independent contractor the fees paid to his personal service company would not be treated as company revenue upon which corporation tax was payable but rather as deemed salary to him. The company would then be responsible for the accounting of tax and national insurance contributions on the deemed salary.

3. Mr Shepherd who was a skilled IT consultant provided his services to Gerling NCM through a series of two connected contracts. The first was a contract between the Appellant and Computer People Limited, a recruitment agency, to perform services for Gerling (NCM) ("the lower level contract"). The second was a contract between Computer People Limited and Gerling NCM to supply the services of the Appellant using Mr Shepherd ("the upper level contract"). The Appellant had no written contract with Mr Shepherd. There was no issue taken about the interposition of Computer People Limited in the contractual sequence.

4. The Appellant was incorporated on 10 April 1997 and commenced trading on that day. Mr Shepherd was the sole director and shareholder of the Appellant. Gerling NCM was incorporated on 15 October 1998 with offices in Cardiff and across the world. The UK arm of its business came into operation following the privatisation of a government agency. The business activity of Gerling NCM was the provision of export and domestic credit insurance. The initial contract to provide services to Gerling NCM (presumably its predecessor) started 2 February 1998.

5. The parties were in agreement that for the purposes of the IR35 legislation Mr Shepherd was the worker, the Appellant the intermediary, and Gerling NCM the client.

6. The substantive issue in dispute was whether Mr Shepherd would have been an employee of Gerling NCM if he had contracted direct with Gerling (NCM) under the hypothetical contract presupposed by the IR35 legislation. The parties were content for a decision to be made in principle on the substantive issue.

The Evidence

7. I heard evidence from Mr Shepherd for the Appellant. The Respondents called four witnesses who were:

(1) Mr Christopher Saunders, HMRC Employer Compliance Officer, who was present at the interviews with Mr Shepherd on 10 October 2002 and 10 December 2004.

(2) Mr David Lewis, HM Inspector of Taxes, who carried out the investigation into the Appellant's tax affairs.

(3) Mr Derek Gigg, Head of Service Delivery Management at Gerling NCM, who was previously a manager responsible for software development at Gerling NCM, and one time manager to whom Mr Shepherd reported.

(4) Mr Stephen Prentice, Manager IT Services at Gerling NCM, Mr Shepherd nominated Mr Prentice as the person to speak to the Respondents about his working relationship at Gerling NCM.

8. The parties prepared five bundles of agreed documents which together with additional documents submitted at the hearing were admitted in evidence. Further the parties supplied skeleton arguments and a Respondents' response together with eight bundles of authorities at the hearing.

9. The contract documentation included in the bundles consisted of:

(1) The Upper Level (Computer People Limited & Gerling NCM): copies of contracts extending the terms of assignment covering the period 16 August 1999 to 26 April 2002, and copies of contract SP862 and extension from 27 April 2002 until 25 October 2003. A copy of the first known main contract, SP861, was not available.

(2) The Lower Level (Computer People Limited & Appellant): copies of contracts extending the terms of assignment of CPL98 covering the period 3 April 2000 to 29 September 2000, copies of an unsigned CPL00 and extensions covering the period 2 October 2000 to 25 April 2002 and a copy of, CPL02 covering the period 25 April 2002 to 25 October 2002, outside the periods under appeal. A copy of the first known main contract, CPL98, was not available

10. The parties in their submissions referred to the contract documentation under the generic groupings of lower level and upper level. I adopted the same convention in this decision except when reference was made to a term in a specific contract or contract extension. The Respondents did not take issue with the missing contracts, since there was evidence of contract documentation for the periods under Appeal. There were no significant inconsistencies between the terms of the lower and upper level contracts.

11. Following the end of the hearing on 23 January 2008 directions were issued requesting further representations on the issue of mutual intention which were received by the due date of 27 February 2008.

Preliminary Issue

12. On 11 January 2008 the Respondents made an application for directions that the issue to be decided should be restricted to whether IR35 applied in principle during the 2000/01 and 2001/02 tax years. The Respondents objected to the Application pointing out that the directions issued on 15 March 2007 identified the issue to be:

> "whether the services which Mr Shepherd provided to Astradius (formerly Gerling NCM) under a number of separate assignments… to 2005 were caught by the IR35 legislation."

13. On 17 January 2008 I directed that

> (1) The question for determination is whether the IR35 legislation should apply in principle to the whole of the work undertaken by the Appellant for Gerling NCM for the tax years 2000/01 and 2001/02.
>
> (2) The parties are entitled to call evidence relating to events and arrangements outside the tax years 2000/01 and 2001/02 provided the evidence is relevant to the disputed issue and no severe prejudice is caused to the other party by the late disclosure of the evidence.

14. The real dispute between the parties regarding the preliminary issue was whether the Appellant could rely on facts, particularly the tax treatment and business activities of Mr Shepherd outside the tax years in dispute. I considered the dispute was not one of admissibility of evidence but about its weight and relevance which was best assessed by examining it as part of the whole factual context of the Appeal. The Respondents were not prejudiced by the late admission of evidence. Their skeleton argument covered the majority of the points raised by the Appellant. Further they placed some reliance on the fact that Mr Shepherd provided his services to Gerling NCM from 1998 to 2005.

The Legislation

15. The IR 35 legislation is found in schedule 12 of the Finance Act 2000 (the 2000 Act) for income tax and in regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000 (the 2000 Regulations) for national insurance contributions.

16. Paragraph 1 of schedule 12 of the 2000 Act provides so far as is relevant:

> '1--(1) This Schedule applies where--
>
> (a) an individual ("the worker") *[Mr Shepherd]* personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client") *[Gerling NCM]*,

(b) the services are provided not under a contract directly between the client *[Gerling NCM]* and the worker *[Mr Shepherd]* but under arrangements involving a third party ("the intermediary") *[Alternative Book Club]*, and

(c) the circumstances are such that, if the services were provided under a contract directly between the client *[Gerling NCM]* and the worker *[Mr Shepherd]*, the worker would be regarded for income tax purposes as an employee of the client *[Gerling NCM]*. ...

(4) The circumstances referred to in sub-paragraph (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided.'

17. Regulation 6 of the 2000 Regulations provides so far as is relevant

'6--(1) These Regulations apply where--

(a) an individual ("the worker") *[Mr Shepherd]* personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client") *[Gerling NCM]*,

(b) the performance of those services by the worker *[Mr Shepherd]* is carried out, not under a contract directly between the client *[Gerling NCM]* and the worker *[Mr Shepherd]*, but under arrangements involving an intermediary *[Alternative Book Club]*, and

(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker *[Mr Shepherd]* and the client *[Gerling NCM]*, the worker *[Mr Shepherd]* would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client *[Gerling NCM]*.'

Construction of the Legislative Provisions

18. Park J in *Ustech Ltd v Young (Inspector of Taxes)* [2004] STC 1671 at page 1686 paragraph 9 said:

"A more general point of construction is worth spelling out at this stage. The conditions of sub-paragraphs (a) and (b) involve an analysis of the actual facts and legal relationships, but when that analysis shows that those two sub-paragraphs are satisfied sub-paragraph (c) involves an exercise of constructing a hypothetical contract which did not in fact exist, and then enquiring what the consequences would have been if it had existed. There may be room in some cases for dispute about what the hypothetical contract would contain and in the present case there is".

19. The respective provisions of the 2000 Act and the 2000 Regulations are not identical, in particular regulation 6 does not contain a provision like paragraph 1(4) of schedule 12 to the Finance Act 2000, expanding on what is covered by 'the circumstances' referred to in sub-paragraph (c) of regulation 6(1).

20. The special commissioner in *Dragonfly Consultancy Limited v HMRC* (2007) Spc00655 at paragraph 32 considered that the potential difference between the 2000 Act and the 2000 Regulations might have an impact on the factual matrix for making

the decision under the respective provisions. In his view a decision under the 2000 Regulations may be restricted to considering the arrangements between the parties which in this case would be the lower and upper level contracts. Whereas a decision under the 2000 Act would require a determination of what the hypothetical contract would contain from a consideration of all the circumstances including the formal arrangements between the parties.

21. Park J in *Ustech Ltd v Young (Inspector of Taxes)* [2004] STC 1671 at page 1686, paragraph 10 did not consider the potential difference between the 2000 Act and the 2000 Regulations material:

> "However, no-one has suggested to me, nor do I consider, that that or the other minor differences between the two statutory provisions affects this case or opens a possibility of the case being decided one way for NICs and another way for income tax and corporation tax".

22. Mr Justice Burton in *The Queen and Commissioners of Inland Revenue ex parte Professional Contractors Group Limited and another* [2001] EWHC Admin 236 Case Number: CO/2302/00 stated at paragraph 48(iii) that

> "It appears to me clear that the Revenue must bear in mind that under IR35 they are not considering an actual contract between the service company and the client but imagining or constructing a notional contract which does not in fact exist. In those circumstances of course the terms of the contract between the agency and the client as a result of which the service contractor will be present at the site are important, as would be the terms of any contract between the service contractor and the agency. But particularly given the fact that, at any rate at present, a contract on standard terms may or may not be imposed by an agency, or may be applicable not by reference to a particular assignment, but on an ongoing basis, and may actually bear no relationship to the (non- contractual) interface between the client and the service contractor, such documents can only form a part, albeit an important part, of the picture."

My Approach

23. The parties' submissions took the form of analysing the terms of the lower level and upper level contracts and the wider circumstances against a range of legal principles derived from case law on employment status, in order to arrive at their respective conclusions on whether the hypothetical contract was one of employment or not. I consider the parties' approach had the wrong emphasis and carried the risk that the dispute turned into one about employment status rather than on the construction of the hypothetical contract. I adopted an approach of finding facts to determine the terms of the hypothetical contract between Mr Shepherd and Gerling NCM followed by an assessment of the terms and contextual circumstances against case law principles on employment status to decide whether it was a contract of service. I concluded that the adopted approach was consistent with the statutory provisions and the general point of construction made by Park J in *Ustech Ltd* at page 1686. Further I decided that the different wording in the 2000 Act and the 2000 Regulations was not material. The factual matrix for decisions under the 2000 Act and the 2000 Regulations was the same, comprising the terms of the lower and upper

level contracts and all the circumstances on which Mr Shepherd provided his services to Gerling NCM.

24. The structure for the decision starts with the legal principles derived from employment status case law, next the facts, the submissions and my findings followed by a construction of the hypothetical contract and its assessment against the principles.

The Legal Principles

25. The IR35 legislation left in place the established case law-based test of employment status. The parties endorsed the general principles established by the leading cases but disagreed on the relevance and the weight to be attached to certain indicators of employment status. The disputed indicators were: the intentions of the parties, whether a substitution clause if existed was a tie-breaker, and whether Mr Shepherd's circumstances should be considered in the context of service providers in the same kind of business.

26. In *Ready Mixed Concrete* (*South East*) *Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 the issue was whether a worker was within the class of employed persons under the National Insurance Act 1965 as being an employed person under a contract of service. MacKenna J said ([1968] 2 QB 497 at 515):

> 'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.'

27. MacKenna J added ([1968] 2 QB 497 at 515):

> 'Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done.'

28. In *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 Cooke J said that the fundamental test was whether a person performed services as a person in business on his own account. Although control was relevant it was not the sole determining factor; when one was dealing with a professional man, or a man of some particular skill and experience, there could be no question of the employer telling him how to do the work.

29. In *Hall (Inspector of Taxes) v Lorimer* [1994] STC 23, [1994] 1 WLR 209 the taxpayer was a vision mixer who undertook work for a number of different television production companies and whose engagements consisted of short term contracts lasting one to two days. In four years he worked on over 800 days. The Court of

Appeal held that there was no single path to a correct decision whether a person was an employee or self employed:

> In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted by viewing it from a distance and by making an informed, considered qualitative appreciation of the whole. It is matter of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in important from one situation to another.

30. The Court Of Appeal then went onto identify a non-exhaustive list of relevant factors taken from decided cases about whether a person was employed or self employed. The list included:

(1) the express or implied rights and duties of the parties;

(2) the degree of control exercised over the person doing the work;

(3) whether the person provides his own equipment and the nature of the equipment involved in his work;

(4) whether the person hires any staff to help him;

(5) the degree of financial risk taken by him;

(6) the degree of responsibility for investment and management;

(7) the opportunity of profiting from sound management of the task.

31. The Court of Appeal also identified other possible relevant factors including:

(1) the understanding or intentions of the parties;

(2) whether a person has set up a business-like organisation of his own;

(3) the degree of continuity in the relationship between the person performing the services and the person for whom he performs them;

(4) how many engagements he performs, and whether they are performed mainly for one person or for a number of different people;

(5) whether the person performing the services is accessory to the business of the person to whom the services are provided or is part and parcel of the latter's organisation.

32. My intention is to group the evidence and findings of fact against the indicators of employment and self employment as identified by the above authorities.

The Facts

Established Tax Treatment of Mr Shepherd

33. Since leaving British Steel in 1978 Mr Shepherd generally provided his services as a self employed person under a partnership with his wife The last time he was regarded as an employee was in 1985 when he worked for six months for Symon Systems. From 1985 to 1995 Mr Shepherd was engaged as a contractor with the Horserace Totalisator Board (the Tote) developing database systems, in particular a staff selection system. In 1997 Mr Shepherd dissolved the partnership, and offered his services through his company Alternative Book Company Limited. His first engagement was with St Ivel which lasted six months. In February 1998 Mr Shepherd commenced work at Gerling NCM. From April 2003 Mr Shepherd supplied his services through a different personal service company, KES Computer Services Limited.

34. Mr Shepherd considered that working as a self employed contractor enabled him to broaden his expertise in business and computer systems, and the opportunity to meet new people. The disadvantages were the lack of job security, no pension scheme and holiday pay, and having responsibility for self development and running a business.

Continuity of the Relationship with Gerling NCM, Exclusivity of Service and Business on Own Account

35. Mr Shepherd worked for Gerling NCM full time, averaging around 36 hours per week from February 1998 to April 2004 except for a break of four weeks between 29 June 2001 and 23 July 2001. From April 2004 Mr Shepherd was engaged for 24 hours per week at his request until July 2005. Mr Shepherd's services were supplied via the Appellant up to 25 April 2003, and then through another personal service company, KES Computer Software Limited.

36. The contractual arrangements for Mr Shepherd's work at Gerling NCM were a series of term contracts generally ranging from three to six months between the Appellant and Computer People Limited, and between Computer People Limited and Gerling NCM. Mr Shepherd gave evidence that there was no guarantee that Gerling NCM would offer a new contract to the Appellant on expiry of the previous one. There was one occasion in April 2000 when Mr Gigg of Gerling NCM intimated to Mr Shepherd that a new contract would not be offered. However, Mr Gigg was unable to find employees to take on the project work done by Mr Shepherd with the result that the Appellant's contract was renewed. Further Mr Shepherd on behalf of the Appellant would make a conscious decision about whether to accept a new contract, in particular whether the project would enhance Mr Shepherd's curriculum vitae. Mr Shepherd, however, accepted in cross examination that the Appellant would not have other work lined up for him on expiry of the contract with Gerling NCM. Mr Shepherd indicated that he would await an offer of a new contract from Gerling NCM before seeking other work.

37. Mr Shepherd obtained the engagement with Gerling NCM from seeing an advert on the website of Computer People Limited which then arranged an interview for Mr Shepherd with Gerling NCM. At the interview Gerling NCM assessed Mr Shepherd's

technical expertise and interpersonal skills for working in a team not the capacity of the Appellant to supply the right personnel for the position.

38. The Appellant adduced no evidence of marketing its services or taking active steps to find alternative work for Mr Shepherd during the period of his engagement with Gerling NCM. The Appellant's accounts for the years ending 31 July 2000, 2001, and 2002 showed that there was no investment or expenditure programme which developed and expanded the business. Computer equipment constituted the sole fixed assets for the business. The Appellant's balance sheets for the accounting years of 2000, 2001 and 2002 recorded expenditure on computers at £1,119.00, £340, and £1,255.00.

39. At various times during the periods of his engagement with Gerling NCM, Mr Shepherd worked on three other assignments. Mr Shepherd supplied ongoing support to the Tote of the systems he created when he worked there between 1985 and 1995. The time spent by Mr Shepherd, however, on support work for the Tote during his contracts with Gerling NCM was not significant. During the periods under Appeal the time spent on Tote work totalled 29 hours and 58 minutes in 2000/01, and 15 hours and 44 minutes in 2001/02. Around April 2000 Mr Shepherd completed a one-off project with J Patterson & Sons converting data files for which he received a VAT inclusive fee of £2,190.56.

40. Finally Mr Shepherd together with a friend developed a computer game named *"Pen'em"* which tested participants' skills on dog handling in the context of sheepdog trials. Mr Shepherd stated that he began work on the computer game in May 2002 which was carried on concurrently with his work for Gerling NCM. Mr Shepherd negotiated a reduction in his hours with Gerling NCM from 36 to 24 hours per week from May 2004 in order to concentrate on the computer game. Mr Shepherd used another company, Digi-Game Limited, of which he was sole director and shareholder, to market the game. Mr Shepherd adduced no evidence of the actual time spent on the development of the game. The game was not brought onto the market until November 2005. Digi-Game Limited did not trade in 2004. The published accounts for Digi-Game Limited ending 31 October 2005 revealed income of £850 and administration expenses of £420. Mr Shepherd did not receive a salary from Digi-Game.

41. The Appellant's turnover for the period 6 April 2000 to 5 April 2002 was an estimated £180,549 gross of VAT, of which the "non-Gerling" work accounted for £6,803 gross of VAT.

42. At the hearing there was a dispute between Mr Shepherd and the representatives of Gerling NCM about whether he was permitted to take phone calls at the Cardiff premises of Gerling NCM from the Tote in respect of the support contract. Mr Gigg stated that Mr Shepherd's contract would have been terminated if he was found to be doing work for another organisation whilst working at Gerling's premises. The analysis of Mr Shepherd's timetable of work done for the Tote revealed that he received a total of 21 telephone calls over a period of two years (2000 -2002). Mr Shepherd confirmed that he did his work for the Tote from home.

43. Clause 14 of the Terms and Conditions of the contract CPL00 (October 2000 to April 2002) between the Appellant and Computer People, restricted the Appellant from accepting any other contract which might have created a conflict of interest with the services performed for Gerling NCM. Under Clause 3.5 of CPL00, the Appellant gave a warranty that it was not prevented by any other contract or agreement from fulfilling its obligations under the agreement.

Mutual Intention

44. Mr Gigg stated that he would prefer to take on employees but it was company policy to engage contractors to work on projects because of budgetary restrictions and limits on headcount. Mr Prentice explained that the engagement of contractors gave Gerling NCM flexibility, in that their contracts could be terminated at short notice if the workload fell. Further there were no overheads of employee indirect costs attached to contractors. The fees, however, paid to contractors were twice the annual salary of a member of staff doing equivalent work.

45. The lower and upper level contracts contained a clause to the effect that the respective agreements did not constitute an employment relationship between the parties. Under the contracts Mr Shepherd had no entitlement to holiday or sickness payments and ineligible to join the pension scheme of Gerling NCM. The Appellant under the low level contract was responsible for PAYE, income tax, corporation tax, national insurance contributions and VAT payments on the fees received.

46. Under the upper level contract the fee rate for Mr Shepherd's services was expressed as a weekly rate for 36 hours. Overtime was calculated on a pro-rata basis. The fee in the lower level contract was altered to an hourly rate from the 8 May 2002.

47. Payment of the fee by Gerling NCM would occur on the presentation of an invoice from Computer People Limited. The payment from Computer People Limited to the Appellant was by bank transfer. The Appellant was required to provide Computer People Limited with a record of the work done for Gerling NCM.

48. A period of four weeks written notice was required to terminate both sets of contracts. The contracts did permit termination with immediate effect on the occurrence of specific events.

Mutuality of Obligation and Hours Worked

49. Under the lower level contract the Appellant provided services to Gerling NCM in consideration of a payment of fee. The person supplying the service was Mr Shepherd. In the upper level contract Computer People Limited assigned Mr Shepherd to provide consultancy services to Gerling NCM for a fee. The contracts could not be terminated without notice if there was no work for Mr Shepherd except in the case of Force Majeure. Computer People Limited advised Gerling NCM in the upper level contract to give advance warning if it wished to extend the services of Mr Shepherd.

50. The summary of Mr Shepherd's time sheets for the tax years 2000/2001 and 2001/2002 revealed that he worked for Gerling NCM for a total of 3,666.85 hours which averaged out at 35.25 hours each week.

Personal Service

51. The upper level contract named Mr Shepherd as the consultant whose services were being hired. No mention was made of the Appellant in the upper level contract until 27 April 2002. The lower level contract identified Mr Shepherd as a consultant or personnel.

52. Mr Prentice confirmed that Mr Shepherd would have been tested at interview on his expertise and skills. Mr Shepherd's appointment as a contractor would have been on the basis of his suitability to do the work. Gerling NCM was not interested in the Appellant or its capacity to provide the services required. Mr Prentice doubted whether the existence of the Appellant would have been mentioned at interview. Mr Shepherd offered expertise in *Oracle* database and *PsQuel, Cobal* and *Visual Basic 6* programme languages. Mr Gigg, however, did not consider that the particular skills offered by Mr Shepherd were in short supply.

53. The lower and upper level contracts commencing 3 April 2000 did not contain a substitution clause permitting the Appellant to supply the services through a consultant other than Mr Shepherd. From 2 October 2000 the contracts included the following clause:

- The Appellant must give 14 days written notice for replacement of personnel.
- The original personnel's absence must not interfere with the performance of the specification or with any agreed timeframe.
- Gerling NCM has the right to refuse the personnel on any reasonable grounds.

54. Mr Shepherd produced a statement from Mr Gigg dated 16 February 2005 which stated that

> The following confirms the contractual arrangements between Gerling NCM (Client) and Alternative Book Company Limited (Contractor):
>
> - The services are to be supplied by Keith Shepherd on behalf of the Contractor.
> - The Contractor has the right to replace Keith Shepherd with a substitute who will carry out the services as specified in the contract.
> - If the Contractor provides a substitute who has the necessary skills to carry out the services specified in the contract, the Client agrees to accept that substitute.
> - The Contractor remains responsible for the payment of, and the work done by the substitute.

55. Mr Gigg in his evidence distanced himself from the above statement. Mr Gigg testified that the words in the statement were not his. Further he told Mr Shepherd that there would be no circumstances under which he would accept a substitute. Mr Gigg, acknowledged in cross-examination that a Mr D might have been a suitable substitute.

Mr D, however, was not a realistic possibility because he was already working for Gerling NCM as an independent contractor and about to retire. In February 2005 several contractors were asking Mr Gigg to sign similar worded statements as a way of getting round the IR35 legislation.

56. PriceWaterhouseCoopers in their capacity as Gerling's representatives, wrote to the Respondents on 6 July 2005 saying that Gerling NCM would consider a substitute if one was offered by the Appellant but would assess the substitute and his capabilities. Gerling's acceptance or rejection of the substitute would depend upon his capabilities. To date no substitute has been offered by the Appellant. Mr Gigg indicated that a substitute would be subjected to the same recruitment process as experienced by Mr Shepherd when appointed as a consultant.

57. When interviewed on 10 October 2002 Mr Shepherd told the Respondents that the substitution clause had been inserted into the assignments as its omission would have been a stronger pointer towards the work falling within 'IR35'. Further in practice Gerling NCM would either tolerate his absence and he would continue with the contract, or Gerling NCM would terminate his contract and find someone else.

58. The Appellant never sent a substitute for Mr Shepherd during his seven years with Gerling NCM. Also the Appellant did not have the capacity to provide a substitute since Mr Shepherd was its sole employee.

Control

59. The lower level contract that ran from 2 October 2000 to 26 April 2002 stated that the Appellant and Mr Shepherd would:

> "devote such time, attention, skill and ability as is necessary to attain a high standard of performance of the service in accordance with the requirements of the client [Gerling NCM] at the location or at such location as the client may reasonably require".

60. The terms and conditions of the upper level contract with effect from 27 April 2002 defined personnel as the person employed by the Appellant to provide the IT services required by Gerling NCM.

61. The lower and higher level contracts for the 6 month period commencing 3 April 2000 contained no details of the services supplied by the Appellant and Mr Shepherd. The subsequent contracts from October 2000 had the same generic description of the services to be provided by the Appellant which was:

> "As agreed between the Gerling NCM and the Appellant services shall include quality initiative projects and associated mini projects".

62. Mr Shepherd gave evidence that each contract with Gerling NCM was for work on a discrete individual project. Mr Prentice, however, indicated that if Gerling's priorities changed Mr Shepherd would have been assigned to other projects. Mr Shepherd did not agree with Mr Prentice's understanding of the contract. Mr Shepherd insisted that he had the right to say no to working on another project. Mr Shepherd, however, gave a different account during his interview on 10 October 2002

when he acknowledged that if he had been unable to continue with his project for any reason, he would be transferred to another project and not left idle, which happened on one occasion when he did some programming to help out another team.

63. Mr Shepherd gave the impression in his evidence that he had considerable freedom in how he carried out his work. He would use his skills and experience to determine the method and manner of performing the services. He worked mostly on his own. Mr Shepherd's interview in October 2002 provided a different insight of how he performed his duties. Mr Shepherd stated that whilst working on a project he was given timescales to solve specific problems. The project manager allocated the task, with Mr Shepherd reporting to him on progress. Mr Prentice confirmed that Mr Shepherd was required to make frequent informal progress reports and a formal report every month to the project manager. The Quality Assurance Team would carry out testing and acceptance checks on Mr Shepherd's work. He would be expected to rectify his errors. Further Mr Shepherd could be over-ruled by a full time senior member of staff, and that Gerling NCM would have the final say on Mr Shepherd's standard of work. Mr Shepherd accepted that he could be overruled, although this never happened.

64. According to Mr Prentice, Mr Shepherd did not work on his own. On the *Puma* project he worked with one other worker, otherwise he worked as part of a team. Mr Prentice pointed out that Gerling NCM did not supervise work in the traditional sense of overseeing every aspect. Gerling NCM was only interested in delivering schedules on time. The control mechanisms of reporting and quality assurance applied to all persons working in the organisation whether contractors or members of staff.

65. Mr Shepherd performed his services at the offices of Gerling NCM at Cardiff. This location was stipulated by Gerling NCM in the lower and upper level contracts. The specified location arose from the necessity to work on the mainframe computer of Gerling NCM. Mr Shepherd estimated that he spent four hours a week at home on tasks for Gerling NCM. Mr Shepherd, however, accepted at his interview on 12 October 2002 that home working was done out of choice, in order to demonstrate his commitment to the job which would make it more likely that his services would be retained when the contract came up for renewal.

66. Mr Shepherd in evidence stated that he was able to work at any time at his discretion provided the pre-agreed delivery dates for the projects were met. He disagreed with the evidence of Messrs Gigg and Prentice that he was expected to be at work during the core hours of 9:30am to 11:30am, and 2:00pm to 3:30pm. An examination of Mr Shepherd's time sheets for tax year 2000/01 showed that there were only 13 occasions when Mr Shepherd was not working during the core hours. The majority of the 13 occasions involved Mr Shepherd starting slightly later than 9.30am. Mr Prentice accepted that Mr Shepherd could choose his own start and finish times outside the core hours. However, this was no different from that which applied to employees under the flexible working staff policy.

67. Under the lower and upper level contracts Mr Shepherd was required to do 36 hours per week. The summary of Mr Shepherd's time sheets showed that he rarely

worked a flat 36 hours, generally he worked around 40 hours per week. However when his hours were averaged out over the two tax years in dispute it produced a figure of 35.25 hours per week. Mr Gigg acknowledged that contractors sometimes worked more or less hours than they were contracted to do. However, if he discovered that a contractor was taking advantage of the situation, he would instruct the contractor to fall back into line. Mr Gigg had not warned Mr Shepherd over his time-keeping.

68. Mr Shepherd completed a weekly time-sheet of hours worked, which required authorisation by Gerling NCM. Employees likewise completed time sheets but with different codes for the staff flexi-hour system. According to Mr Gigg, Mr Shepherd would need permission to work hours in excess of the contracted hours or at the weekends.

69. Mr Shepherd denied that he needed permission from Gerling NCM for absences or leave. The lower level contract from October 2000 to April 2002, however, included a term requiring Mr Shepherd to seek permission from Gerling NCM for any absence. The contract extension commencing on 1 January 2001 showed that a one week holiday was agreed in advance for the period 25 June 2001 to 29 June 2001. Mr Prentice said that work was planned in advance to take account of any known absences. Mr Gigg stated that if a contractor asked for time off to complete work for another organisation then, so long as the absence did not affect any Gerling deadlines, then the request would be granted.

Provision of Equipment

70. Gerling NCM provided Mr Shepherd with a computer terminal, desk, chair and phone on its premises. Mr Shepherd accepted that Gerling NCM provided him with the equipment to do the job. Mr Prentice on behalf of Gerling NCM accepted that Mr Shepherd was allowed to work from home out of choice. This happened relatively infrequently and was not a feature of the engagement.

Financial Risk

71. Mr Shepherd was paid hourly and his earnings were fixed during the duration of each contract. The only way he increased his income from the assignment with Gerling NCM was to do extra hours or work at weekend which were paid at the same hourly rate and required prior authorisation from Gerling NCM. Mr Shepherd was engaged to perform a particular service. He was not remunerated on a project or fixed fee basis. The Appellant and Mr Shepherd did not invest capital in the project. The payments under the contract were guaranteed on production of time sheets and made at regular pre-defined intervals under the terms of the lower and upper level contracts. Mr Prentice said that Mr Shepherd would be paid for rectifying errors in his work. Mr Shepherd acknowledged that there was no question of him rectifying mistakes in his own time

72. Under Clause 4 of the lower level contract (2 Oct 00 – 26 April 2002) the Appellant agreed to indemnify Computer People Limited for any financial loss arising out of or in connection with any act or omission of Mr Shepherd.

73. The lower level and upper level contracts gave Mr Shepherd no job security, no entitlement to redundancy and no legal recourse in the event of unfair dismissal. He was required to provide his own training so that he could maintain his skills in a competitive environment. Mr Shepherd took financial risks with the development of the computer game, *"Pen'em"*, which eventually was a loss making enterprise.

74. Mr Shepherd reduced his overheads by working from home and working the whole day when at the Cardiff premises. Mr Shepherd accepted that the terms of the assignment with Gerling NBC provided limited scope for efficiency savings.

Part and Parcel

75. Mr Shepherd stated that he worked largely on his own and that he would liaise occasionally with employees of Gerling NCM. In contrast Mr Prentice asserted that Mr Shepherd worked as part of a mixed team of employees and contractors. According to Mr Prentice, Mr Shepherd was the team leader for a particular project, although as team leader he did not have responsibilities for the personnel management of team members. Mr Shepherd disputed that he was ever a team leader at Gerling NCM.

76. Mr Prentice stated that Mr Shepherd would be required to make progress reports to project managers. The contents of Mr Shepherd's interview on 10 October 2002 corroborated aspects of Mr Prentice's evidence regarding reporting arrangements.

77. Mr Shepherd was given a security pass with his photograph to gain access to the Cardiff premises of Gerling NCM. He was expected to observe the Staff Code of Conduct. Mr Prentice stated that an information pack about the work practices of Gerling NCM would have been given to Mr Shepherd on appointment but Mr Prentice could not recall giving a pack personally to Mr Shepherd.

78. Mr Gigg considered that Mr Shepherd became part of the scenery at Gerling NCM. Mr Shepherd was invited to the company's Christmas dinner, which he declined. He took part in five a side football matches, which were informal social events organised by the participants rather than the company.

79. Mr Shepherd was not included in the staff appraisal scheme and had no career path within Gerling NCM.

The Submissions

The Appellant

80. Counsel contended that a hypothetical contract between Mr Shepherd and Gerling NCM would have included a substitution clause, in which case there was no requirement for Mr Shepherd to perform the services personally to Gerling NCM. Counsel submitted if that was the case the hypothetical contract would not as a matter of law constitute a contract of employment.

81. As authority for his proposition Counsel cited the Court of Appeal decision in *Express & Echo Publications Ltd v Tanton* I.C.R. [1999] 693. The case primarily

turned upon a substitution clause (3.3) in an agreement for services which stated that if

> "the driver was unable or unwilling to perform the services personally he shall arrange at his own expense entirely for another suitable person to perform the services"

82. Lord Justice Gibson at page 698 found that

> " ….in my judgment, it is plain from clause 3.3 that the applicant, as a matter of contract, was not obliged to perform any services personally himself if he was unwilling or unable to do so, provided that he could find a substitute driver".
>
> " In those circumstances, it is, in my judgment, established on the authorities that, where, as here, a person who works for another is not required to perform his services personally, then as a matter of law the relationship between the worker and the person for whom he works is not that of employee and employer".

83. If his submission about the tie breaker nature of the substitution clause did not find favour, counsel contended that the facts of Mr Shepherd's engagement with Gerling NCM should be evaluated against the case law principles on employment status in the context of other "service providers" in the same kind of business. Thus as an example the fact that Mr Shepherd only made a modest investment in capital assets for his business was not necessarily a factor pointing towards employment. A computer software consultant in business was principally selling his IT skills which did not require the same capital investment as a road haulier running his business.

84. Counsel considered that the established tax treatment of Mr Shepherd as a self-employed person was significant when determining whether the work carried out for Gerling NCM was under a contract for services. *Barnett v Brabyn* 69 TC 133 decided that established tax treatment as self-employed was *a cogent factor* pointing to a contract for services. Similarly the fact that Mr Shepherd was in business on his own account carrying out other work at the same time as supplying his services to Gerling NCM was a strong indication that the hypothetical contract would not be one of employment. Cooke J in *Market Investigations* at page 185B said :

> "The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him"

85. Counsel pointed to the evidence of Messrs Gigg and Prentice that Gerling NCM did not want an employment relationship with Mr Shepherd. They wanted a contractor with no strings attached. Equally Mr Shepherd was prepared to take the attendant risks of a self employed contractor in return for a fee which was roughly twice the hourly rate enjoyed by employees. Counsel submitted that the stated mutual intentions of the parties were highly relevant in determining the status of the

hypothetical contract between Gerling NCM and Mr Shepherd. Counsel disagreed with the Respondents' view that mutual intention was not relevant when construing a hypothetical contract. *Hall v Lorimer* cited mutual intention as a potential factor for deciding employment status. The High Court in *Professional Contractors Group Limited* confirmed that the case law principles on employment status applied to the IR35 legislation. Counsel cited two special commissioners' decisions *Battersby v Cambell* [2001] STC 189 and *FS Consulting v McCaul [2002]* STC 138 where evidence of mutual intention had been taken into account in cases involving IR35 determinations. Essentially Counsel submitted that mutual intention was relevant to an IR35 analysis, the precise weight to be attached to it, however, was a matter for the fact finding tribunal.

86. Counsel considered that Mr Shepherd could exercise considerable discretion in how and when he performed his services for Gerling NCM. Mr Shepherd was only paid for work done and did not have the job security and benefits enjoyed by employees.

87. The facts which pointed towards employment, such as provision of equipment by Gerling NCM, the place of work and the notice period of four weeks in the lower and upper level contracts were not significant. Counsel concluded that when all the facts were considered in the context of a business of a computer software consultant, the hypothetical contract between Mr Shepherd and Gerling NCM would have been a contract for services.

The Respondents

88. The Respondents contended that the minimum obligation necessary for a contract of service was the obligation on the part of the engager to pay the worker remuneration and for the worker to provide his services in consideration of that remuneration (*Nethermere v Taverna and Gardiner* [1984] IRLR 240). In this Appeal the Respondents submitted that the question of mutuality of obligation posed no difficulty. The evidence clearly demonstrated that Mr Shepherd would have provided services in return for remuneration under the terms of a hypothetical contract between Gerling NCM and Mr Shepherd.

89. The Respondents considered that the evidence showed that the personal service of Mr Shepherd was required by Gerling NCM and that in reality the replacement of Mr Shepherd by a substitute would not have been practical. At the highest the substitution clause in the lower and upper contracts was merely a right to propose a replacement in which case it was not a tie breaker but simply one fact among others in assessing the weight to be given to it, when deciding the status of the hypothetical contract (*Synaptek Ltd v Young* [2003] STC 543).

90. According to the Respondents the work undertaken by Mr Shepherd for the Tote during the contract with Gerling NCM was insufficient to satisfy business on own account. The income received from the Tote venture was small in comparison with that received from Gerling NCM. In any event the existence of the Tote venture did not preclude Mr Shepherd from being an employee of Gerling NCM under a hypothetical contract.

91. The Respondents submitted that no weight should be attached to Mr Shepherd's activities developing the computer game *"Pen'em"*. These activities were not those of the Appellant but of Mr Shepherd's other personal service companies. Further the activities occurred outside the period under investigation. The legislation required the Tribunal to consider the nature of the Appellant's arrangements with Gerling NCM during the period of the Appeal. The computer game was not part of those arrangements.

92. The Respondents argued that the intention of the parties was not a relevant consideration for determining the status of a hypothetical contract under the IR35 legislation. In employment status cases the Respondents contended that the intentions of the parties were only pertinent in borderline cases when the status of the work relationship was ambiguous. Lord Denning in *Massey v Crown Life Insurance Co* [1978] IRLR 31 at page 33 said:

> "The law as I see it is this: If the true relationship of the parties is that of master and servant under a contract of services, the parties cannot alter the truth of that relationship by putting a different label upon it …..On the other hand, if their relationship is ambiguous and is capable of being one or the other, then the parties can remove that ambiguity, by the very agreement itself which they make with one another. The agreement itself then becomes the best material from which to gather the true relationship between them".

93. According to the Respondents in an employment status case situation a direct relationship existed between the engager and the worker, and in those circumstances it was possible to arrive at a conclusion about whether the parties intended to create a contract of service or a contract for services. On the other hand, an IR35 situation comprised a three party arrangement where the contracting parties' intentions would always be to contract on a self employed basis. Thus the construction of the hypothetical contract would start with the premise that the parties intended it to be a contract for services which from the Respondents' point of view was not a tenable position and would undermine the purpose of the IR35 legislation. In their view the special commissioners in *Netherlane Limited* (2005) SPC00457 and *Dragonfly* were right in their findings that it was not possible for the parties to have any intention over a hypothetical contract. Finally the Respondents commented that in this Appeal it may have been the parties' intentions not to enter into an employment relationship but it was apparent from the evidence that Gerling NCM wanted Mr Shepherd to provide services under arrangements akin to those which applied to its employees.

94. The Respondents contended that the degree of control exercised by Gerling NCM over Mr Shepherd was sufficient to be consistent with a contract of service in a hypothetical relationship. The absence of financial risk, the provision of equipment, and the four weeks notice of termination were all pointers towards employment. Further the evidence indicated that Mr Shepherd had become an integral part of the Gerling organisation.

95. The Respondents concluded that the picture painted by the facts of this Appeal was one of a contract of service rather than a contract for services.

Findings of Fact

96. I find under *mutuality of obligation* that Mr Shepherd was required to perform services to complete IT projects for which Gerling NCM was obliged to pay a fee. I am satisfied that under the arrangements and circumstances of the engagement Gerling NCM was also obliged to provide work for Mr Shepherd. The indications to the contrary were that Gerling NCM would only pay for the hours worked, and no specific term in the lower and upper level contracts requiring Gerling NCM to make work available. I consider those contrary indications were outweighed by:

(1) The termination provisions in the contracts, Gerling NCM could not finish the contract on the grounds of no work without giving four weeks notice.

(2) The periods of the contract which were relatively short and aligned to the duration of specific projects.

(3) The clear expectation on the face of the contracts that Gerling NCM would supply 36 hours of work per week.

(4) The fact that Mr Shepherd did work on average 35.25 hours per week throughout the two tax years under Appeal, which included weeks when Mr Shepherd chose to take a holiday.

97. There was a clear conflict between Mr Shepherd's evidence and that of Messrs Gigg and Prentice in respect of *control*. I preferred the evidence of Messrs Gigg and Prentice which was consistent with the terms of the lower and upper level contracts. Also the contents of Mr Shepherd's interview on 10 October 2002 were more in line with the accounts given by Messrs Gigg and Prentice than with his evidence in chief given before me. I find on the issue of control:

(1) *The what*: Gerling NCM assigned Mr Shepherd to specific IT projects in accordance with its priorities. Within a project Mr Shepherd was allocated certain tasks to do. Gerling NCM retained the right to move Mr Shepherd to other projects which happened on one occasion. I was not convinced by Mr Shepherd's evidence that he would only accept a contract if the project met his needs. The tenor of Mr Shepherd's evidence was that he was keen to show commitment to guarantee the renewal of the contract with Gerling NCM. Further he took no steps to find alternative work but awaited the offer of a new contract. His evidence suggested that he would accept whatever the work given to him by Gerling NCM.

(2) *The how*: Mr Shepherd was not subjected to daily supervision by a line manager. Mr Prentice for Gerling NCM was focussed on delivering projects on time to the correct quality standard, which were achieved by project team members reporting regularly on progress and subjecting outcomes to quality assurance processes. Mr Shepherd was obliged to report regularly on progress and provide the project manager with formal reports monthly. The quality of his work was assessed by the quality assurance team. The controls of reporting and quality assurance exercised over Mr Shepherd's work were the same as those applied to Gerling's

employees working on IT projects. Finally I am satisfied that Mr Shepherd worked as a member of team not generally on his own.

(3) *The where*: Mr Shepherd accepted that he was required to attend the offices of Gerling NCM in Cardiff to perform his services. The work done from home was minimal and generally out of choice.

(4) *The when*: I am satisfied from the evidence that Mr Shepherd did not have freedom to choose his hours of work and take leave without prior authorisation. I find that Mr Shepherd could choose his start and finish times provided he was in attendance during the core hours. This was the same arrangement given to members of staff working flexi-time. Mr Shepherd required prior authorisation to take leave as was clear from the contract documentation and the evidence of Messrs Gigg and Prentice.

98. The Appellant's submission that Gerling NCM did not require Mr Shepherd to perform the contracted services personally relied upon the substitution clause in the contracts which was added in October 2000, and the existence of no right under the contracts to sue Mr Shepherd for non-performance. I find that the Appellant's submission was without substance, and that Gerling NCM had effectively contracted with Mr Shepherd to perform the required services. I reach that conclusion for the following reasons:

(1) The upper level contracts specified Mr Shepherd as the consultant supplying the services. The Appellant was not identified in the upper level contracts until 27 April 2002. The lower level contracts also named Mr Shepherd as the consultant.

(2) Gerling NCM recruited Mr Shepherd directly for his IT expertise. Gerling NCM interviewed Mr Shepherd as an individual not in his capacity as a director of a service company.

(3) The substitution clause added to the contracts from 2 October 2000 did not give the Appellant an unfettered right to provide a substitute in place of Mr Shepherd. Gerling NCM was entitled to refuse the substitute offered on any reasonable grounds. I placed no weight on the joint statement of Mr Gigg and Mr Shepherd dated 16 February 2005 which indicated that Gerling NCM would accept a substitute with the necessary skills. I accepted Mr Gigg's explanation that the words used in the statement were not his, and that any substitute offered would have to go through the same recruitment process as applied to Mr Shepherd. Mr Shepherd admitted in his interview on 10 October 2002 that the substitution clause was of no practical effect: Gerling NCM would either tolerate his absence allowing him to continue with the contract, or would terminate his contract and find someone else. In the same interview Mr Shepherd accepted that the substitution clause was inserted to meet any potential IR35 challenge. Further the facts showed Mr Shepherd performed the services throughout the seven years he worked for Gerling NCM. The Appellant offered no substitute during the seven years, which in any event would not have been possible because Mr Shepherd was its sole employee. I attach no weight to

the example given of Mr D, which was hypothetical since Mr D was retiring. Overall I conclude that the substitution clause was window dressing, and that Gerling NCM would have replaced Mr Shepherd if he was unable to carry out the work.

(4) The substitution clause at its highest was no more than a right to nominate another person in the event of Mr Shepherd being unable to perform his duties. However, on the facts found I consider that if Gerling NCM had been contracting directly with Mr Shepherd it would not have agreed to a substitution clause. This conclusion was supported by the fact that the contracts up to October 2000 did not include a substitution clause.

(5) Although there was no right to sue Mr Shepherd for non-performance, the lower level contract could be terminated without notice if Gerling NCM considered Mr Shepherd to be technically incompetent.

99. Whilst under contract with Gerling NCM I am satisfied that Mr Shepherd was required to provide his services exclusively during the hours worked. I accept the evidence of Mr Gigg that Mr Shepherd's contract would have been terminated if he had been carrying out external assignments without consent, whilst working for Gerling NCM. I have no reason to doubt Mr Shepherd's evidence that he received phone calls from the Tote at the Cardiff offices of Gerling NCM. However the number of phone calls taken was infrequent, 21 over two years with the longest being 22 minutes, and probably not noticed by Mr Gigg or Mr Prentice. Further Mr Shepherd actually did the work for the Tote in his own time at home, which suggested that Mr Shepherd accepted that he should not be doing other work when at the Cardiff premises.

100. I find no compelling evidence that the Mr Shepherd was in business on his own account during his engagement with Gerling NCM. He worked for Gerling NCM for a period of seven years albeit under a series of fixed term contracts. During that time he effectively had only one other engagement which was with the Tote. The time spent on work for the Tote was minimal in the disputed years averaging out at less than 30 minutes per week during 2000/01 and 2001/02. Further the Tote was not new work gained whilst working for Gerling NCM but a long-standing arrangement stemming from an assignment completed in 1995. The Appellant and Mr Shepherd did not market their services or seek other assignments. Mr Shepherd was content to await the offer of another contract by Gerling NCM. The Appellant cited Mr Shepherd's development of the computer game, *"Pen'em"* to demonstrate that he was in business on his own account. The facts showed that the game was not marketed until 2005, no development work was undertaken during the disputed years. The scale of the enterprise was modest realising a turnover of £850 for the year ending 31 October 2005. I placed no weight on the evidence of *"Pen'em".* The evidence was too remote from the tax years under Appeal and was not part of the arrangements under investigation since it did not involve the Appellant. Finally the modest scale of the enterprise had the hallmarks of a personal project rather than a business.

101. I find that Mr Shepherd was integrated within the IT department of Gerling NCM. He worked there for seven years, doing on average 36 hours a week until April 2004. Mr Shepherd worked generally as a member of team, which included employees. As with other members of staff working on IT projects, he was required to make progress reports and submit his work to the quality assurance team. I consider that Mr Gigg's statement that Mr Shepherd was part of the scenery was an accurate description of Mr Shepherd's relationship with Gerling NCM.

102. I find that the lower and upper level contracts specified that the agreements did not constitute or imply an employment relationship between the parties. Mr Prentice explained that Gerling NCM engaged contractors to comply with agreed staff establishment levels and to provide flexibility in the event of a downturn in business. Mr Shepherd sought engagement as a consultant rather than as an employee. The insertion of this clause in the hypothetical contract, however, would not be decisive about the nature of the working relationship between Mr Shepherd and Gerling NCM. The effect of the clause has to be considered in the context of the contract as a whole.

103. There was no substantive dispute between the parties on the facts regarding established tax treatment, provision of equipment, and financial risk. They, however, disagreed about their significance for deciding whether the hypothetical contract between Mr Shepherd and Gerling NCM was a contract for services or a contract of service, which I will deal with when I consider the hypothetical contract. I formally make the following findings:

> (1) Mr Shepherd had an established record of paying tax as a self employed person.
>
> (2) Gerling NCM provided Mr Shepherd with the equipment necessary to do the job.
>
> (3) Mr Shepherd was not exposed to significant financial risk with his engagement with Gerling NCM. He was remunerated on a fixed fee basis and had no capital invested in the assignment. Mr Shepherd, however, did not have job security or the benefit of sickness pay. There was a possibility that his contract would not be renewed, although on the evidence Mr Shepherd expected it to be renewed as he would await the offer of a new contract before looking for other work.

The Hypothetical Contract

104. Under the legislation I am required to construct a hypothetical contract between Gerling NCM and Mr Shepherd for the tax years in question from my findings on the arrangements and wider circumstances and decide whether the terms of the contract as a whole in the contextual circumstances constituted a contract for services or a contract of service.

105. I find that the hypothetical contract would contain the following terms:

(1) During the period of the hypothetical contract there would be several fixed term contracts typically ranging from three to six months. The contract would have a clause requiring Gerling NCM to give notice whether it intended to renew the contract on the same or similar terms.

(2) A requirement for Mr Shepherd to provide personally the services of an IT specialist

(3) Mr Shepherd would be assigned by Gerling NCM to quality initiative projects and associated mini projects.

(4) A requirement on Mr Shepherd to report on progress to the project manager at regular intervals and subject finished work to testing by the quality assurance team.

(5) The place of work would be at the Cardiff offices of Gerling NCM with a provision to work occasionally from home with prior agreement of the project manager

(6) The hours would be 36 hours per week Monday to Friday with a requirement to work the core hours of 9:30 am to 11:30am and 2:00pm to 3:30pm. Mr Shepherd would have a discretion on start and finish times outside the core hours.

(7) The fee for the work would be expressed at an hourly rate with the figure for 36 hours. The fee would be payable weekly in arrears by bank transfer and on production of an authorised completed time sheet for the week.

(8) The hourly fee rate would be significantly higher than a permanent employee in a similar position.

(9) Overtime and working at weekends would require specific authorisation of the project manager. The fee rate for overtime and weekend working would be at the same rate as for the 36 hours.

(10) Any leave taken during the term of the contract would require prior authorisation of the project manager.

(11) An obligation on Mr Shepherd to inform the project manager of his inability to attend work through illness or other exceptional reason.

(12) The equipment necessary to do the job would be provided by Gerling NCM.

(13) A term prohibiting Mr Shepherd from taking on other work during the term of the contract except with the consent of Gerling NCM. The consent could not be unreasonably withheld.

(14) Written notice of 4 weeks from either party would be required to terminate the contract early. There would be a residual clause permitting Gerling NCM to terminate the contract unilaterally in defined exceptional circumstances.

(15) No entitlement to paid leave or sickness benefit.

(16) Not eligible to be a member of the pension scheme.

(17) A clause to the effect that the parties did not intend to create an employment relationship

106. Before deciding whether the terms of the hypothetical contract would constitute a contract of service or a contract for services I wish to deal with the three specific points raised by Appellant's counsel namely: substitution clause; mutual intentions, and evaluating the contract in context of service providers in the same line of business.

107. Appellant's counsel submitted that the existence of substitution clause was a tie breaker in that if it existed the contract could not be an employment one. However, as Park J found in *Usetech* after reviewing the authorities starting with *Tanton* it was necessary first to determine as fact the precise effect and nature of the substitution clause, and only then would it be possible to decide whether the clause was a tie-breaker or fact amongst others. Park J stated at 1699 paragraph 53:

> "As it seems to me the present state of the law is that whether a relationship is an employment or not requires an evaluation of all of the circumstances. In the words of Hart J in *Synaptek Ltd v Young* [2003] STC 543, 75 TC 51, paragraph 12, the context is one *'where the answer to be given depends on the relative weight to be given to a number of potentially conflicting indicia'*. The presence of a substitution clause is an indicium which points towards self-employment, and if the clause is as far-reaching as the one in *Tanton* it may be determinative by itself. In this case, however, if, contrary to my view, the hypothetical direct contract between Mr Hood and ABB has to be assumed to have contained a substitution clause similar to that in the Usetech/NES contract, in my opinion (agreeing with the Special Commissioner) it would not be sufficient to override the effect of all the other considerations which led the Commissioner to decide that the relationship would have been that of employee and employer.

108. In this Appeal I found as fact that the substitution clause in the lower and upper level contracts was at its highest no more than a right to nominate another worker, and certainly did not have the far reaching characteristics of the clause considered by the Court of Appeal in *Tanton.* However, I have gone one step further in that I hold on the facts found that no substitution clause would be included in a hypothetical contract between Mr Shepherd and Gerling NCM. I found that the substitution clause in the lower and upper level contracts was window dressing and had no practical effect on how the contract would operate. I consider that if Gerling NCM had negotiated the contract with Mr Shepherd direct it would not have agreed to a substitution clause because Gerling NCM was only interested in the skills and personal services of Mr Shepherd.

109. I consider on a correct construction of the IR35 legislative provisions that I am entitled to conclude from the wider circumstances that the hypothetical contract would not include a substitution clause even though it appeared in both the lower and upper level contracts. Park J in *Usetech* decided after consideration of the all circumstances to exclude the substitution clause from the hypothetical contract. His rationale for so doing was based on the observations of Burton J in *R (on the*

application of Professional Contractors Group Ltd) v IRC [2001] EWHC Admin 236, [2001] STC 629, 74 TC 393, paragraph 48:

> "In those circumstances, of course the terms of any contract between the agency and the client as a result of which the service contractor will be present at the site are important, as would be the terms of any contract between the service contractor and the agency. But, particularly given the fact that, at any rate at present, a contract on standard terms may or may not be imposed by an agency, or may be applicable not by reference to a particular assignment, but on an ongoing basis, and may actually bear no relationship to the (non-contractual) interface between the client and the service contractor, such documents can only form a part, albeit obviously an important part, of the picture."

110. There may be an argument that the circumstances of the non-contractual interface is only relevant when there is a conflict between the lower and upper level contracts which was the case in *Usetech Limited.* I consider that argument is not supported by the observation of Burton J which emphasised that the terms of the contracts only formed part of the picture for the hypothetical contract. If, however, I am wrong about the extent of the observation of Burton J, the factual circumstances of this Appeal were within the territory of resolving a conflict between contractual terms by reference to the facts of the non-contractual interface. The conflict in this Appeal was between the lower and upper level contracts commencing 3 April 2000 which contained no substitution clause, and those contracts which did, starting from 2 October 2000. The fact that there was no substitution clause in the contracts prior to 2 October 2000 gave support to my conclusion that Gerling NCM would not have agreed to a substitution clause had it negotiated the contract direct with Mr Shepherd.

111. I am grateful to the parties for their detailed submissions on the relevance of the mutual intention of parties to the disputed issue of whether the hypothetical contract is a contract of service or not. Essentially I agree with the legal analysis of Appellant's counsel. Under the common law of employment mutual intention of the parties expressed as a statement in a written contract and or an actual intention established by evidence may be a relevant factor amongst others in establishing the correct status of a contract for work. Evidence of mutual intention is unlikely to be conclusive, its importance may vary according to the circumstances of the case. The true nature of the relationship, however, cannot be altered by simply putting a different label on the agreement. The IR35 legislation leaves in place the legal principles on employment status established by case law. The circumstances for determining the contents of a hypothetical contract include the terms of the contracts and the context in which the services are provided. A statement of mutual intention or evidence thereof may form part of the circumstances as defined by the 2000 Act and the 2000 Regulations.

112. The Respondents' contention that evidence of mutual intention should be excluded was based on the proposition that its inclusion skewed the IR35 analysis which was unfair and defeated the purpose of the legislation. I consider their proposition merged the two stages of identification of the evidence and its evaluation, and assumed that the IR35 analysis started with a blank canvass rather than a set of

actual arrangements which purport to be a contract for services. I conclude that the parties' mutual intention forms part of the circumstances which are taken into account in the analysis of the hypothetical contract. The weight to be attached to the evidence of mutual intention would vary from case to case. A mere statement asserting contract for services carries no evidential weight unless that intention has been translated into actual substantive arrangements of self-employment.

113. I was not convinced by Appellant's counsel submission that I should evaluate the hypothetical contract of Mr Shepherd in the context of service providers in the same line of business. Counsel relied on the judgments in *Market Investigations* and *Hall v Lorimer* for his submission. I consider these judgments are authorities for the proposition that each case should be decided on its own individual circumstances, and that the facts which may be compelling in one case in the light of all the facts may not be compelling in the context of another case.

114. Turning to the evaluation of the terms of the hypothetical contract, I find that

(1) Mutuality was satisfied by the obligations upon Mr Shepherd to perform the services of an IT specialist and upon Gerling NCM to pay him for those services throughout the period of the fixed term contracts.

(2) Mr Shepherd was obliged to provide his services personally and exclusively during the hours contracted.

(3) Gerling NCM was required to provide work of 36 hours per week under the contracts which could only be terminated early by four weeks notice or on exceptional grounds.

(4) Gerling NCM had the right to assign Mr Shepherd to specific work projects and teams, and require him to report on progress and submit his work for checking by quality assurance team. Mr Shepherd was obliged to attend the offices of Gerling NCM during specified hours. The controls exercised over Mr Shepherd were the same as those for Gerling's employees and consistent with a contract of service.

(5) The obligation upon Mr Shepherd to obtain prior authorisation for extra hours and absence, and the obligation upon Gerling NCM to provide equipment indicated a contract of service.

(6) No employee benefits was, in my view neutral, particularly as Mr Shepherd's fee, twice the payment rate for an equivalent member of staff, provided him with more than adequate compensation for the loss of benefits.

(7) I placed no weight on the term that the parties did not intend to create an employment relationship. This intention was not reflected in the other terms found for the hypothetical contract or in the actual work arrangements for Mr Shepherd which were similar if not the same for a Gerling employee doing equivalent work.

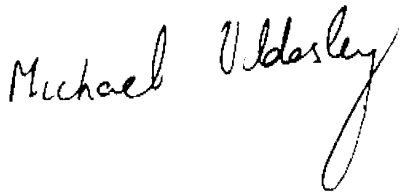
115. Under the contextual circumstances I found that Mr Shepherd was not exposed to significant financial risk from his engagement with Gerling NCM. Mr Shepherd

was part of the scenery at Gerling NCM. There was no compelling evidence that Mr Shepherd was in business on his own account during his engagement with Gerling NCM. His established tax treatment as a self-employed person did not prevent him from being an employee of Gerling NCM and of no significance in the light of all the circumstances.

116. I find that the hypothetical contract would have the necessary irreducible minimum to constitute an employment contract. When I stand back and consider the position as a whole I conclude that the picture painted of the relationship between Gerling NCM and Mr Shepherd was overwhelmingly one of employment.

Decision

117. In the light of my findings I decide in principle that if the services were provided under a contract directly between Mr Shepherd and Gerling NCM, Mr Shepherd would be regarded for income tax purposes as an employee of the Gerling NCM for the tax years 2000/01 and 2001/02, and for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by Gerling NCM for the period 6 April 2000 to 5 April 2002. I, therefore dismiss the Appeal.



MICHAEL TILDESLEY OBE
SPECIAL COMMISSIONER
RELEASE DATE: 19 May 2008

LON/

Authorities referred to in skeletons and bundles but not referred to in the decision:

Airfix Footwear Ltd v Cope [1978] IRLR 396
Ansell Computer Services Ltd v Richardson (Inspector of Taxes) [2004] STC (SCD) 472.
Datagate Services v HMRC [2007] SPC 00656
Davies v Braithwaite [1931] 2KB 628
Esterson, R v Revenue and Customs [2005] EWHC 3037 (Admin)

Ferguson v John Dawson [1976] IRLR 346
Future Online v Foulds [2004] 76 TC 590
Island Consultants Ltd v The Commissioners for HMRC [2007] SPC 00618
Global Plant Ltd v Secretary of State for Health and Social Security [1972] 1 QB 139 [1971] 3 All ER 385.
Lime-IT Ltd v Justin (Officer of the Board of Inland Revenue) [2003] STC (SCD) 15
Massey v Crown Life Insurance Co [1978] 1 WLR 676, [1978] ICR 590, [1978] 2 All ER 576, [1978] IRLR 31, CA.
McManus v Griffiths (Inspector of Taxes) [1997] STC 1089, 70 TC 218
Morren v Swinton and Pendlebury Borough Council [1965] 2 All ER 349
MKM Computing Ltd v HMRC [2007] SPC 00653
Netherlane Limited v Simon York [2004] SPC00457
Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612, [1984] IRLR 240, CA.
Prater v Cornwall County Council [2006] 2 AllER 1013
WHPT Housing Association Limited v The Secretary of State for Social Services 1981 Unreported SJ/465/80
Young v Woods [1980] IRLR 201

Case No: CH/2008/APP/0289

Neutral Citation Number: [2008] EWHC 3284 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 24 November 2008

BEFORE:

SIR DONALD RATTEE

BETWEEN:

HER MAJESTY'S REVENUE & CUSTOMS

Applicant/Claimant

- and -

LARKSTAR DATA LTD

Respondent/Defendant

No representation provided

Approved Judgment

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1. SIR DONALD RATTEE: This is an appeal by Her Majesty's Revenue & Customs against a decision of the General Commissioners allowing an appeal by Larkstar Data Ltd against a determination by Her Majesty's Revenue & Customs of liability to income tax under PAYE regulations and social security contributions for the period of 6 April 2001 to 5 April 2003.

2. The relevant background facts can be stated fairly shortly. Larkstar Data Ltd, to which I will refer simply as Larkstar, is a company which describes its business as "the provision of computer consultancy services". One Mr Alan Brill is its sole director.

3. Technology Project Services International Ltd ("TPS"), is a company which acts as an agency for the engagement of contractors by a third company, Matra Bae Dynamics UK Ltd ("MBDA") which at the material time worked on defence missile systems and was engaged on a long project which required specialist computer services.

4. For the purpose of acquiring these services MBDA entered into agreements with TPS for their procurement.

5. Starting on 11 August 2000 Larkstar entered into a series of agreements with TPS for the provision of computer consultancy services to MBDA. Pursuant to those agreements Larkstar provided to MBDA the specialist services of Mr Brill, which he provided for MBDA at its premises. There was no direct contract between Mr Brill and MBDA. He was the person whom Larkstar provided for the purpose of fulfilling its contractual obligations to TPS.

6. However HMRC took the view that these arrangements were such as to fall within the anti-avoidance provisions contained in schedule 12 to the Finance Act 2000, dealing with income and corporation tax, and regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000, Statutory Instrument 727 of 2000 ("the Social Security Regulations"), dealing with national insurance contributions. These provisions together are commonly referred to as the IR35 legislation.

7. The Revenue served notices of determination and decision on Larkstar on the basis that the IR35 legislation applied.

8. The purpose of the IR35 legislation was explained by Robert Walker LJ, as he then was, in R (on the application of Professional Contractors Group Ltd and others) v Inland Revenue Commissioners [2001] EWCA Civ 1945 reported in 2002 Simon's Tax Cases at 165 as follows:

> "…to ensure that individuals who ought to pay tax and NIC as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation."

9. The IR35 legislation provides, so far as material for present purposes, as follows. Regulation 6 to the Social Security Regulations provides:

> **"6.** (1) These Regulations apply where –

(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client"),
(b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and
(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client.
(3) Where these Regulations apply –
(a) the worker is treated, for the purposes of Parts I to V of the Contributions and Benefits Act, and in relation to the amount deriving from relevant payments and relevant benefits that is calculated in accordance with regulation 7 ("the worker's attributable earnings"), as employed in employed earner's employment by the intermediary, and
(b) the intermediary, whether or not he fulfils the conditions prescribed under section 1(6)(a) of the Contributions and Benefits Act for secondary contributors, is treated for those purposes as the secondary contributor in respect of the worker's attributable earnings.
And Parts I to V of that Act have effect accordingly."

10. The corresponding provisions, so far as material, of schedule 12 to the Finance Act 2000 are as follows:

> "(1) This Schedule applies where:
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client"),
> (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and
> (c) the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client.
> (4) The circumstances referred to in sub-paragraph (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided."

11. I need not refer to the provisions of the 2000 Act setting out the consequences of schedule 12 applying. They are not in issue. Suffice it to say that, as with the Social Security Regulations, they treat the worker as employed by the intermediary. I am only concerned on this appeal, as were the General Commissioners, with the question of whether schedule 12 does apply to the present case. It is common ground that there is no relevant difference for present purposes between the terms of Regulation 6 of the Social Security Regulations and Schedule 12 to the 2000 Act.

12. The General Commissioners rejected the view of the Revenue that the IR35 legislation did apply in the present case. They concluded that, had Mr Brill, "a worker" for the purpose of the IR35 legislation, provided the services he did to MBDA, "the client" for the purpose of the legislation, under a direct contract with MBDA, he would properly have been regarded as an independent contractor with, and not an employee of, MDBA, with the result that the IR35 legislation did not apply.

13. The Revenue appeals to this Court against that decision on four grounds set out in its grounds of appeal. The grounds of appeal are:

> "The General Commissioners erred in law in that they
> (1) misdirected themselves in law and in particular having identified the correct question they did not answer it and applied the wrong test in determining whether or not the arrangements would have amounted to a contract of or for service if they had been entered into directly with the client.
> (2) misdirected themselves in law in their approach to the issues of
> (a) control (b) mutuality of obligation and (c) the relevance of a number of considerations to the question they had to determine.
> (3) took into account irrelevant considerations and based their decision on a number of findings of fact which were either not supported by the evidence or inconsistent with other findings of fact.
> (4) reached a conclusion which was not open to them on the evidence before them."

14. In the Case Stated by the General Commissioners they set out facts found by them in paragraph 5. I shall refer to some of those findings which are as follows.

15. (1) On 11 August 2000 Larkstar entered into the first agreement with TPS for the provision of consulting services to MBDA.

16. (2) This was followed by four further successive such agreements. In fact the agreements were each for a period of six months immediately following the previous agreement, making a total of two and a half years during which Mr Brill's services were provided to MBDA pursuant to those agreements.

17. (3) Remuneration to be paid by MBDA was based on an hourly rate.

18. (4) There was no provision in the contracts for sickness, holidays, pensions, bonuses or employee's rights and privileges, such as car parking, sports facilities or medical services.

19. (5) An ongoing project known as ASRAAM, being worked on by MBDA, was the sole purpose of the contracts entered into between Larkstar and TPS.

20. (6) The work to be done by Mr Brill had to be performed exclusively at MBDA's premises for security reasons.

21. (7) Mr Brill was encouraged to work during MBDA's core hours for the purpose of co-ordinating his work with that of others, but he was free to decide when to work outside these core hours.

22. (8) Once Mr Brill and MBDA had negotiated the next stage of the ASRAAM project no control over how Mr Brill did his work was exercised by MBDA.

23. (9) Each of the five contracts allowed a substitute to be provided for Mr Brill, but the overriding security arrangements required substitutes to undergo procedures as rigorous as contractors and in practice that did not happen.

24. (10) Each of the five contracts required Mr Brill to provide his own equipment, but the overriding security arrangements required him to use MBDA's on-site equipment.

25. (11) Mr Brill was deliberately set apart by MBDA from their company's structure so that he could independently analyse and criticise and test their systems so as to further the success of the project. His professional independence was what MBDA hired. Without it there was no point in hiring him.

26. (12) He occupied no post and had no title. His badge described him as a contractor.

27. (13) When the project ended, or, if it had been terminated prematurely, the engagement ended, there was no obligation on MBDA to provide work outside or beyond each contract and, if it had been offered, no obligation on Mr Brill to do it.

28. (14) Mr Brill was free to work for other clients but did not in fact do so.

29. (15) The engagement could be terminated (i) at the end of each contract without notice (ii) by either party giving the other one month's notice within the contract period and (iii) at the end of the project without notice, as in fact happened.

30. (16) Mr Brill had no financial risk apart from loss of income (i) on premature termination and (ii) on having to redo unsatisfactory work at his own expense.

31. (17) Larkstar's involvement with MBDA ended on or about 31 October 2003.

32. On this appeal the Revenue submits that I should set aside the General Commissioners' conclusion because they misdirected themselves in law in various respects and made findings of fact unsupported by the evidence. I shall consider each of the four grounds of appeal in turn.

33. Ground 1 (and I re-quote it for purposes of convenience) is:

> "The General Commissioners misdirected themselves in law. In particular having identified the correct question they did not answer it and applied the wrong test in determining whether or not the arrangement would have amounted to a contract of or for service if they had been entered into directly with the client."

As developed by Mr Nawbatt for the Revenue, the substance of its complaint here is that the General Commissioners purported to answer the question they had identified by reference to the actual facts found by them without carrying out the process required by law of constructing a hypothetical contract between Mr Brill and MBDA.

34. As authority for the correctness of this latter process Mr Nawbatt relied on various dicta in other cases and in particular on a passage in the judgment of Park J in Usetech Ltd v Young (HM Inspector of Taxes) 76 Tax Cases 811. In paragraph 9 of his judgment, after setting out the relevant provisions of paragraph (ii) of schedule 12 to the Finance Act 2000, Park J said this:

> "A more general point of construction is worth spelling out at this stage. The conditions of sub-paragraphs (a) and (b) involve an analysis of the actual facts and legal relationships, but when that analysis shows that those two sub-paragraphs are satisfied sub-paragraph (c) involves an exercise of constructing a hypothetical contract which did not in fact exist, and then inquiring what the consequences would have been if it had existed. There may be room in some cases for dispute about what the hypothetical contract would contain."

35. While I agree that this is an accurate analysis of the process to be carried out, I am afraid I fail to see any real substance in the Revenue's objection to the Case Stated on this ground. It is true that the General Commissioners did not so express the task they were performing, but it is, in my judgment, clear from the Case Stated that the General Commissioners were considering whether, on the facts they have found, including the terms of the actual contracts between Larkstar and TPS, the relationship between Mr Brill and MBDA would have been one of master and servant or one of independent contractors, had Mr Brill been doing what he did in the way he did and in the circumstances he did under a contract between himself and MBDA.

36. Although it is no doubt true that the General Commissioners could have described their process in more precise legal terms, such as those used by Park J and other judges, I am not satisfied that the process they did adopt was not that required by paragraph 12(1)(c) of schedule 12 to the 2000 Act. So, I reject this first ground of appeal.

37. Ground 2 is as follows:

> "Misdirected themselves in law in their approach to the issues of (a) control (b) mutuality of obligation (c) irrelevance of a number of considerations to the question they had to determine."

38. As to (a), the question of control, Mr Nawbatt made the following submissions:
(1) The General Commissioners failed to have regard to the dictum of Lord Parker, CJ, in Morren v Swindon & Pendelbury Borough Council [1965] 2All ER 349, to which the General Commissioners had been referred by the Revenue. The dictum concerned, directed to the identification of a contract of service as opposed to a contract for services, is as follows:

> "The cases have over and over again stressed the importance of the factor of superintendence and control, but that it is not the determining test is quite clear. In *Cassidy v Minister of Health*, Somervell LJ

> referred to this matter, and instanced, as did Denning LJ in the later case of *Stevenson, Jordan & Harrison v MacDonald & Evans*, that clearly superintendence and control cannot be the decisive test when one is dealing with a professional man, or a man of some particular skill and experience. Instances of that have been given in the form of the master of a ship, an engine driver, a professional architect or, as in this case, a consulting engineer. In such cases there can be no question of the employer telling him how to do work; therefore, the absence of control and direction in that sense can be of little, if any, use as a test."

39. The Revenue submit that the statements by the General Commissioners in paragraph 9(b)(iv) of the Case Stated that the fact that Mr Brill was a consultant and that there was no control by MBDA as to how he did his work indicated that he was independent, without any reference to Lord Parker, CJ's dictum, show that the General Commissioners took no proper account of the principle enunciated in that dictum. I think there is force in this submission and it is supported by the unfortunate fact that the General Commissioners appear to have overlooked the fact that the Revenue representative appearing before them had referred them to authority in the form of decided cases - see paragraph 8 of the Case Stated. That paragraph reads as follows:

> "At the conclusion of the parties' submissions, and having regard to the fact that none of the cases in Bundles A and B had been referred to, the Chairman of the Commissioners asked the Inspector whether he wished to draw attention to any of the reported cases. The Inspector declined."

40. This is quite wrong and the error in the draft case was drawn to the attention of the clerk to the General Commissioners with a reminder that the Inspector had referred to no less than nine authorities and provided the clerk with a copy of his typed speaking brief during the hearing. If, as appears to be the case, the General Commissioners took no account of the authorities to which they were referred, one can well understand how they may have come to misdirect themselves on the law, and I accept that they did in this respect.

41. (2) Mr Nawbatt for the Revenue relied on another unsatisfactory feature of paragraph 9(b)(iv) of the Case Stated and the General Commissioners' findings on the question of control, and that is that it refers back to the finding of fact in paragraph 5.6 that:

> "Mr Brill was encouraged to work during MBDA's core hours"

when in fact it is apparent from paragraph 7(4)(viii) of the Case Stated that Mr Brill's own evidence was to the effect that he was required to work 37 hours a week including the core times of 9.30am to 12 noon and 1.00pm to 4.00pm. There was no other evidence to the contrary save perhaps a document that did not come into existence until 2005, long after the relevant period, dealing with relations between MBDA and what were called in the document their "sub-contractors".

42. Bearing in mind the General Commissioners' statement in paragraph 9(a)(iv) of the Case Stated that they found Mr Brill's evidence to be convincing and to be preferred in

all cases of apparent conflict, I find it impossible to see how the finding that Mr Brill was only encouraged as opposed to required to work the core hours can be justified by the evidence. I accept Mr Nawbatt's submission that, had they made a finding in accordance with Mr Brill's evidence that he was required to work these hours, they might well have taken the view that such finding pointed to employment rather than, as they say in paragraph 9(b)(iv) "being neutral as between employment and independent sub-contracting."

43. As to ground 2(b), that the General Commissioners misdirected themselves in law on the issue of mutuality of obligation, Mr Nawbatt made the following submissions: (1) the General Commissioners considered the issue of mutuality of obligation in paragraph 9B 10 and 9(b)(xii) of the Case Stated, which I shall read. Paragraph 9(b)(x) is as follows:

> "Whether the worker works continuously for the client or whether the worker has a series of engagements. Throughout Mr Brill worked only on the ASRAAM project but under a series of five contracts. When the project ended, or if it were terminated prematurely, his engagement would end. There was no obligation on the employer to provide work outside or beyond each contract. This indicates that he was independent."

44. Then paragraph 9(b)(xii) under the heading "Whether the client is obliged to offer work and whether the worker is obliged to do the work", reads as follows:

> "There was no obligation either way. The obligations of the parties were contained in and confined by the contract. This indicates that he was independent."

45. (2) Mr Nawbatt submitted that the General Commissioners misdirected themselves in law in directing themselves that the absence of any obligation in one six-month contract to offer work to Mr Brill after the end of that contract indicated that Mr Brill was not employed by MBDA. In so finding the General Commissioners completely ignored statements of principle by the Court of Appeal in Cornwall County Council v Prater [2006] EWCA Civ 102. The issue in that case was whether Mrs Prater, who during a ten-year period, had had a series of work contracts with the council to teach pupils unable to attend school, was, by those contracts, an employee of the council or an independent contractor.

46. At paragraph 40 of the transcript Mummery LJ said this:

> "To sum up, the legal position between the Council and Mrs Prater was as follows.
> (1) During that period 1988 to 1998 Mrs Prater had a number of work contracts with the Council. The issue was whether or not they were contracts of service. If they were, she enjoyed continuity of employment, notwithstanding the breaks between the contracts.
> (2) Under the contracts Mrs Prater was engaged and was paid to teach individual pupils unable to attend school.

> (3) There can be no doubt that, if she was engaged to teach the pupils in a class, collectively or individually, at school under a single continuous contract to teach, Mrs Prater would have been employed under a contract of service.
> (4) It makes no difference to the legal position, in my view, that she was engaged to teach the pupils out of school on an individual basis under a number of separate contracts running concurrently or successively.
> (5) Nor does it make any difference to the legal position that, after the end of each engagement, the Council was under no obligation to offer her another teaching engagement or that she was under no obligation to accept one. The important point is that, once a contract was entered into and while that contract continued, she was under an obligation to teach the pupil and the Council was under an obligation to pay her for teaching the pupil made available to her by the Council under that contract. That was all that was legally necessary to support the finding that each individual teaching engagement was a contract of service."

47. Longmore LJ referring to a submission that:

> "There was no or no sufficient "mutuality of obligation" which was part of the irreducible minimum which had to exist before a contract could be a contract of employment."

said this at paragraph 43 and following of the transcript:

> "43. I cannot accept this submission. There was a mutuality of obligation in each engagement; namely that the County Council would pay Ms Prater for the work which she, in turn, agreed to do by way of giving tuition to the pupil for whom the Council wanted her to provide tuition. That to my mind is sufficient "mutuality of obligation" to render the contract a contract of employment if other appropriate indications of such an employment contract are present.
> 44. If Ms Prater had been seeking to prove that there was a long-term or global contract of employment, the fact that the Council were not obliged to offer her any work and that, if they did offer her work, she was not obliged to accept that offer would, no doubt, mean that no such long-term or global contract existed. But Ms Prater put forward no such argument. She was only saying that the individual commitments, or engagements, once entered into, constituted contracts of employment. The Employment Tribunal held that this was indeed the position in paragraph 14 of their decision and I can detect no error of law in their conclusion."

48. (3) Those statements of the relevant law seem to have been ignored by the General Commissioners, because what they say in paragraph 9(b)(x) and (xii) of the Case Stated is quite inconsistent with them.

49. (4) In paragraph 9(c) of the Case Stated the General Commissioners indicate that they regarded the alleged lack of mutual obligation as one of the most compelling factors indicating, in their view, independent contracting.

50. (5) This conclusion is vitiated by the clear misdirection by the General Commissioners of themselves on the relevant law.

51. Mr Stafford on behalf of Larkstar, the respondent on this appeal, argued that, and I quote from his skeleton argument:

> "Seen in the context of the findings of fact made by the General Commissioners, it can be seen that the point which they were making was not that there was no mutuality of obligation during the currency of any of the fixed term contracts. Indeed, the explicit words of the finding of fact and of paragraph 9B(l0) & (12) reveals this to be so. Instead, the General Commissioners were drawing a contrast between project work and employment. All employee who is given a task remains employed even when that task IS completed, and his employer is generally going to look for something else for him to do. If something is found, then an employee cannot simply turn his nose lip at it. By contrast, someone who is only engaged for the duration of a project cannot expect an entitlement to be offered other work, nor can the end-user be required to find other work."

52. I am afraid I do not find this provides any answer to the Revenue's argument. The relevant question for the General Commissioners was whether Mr Brill would have been employed by MBDA during the two and a half years of the hypothetical contract or contracts between them. The decision of the Court of Appeal in Prater seems to me clearly to indicate that the fact relied on by the General Commissioners, namely that MBDA would have been under no obligation to offer further work outside the terms of these contracts, is irrelevant to the question in issue. Thus I accept Mr Nawbatt's submission that here one finds a clear misdirection of themselves by the General Commissioners as to the law.

53. I turn then to (c) of ground of appeal (2), namely that the General Commissioners misdirected themselves in their approach to the relevance of a number of considerations to the question they had to determine. Some of the points relied on by Mr Nawbatt under this heading were the following.

54. Mr Nawbatt's first point relates to the provisions for termination on one month's notice of each contract between Larkstar and TPS which the General Commissioners assumed would be in the hypothetical contracts between Mr Brill and MBDA. The General Commissioners find this to be one of the most compelling indicia of a contract for services rather than employment. The Revenue submits that this was again a result of a misdirection by the General Commissioners of themselves on the relevant law.

55. Mr Nawbatt points out that in McManus v Griffiths 70 Tax Cases 218 at page 232 Lightman J expressed the view that a condition for termination on three months' notice was no indication of whether the contract was of service or for services. In Morren v Swindon & Pendelbury Borough Council [1965] 2All ER349 at page 351 Lord Parker, CJ considered that a provision for one month's notice indicated a contract of service. The General Commissioners do not seem to have taken account of either of these authorities.

56. While I see force in the Revenue's argument, I am not convinced that it is fair to say that the General Commissioners misdirected themselves in law on this point. It follows from the apparent conflict between the dicta cited by Mr Nawbatt, to which I have referred, that there does not seem to be any clear law on the point.

57. The remainder of the considerations referred to in ground (2)(c) of the grounds of appeal constitute a list of factors which the General Commissioners regarded as indicia of a contract for services, or rejected as indicia of a contract of service. In each case the Revenue submits that the General Commissioners erred in the significance they attached to these factors. I do not believe it helpful to go through the list.

58. I have already indicated that I accept that the General Commissioners did misdirect themselves on the law in relation to their consideration of what they found to be the important questions of control and mutuality of obligation and made one finding of fact in relation to the former question, namely that Mr Brill was only encouraged to work the core hours, unjustified by the evidence before them.

59. It follows in my judgment that the appeal must be allowed and I am afraid the matter must be remitted to the General Commissioners to be re-heard *de novo* by a differently constituted panel, for I cannot be satisfied that they would have reached the same conclusion as they did, had they not made the errors of law and unjustified finding of fact which I have identified.

60. In these circumstances it does not seem appropriate to express a view on the Revenue's further list of matters under ground of appeal (2)(c) as to which I do not find any point of law on which I can say the General Commissioners misdirected themselves.

61. Particularly having regard to the comparatively small amount of money at stake on this appeal it is in my opinion unfortunate that there has to be all the expense and delay of a re-hearing by the General Commissioners, but I have to accept Mr Stafford's submission that I cannot myself properly determine questions of fact central to Larkstar's appeal. Hence submissions before me were properly directed only to particular criticisms of the decision made by the General Commissioners and not to the question of whether in fact Mr Brill would, under the hypothetical contract, have been employed or self-employed.

62. That was consistent with the fact that the Revenue in its Notice of Appeal indicated that the only order sought by it on this appeal is an order "setting aside" the decision of the General Commissioners. They did not indicate that they sought any alternative order.

63. I have not yet said anything about the Revenue's 3rd and 4th grounds of appeal. Mr Nawbatt for the Revenue accepted rightly that ground (3) really adds nothing to ground (2). As to ground (4), namely that the General Commissioners erred in law and that they reached a conclusion not open to them on the evidence before them, the only additional argument relied on by Mr Nawbatt was directed at paragraph 9(d) of the Case Stated in which the General Commissioners said:

> "We were invited to apply to the facts of this casethe analogy of a surgeon employed by a hospital. He has complete professional freedom, but is nevertheless an employee. We prefer the analogy of a householder engaging a builder. However many the additions or amendments to the original contract, and however pernickety or demanding the householder, the builder remains an independent contractor. And so it was in this case."

64. Mr Nawbattt criticises the analogy of a builder chosen by the General Commissioners and submits that it is so inept as to indicate that the General Commissioners must have misdirected themselves in law. I agree that the analogy is certainly not a happy one, but I do not think that the choice of it by the General Commissioners would of itself have been sufficient to establish an error of law by them.

65. For the reasons I have given, however, I shall allow the Revenue's appeal and remit the matter to the General Commissioners for re-hearing by a different panel.

66. As no one is here representing either party what I propose to do is to make the order I have indicated, order that the respondent shall pay the Revenue's costs of this appeal to be the subject of a detailed assessment in the absence of agreement, and I will direct that either party may make an application to me within the next 28 days (such application to be in writing via the Chancery Listing Office, as I shall not be sitting any more this term) to make some further order or to change the wording of some order I have indicated I shall make - not, of course, an application to amend the judgment.

67. So, the order I make is that the appeal is allowed with costs, costs to be the subject of a detailed assessment in the absence of agreement, and the subject matter of the appeal shall be remitted to the General Commissioners for re-hearing by a differently constituted panel from the panel that heard the appeal on the previous occasion.

Novasoft Ltd v Revenue & Customs [2010] UKFTT 150 (TC) (06 April 2010)
INCOME TAX/CORPORATION TAX
Personal service companies (IR 35)

[2010] UKFTT 150 (TC)

TC00456

Appeal number TC/2009/10828

Income tax and NIC – Intermediaries legislation - IR35 – appeal allowed

FIRST-TIER TRIBUNAL

TAX

NOVASOFT LIMITED Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS Respondents

TRIBUNAL: Tribunal Judge Peter Kempster
Mr Stuart Martin

Sitting in public in Manchester on 8 & 9 December 2009

Mr Novak Brajkovic (Director) for the Appellant

Mr Alan Hall (HMRC) for the Respondents

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DECISION

1. This appeal concerned the applicability of the intermediaries legislation – commonly referred to as the IR35 legislation – to the affairs of the Appellant ("Novasoft") during the tax years in dispute.

Assessments and appeals

2. On 13 June 2005 the Respondents ("HMRC") served on Novasoft formal notices under Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 and formal decisions under section 8 of the Social Security (Transfer of Functions etc) Act 1999, covering the period 6 April 2000 to 13 December 2002. 6 April 2000 was the commencement of the operation of the IR35 legislation (described below).

3. On 27 June 2005 Novasoft's representatives appealed against all the items described in paragraph 2 above. Further grounds of appeal were later added and there was case management of the proceedings by both the former General Commissioners and this Tribunal before the appeals were listed for hearing.

4. Mr Hall for HMRC confirmed that, because of the manner of operation of the IR35 legislation, this Tribunal was being asked to make a decision in principle on the appeals. Unless the appeals were all allowed in full then it would be necessary for actual figures to be agreed between the parties or brought back to the Tribunal for further consideration.

5. Mr Hall confirmed that, if successful, HMRC would seek to recover interest as well as the PAYE and NIC, but would not seek to impose any penalty.

Background and contracts

6. Novasoft was incorporated in February 1997 and is owned 75% by Mr Novak Brajkovic ("Mr Brajkovic") and 25% by Mr Brajkovic's wife. During the period covered by the maters in dispute in this appeal Mr Brajkovic was the sole director of Novasoft. Mr Brajkovic is an IT analyst and programmer.

7. Novasoft provided the services of Mr Brajkovic to Post Office IT (March 1997 to June 1997) and to Halifax Building Society (June 1997 to July 1998).

8. In July 1998 Novasoft entered into a contract ("the Lower Contact") with Lorien Holdings Limited ("Lorien") (an unconnected company). This contract was extended on several occasions up to December 2002. The business of Lorien was to act as an agency providing IT contractors to companies engaged in IT projects.

9. The Lower Contract named Zeneca Specialities as "Client" and gave the site location as Blackley. The Lower Contract stated "[Novasoft] hereby agrees to provide the services to Lorien's client as set out in the Schedule below and agrees to provide the personnel shown in the Schedule to work on the client's premises as mentioned below under the client's supervision." The Schedule named Mr Brajkovic; gave his position as "contract analyst programmer"; gave the initial contact period as 4 August 1998 to 29 January 1999; standard hours as 36 per week; and standard rate as £34.00 per hour. Appended to the contract were "general terms and conditions", which included the following:

(1) Clause 6 required 28 days notice of termination by Lorien, with four exceptions. First, under clause 6 "Lorien shall be entitled to terminate this agreement by 7 days notice in the event that Lorien's client shall default in payment or be in arrears of Lorien's charges". Secondly, under clause 11 "In the event of Lorien's client proving to Lorien's satisfaction that the services of [Novasoft] provided hereunder are unsatisfactory during the term of this contract then Lorien reserves the right to terminate this agreement forthwith without any compensation whatsoever." Thirdly, clause 14 allowed Lorien to terminate after failure to remedy a notified breach within seven days. Lastly, also under clause 14, Lorien could terminate in the event that Novasoft contracted direct with the client.

(2) Clause 8 stated "The personnel shown in the schedule hereto shall be the only persons whose services may be supplied by [Novasoft] to the client otherwise [*sic*] agreed by Lorien in writing." Clause 12 stated "[Novasoft] and personnel supplied hereunder shall be under the direct supervision of Lorien's client and shall perform their duties hereunder subject to the client's reasonable requests."

(3) Clause 20 stated "For the duration of this agreement [Novasoft] hereby agrees that the personnel supplied hereunder shall not undertake any other work of a similar nature except with the express consent in writing of Lorien." Clause 10 was a covenant by Novasoft not to contract direct with the client for six months after the expiry of the contract.

(4) Clauses 15 & 17 made provision for payment 4-weekly against invoices "supported by timesheets for the invoice period and duly signed and authorised by the client."

10. In October 1998 Lorien (or strictly, Lorien Resourcing Solutions) entered into a contact ("the Upper Contract") with Zeneca Limited. Zeneca Specialities was a division of Zeneca Limited. The Upper Contract recited that "[Lorien] has developed certain expertise in the provision of IT contractors and is in the business of providing such expertise. Zeneca desires to obtain the expertise of [Lorien] and apply it to Zeneca businesses. [Lorien] has agreed to provide to Zeneca the Services as described in this agreement and Zeneca has agreed to appoint [Lorien] as a supplier of the said Services." The Services were defined as meaning "the services relating to the provision of Contractors by [Lorien] in accordance with the provisions of this agreement." Contractor was defined as meaning "a person engaged by [Lorien] and supplied or likely to be supplied to Zeneca to perform contractor services subject to a contract." Clause 22.2 allowed Zeneca to terminate the Upper Contract for any reason on one month's written notice.

11. On 8 July 1998 Mr Brajkovic commenced working at Zeneca on IT projects which are described later in this decision notice. As Mr Brajkovic commenced working before the date of the Upper Contract it may be that there was an earlier contract that was superseded or else the parties to the Upper Contract delayed in formalising their arrangements; the Tribunal took it that the Upper Contract correctly reflected the arrangements at the relevant times.

12. Mr Brajkovic had been interviewed by Mr Black (who gave evidence at the hearing). Mr Brajkovic worked on three IT projects being undertaken by Avecia, primarily a chemical compounds and formulations application called HENRE6.

13. In June 1999 Avecia Limited was spun out of Zeneca and it was common ground that for the purposes of the IR35 legislation (see below as to terminology) the "client" was Avecia Limited ("Avecia").

14. During the early years of operation of the IR35 legislation there was a procedure whereby a taxpayer could seek the views of HMRC as to whether the IR35 legislation might apply to its circumstances. Novasoft did that in January 2002. HMRC undertook various enquiries including interviews of managers at Avecia. The parties could not agree the position and this led eventually to the issue of the assessments described in paragraph 2 above.

The IR35 Legislation

15. The legislative background and approach may be given by quoting a passage from the judgment of Henderson J in *Dragonfly Consultancy Ltd v Revenue and Customs Commissioners* [2008] STC 3030 (at 3053 onwards).

> "**[8]** The background to the IR35 legislation (so called because that was the number of the Inland Revenue press release in March 1999 which heralded its introduction) is fully set out in the judgment of Robert Walker LJ (as he then was) in *R* (*on the application of Professional Contractors Group*) *v IRC* [2002] STC 165. At [51] of his judgment, with which Auld and Dyson LJJ agreed, he described the aim of both the tax and the NIC provisions as being:
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> '[51] … to ensure that individuals who ought to pay tax and NIC as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation …'
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> **[9]** The method adopted by the legislation to achieve this aim, broadly stated, is to tax an individual worker [in the present appeal, Mr Brajkovic] whose services are provided to a client [in the present appeal, Avecia] through an intermediary [in the present appeal, Novasoft] on the same basis as would apply if the worker were performing those services as an employee, provided that (in terms of the income tax test set out in para 1(1) of Sch 12 to the Finance Act 2000):
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> '… (c) the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client.'
>
> In other words, the legislation enacts a statutory hypothesis and asks one to suppose that the services in question were provided under a contract made directly between the client … and the worker …. If that hypothetical contract would be regarded for income tax purposes as a contract of employment (or service), the legislation will apply. Conversely, if the hypothetical contract would not be so regarded, the legislation will not apply.
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> **[10]** It is important to notice that the effect of the statutory hypothesis is not automatically to transform all workers whose services are supplied through a service company into deemed Sch E taxpayers. On the contrary, as Robert Walker LJ stressed in his judgment in *R* (*on the application of Professional Contractors Group*) *v IRC* [2002] STC 165 at [12]:
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> '[12] … The legislation does not strike at every self-employed individual who chooses to offer his services through a corporate vehicle. Indeed it does not apply to such an individual at all, unless his self-employed status is near the borderline and so open to question or debate. The whole of the IR35 regime is restricted to a situation in which the worker, if directly contracted by and to the client "would be regarded for income tax purposes as an employee of the client". That question has to be determined on the ordinary principles established by case law …'
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> **[11]** For NIC purposes, the statutory hypothesis is framed in slightly different language. Regulation 6(1) of the Social Security Contributions (Intermediaries)

> Regulations 2000, SI 2000/727 ('the 2000 Regulations') says that they apply where the services of the worker are supplied 'under arrangements involving an intermediary', and:
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> '… (c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client.'
>
> **[12]** The nature of the exercise which the court has to perform under reg 6(1) was helpfully described by Hart J in *Synaptek Ltd v Young* (*Inspector of Taxes* [2003] STC 543, in a passage which merits quotation in full. It is helpful not only for Hart J's analysis of the statutory language, but also for his rejection of the submission made by counsel for the taxpayer that the question was necessarily one of law because it involved the characterisation of a hypothetical contract. Hart J said (see [2003] STC 543 at [11] …):
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> '[11] I do not accept that submission. The inquiry which reg 6(1) directs is in the first instance an essentially factual one. It involves identifying, first, what are the "arrangements involving an intermediary" under which the services are performed, and, secondly, what are the "circumstances" in the context of which the arrangements have been made and the services performed. The legal hypothesis which then has to be made is that the arrangements had taken the form of a contract between the worker and the client. To the extent that "the arrangements" are in the particular case to be found only in contractual documentation, it may be true to say that the interpretation of that documentation is a question of law. Even in that case, however, the findings of the fact-finding tribunal will be determinative of the factual matrix in which the interpretative process has to take place, and influential to a greater or lesser degree in enabling the essential character of the arrangements to be identified. Where, on the other hand, the arrangements cannot be located solely in contractual documentation, their identification and characterisation is properly to be described as a matter of fact for the fact-finding tribunal. The fact that the tribunal is then asked to hypothesise a contract comprising those arrangements directly between the worker and the client does not, by itself, convert the latter question from being a question of mixed fact and law into a pure question of law. …"

16. The Tribunal finds, indeed it was not contested by the Appellant, that the statutory requirements (above) as to the arrangements involving an intermediary under which the services are performed are satisfied.

17. So the approach to be taken by this Tribunal is to hypothesise a notional contract between the worker (Mr Brajkovic) and the client (Avecia), and then to consider whether under that notional contract the worker would have been an employee of the client. That should be done by applying normal principles of contract and employment law – the IR35 legislation provides no special code in that regard.

Whether a (notional) contract of employment exists

18. This is, of course, a question often posed to the tribunals and courts, and from the very considerable body of case law on the topic this Tribunal draws the following principles – all of which were endorsed by both parties to the present appeal.

19. In *Ready Mixed Concrete* (*South East*) *Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 MacKenna J stated (at 515):

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service, he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

20. In *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 Cooke J stated (at 184–185):

> "… the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes," then the contract is a contract for services. If the answer is "no," then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

21. In *Hall v Lorimer* [1992] STC 599 Mummery J stated (at 612) (in a passage approved on appeal by Nolan LJ - [1994] STC 23 at 29):

> "In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The process involves painting a picture in each individual case. As Vinelott J said in *Walls v Sinnett* (*Inspector of Taxes*) [1986] STC 236 at 245: "It is, in my judgment, impossible in a field where a very large number of factors have to be weighed to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are common, what are different and what particular weight was given by another tribunal to the common facts. The facts as a whole must be looked at, and a factor which may be compelling in one case in the light of the facts of that case may not be compelling in the context of another case.""

22. Mr Hall in his skeleton argument proposed the following list of factors for consideration, and we agree these are the relevant factors:

(1) Extent and degree of control exercised by the client over the worker.

(2) The worker's right to engage helpers or substitutes.

(3) Mutuality of obligations between the worker and the client.

(4) Financial risk of the worker.

(5) Provision of equipment.

(6) Basis of payment of the worker.

(7) Personal factors

(8) The existence of employee rights.

(9) Termination of the contract.

(10) Whether the worker was part and parcel of the client's organisation.

(11) Exclusive services.

(12) Mutual intention.

We bear in mind the admonishment of Mummery J not to treat this as a checklist to run through mechanically. Instead they are the factors that go towards painting the picture whose overall effect must be evaluated.

The hearing

23. The Tribunal took evidence as follows. For the Appellant: Mr Brajkovic gave no formal evidence but made his submissions as advocate. The Tribunal considered that satisfactory but noted that it denied Mr Hall the opportunity to cross-examine formally for HMRC. For HMRC: Mr Steve Black, a former IT team leader at Avecia, adopted a witness statement dated 26 August 2009 and gave sworn oral evidence; and Ms Jill Dugdale, a former IT manager at Avecia, adopted a witness statement dated 24 September 2009 and gave sworn oral evidence. The Tribunal considered both witnesses to be credible and reliable, with good recollection of the events within their personal knowledge.

Consideration of the various factors

24. We arrange the submissions made, evidence taken and our findings under the various factors set out in paragraph 22 above.

Extent and degree of control exercised by the client over the worker.

25. The Tribunal notes that in *Ready Mixed Concrete* (cited above) MacKenna J stated (at 515):

> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted."

26. In a letter to HMRC dated 30 June 2003 Ms Dugdale replied to a set of standard questions used by HMRC in IR35 enquiries, and wrote:

> "The contract with Mr Brajkovic was based on a 36 hour week. Core hours of 10.00 – 16.00 are mandatory. Start/end times flexible from 7.00 – 10.00 & 16.00 – 19.00. Manual timesheets were completed at start and end of day to track start/end times and hours worked on a daily basis. It is possible to collate up to + or – 10 hours in any given month."

On this last point, there was a system of flexitime that allowed carry forward or back between months of up to 10 hours. The letter continues:

> "Mr Brajkovic would have been expected to work a 5 day week, hours within the time periods described [above]. Permission would have been required if Mr Brajkovic wanted to vary start/end times within the core hours or outside the earliest start time/latest end time. Mr Brajkovic would make a request to his manager for leave. If sick, a phone call to manager would be expected. Mr Brajkovic was not paid by Avecia for leave or sickness."
>
> "Mr Brajkovic was expected to follow the team standards and procedures. … Mr Brajkovic would work on projects as and when allocated to him, which were appropriate to his skills."

27. Mr Brajkovic for Novasoft submitted:

> (1) Mr Brajkovic was working on specified projects and he was not obliged to comply with any requests to assist outside those projects. He would try to accommodate reasonable requests, if possible, out of courtesy, but there was no obligation. In order that the IT programming was intelligible to persons outside the immediate project team (for example, for later correction or updating) all work was performed according to industry-wide Microsoft standards governing naming conventions and formatting. Beyond that, Mr Brajkovic was expected to use his specialist skills and Avecia exercised no control over how he implemented his skill and knowledge to arrive at the delivered solutions.
>
> (2) Mr Brajkovic preferred to start work early rather than work late, and also to take time off for recreational activities with his young family or in relation to his sporting interests. He arrived at Avecia's premises no later than 8 am and left no later than 4 pm, sometimes significantly earlier. Avecia's employees were expected to work set hours. Mr Brajkovic completed agency timesheets; these were a budgetary and accounting device, to record the number of hours worked. Mr Brajkovic estimated that his average hours were around 36 per week, compared to 40 for employees of Avecia. Mr Brajkovic usually took 8 to 12 weeks vacation each year, which was an attraction of working freelance and was not available to employees of Avecia. Although Mr Brajkovic would inform Avecia of any intended absences, that was a matter of courtesy and there was no requirement for authorisation.
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> (3) In cross-examination Ms Dugdale had noted that the hours recorded in some weeks towards the end of the contract were less than the 36 hours per week that she had recollected in her letter to HMRC. Although complete records were no longer available, that was a consistent picture of the work pattern throughout the assignment – there was flexibility that would not be available to an employee.
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> (4) All Mr Brajkovic's work on the Avecia projects was undertaken at Avecia's premises. This was because of security issues and to facilitate access to IT infrastructure, servers and corporate databases. Access was governed by Avecia's business operation and building access hours.

28. Mr Hall for HMRC submitted :

> (1) For a professional person a light-touch manner of control was sufficient. Members of the Avecia IT team could not do whatever they wanted.
>
> (2) Clause 12 of the Lower Contract stated that Novasoft would be under the direct supervision of Avecia.

(3) Mr Brajkovic was allocated tasks by Mr Black which would be executed to set standards and protocols at the direction of Avecia – those templates and protocols were prepared by Mr Black and his colleagues and preceded (but were later superseded by) the Microsoft standards. Mr Black had confirmed that team members had to comply with the Avecia standards he had promulgated. Tasks had to be performed within deadlines and budgets set by Avecia. That work was checked and reviewed by colleagues in the team.

(4) While HMRC accepted that Mr Brajkovic could work flexible hours, that was open to employees as well to a certain extent. A review of remittance advices provided by Novasoft (these did not cover the entire period under consideration) and the accounts of the company indicated that the billings reflected hours worked by Mr Brajkovic broadly equivalent to the contractual hours of Avecia employees. That accorded with Ms Dugdale's answers to HMRC's questions. Ms Dugdale had also said that she did not recall Mr Brajkovic having a lot of time off work.

(5) Mr Black's evidence was that he expected to be asked in advance about holiday absence, and that he would refuse if it was inconvenient to the project.

29. The Tribunal notes that in *Morren v Swinton and Pendlebury Borough Council* [1965] 2 All ER 349 Lord Parker CJ stated(at 351):

> "The cases have over and over again stressed the importance of the factor of superintendence and control, but that it is not the determining test is quite clear. In *Cassidy v Minister of Health*, Somervell LJ referred to this matter, and instanced, as did Denning LJ in the later case of *Stevenson, Jordan & Harrison v MacDonald & Evans*, that clearly superintendence and control cannot be the decisive test when one is dealing with a professional man, or a man of some particular skill and experience. Instances of that have been given in the form of the master of a ship, an engine driver, a professional architect or, as in this case, a consulting engineer. In such cases there can be no question of the employer telling him how to do work; therefore, the absence of control and direction in that sense can be of little, if any, use as a test."

30. We conclude that the notional contract between Avecia and Mr Brajkovic would have required Mr Brajkovic to undertake his work in accordance with standards and protocols necessary to make the project work-product fit for purpose and maintainable in the future by other IT experts; also to commit sufficient time to that work in order for deadlines and budgets to be met; also to ensure any significant absences fitted with the staffing of the projects overall. Otherwise, the notional contract would not have been prescriptive as to exact hours of attendance, or the exact manner in which Mr Brajkovic implemented the skilled tasks assigned to him.

The worker's right to engage helpers or substitutes.

31. Clause 8 of the Lower Contract (quoted at paragraph 9 above) provides that only Mr Brajkovic may be provided and no substitution is allowed.

32. Both Mr Black and Ms Dugdale were clear in their evidence that Avecia expected Mr Brajkovic to perform the work personally; had Mr Brajkovic nominated a substitute then that person could not have gained access to the department because of security issues, and would not have been allowed to work on the project software because his/her technical competence had not been established by the project leader and manager.

33. The Tribunal notes that in *Ready Mixed Concrete* (cited above) MacKenna J stated (at 515):

> "The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be …"

Although a right of substitution would generally be inconsistent with a contract of employment, its absence does not point definitely to such a contract.

34. We conclude that the notional contract between Avecia and Mr Brajkovic would not have permitted substitution.

Mutuality of obligations between the worker and the client.

35. Mr Hall for HMRC submitted that the irreducible minimum of mutuality of obligation was clearly satisfied. HMRC accepted that there was no obligation on Lorien to offer further work on expiry of the contract – nor on Novasoft to accept it – but while the contract was in place mutual obligations did exist.

36. Mr Brajkovic for Novasoft submitted that the formal expiry date of the contract was 27 December 2002 but it was terminated on 13 December 2002 with no offer or expectation of any rights in respect of the final fortnight. There was no right or expectation to be offered any contracts on future phases of the projects. Avecia did subsequently ask if Mr Brajkovic was available but that was declined. After the end of the contact Novasoft did not secure another assignment for three months.

37. Both Mr Black and Ms Dugdale were clear in their evidence, and Mr Brajkovic confirmed, that if there had been an unexpected incident that prevented work on the project (for example, a total power outage) then Mr Brajkovic would have been expected not to include the down-time on his worksheets – so Novasoft would not have received any fees for that down-time.

38. The Tribunal notes that in *Usetech Ltd v Young* [2004] STC 1671 Park J stated (at 1699):

> "[57] … If there is a relationship between a putative employer and employee, but it is one under which the 'employer' can offer work from time to time on a casual basis, without any obligation to offer the work and without payment for periods when no work is being done, the cases appear to me to establish that there cannot be one continuing contract of employment over the whole period of the relationship, including periods when no work was being done. There may be an 'umbrella contract' in force throughout the whole period, but the umbrella contract is not a single continuing contract of employment. …
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> [58] That leaves open the possibility that each separate engagement within such an umbrella contract might itself be a free-standing contract of employment …
>
> [59] However that may be for a case where the argument is that there has been a succession of separate contracts of employment, this case is not really of that nature. In contrast to a case like *Market Investigations* (or so it seems to me), the facts lend themselves readily to the conclusion that, if Mr Hood [the worker] had been working for ABB [the client] under a direct contract, it would have been a contract of employment. The engagement lasted for 17 months. Viewed

> realistically there was nothing casual about it. On Mr Hood's own evidence he worked for an average of 58 hours a week. The Special Commissioner found that 'he was, as a rule, expected to work the "core" hours from 8am to 5pm' (para 26 of the decision).
>
> [60] I would accept that it is an over-simplification to say that the obligation of the putative employer to remunerate the worker for services actually performed in itself always provides the kind of mutuality which is a touchstone of an employment relationship. Mutuality of some kind exists in every situation where someone provides a personal service for payment, but that cannot by itself automatically mean that the relationship is a contract of employment: it could perfectly well be a contract for free lance services. …"

39. We conclude that the notional contract between Avecia and Mr Brajkovic would have established mutuality of obligations during the term of the contract but, for the reason put forward by Park J in *Usetech*, consider that that is appropriate to a self-employment contract as well as one of employment.

Financial risk of the worker.

40. The Tribunal notes that in *Hall v Lorimer* in the Court of Appeal [1994] STC 23 Nolan LJ stated (at 29):

> "… the risk of bad debts and outstanding invoices is certainly not one which is normally associated with employment."

But, as Mr Hall for HMRC pointed out to us, in that case the longest engagement was 10 days – usually they were only for one or two days – and the taxpayer had an average of 120 to 150 engagements each year spread among some 20 producers, all of which had to be invoiced and collected.

41. The evidence of both Mr Black and Ms Dugdale was that if some of Mr Brajkovic's work had been unsatisfactory then the time spent by Mr Brajkovic in correcting that work would have been remunerated, so that Novasoft would have received fees for that extra work. Mr Brajkovic stated that there had not been any such occasions (this was confirmed by Mr Black) but if there had then he would have felt professionally obliged to remedy matters without putting the time on his timesheet, even if Avecia would have been willing to pay.

42. Mr Brajkovic for Novasoft submitted that the contract could be terminated immediately by Lorien in certain circumstances without compensation. Novasoft bore the risk of late payment or non-payment of invoices by Lorien. Novasoft incurred costs of training, printing of materials and stationery, hardware upgrades, library of IT manuals. Novasoft was required to carry professional indemnity insurance.

43. Mr Hall for HMRC challenged Mr Brajkovic's assertion that Novasoft incurred training costs; Mr Brajkovic stated that much training in the IT world was provided free by software companies, but still required absence from paid assignments and so represented an economic cost. Mr Hall submitted that the arrangements with Avecia did not permit Novasoft to win extra profit by working harder.

44. We conclude that the notional contract between Avecia and Mr Brajkovic would have given Mr Brajkovic a risk of non-payment by Avecia (see also paragraphs 48-50 below

concerning manner of payment) but do not see that as a helpful distinction between a contract of service or one for services in the circumstances of this notional contract.

Provision of equipment.

45. Mr Brajkovic for Novasoft submitted that there was no requirement or expectation that Mr Brajkovic (or Novasoft) should provide any IT equipment in connection with the Avecia projects. The IT systems were those of Avecia and (as Mr Black confirmed in his evidence) there would be security concerns about permitting outside hardware being connected to the Avecia IT system. Mr Brajkovic was provided with IT equipment (for use outside Avecia) by Novasoft.

46. Mr Hall for HMRC submitted that Avecia provided to Mr Brajkovic all the necessary hardware and software in connection with the projects on which he worked. There was also the provision of office accommodation and canteen facilities (both stipulated in clause 4 of the Upper Contract) and car parking. HMRC accepted that in the context of the facts of the present appeal, this was unlikely to be an important factor.

47. We conclude that the notional contract between Avecia and Mr Brajkovic would not have required Mr Brajkovic to provide any IT equipment or software of his own – and indeed may have required him to use only that provided by Avecia, because of security concerns. It would have been an implied term that Mr Brajkovic would have access to the buildings to the extent necessary to perform his work.

Basis of payment of the worker.

48. Mr Brajkovic for Novasoft submitted that Novasoft was paid an hourly rate for Mr Brajkovic's services that was negotiated between Lorien and Novasoft. That hourly rate was different from that paid by Avecia to its employees. It was also different from that charged by Lorien to Avecia. Novasoft invoiced Lorien and charged VAT on its invoices, and payment was made by Lorien to Novasoft. The amounts varied form month-to-month, which contrasted with the receipt of a regular monthly amount of salary expected by an employee.

49. Mr Hall for HMRC submitted that payment by reference to project milestones might indicate self-employment. Payment by the hour might be more typical of employment – but he accepted that many professional advisers operate on the basis of an hourly charge-out rate.

50. We conclude that the notional contract between Avecia and Mr Brajkovic would have provided for an hourly rate of compensation, and would have required proper invoices to be delivered periodically.

Personal factors

51. The Tribunal notes that in *Hall v Lorimer* in the Court of Appeal (cited above) Nolan LJ stated (at 30):

> "A self-employed author working from home or an actor or a singer may earn his living without any of the normal trappings of a business. For my part I would suggest there is much to be said in these cases for bearing in mind the traditional contrast between a servant and an independent contractor. The extent to which the individual is dependent on or independent of a particular paymaster for the financial exploitation of his talents may well be significant."

52. Mr Brajkovic for Novasoft submitted that the total length of the contract with Avecia was four and a half years. Mr Brajkovic's previous assignments had involved long travelling (120 and 80 miles round trips) and so as Avecia was only a few miles away it suited him to accept extensions of the assignment there.

53. Mr Hall for HMRC submitted that Mr Brajkovic had effectively worked full-time for Avecia from August 1998 until December 2002. HMRC accepted that a self-employed businessman may work exclusively for one client because it is commercially advantageous to do so, but Mr Brajkovic did not present an image of a businessman offering his services to the marketplace; rather, of someone comfortable working for the same client on terms equivalent to employment.

54. We conclude that the notional contract between Avecia and Mr Brajkovic would not have contained any provisions specifically relevant to this factor.

The existence of employee rights.

55. Mr Brajkovic for Novasoft submitted that he was not provided by Avecia with any of the types of benefits commonly enjoyed by employees:

(1) He had no entitlement to holiday pay.

(2) He had no entitlement to sick pay. He had no requirement to produce to Avecia "sick notes" in support of any absence due to illness.

(3) He had no entitlement to participate in any corporate pension scheme.

(4) He had no entitlement to the bonuses or profit-related pay arrangements that were operated by Avecia.

(5) He had no entitlement to paternity leave.

(6) He had no entitlement to redundancy compensation.

56. Mr Hall for HMRC submitted that this was a consequence of Mr Brajkovic's choosing -or being required – to work through a service company. He did enjoy these rights but by virtue of his employment by Novasoft, his own company, which had responsibility for these matters.

57. We conclude that the notional contract between Avecia and Mr Brajkovic would not have provided for any of these benefits. We do not consider it appropriate to "read across" into the notional contract between Avecia and Mr Brajkovic any features which were confined to the actual contract between Novasoft and Mr Brajkovic, which was twice removed from the notional contract – being the other side of both the Upper Contract and the Lower Contract.

Termination of the contract.

58. Mr Brajkovic for Novasoft submitted that the contract could be terminated immediately by Avecia in certain circumstances, without compensation. In contrast, Avecia employees, depending on grade, would be given a minimum of three months notice of termination.

59. Mr Hall for HMRC submitted that a typical self-employment contract came to an end on completion of the work for which the contractor was engaged, whereas an employment contract usually contained provision for termination by one party or the other. Both the Upper Contract and the Lower Contract broadly permitted termination on one month's

notice. That was similar to a normal contract of employment and so was an indicator of employment status.

60. We conclude that the notional contract between Avecia and Mr Brajkovic would have provided for it to be terminable by either party on reasonable stated notice (say, one month) or immediately in the event of breach.

Whether the worker was part and parcel of the client's organisation.

61. Mr Brajkovic for Novasoft submitted:

> (1) Avecia employees underwent a half to full day induction programme on first joining the company – Mr Brajkovic had no such induction.
>
> (2) He did not attend the mandatory annual staff away-days.
>
> (3) He was not part of Avecia's staff training programme.
>
> (4) His security pass was a contractor's pass of a different design to that used by staff, and had an expiry date.
>
> (5) He was not permitted to use the staff car park, even when ample spaces were available.
>
> (6) He was excluded from Avecia's personal accident insurance cover.
>
> (7) Although he was given an Avecia email address, that was because there was no access to external email on the Avecia IT system.

62. Mr Hall for HMRC submitted that Mr Brajkovic was embedded in the Avecia organisation. Mr Brajkovic reported to Mr Black informally on a daily basis and more formally each week. Mr Brajkovic was a part of the Avecia IT project team structure for over four years. Clause 12 of the Lower Contract states "[Zeneca] has also agreed to provide the same facilities in terms of restaurant, canteen, car parks and other amenities as may be made available to [Zeneca's] own staff of a similar standing."

63. We conclude that the notional contract between Avecia and Mr Brajkovic would not have provided for any of the points listed above by Mr Brajkovic. Avecia saw no reason to provide them to Mr Brajkovic while he was at their premises, and Mr Brajkovic saw no reason to demand or negotiate for them.

Exclusive services.

64. Mr Brajkovic for Novasoft submitted that he was free to undertake work for parties other than Avecia, subject to (a) a confidentiality undertaking that was normal practice in the IT industry, and (b) the agreement of Lorien. Mr Brajkovic did undertake another paid assignment at his time, being setting up a website for a music band.

65. Mr Hall for HMRC submitted that a single master is indicative of an employment.

66. We conclude that the notional contract between Avecia and Mr Brajkovic would have provided for Mr Brajkovic's services to be provided as required on the projects without competing demands – or at least, taking precedence over any competing demands – for his time; but would not have prohibited him from other assignments that did not conflict with Avecia's business interests.

Mutual intention.

67. Mr Brajkovic for Novasoft submitted:

> (1) There was no contract directly between Mr Brajkovic and Avecia. There was nothing in the documentation involving Novasoft, Lorien and Avecia to suggest that Mr Brajkovic was an employee of Avecia. The parties had seen no need to state that there was no employment because it was obvious that there was none.
>
> (2) Novasoft paid a salary to Mr Brajkovic and accounted for PAYE and NIC thereon. Mr Brajkovic did have an employer, and it was Novasoft. Avecia could never be considered to be Mr Brajkovic's employer.

68. Mr Hall for HMRC submitted that although HMRC accepted that the actual contracts were not intended to create an employment, minimal weight should be attached to that in considering the terms of the notional contract.

69. The Tribunal notes that in *Dragonfly* (cited above) Henderson J stated (at 3069):

> "I would not, however, go so far as counsel for HMRC who submitted that, as a matter of law, the hypothetical contract required by the IR35 legislation must be constructed without any reference to the stated intentions of the parties. If the actual contractual arrangements between the parties do include statements of intention, they should in my view be taken into account, and in a suitable case there may be material which would justify the inclusion of such a statement in the hypothetical contract. Even then, however, the weight to be attached to such a hypothetical statement would in my view normally be minimal, although I do not rule out the possibility that there may be borderline cases where it could be of real assistance."

70. We conclude that the notional contract between Avecia and Mr Brajkovic would not have provided for any statement of intention.

Other submissions

71. Mr Brajkovic emphasised that the engagement of Novasoft by Avecia (via Lorien) commenced 21 months prior to the introduction of the IR35 legislation; HMRC had accepted until April 2000 that the arrangements were a contract for services performed by Novasoft for Avecia, and that relationship did not change on 1 April 2000. While the Tribunal accepts that as factually correct, the point of the IR35 legislation is to change (from April 2000) the tax implications of such arrangements if the notional worker-client contract is one of employment; there is no "grandfathering" of pre-April 2000 contacts.

72. Mr Brajkovic submitted that he was aware of other IT consultants in a similar if not identical situation to himself who had been scrutinised by HMRC, including the same officers who had dealt with the affairs of Novasoft, and received confirmation that the IR35 legislation was not applicable to their arrangements. Mr Brajkovic acknowledged that each case must be considered on its own particular facts, and the Tribunal, while noting Mr Brajkovic's comments, has confined itself to the arrangements between the persons involved in the matters leading to the appeals before this Tribunal.

73. In correspondence between the parties prior to the hearing there had been reference to a possible "disguised employment" between Mr Brajkovic and one of the companies – however this was not pursued at the hearing.

74. Although not a formal submission Mr Hall drew to our attention – and Mr Black confirmed in his evidence – that Novasoft's previous representatives (who were no longer acting at the time of the hearing) had attempted in June 2009 to persuade Avecia to "clarify" a statement of arrangements made by Avecia to HMRC some five years earlier, with over eight pages of proposed changes. Mr Black told us that he felt the document was attempting to rewrite the outcome of a meeting held five years previously; that he considered parts of it were factually incorrect; that he felt uncomfortable with what he took to be a threatening tone; and that on the advice of the legal department of his group holding company he declined to participate. We were unable to question the former representatives on this matter and we have not drawn any inferences to the detriment of Novasoft.

Conclusions on the notional contract

75. We now bring together our conclusions on the factors which would have determined the contents of the notional contract between Avecia and Mr Brajkovic. As we have stated above, the notional contact:

> (1) would have required Mr Brajkovic to undertake his work in accordance with standards and protocols necessary to make the project work-product fit for purpose and maintainable in the future by other IT experts; also to commit sufficient time to that work in order for deadlines and budgets to be met; also to ensure any significant absences fitted with the staffing of the projects overall. Otherwise, the notional contract would not have been prescriptive as to exact hours of attendance, or the exact manner in which Mr Brajkovic implemented the skilled tasks assigned to him.
>
> (2) would not have permitted substitution.
>
> (3) would have established mutuality of obligations during the term of the contract but, for the reason put forward by Park J in *Usetech*, we consider that that is appropriate to a self-employment contract as well as one of employment.
>
> (4) would have given Mr Brajkovic a risk of non-payment by Avecia but we do not see that as a helpful distinction between a contract of service or one for services in the circumstances of this notional contract.
>
> (5) would not have required Mr Brajkovic to provide any IT equipment or software of his own – and indeed may have required him to use only that provided by Avecia, because of security concerns. It would have been an implied term that Mr Brajkovic would have access to the buildings to the extent necessary to perform his work.
>
> (6) would have provided for an hourly rate of compensation, and would have required proper invoices to be delivered periodically.
>
> (7) would not have provided for any typical employee benefits or statutory protections.
>
> (8) would have provided for it to be terminable by either party on reasonable stated notice (say, one month) or immediately in the event of breach.
>
> (9) would not have provided for any of the points listed in paragraph 61 above that might indicate that Mr Brajkovic was "part and parcel" of Avecia's organisation.
>
> (10) would have provided for Mr Brajkovic's services to be provided as required on the projects without competing demands – or at least, taking precedence over

any competing demands – for his time; but would not have prohibited him from other assignments that did not conflict with Avecia's business interests.

(11) would not have provided for any statement of intention. However, for the reasons outlined by Henderson J in *Dragonfly*, we attach little importance to that outcome.

76. We reiterate the words of Mummery J in *Hall v Lorimer*:

> "The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The process involves painting a picture in each individual case."

77. In *Synaptek* Hart J stated (at 553): "Deciding, in a borderline case, whether a particular contract is a contract of service or a contract for services is notoriously difficult."

78. We consider that the overall picture painted is one of a contract of self-employment.

79. An "individual detail" in the picture is that, as we have found, Mr Brajkovic would not have been permitted to supply a substitute to perform the work. That could be an important detail - and was given some emphasis in both *Usetech* and *Dragonfly* – but in the particular situation of Novasoft and taking the picture as a whole that detail does not disturb the overall impression we have formed of the notional contract.

Decision

80. The appeals are allowed in full.

Right of appeal to Upper Tribunal

81. Section 11 of the Tribunals, Courts and Enforcement Act 2007 provides that any party to a case has a right of appeal to the Upper Tribunal on any point of law arising from a decision of the First-tier Tribunal. The right may be exercised only with permission which may be given by the First-tier Tribunal or the Upper Tribunal. Rule 39(2) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 SI 2009/273 provides that a person seeking permission to appeal must make a written application to the Tribunal for permission to appeal, which application must be received by the Tribunal no later then 56 days after the date that the Tribunal sends full written reasons for the Decision. Rule 39(5) provides that an application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors in the decision, and state the result the party making the application is seeking.

82. This document contains the full written reasons for the Decision.

TRIBUNAL JUDGE

RELEASE DATE: 6 April 2010

TC00912

Appeal number TC/2009/13115

Social Security Contributions, employed earner - income tax, employee - independent service provider - services of design engineer - IR35 legislation – hypothetical contract – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MBF DESIGN SERVICES LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (*income tax*) **Respondents**

TRIBUNAL: Judge Malachy Cornwell-Kelly
Mr Christopher Perry C. Eng.

Sitting in public at Vintry House, Wine Street, Bristol on 15 & 16 November 2010

Mr Matthew Boddington and Ms Nicola Smith of Accountax Consulting for the taxpayer

Mr Colin Williams and Mr David Lewis of Her Majesty's Revenue and Customs for the Crown

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DECISION

Introduction

1 The appeals before us were made on 9 March 2009 as follows.

2 Firstly, there is an appeal against a notice of decision dated 18 February 2009 issued to MBF Design Services Limited (MBF) under section 8(1)(m) of the Social Security Contributions (Transfer of Functions, etc) Act 1999 and regulation 6(4) of the Social Security Contributions (Intermediaries) Regulations 2000 covering the years 2001-02 to 2006-07. Secondly, there is an appeal against determinations also dated 18 February 2009 issued to MBF under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 for the same years.

3 The appeals concern the supply of the design engineering services of the sole director of the taxpayer company (MBF), Mr Mark Fitzpatrick, to Airbus UK Limited (Airbus) through a series of contracts involving MBF, two intermediaries and Airbus. The periods now under appeal are the tax years 2003-04 and 2004-05, and we are invited formally to allow the taxpayer's appeals in respect of the years 2001-02, 2002-03, 2005-06 and 2006-07.

4 The issue before the tribunal involves applying to the facts of the case the statutory hypothesis, explained further below, which requires us to establish whether, had the arrangements with Airbus taken the form of a contract between Mr Fitzpatrick and Airbus, they would have resulted in his being (i) an employed earner of Airbus for the purpose of National Insurance Contributions and (ii) an employee of Airbus for

income tax purposes. The notice and determinations under appeal decided that Mr Fitzpatrick was such an employed earner and employee. It was agreed that for the purposes of this appeal the two tests are not materially different.

5 We find the facts related hereafter to have been proved on the balance of probabilities, except where we indicate in terms that our finding is otherwise.

Facts – the contracts

6 The parties agreed that of the various contracts by which Mr Fitzpatrick's services were supplied to Airbus, the following might be taken for the purposes of this appeal as representative of each stage in the chain. There were no written contracts between Mr Fitzpatrick and MBF, and no board minutes approving those made by MBF, but we are satisfied that Mr Fitzpatrick was the sole controlling mind of MBF and that its contracts were duly authorised and competent.

7 First, came a contract between MBF and GED-Sitec Limited (GED) dated 23 April 2003 for services to be provided by MBF, through GED, to Airbus. The "Nature of Assignment (Project)", was described simply as "Designer". The start date was 28 April 2003, the duration "until 24 October 2003"; two hourly rates were specified: £21.47 per hour "for the initial 35 hours per week" and £22.34 per hour "for hours above the initial 35 /week"; the notice period was stated to be 7 days.

8 The contract was preceded by a "Request for Services" from GED, which provided that –

> "Should the services supplied prove substandard in any way, or the conduct or attendance record give rise to a legitimate claim by our client to withhold

payment, we reserve the right in turn to reclaim/withhold the money from [MBF]."

9 Detailed printed conditions formed part of the contract as follows:-

- Mr Fitzpatrick was not named anywhere, but clause 1.1 provided that " 'Operatives' means any person, firm or company engaged by [MBF] or its subcontractors in connection with the project".

- Clause 2.1 stated that the terms and conditions "contain the entire agreement" between the parties.

- Clause 3.1 required MBF to comply with the Working Time Regulations 1998 and where necessary to obtain any agreements to opt out of the 48 hour working week limit.

- Clause 3.2 provided that MBF "will use its reasonable endeavours to ensure that the Operative(s) work the normal working hours".

- Clause 3.3 said that GED might on reasonable notice require MBF to "supply the Operative(s) ... for periods of time in excess of the normal working hours" at a fee to be agreed.

- Clause 3.4 provided that the services were to be performed "at such location as [GED] and [MBF] may agree from time to time".

- Clause 3.5 stated that "[MBF] or the Operative (sic) shall have reasonable autonomy in the provision of the Services, but shall

comply with any reasonable request of [GED] or [Airbus] whilst on their premises".

Clause 5.1 required MBF to "ensure that all Operatives are suitably trained and qualified at the cost of [MBF]", and clause 5.2 required MBF to "rectify at its own cost any defective work it carries out in relation to the Project". There was no mention of the nature of the "designer" services to be supplied, or of the level of competence required.

- Clause 7.3 provided for the vesting of all intellectual property rights originated in the performance of the contract in Airbus.

- Clauses 8 and 9 also made it clear that there was no obligation to provide any particular "Operative" and that the Operative provided did not have "any of the statutory or common law rights of an employee", specifically excluding employee's common law or statutory rights, illness or holiday pay or protection under the legislation relating to unfair dismissal or redundancy.

- Clause 11 imposed a requirement for GED "and the Personnel" (not specified) to carry insurance against public, employer's and professional indemnity risks of £250,000.

10 The second contract in the chain was dated 24 April 2003 and made between GED and Morson Human Resources Limited (Morson). The client is stated to be Airbus, the fees are £23.25 an hour, and the project period is "from 28.04.03 until completion of the Project", the project itself being

described simply as "Airbus". A special term is that the requirement for professional indemnity insurance in the printed conditions (which would have required GED to carry insurance against public, employer's and professional indemnity risks) did not apply.

11 The printed conditions define the "Operatives" as "any person firm or company engaged by [GED] or its subcontractors in connection with the Project". They go on to include the following stipulations:-

- Clause 3.1: neither Morson nor Airbus shall be "entitled to or seek to exercise any supervision, direction or control over [GED] or the Operatives in the manner of performance of the Project."

- Clause 3.2 required MBF to comply with the Working Time Regulations 1998 and where necessary to obtain any agreements to opt out of the 48 hour working week limit.

- Clause 5 contained requirements for GED to ensure that all Operatives were suitably trained at its own expense, to rectify defective work at its own cost and to ensure that computer equipment used was in good order and virus-protected.

- Clause 6.1.4 enabled the contract to be terminated on 7 days' notice.

- Clause 7.3 provided for the vesting of all intellectual property rights originated in the performance of the contract in Airbus.

- Clause 8.1: the "relationship of employer and employee" between Morson and GED or the

Operatives, or between Airbus and GED or the Operatives, is specifically excluded.

- Clause 8.2 reinforces 8.1, specifically excluding employee's common law or statutory rights, illness or holiday pay or protection under the legislation relating to unfair dismissal or redundancy.

- Clause 9.1: GED is not obliged to provide the services of any named individual for the project.

- Clause 9.3: GED is free to provide its services and those of the Operatives to any person other than Morson or Airbus.

12 For the third contract taken as typical there are two examples, because their terms are not completely identical. The first example was originally dated 17 September 2003 made between Airbus and Morson, though the copy of this contract is also dated 23 January 2004 under the rubric "date changed". It is agreed that no point arises on this double dating, which simply indicates that a further contract was being made on the template of the previous one.

13 Whereas the first and second contracts provided only for the services of unnamed 'operatives' to be provided, this contract provides for the services of no fewer than 53 named persons, including Mr Fitzpatrick, to be supplied. The contract has clearly been adapted from one normally used for the purchase of goods, and the individuals named are listed beside the headings "quantity" and "net price". The quantities are specified in hours beside each group of persons, and the net prices are the hourly rates applicable to them.

14 Thus, in the group of 16 persons in which Mr Fitzpatrick's name appears, the total hours purchased by Airbus is 42,500,

and the hourly rate is £23.72. There is no distinction as to the hours to be worked or as to the rate per hour between the individuals in the group. Each of the 12 groups listed has a different overall total of hours to be worked and a different hourly rate applicable to its members.

15 The period of the order is stated to be 1 October 2003 to 31 December 2004. The special conditions include:-

> "All on-site subcontractors booking to Airbus cost centre EO3 recording hours via the Airbus electronic timesheet process – PMITS."
>
> "The following time reporting procedure is applicable to this purchase order:
>
> > 'On site subcontract time reporting for design work.'
>
> "Quality requirement:
>
> Clause 5 – Inspection Code 5.1(c)
>
> > '[Morson] shall ensure that the order is carried out in conformity with the quality requirements of his Airbus UK approval.' "
>
> "Note:
>
> > 1) All individuals working 'on site' must complete the electronic timesheet on a weekly basis."

16 The second example of the third contract was again double-dated 13 January and 7 February 2005, and again no point arises on this feature which has the same explanation as before; and as before, the parties are Morson and Airbus. Again, there are schedules of persons whose services are to be supplied, 45 in all. Mr Fitzpatrick appears in two groups: in the first group of 16 persons, he is shown as "resource valid until 28.01.05 (168 hours allocated) requirement transferred to item 8"; in group 8, consisting of four persons, against Mr Fitzpatrick's name is then noted "resource allocated from 31.01.05 (1,832

hours added) requirement transferred from item 6". The total hours for group 6 are 30,001 and the "net price" or hourly rate is £24.04; for group 8 the figures are 7,712 and £25.14 respectively.

17 The period of the order is stated to be 4 January to 31 December 2005. The special conditions are the same as in the first example save that relating the quality requirement, which reads:-

> "Quality requirement:
>
> Clause 5 – Inspection Code 5.1(e)
>
> > 'No release required – all work undertaken must be checked and approved by Airbus UK staff prior to formal acceptance.' "

18 The special conditions in both examples of the third contract also state that "The terms and conditions of this purchase order are detailed within letter Ref: D33/RNC/1852 dated 15th September 2003"; that letter was not shown to us by either party, and not relied on in argument, and we must therefore conclude that it has no relevance to the matter at issue.

19 There were detailed printed conditions relevant to both examples of this contract. The conditions were in two editions dated 2001 and 2005; we were told that there was no material distinction between them in so far as this appeal was concerned. Morson was identified in the contract as "the Supplier", which was not further defined. The conditions included the following:-

- Clause 4.1 obliged the Supplier to "provide the supplies in all respects in accordance with the Order".
- Clause 5 dealt with quality conditions.

5.1 stated that "The Supplies shall be subject to whichever of the following Quality Assurance Conditions are specified on the face of the Order-

....

c) The Supplier shall ensure that the Order is carried out in compliance with the quality requirements of his Airbus UK Limited approval.

...

(e) Exceptional arrangements determined by the Quality Manager/Chief Inspector and shown on the face of the Order.

- Clause 13.1.3 required any breach capable of remedy to be remedied within 28 days of notice by Airbus at the Supplier's expense.

- Clause 13.5 stated that the Order might be cancelled by Airbus at any time on written notice (no period was stated), and that while a "fair and reasonable price" was to be paid for all work done, Airbus's liability was not to exceed "the agreed price".

- Clause 14 vested all intellectual property created as a result of the work undertaken by the Supplier or its subcontractor in Airbus.

- Clause 16 required the Supplier to effect legal liability insurance of not less than £5M if its employees, agents or subcontractors were present on the Airbus site, in respect of loss of or damage to Airbus's property or death or injury resulting from performance of the Order.

- Clause 17.3 provided that any information given to the Supplier by Airbus should remain the absolute property of Airbus.

- Clause 20 placed the responsibility of complying with statutory and "other" requirements on the Supplier.

- Clauses 2 and 27 provided that the written contract was (a) to supersede any prior agreement between the parties and (b) could only be amended by a signed written document.

Facts – the oral evidence

20 We heard oral evidence from Mr Mark Fitzpatrick; Mr Alan Cooper a former employee of Airbus during the appeal period; Mr Josef Dudman a contractor during the appeal period; and Mr Minh Pham a lead designer employed by Airbus during the appeal period, leading a team of four employed designers and responsible for up to 40 contracted designers – including for a small part of the period Mr Fitzpatrick. Their witness statements had been served beforehand.

21 We regarded these witnesses as straightforward and honest, with the exception of Mr Pham. We did not doubt Mr Pham's honesty, but he admitted that his witness statement had been prepared for him by HMRC and he had considerable difficulty - due apparently to a limited command of English - in reading it out; and he was hesitant and uncertain in his replies to cross-examination. We were not satisfied that Mr Pham fully understood the contents of his witness statement.

22 After hearing submissions we declined, pursuant to rule 15(2)(b)(iii), to admit unsworn witness statements by two officials of Airbus, Mr Paul Messenger a team leader for most of Mr Fitzpatrick's time at Airbus, and Mr Steve Hoskins the Head of Product Related Services at Airbus. The statements in question were disputed as to their contents, which related to issues central to the appeal, and the tribunal had given no previous directions that they were to be admitted as they stood

without the presence of the witnesses. No witness summonses had been sought for the attendance of the individuals concerned, and in the circumstances it appeared to us to be unfair that these statements should be admitted when they would not be open to challenge by cross-examination, or questioning by the tribunal.

23 The evidence given at the hearing establishes the following facts.

(i) Recruitment

24 Mr Fitzpatrick established MBF in 1996 after the company he had worked for ceased business. Mr Fitzpatrick's introduction to Airbus was via another contractor who did work for them; initial contact failed to produce a satisfactory outcome, but further negotiations followed and Mr Fitzpatrick was offered a higher rate by the agency involved and (so far as this appeal period was concerned) began work around April 2003. MBF had provided Mr Fitzpatrick's services to Airbus in earlier periods as well and was registered for VAT.

25 MBF was offered a number of contracts during the appeal period but Mr Fitzpatrick did not consider that it was obliged to accept them: he gave as an example one project in May 2004 where Airbus had requested him to take overall responsibility for the Flight Test Instrumentation for the A380, which Mr Fitzpatrick declined on behalf of MBF because good enough terms were not available. As has been seen in the third level contracts, the periods of each stage of the work and the total resources in hours which Airbus required for it were settled anew at various dates as the project progressed.

26 In practice, there was never any question of providing a substitute for Mr Fitzpatrick (though he asserted that the Morson-Airbus contract entitled the latter to send a substitute

for him if they chose). The evidence was that substitution would from Airbus's point of view have been very difficult to manage, but it would not have been impossible to organise, changing Mr Fitzpatrick's security clearances and passwords, etc. If Mr Fitzpatrick was absent when work from him was needed, it would either await his return or be done by another designer; if he sent a substitute, a complaint would have been made to the agency because Airbus wanted Mr Fitzpatrick's services specifically. Airbus would normally want to see and verify the CVs of persons doing work for them.

27 MBF had a history of contracting out Mr Fitzpatrick's services of the kind featured in this appeal to a number of different clients, including Westland Helicopters, Strachan & Henshaw and Western Design Systems, both before and after the appeal period.

(ii) Work content

28 The work concerned the A380 aircraft and producing acceptable design solutions for components specific to that project. It included incorporating instrumentation devices for measuring and verifying the design specification parameters obtainable from the aircraft, together with routing the data acquisition devices and their connections through the aircraft structure; this enabled the validation of its design for certification by all the relevant aviation authorities worldwide. Mr Fitzpatrick's activity involved also gathering data on the performance of the aircraft and preparing specifications for the instruments and adapting standardised instruments. Mr Fitzpatrick was entitled to do his own research for this work, and did so both at Airbus and on his own account.

(iii) Supervision

29 Certain design criteria would be offered to Mr Fitzpatrick by Airbus, though often it was up to him to decide what to refer to. It is clear that his work was in principle subject to Airbus approval, but it is also clear that that was so not because of any need to supervise Mr Fitzpatrick's work as such but because of the need to integrate the work of each contractor in the overall design of the aircraft and to measure it against the requirements of the aviation authorities worldwide, and especially the Civil Aviation Authority in the UK.

30 Thus, both Mr Paul Messenger Mr Fitzpatrick's team leader or Mr Minh Pham on later occasions, or as occasion required other Airbus officials, did check the work done with a view to ensuring its harmonisation with the rest of the project and its suitability in that context, including its conformity with the technical protocols being used in the project or required by the authorities. It was up to the designer to do the detail of the design. The checking was not therefore primarily for the purpose of quality supervision but more as part of the team leader's task of co-ordination, not least with other work being done simultaneously.

31 It was explained in this respect that Airbus worked with a system known as 'concurrent engineering', in which several designers would be working on related items of design at the same time: as one posted his or her work on the computer system, the others could see to what extent – if any – their own designs needed modifying to fit with what had been done. There was therefore from time to time the need for corrective work to be undertaken by designers such as Mr Fitzpatrick, which they would usually undertake on their own initiative.

32 Reworking due to another designer having altered the landscape in this way would be part of the contract for which Airbus would pay. But if a designer such as Mr Fitzpatrick

saw, by contrast, that his work was technically at fault, it would be for him to correct it at his own expense and not as a charge to Airbus; Mr Fitzpatrick had sometimes done so on his own initiative but never at the request of Airbus. If Airbus were dissatisfied with Mr Fitzpatrick's work, they would discuss the matter with him or, if the problem was serious enough, they would terminate his contract.

33 Naturally, Airbus's team leaders had the task of co-ordinating the work being done on a particular phase of the project and would give out instructions to the designers, employed or contractors, as to what should be done next or as to the work priorities. Airbus would, as the owner and driver of the project, have the final say as to what should be done and when, but they would not control the precise manner of the work.

34 Mr Fitzpatrick was not subject to the disciplinary or grievance procedures, nor given job appraisals.

(iv) Location

35 The location of the work done was usually, but not invariably, Airbus's premises at Filton, near Bristol. That was both for security reasons and because Mr Fitzpatrick's services normally involved logging into and using the computer and design facilities of Airbus on site as the aircraft developed. On occasion, however, Mr Fitzpatrick would do research work at home and in his own time.

(v) Hours

36 Mr Fitzpatrick did not work set days or hours: he would begin work at any time from 6.30 am to midday and finish up to 6.30 pm to suit himself. Usually, Mr Fitzpatrick took no more than 30 minutes for lunch but at times he took up to two

hours; if he had decided to work a short day, Mr Fitzpatrick would then take no lunch break at all.

37 As has been seen from the third level contracts, the keeping of time records by contractors was required. There was a conflict of evidence as to whether the keeping of core hours was an obligatory feature of this in so far as the contractors were concerned, Mr Pham claiming at first that it was; on further consideration, Mr Pham was not sure whether this was actually a contractual requirement or merely "a gentlemen's agreement" by contractors to fall in line with the hours kept by employees, but he said it was Airbus's policy that all operatives should be present during core hours.

38 For his part, Mr Fitzpatrick said that he did not know what the core hours were supposed to be and that he came and went when he chose, but that he kept Airbus informed of what he was doing. A timesheet covering 34 weeks of 2005 was in evidence and showed that for this period anyway Mr Fitzpatrick would often work more than the standard 35 hours, in the majority of cases for 40 hours a week or more, and in only five of the 34 weeks did he put in fewer than 35 hours.

39 Our finding on the matter of core hours is that, while the keeping of core hours was strictly speaking a definite requirement by Airbus, the practical outworking of the matter was that the policy was not enforced if effective co-ordination of the contractors' work with that of the rest of the establishment was achieved. It was thus left to the professional good sense of contractors to ensure that their working practices were sufficiently integrated with those of the staff for the overall operation to continue efficiently, and that we find was the case in Mr Fitzpatrick's situation.

40 It happened on occasion that the power supply to Airbus's computers failed and that it was impossible to continue useful work accordingly. In that case, the employees of the company would try and find something to do and make themselves look busy. By contrast, contractors would, as soon as it became clear that the outage was not going to be remedied quickly and that there was nothing else they could be doing, simply be sent home; in this situation, the contractors found themselves stood down and unpaid until the problem was remedied.

(vi) Conditions

41 Mr Fitzpatrick worked alongside Airbus employees and other contractors and while the proportion of one to the other varied, it was mostly about 4 to 5 contractors to one Airbus employee. The security passes issued differentiated between the two classes of persons.

42 MBF issued weekly VAT invoices to GED referable to the number of hours Mr Fitzpatrick had worked in the week. There was no holiday pay or sick pay for Mr Fitzpatrick or his fellow contractors, and they were not in principle invited to the social events organised for Airbus staff or entitled to their various benefits, such as the employee car scheme, the pension scheme, healthcare scheme and so on: there were 25 in all in the list put in evidence. The same applied to occasional benefits, such as Christmas presents or the opportunity for family members to see the A380's first flight.

43 Airbus would be informed by Mr Fitzpatrick when he was going to take his holidays but, though it was sensible to coordinate the periods in question with Airbus, the latter did not have control as such of Mr Fitzpatrick's holiday absences; if they did not find his timing acceptable, Airbus were entitled to terminate Mr Fitzpatrick's involvement with them - he

thought on 7 days' notice (though the Morson/Airbus contract makes it clear that no notice period was specified). Airbus in fact did just that in August 2005, not because of any disagreement over holidays or hours, but because it suited their business interest to do so, giving MBF 4 days' notice to terminate a contract whose period had commenced less than a month before.

(vii) Training

44 Some of the specialist technical training Mr Fitzpatrick needed for this highly specific work was done at Mr Fitzpatrick's expense and in his own time. Thus, Mr Fitzpatrick did not have formal training in the use of the 'Primes' database, which controlled the parts list for the designs and their issue status; he was self-taught in the matter.

45 The same was true in regard to the CATIA version 5 system – a 3D modelling system Airbus introduced to replace an older one; a formal certificate of competence in regard to this was needed. Mr Fitzpatrick could have been trained for CATIA at his own cost on Airbus's system, but together with others he opted to be trained elsewhere by IBM at a lower cost and at more convenient times.

46 By contrast, Mr Fitzpatrick was trained by Airbus at its expense in the use of the computer-aided design system known as CADD, as Airbus specified the software to be used by the designers.

Legislation

47 Section 2(1) of the Social Security Contributions and Benefits Act 1992 defines 'employed earner' and 'self-employed earner' as follows: -

"2 Categories of earners

(1) In this Part of this Act and Parts II to V below—

(a) "employed earner" means a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elective office) with [general earnings]; and

(b) "self-employed earner" means a person who is gainfully employed in Great Britain otherwise than in employed earner's employment (whether or not he is also employed in such employment)."

48 Section 4A of that Act makes provision in relation to the earnings of workers supplied by service companies: -

"4A Earnings of workers supplied by service companies etc

(1) Regulations may make provision for securing that where—

(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client"),

(b) the performance of those services by the worker is (within the meaning of the regulations) referable to arrangements involving a third person (and not referable to any contract between the client and the worker), and

(c) the circumstances are such that, were the services to be performed by the worker under a contract between him and the client, he would be regarded for the purposes of the applicable provisions of this Act as employed in employed earner's employment by the client,

relevant payments or benefits are, to the specified extent, to be treated for those purposes as earnings paid to the worker in respect of an employed earner's employment of his."

49 The Social Security Contributions (Intermediaries) Regulations 2000, regulations 5 & 6, provided further: -

"5 Meaning of intermediary

(1) In these Regulations "intermediary" means any person, including a partnership or unincorporated association of which the worker is a member—

(a) whose relationship with the worker in any tax year satisfies the conditions specified in paragraph (2), (6), (7) or (8), and

(b) from whom the worker, or an associate of the worker—

(i) receives, directly or indirectly, in that year a payment or benefit that is not chargeable to tax [as employment income under ITEPA 2003], or

(ii) is entitled to receive, or in any circumstances would be entitled to receive, directly or indirectly, in that year any such payment or benefit.

(2) Where the intermediary is a company the conditions are that—

(a) the intermediary is not an associated company of the client, within the meaning of section 416 of the Taxes Act, by reason of the intermediary and the client both being under the control of the worker, or under the control of the worker and another person; and

(b) either—

(i) the worker has a material interest in the intermediary, or

(ii) the payment or benefit is received or receivable by the worker directly from the intermediary, and can reasonably be taken to represent remuneration for services provided by the worker to the client.

(3) A worker is treated as having a material interest in a company for the purposes of paragraph (2)(a) if—

(a) the worker, alone or with one or more associates of his, or

(b) an associate of the worker, with or without other such associates,

has a material interest in the company.

(4) For this purpose a material interest means—

(a) beneficial ownership of, or the ability to control, directly or through the medium of other companies or by any other indirect means, more than 5 per cent of the ordinary share capital of the company; or

(b) possession of, or entitlement to acquire, rights entitling the holder to receive more than 5 per cent of any distributions that may be made by the company; or

(c) where the company is a close company, possession of, or entitlement to acquire, rights that would in the event of the winding up of the company, or in any other circumstances, entitle the holder to receive more than 5 per cent of the assets that would then be available for distribution among the participators.

In sub-paragraph (c) "close company" has the meaning given by sections 414 and 415 of the Taxes Act, and "participator" has the meaning given by section 417(1) of that Act.

6 Provision of services through intermediary

(1) These Regulations apply where—

(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services [for another person] ("the client"),

(b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and

(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client.

(2) Paragraph (1)(b) has effect irrespective of whether or not—

(a) there exists a contract between the client and the worker, or

(b) the worker is the holder of an office with the client.

(3) Where these Regulations apply—

(a) the worker is treated, for the purposes of Parts I to V of the Contributions and Benefits Act, and in relation to the amount deriving from relevant payments and relevant benefits that is calculated in accordance with regulation 7 ("the worker's attributable earnings"), as employed in employed earner's employment by the intermediary, and

(b) the intermediary, whether or not he fulfils the conditions prescribed under section 1(6)(a) of the Contributions and Benefits Act for secondary contributors, is treated for those purposes as the secondary contributor in respect of the worker's attributable earnings,

and Parts I to V of that Act have effect accordingly.

(4) Any issue whether the circumstances are such as are mentioned in paragraph (1)(c) is an issue relating to contributions that is prescribed for the purposes of section 8(1)(m) of the Social Security Contributions (Transfer of Functions, etc) Act 1999 (decision by officer of the Board)."

50 The Income Tax (Earnings and Pensions) Act 2003 makes similar provision as follows:-

"49 Engagements to which this Chapter applies

(1) This Chapter applies where—

(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services [for another person] ("the client"),

(b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and

(c) the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client.

(2) . . .

(3) The reference in subsection (1)(b) to a "third party" includes a partnership or unincorporated body of which the worker is a member.

(4) The circumstances referred to in subsection (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided.

(5) In this Chapter "engagement to which this Chapter applies" means any such provision of services as is mentioned in subsection (1).

50 Worker treated as receiving earnings from employment

(1) If, in the case of an engagement to which this Chapter applies, in any tax year—

(a) the conditions specified in section 51, 52 or 53 are met in relation to the intermediary, and

(b) the worker, or an associate of the worker—

(i) receives from the intermediary, directly or indirectly, a payment or benefit that is not employment income, or

(ii) has rights which entitle, or which in any circumstances would entitle, the worker or associate to receive from the intermediary, directly or indirectly, any such payment or benefit,

the intermediary is treated as making to the worker, and the worker is treated as receiving, in that year a payment which is to be treated as earnings from an employment ("the deemed employment payment").

(2) A single payment is treated as made in respect of all engagements in relation to which the intermediary is treated as making a payment to the worker in the tax year.

(3) The deemed employment payment is treated as made at the end of the tax year, unless section 57 applies (earlier date of deemed payment in certain cases).

(4) In this Chapter "the relevant engagements", in relation to a deemed employment payment, means the engagements mentioned in subsection (2).

51 Conditions of liability where intermediary is a company

(1) Where the intermediary is a company the conditions are that the intermediary is not an associated company of the client that falls within subsection (2) and either—

(a) the worker has a material interest in the intermediary, or

(b) the payment or benefit mentioned in section 50(1)(b)—

(i) is received or receivable by the worker directly from the intermediary, and

(ii) can reasonably be taken to represent remuneration for services provided by the worker to the client.

(2) An associated company of the client falls within this subsection if it is such a company by reason of the intermediary and the client being under the control—

(a) of the worker, or

(b) of the worker and other persons.

(3) A worker is treated as having a material interest in a company if—

(a) the worker, alone or with one or more associates of the worker, or

(b) an associate of the worker, with or without other such associates,

has a material interest in the company.

(4) For this purpose a material interest means—

(a) beneficial ownership of, or the ability to control, directly or through the medium of other companies or by any other indirect means, more than 5% of the ordinary share capital of the company; or

(b) possession of, or entitlement to acquire, rights entitling the holder to receive more than 5% of any distributions that may be made by the company; or

(c) where the company is a close company, possession of, or entitlement to acquire, rights that

would in the event of the winding up of the company, or in any other circumstances, entitle the holder to receive more than 5% of the assets that would then be available for distribution among the participators.

(5) In subsection (4)(c) "participator" has the meaning given by section 417(1) of ICTA.

59 Provisions applicable to multiple intermediaries

(1) The provisions of this section apply where in the case of an engagement to which this Chapter applies the arrangements involve more than one relevant intermediary.

(2) All relevant intermediaries in relation to the engagement are jointly and severally liable, subject to subsection (3), to account for any amount required under the PAYE provisions to be deducted from a deemed employment payment treated as made by any of them—

(a) in respect of that engagement, or

(b) in respect of that engagement together with other engagements.

(3) An intermediary is not so liable if it has not received any payment or benefit in respect of that engagement or any such other engagement as is mentioned in subsection (2)(b).

(4) Subsection (5) applies where a payment or benefit has been made or provided, directly or indirectly, from one relevant intermediary to another in respect of the engagement.

(5) In that case, the amount taken into account in relation to any intermediary in step 1 or step 2 of section 54(1) is reduced to such extent as is necessary to avoid double-counting having regard to the amount so taken into account in relation to any other intermediary.

(6) Except as provided by subsections (2) to (5), the provisions of this Chapter apply separately in relation to each relevant intermediary.

(7) In this section "relevant intermediary" means an intermediary in relation to which the conditions specified in section 51, 52 or 53 are met."

The case law

51 It will be seen the statutory hypothesis which has to be applied to the actual facts found is this: what contract would in the circumstances have existed between them if the worker (Mr Fitzpatrick) had been engaged directly by the client (Airbus)? It is on the basis of that hypothetical contract that the fiscal consequences are determined.

52 The process of reaching this conclusion involves what Sir Stephen Oliver QC, sitting as Presiding Special Commissioner in *Tilbury Consulting Ltd v. Gittins (No 2)* [2004] STC (SCD) 72, at [6], has described in these terms:-

> "The legislation calls for a two stage exercise. The first is to find the facts as they existed during the period covered by the decision. The facts to be found are those that serve to identify the 'arrangements' involving the intermediary and the circumstances in which those arrangements existed and the nature of the services performed by the 'worker'. The second is to assume that worker [Mr Fitzpatrick] was contracted to perform services to the client [Airbus] and to determine whether in the light of the facts as found [Mr Fitzpatrick] would be regarded as [Airbus's] employee."

53 From the considerable case law on this subject, we deduce the following guidelines for the tribunal in constructing the hypothetical contract.

(i) The contractual terms

In determining the relationship which existed, regard should be had primarily to the actual contract terms rather than to what in fact occurred: per Peter Gibson LJ in *Express Echo Publications v. Tanton* [1999] IRLR 367 at [25]. But in

determining the 'circumstances' in which they are supplied (particularly where there is no privity of contract between the worker and the client), the legislation requires a view to be taken of the combined effect of the contracts and of their practical outworking: per Hart J in *Synaptek Limited v. Young* [2003] EWHC 645, 75 TC 51, at [11] – but see also the observations of Henderson J in *Dragonfly Consultancy Limited v. HMRC* [2008] STC 3030 at [14] to [19].

(ii) Personal service

The requirement that services must be performed personally has been seen as a characteristic of the employment relationship, and if it is not present the relationship will not be one of employer/employee: per Peter Gibson LJ in *Express Echo* at [31]; and the right to send a substitute to perform services, whether or not it is exercised, is inconsistent with employment: per Peter Gibson LJ in *Express Echo* at [25]. That that view is applicable in every situation has however been doubted at High Court level several times: see e.g. per Henderson J in *Dragonfly* at [32] and [37] in favour of regarding a right of substitution being an indicator only of self-employment and not as necessarily a guarantor of it.

It does not follow that the terms of the notional contract would not reflect the terms of the third level contract with the end-user client (such as the absence of a right of substitution) merely because the service provider had at the time necessarily been unaware of those terms: per Park J in *Usetech Limited v. Young* (2004) 76 TC 811, at [43] to [47].

Freedom to perform work for another during the period of the engagement is not inconsistent with employee status:

per Cooke J in *Market Investigations Ltd v. Minister of Social Security* (1969) 2 QB 173, at 187.

(iii) Mutuality of obligation

There may be mutuality of obligation in individual contracts made in an ongoing series of engagements, even though there is no obligation on either party to continue the series after the expiry of any of the individual contracts. The requirement for mutuality is satisfied if in each individual contract there is an obligation on the employer to continue paying, and the employee to continue working, until the specified work is complete: per Mummery LJ in *Prater v. Cornwall County Council* [2006] 2 All ER 1013, at [40] and Longmore LJ at [43].

Mutuality does not require the employer to provide the employee with work in addition to wages: per Stephenson LJ in *Nethermere (St Neots) v. Taverna* [1984] IRLR 240, at 246. It is only where there is both no obligation to provide work and no obligation to pay the worker for time in which the work is not provided that the want of mutuality precludes the existence of a continuing contract of employment: per Park J in *Usetech* at [64].

An obligation on the employer to provide work, or in the absence of available work to pay, is a touchstone or feature one would expect to find in an employment contract and whose absence would call into question the existence of such a relationship: per Special Commissioner Hellier at first instance in *Dragonfly Consultancy Limited v. HMRC* [2008] STC (SCD) 430 at [59]. A termination notice clause implies an obligation on the employer to provide work until the right to terminate is exercised: per Hart J in *Synaptek* at [27].

(iv) Control

Control of an employee's work has traditionally been seen as a feature of a contract of service, and it includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time and place where it shall be done; the right of control need not be unrestricted for an employee relationship to exist, particularly in the case of professional or skilled work. The right of control is a necessary though not always a sufficient condition of a contract of service, and in classifying the contract other matters besides control may be taken into account and it is not the sole determining factor: per MacKenna J in *Ready Mixed Concrete (South East) Limited v. Minister of Pensions and National Insurance* (1968) 2 QB 497, at 516; and per Cooke J in *Market Investigations* at 185.

(v) Business on own account

If the facts show that the service provider was effectively in business on his own account, that points to a contract for services but the weight to be given to it is a matter for the tribunal: per Hart J in *Synaptek* at [20]. Among the factors relevant are whether the service provider provides his own equipment or hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, whether and how far he has an opportunity of profiting from sound management in the performance of his task and whether the business he has is already established: per Cooke J in *Market Investigations* at 185; and the fact of invoicing for payment: per Special Commissioner Avery Jones in *Lime-IT v. Justin* SpC 342 (2002).

A course of business dealings in which the company (or its controlling director) has had a series of engagements with a succession of clients may be material to this issue: per Park J in *Usetech* at [31]. The risk of bad debts and outstanding invoices is not normally associated with employment: per Nolan LJ in *Hall v. Lorimer* [1994] STC 23, at 30.

In order to consider whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. The object of the exercise is to paint a picture from the accumulation of detail: per Nolan LJ approving Mummery J in *Hall v. Lorimer* at 29.

(vi) Intention of the parties

A statement of the parties' disavowing any intention to create a relationship of employment cannot prevail over the true legal effect of the agreement between them, but in a borderline case a statement of the parties' intention may be taken into account and may tip the balance one way or the other; and, in the context of the intermediaries legislation, statements of intention made in relation to actual contracts with an agency are unlikely to throw more than minimal light on the proper characterisation of the notional contract between the worker and the client, though an expression of intention in such a contract remains a possibility: per Henderson J in *Dragonfly* at [54] and [55].

(vii) Overall view

The test of being an employee does not rest on a submission to orders but depends on whether the person is 'part and

parcel' of the organisation: per Denning LJ in *Bank voor Handel en Scheepvaart NV v. Slatford* (1953) 1 QB 248, at 295. But see also the dissent from this proposition of MacKenna J in *Ready Mixed Concrete* at 525.

Submissions

54 There has been substantial agreement between the parties as to the effective tests required by the legislation to be applied and, as we have noted, there is agreement in particular that there is for the purpose of this appeal no material difference between the 'employed earner' and the 'employee' tests and that the same criteria can be referred to in relation to each. Although there may in some cases be a distinction to be drawn between the two statutory formulations, we see none in the circumstances of this case and we are reassured by the observations of Henderson J in *Dragonfly*, at [17], that "Nine times out of ten, perhaps ninety nine times out of a hundred, the two tests will lead to the same answer".

55 For the taxpayer it was submitted as follows:-

- Both the written contracts and the day to day circumstances in which Mr Fitzpatrick's work was performed, and indeed Mr Fitzpatrick's business circumstances at large, must be taken into account.
- Careful regard should be paid to whether the evidence shows as present the 'irreducible minimum' referred to by Stephenson LJ in *Nethermere* at 246 as necessary for a contract of service, namely a mutual obligation between the employer to provide payment and the employee to provide his own skill and work.

- A right of substitution is clear from the first and second level contracts and although Morson would have difficulties under its contract with Airbus in the event that substitution was required, such a right would be contained in the hypothetical contract. It had been admitted by Mr Pham that substitution would not have been impossible and could have been arranged. The fact of actual personal service throughout should not alter this.

- The appellant company was engaged for the performance of a specific project in circumstances typical of the freelance contracting marketplace, and atypical of an employment relationship.

- The general supervision and direction found in this case do not amount to control in the sense which is characteristic of employment relationships. The willingness of the court in *Morren v. Swinton & Pendlebury Borough Council* (1965) 1 WLR 576 to relax the requirement for control in the case of a skilled worker has not been reflected in the more recent authorities.

- The absence of sick pay, pension rights, healthcare facilities and holiday pay for Mr Fitzpatrick, invoicing for fees by MBF, its previous course of contracts and its VAT registration were all typical features of a business being carried on as such, and inconsistent with the notion of Mr Fitzpatrick being an employee. The cost of training being borne by MBF and the risk of bad debts occurring were to the same effect.

- The intention of both parties – Airbus and Mr Fitzpatrick - in constructing the hypothetical contract would clearly be to avoid employment status being created. Consistently with this, HMRC's Employment Status Manual, at para 3286, assumes in cases of doubt a mutual intention to create a contract for services.

- The right of cancellation contained in clause 13.5 of the third level contract is inconsistent with the required mutuality of obligation in the case of employment; this is exemplified further in contractors being sent home without pay if there was for the time being no work for them to do.

- Clauses 3.2 and 3.3 of the first level contract MBF to GED should be construed as not *requiring* any work at all to be done, albeit that the rates per hour for work which was done were specified. The evidence showed that if Mr Fitzpatrick accepted a package of work then he would complete it but not that Airbus had any obligation to provide it.

- Clause 5.1(c) and(e) of the Airbus/Morson contract's special conditions – the quality conditions – showed that if Airbus did not accept a piece of work they would not pay for it, contrary to the case of an employee whose work - even if it was poor - which would be paid for. Reworking of designs fitted that pattern as Mr Fitzpatrick fulfilled his task as a professional designer delivering a quality service.

- The evidence showed that there was a varied work pattern, with different hours frequently being worked as

different issues arose to be dealt with; insofar as 'core hours' were covered, that was due to a need to co-ordinate with Airbus employees and not because Mr Fitzpatrick was a 9-5 worker. Work on site was not inconsistent with the independence of the worker.

56 For the Crown it was submitted:-

- Both the written contracts and the circumstances in which they were discharged must be considered in a two-stage process, first identifying the 'arrangements' and then the 'circumstances'.

- The evidence shows that the normal minimum of 35 hours a week worked by Mr Fitzpatrick, the allocation of specific tasks to him, the following of Airbus's instructions as to methods and systems of work, the scope of each task and the checks on work done which were made, all support a finding of the degree of control typical of an employed relationship. The appellant is wrong to say that *Morren* and the latitude it recognises in regard to control of skilled workers has not been followed in more recent decisions: it was for example cited with approval in *Market Investigations* and remains good law.

- Airbus's requirements were clearly for the personal services of Mr Fitzpatrick and the hypothetical contract would not contain a substitution clause, pointing strongly to employment.

- The 'irreducible minimum' in regard to mutuality of obligation was present in that work was always available for Mr Fitzpatrick and he was always paid for

it. The evidence showed the reality of mutual obligations, which would be imported into the notional contract.

- There was in reality no financial risk for MBF other than the costs of sickness and its only chance to increase profits was for Mr Fitzpatrick to work longer hours. Payment by the hour is more akin to a contract of service than to one for services. Negotiation of fees is no different to bargaining for wages.

- The equipment needed for the work performed was provided by Airbus, as an employer, and no equipment as such was provided by Mr Fitzpatrick; training at MBF's cost may be consistent with employment.

- The continuity of work throughout the appeal period leads to the conclusion that Mr Fitzpatrick was dependent for that time on one party as his employer.

- The right to terminate on 7 days' notice is characteristic of an employment contract.

- The evidence does not show that Mr Fitzpatrick was 'part and parcel' of Airbus's organisation but that factor carries little weight on its own.

- The likely mutual intention to avoid employment status in the notional contract is irrelevant in view of the other pointers to a contract of service, since the parties cannot change the objective effect of the contract they make simply by re-labelling it.

- No work was done for others and in view of the hours worked it was unlikely that any such work could have been done. There is therefore the reality of exclusivity

in the appeal period which is a relevant circumstance in establishing the notional contract; in any event, the factor is not determinative since many employees have more than one job.

- The contracts at levels 1 and 2 specified 'normal working hours' and quantities of hours for the work, while the level 3 contract was made also by reference to hours of work, which is not typical of an obligation under a contract for services: the notional contract would do the same, leading to a regime which was typical of employment. The same is true of the requirement for work to be done on location.

Conclusions

57 As a matter of overall impression, we are of the view that both the arrangements and the circumstances in which they took effect gave rise to the reality of a relationship - or a series of relationships during the appeal period - typical of that in a contract for services. Many factors, as might be expected, point in that direction in the various contracts.

58 Thus, even in the third level (Morson/Airbus) contract which at first sight looks like an agreement for the supply of casual staff who might be expected to be temporary employees, and which contains none of the explicit provision found in the level 1 and 2 contracts designed to establish clearly that they are contracts for services, there are features which mark it out as inappropriate for employees.

59 The first example of the third level contract provides for groups of persons to be supplied to Airbus, without making any distinction between them, and at hourly rates applicable to all the members of the group indifferently. There was no stated obligation for Airbus to offer a particular amount of work to any individual, and it is apparent that the total number of hours allocated to any group could be used up by its members unequally – one earning more than another because of a greater number of hours worked, consequent upon a greater volume of work allocated.

60 In the second example of this contract, there is the appearance of a set number of hours being allocated to Mr Fitzpatrick specifically, but it is apparent that this is in effect an accounting mechanism reflecting the different rates of hourly payment for each of the groups to which he was in turn allocated. And although Airbus had specifically chosen the persons to make up each group, vetting their CVs, and thus could be said to have required their personal services, there remains an absence of the mutuality of obligation needed for a contract of employment to exist.

61 Secondly, the right in third level contract to cancel without notice is characteristic of a contract for services but quite foreign to the world of employment, as is the provision for agreeing compensation in such an event. Each contracted worker was fundamentally insecure, having neither a specified rôle in the company nor a particular line of duty beyond what was for time being allocated by the permanent staff. Clause 13.1.3 on the remedying of breaches, clause 16 requiring legal liability insurance to be effected by Morson and clause 20 placing the responsibility on Morson of complying with various statutory obligations point in the same direction; it is hard to imagine an employee in the normal way being affected by such

terms. The fact that a form of contract intended for purchases of goods was pressed into service for another purpose is beside the point: this was the contract the parties made and it is the only one the tribunal can refer to.

62 Against such a background, the other terms of the third level contract which point to employment have less weight. They are consistent with a contract for services and are explained by the special needs of a very complex and commercially sensitive undertaking. They are: the selection of named individuals, payment by the hour, time recording, quality standard approvals, site working, and all intellectual property created and information involved vesting in Airbus.

63 The first and second level contracts are quite explicitly contracts for services and it is unnecessary to refer to them in any detail, so well known are the terms which typify such agreements and which they clearly contain. The only pointers to employment are the references to working normal or core hours, the differential rate in the first level contract for extra hours, the 7 day notice periods, the omission of the insurance obligation in the second level contract and the vesting of intellectual property rights in Airbus. As before, we do not see these provisions as altering the main character of the contracts and as being referable to the particular circumstances of the end-user.

64 Does the practical reality of working alter the conclusion which emerges from the contracts? In some respects, the evidence about this seems ambiguous: thus the negotiation of remuneration at various stages, the absence of any prospect of Mr Fitzpatrick actually sending a substitute, the degree of checking and approval of designs, the work allocation and coordination by the permanent team leaders, the broad similarity of working hours from one week to the next, the fact

of almost all work being done on site, the close integration with Airbus's own workers, all these could be interpreted either way. We are satisfied, however, that these factors should fairly be seen in the context of others which point to independence:

- Thus, the absence in reality of any thought that Mr Fitzpatrick might send a substitute to discharge his obligations is, as the authorities show, not inconsistent with his having been engaged as a professional man whose personal expertise was valued as might be that of an architect or surgeon. Against the background of MBF's well-established existence and its history of engagements with various end-users, Mr Fitzpatrick's status as a freelance specialist in his area is entirely credible.

- Both contractors and employees habitually negotiate and re-negotiate their remuneration whenever the chance presents itself. In the absence of any career structure for Mr Fitzpatrick, MBF's negotiation of fees for new work is typical of how an independent provider would proceed, whereas an employee would tend to look as much for re-grading or promotion as a means of improving remuneration and there is no evidence of such behaviour on Mr Fitzpatrick's part.

- The checking and approval required of design work was an inevitable necessity in a project in which every part was interdependent and was in addition subject to the approval of external authorities. This factor would have had to be present in respect of any work done for Airbus, as the special conditions as to quality approval in the third level contract testify, so that there may appear little difference between the position of employees and service providers: the difference came in

the absence of disciplinary or grievance procedures for the contractors, the fact of having to rectify errors at their own expense and their liability to be laid off without notice.

- Mr Fitzpatrick's design work had normally to be performed on site and with Airbus's equipment because there was no other sensible way to do it, given the nature of the overall project of building an aircraft; there are many other examples of an independent contractor's work being done on the client's site and with the client's equipment for the same sort of reasons: an electrician repairing a wiring circuit, a plumber adapting a drainage system, an engineer checking a safety installation on an oil rig, and so on. In the context, we do not see on-site working as a conclusive indicator of employment.

- Basic working or core hours needed, within reason, to be adhered to produce an efficient interface with Airbus's staff, but given the variations in them which in fact occurred, in particular with regard to Mr Fitzpatrick's starting and ending times in the day, the pattern of working does not seem to us to be typical of normal employee working habits.

- A further factor in this context which distances Mr Fitzpatrick's situation from that of employment is payment for each hour worked and weekly invoices being submitted reflecting that; being sent home without pay when the Airbus computers broke down is a logical extension in that context, as is the absence of sick or holiday pay, the range of employee benefits generally and universal employer-provided training for work-related needs.

65 Other considerations pointing to a contract for services can be seen. Thus, the evidence does not show that Mr Fitzpatrick was 'part and parcel' of Airbus's organisation in any but the most temporary and limited sense; the opportunity for other work to be undertaken simultaneously was there for Mr Fitzpatrick if he had chosen to limit his working hours for Airbus; the fact is established of differing payments following weekly invoicing; the financial fortunes of MBF vary depending on the work and remuneration available; MBF's had a repeated need to find new clients for Mr Fitzpatrick's skills; the parties' plain intention, shown both in the contracts and in practical ways, was not to create an employment relationship.

The notional contract

66 We find that the contract which the legislation requires us to hypothesise would be a contract in which Mr Fitzpatrick would not be regarded for the purposes of Parts I to V of the Social Security Contributions and Benefits Act 1992 as employed in employed earner's employment by Airbus, and one in which he would not be regarded for income tax purposes as an employee of Airbus. The appeals for the years 2003-04 and 2004-05 must therefore be allowed.

67 The appeals against HMRC's decision and determinations for the years 2001-02, 2002-03, 2005-06 and 2006-07 are allowed for the reasons indicated at paragraph 3 above.

Appeal rights

68 This document contains the 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 no later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Malachy Cornwell-Kelly
Tribunal judge

Release date: 5 January 2011

E C R Consulting Ltd v Revenue & Customs [2011] UKFTT 313 (TC) (11 May 2011)
INCOME TAX/CORPORATION TAX
Personal service companies (IR 35)

[2011] UKFTT 313 (TC)
TC01174

Appeal number TC/2010/1565

National Insurance - earnings of worker supplied by service company - provision of services through intermediary – Company contracting to provide computer services – whether, if arrangements had taken the form of a contract between the worker and the client, the worker would have been employed by the client under a contract of service – No – Appeal allowed- Social Security Contribution (Intermediaries) regulations 2000, SI 2000/727, reg 6 (1) (c).

FIRST-TIER TRIBUNAL

TAX

E C R CONSULTING LIMITED Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS Respondents

TRIBUNAL: DAVID S PORTER (JUDGE)
ALBAN W HOLDEN (MEMBER)
Sitting in public at Albion House, Leeds on 17 and 18 February 2011

Matthew Boddington, a tax consultant, for the Appellant

Tony Burke, a tax inspector, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. E C R Consulting Ltd (ECR), appeals against the decision and determinations issued on 3 December 2007 in respect of liability to National Insurance Contributions (NIC) for the period 6 April 2002 to 27 March 2005 and liability to PAYE income tax for each of the years 2002/03, 2003/04, and 2004/05. The decision and determinations were made pursuant to what is commonly known as the IR35 legislation, and related to arrangements where ECR indirectly provided the services of its sole director and shareholder, Miss Richardson, to Vertex Data Services (VDS) during the relevant period.

2. The decision was made under Social Security Contributions (Intermediaries) regulations 2000, SI 2000/727 Regulation 6 (4) and the determination under Income Tax (Pay as You Earn) Regulations 2003, SI 2003/2682, Regulation 82

3. ECR did not provide Miss Richardson's service directly to VDS, but did so through arrangements with an agency company, Best People Ltd / Spring Technology. Miss Richardson is a highly skilled IT worker specialising in software development.

4. Mr Matthew Boddington, a tax consultant with Accountax Specialist Tax Advisers appeared on behalf of Miss Richardson and called her to give evidence. Mr Tony Burke, from the Appeals and Reviews Unit at Leeds, appeared for HMRC and called Miss Hilary Harrison, a compliance officer, Miss Linda Brown, a team leader employed by VDS, and Mr Graham Holmes, a senior manager at VDS to give evidence. All the witnesses gave evidence under oath and we were provided with agreed bundles.

5. We were referred to a substantial number of cases the principle ones being :-

- *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497
- *Mersey Docks and Harbour Board v Coggins & Griffiths (Liverpol) Ltd* [1946] UKHL 1
- *Hall (H M Inspector of Taxes) v Lorimer* [1992] 1 WLR 939 (CA)
- *Dragonfly Consultancy Limited v The Commissioners for her majesty's Revenue and Customs*[2008] EWHC 2113 (Ch)
- *Nethermere (St Neots) Limited v Gardiner* [1984] I.C.R. 612
- *Lime-it Ltd v Justin (office of the Board of Inland Revenue)*[2003] STC (SCD)15
- *Tilbury Consulting Ltd v Margaret Gittins (H M Inspector of Taxes)* [2003] SPC 3020
- *Market Investigations Limited v Minister of Social Security* [1969] 2 QB 173
- *Stoddart v Cawder Golf Club* [2001] EAT/87300

- *Express and Echo Publications Limited v Ernest Tanton* [1999] EATRF 98/0528/3

The LAW

6. Regulation 6 (1) of the Social security Contributions (Intermediaries) Regulations 2000, SI 2000/727 made under the Social Security Contributions and Benefits Act 1992 (the 1992 Act) provides:

'These regulations apply where-

a. an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client"),

b. the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and

c. the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would have been regarded for the purposes of parts 1 to V of the 1992 Act as employed in employed earner's employment by the client.'

'Intermediary' is defined in Regulation 5 and it is common ground that ECR is an intermediary for this purpose. 'Employed earner's employment' is defined in section 2 (1) of the 1992 Act to include a person whom is gainfully employed under a contract of service (which is not further defined).The intermediary is treated as making, and the individual as receiving, a payment of deemed employment income calculated in accordance with the rules set out in the legislation in respect of which the intermediary has to account for PAYE and primary and secondary Class1 NIC.

7. The legislation calls for a two stage exercise. The first is to find the facts as they existed during the period covered by the decision. The facts to be found are those that serve to indentify the 'arrangements' involving the intermediary and the circumstances in which those arrangements existed and the nature of the services performed by the 'worker'. The second is to assume that the 'worker' (Miss Richardson) was contracted to perform the services to the client (VDS) and to determine, whether in the light of the facts, Miss Richardson would be regarded as VDS's employee. The burden of proof lies with ECR and the standard of poof is on the balance of probabilities

The facts

8. The parties are as follows:

Vertex Data Science Ltd (the "Client")
Best People Ltd /Spring Technology (the 'Agency')

ECR Consulting Ltd (the "intermediary")

Miss Elaine Richardson (the "worker")

Miss Richardson has been in business since June 1993 after having been made redundant by her previous employers. She told us that she did not want to risk being made redundant again and decided to become self - employed. As her expertise was in complex computer consultancy, she formed a company to prevent personal liability if she were to be sued. She appears to have had a large number of contracts, some of which have, in the past, run for nearly a year with the same clients. The average period appears to have been about 6 months. Her contract with Jaguar Land Rover, for instance, appears to have run intermittently from 20.8.2008 to 12.6.2010. ECR has serviced up to 3 separate clients during the period 2002 – 2005; in 2006 and 2007 it serviced 2 separate clients. ECR has specialised computer equipment and an office. It promotes the company's services through a website (http:/www.ecr-consulting.
demon.co.uk).The Website contains details of Miss Richardson's CV.

9. Late in 2001, Miss Richardson was asked by Best People Ltd (Best) whether she wished to provide computer services to VDS but she refused as she was involved with another contract. She indicated that she would be pleased to help in the future if they approached her again. In February 2002 Best approached her again to see if she could help with the implementation of the Accenture Customer 1 billing system (with which she was familiar) for TXU Energy. This meant moving the clients of TXU Energy from several mainframes at VDS's building into a new billing system. She told us that she was not interviewed for the position and assumed that VDS had checked her web site which contained her CV.

10. There was no direct contract between Miss Richardson and VDS. VDS had urgently required to find someone to help with the work and they had been approached by Best, who had suggested that they used ECR and Miss Richardson. VDS had been prepared to pay £600 per day for the services but insisted, in view of the very high daily fee, that should they terminate the contract with Best, they would not expect to pay a termination fee of the same order.

11. This first contract between Best and ECR was for a period of 6 months from 6 March 2002 to 5 September 2002, but was extended by correspondence from 6 September 2002 to 27 December 2002. By a letter dated 18 October . Best terminated the contract on 18 November 2002. ECR did not employ Miss Richardson to work with Best or VDS again until 21 April 2003, a gap of 3 months. She had been apprehensive about working for VDS again after the early termination of the last contract. Best offered a rate of £300 per day to ECR for her services but she refused to work at that level. Eventually the rate was increased to £350 and she agreed to the work because of the poor state of the contracting market. The work involved converting all Powergen's customers onto one platform- the Accenture Customer 1 system.

12. The second contract ran from 22 April 2003 to 25 July 2003, but following correspondence was extended to run from 11 August 2003 to 7 November 2003; and then from 24 November 2003 to 23 February 2004.

13. Best was taken over by Spring Technology Staffing Services Limited (Spring) who entered into four further contracts with ECR for Miss Richardson services at a rate of £350 per day for the following periods:-

- 15 March 2004 to 21 May 2004
- 22 May 2004 to 20 August 2004
- 23 August 2004 to 19 November 2004
- 22 November 2004 to 18 February 2005. This contract was extended by correspondence on 3 occasions to cover the following periods:
- 21 February 2005 to 11 March 2005
- 14 March 2005 to 20 March 2005
- 21 March 2005 to 27 March 2005.

14. In November 2005 Mrs Hilary Harrison, an HMRC Employer Compliance officer, commenced a review of the business records of ERC. She subsequently entered into correspondence with ECR's agents, Lawspeed, about her findings. In April 2007, after concluding her enquiries, she sought the advice of a Status Inspector colleague, who considered the evidence provided by her and then informed Lawspeed that the IR35 legislation was applicable as regards Miss Richardson's work for VDS. Mrs Harrison could not advise as to the Status Inspector's thought process and he had not been called as a witness.

15. Lawspeed did not agree that the IR35 legislation applied and consequently Mrs Harrison arranged, in December 2007, for the issue of Regulation 80 Determinations to ECR to recover additional tax as under:

Notice of Regulation 80 determination 2002/03 £8907.78
2003/04 £8710.00
2004/05 £9395.00

Total £27,012.78
She also arranged for the issue of a section 8 decision to recover Class 1 NIC of £24,539.74 for the period 6 April 2002 to 27 march 2005 (of which £7069.51 had already been paid).

The contracts

16. As indicated at paragraph 7 above, it is first necessary to consider the terms of the various contracts dealing with the employment. In this context there were three contracting parties. There are agreements between VDS and Best/Spring, and contracts between Best and ECR. The contracts between VDS and Best/Spring produced to the Tribunal were less than satisfactory as they were unsigned by either party and appear to be generic agreements provided by VDS as their "IT Procurement Services" contract. As it appears that the agreements have been acted on by the parties, we are treating the agreements as valid and determinative for the purposes of this appeal.

17. The first contract between VDS and Best appears to be Version 1.0 (27.4.01) and provided that Best had to find a suitable contractor, which it sourced from ECR having seen Miss Richardson's CV on ECR's website. The contract provided that VDS would be charged within the appropriate bandwidths (as fixed by VDS presumably in agreement with Best) for the level of personnel required, which rate would be fixed for 12 months. The parties conceded that the rate paid by VDS to Best was different to that paid by Best to ECR. From the figures in the contract the difference appears to have been substantial. For example Appendix 4 rates run from £988 to £1400. The contract specifically named Miss Richardson to be the personnel for the purposes of the contract.

- Clause 4.3 states that Best will supply a contractor who "will perform to a standard consistent with the requirements specified by VDS, and that the contractor will be replaced within 3 working days if Best has been informed by VDS that the contractor was not satisfactory. It also provided as follows.
  "The Consultants who are unable to fulfil their duties to the standard required will be replaced by the Agency if required"…
- 4.6 payment of invoices would be in 30 days
- 4.10 Best is to indemnify VDS against all losses, liabilities, claims, costs and expenses and insure the same up to £2,000,000
- 4.15 VDS could terminate the contract on 4 weeks notice.

The second contract between Best and VDS appears to be Version 2.0 (1/4/2002). Again the contract is unsigned and it is agreed that for the purposes of this appeal the terms are the same as the earlier contract.

18. The six Contracts above between Best and ECR are all in the same format and provide that ECR is the supplier of the services, which will be performed by Miss Richardson, the personnel named in the schedule. The rate for the first contract was £600 per day, which is equivalent to £140,000 per annum allowing for weekends and holidays. The subsequent contracts were at £350 per day equivalent to £84,000 on a similar basis. The level of payment indicates that miss Richardson is clearly a knowledgeable computer expert capable of handling complex work.

19. The contracts between Best and ECR provided at :

- 1 b) The Supplier (ECR) warrants that the Services shall be initially performed by such personnel named in the Schedule (in this case Miss Richardson). The Supplier may propose a replacement to perform the Services in substitution for the named personnel, but any such proposed substitute shall only be accepted if approved in writing by Best and the client.

- 2 c) At the end of the initial engagement Best shall be under no obligation whatsoever to offer further work to the Supplier and the Supplier shall be under no obligation whatsoever to accept any further work, if offered.

- 3 a) provides for indemnity from ECR to Best in similar terms to the VDS contract, and that ECR will indemnify Best against any income tax (whether PAYE or otherwise) or primary National Insurance Contributions…

- 4 b) invoices are to be raised against time sheets

- 5 c) Best are entitled to terminate the contract on 28 days notice or pay ECR in lieu of notice.

20. It appears that there was no contract between Miss Richardson and ECR, due to the fact she is the single shareholder and Director of the company. We take the view that the terms of the other contracts are relevant when considering the manner in which Miss Richardson worked at VDS. The contracts have been entered into by parties other than Miss Richardson. The other parties must have intended the tems of the contracts to be enforceable. There have been numerous cases in the High Court, this Tribunal and the Employment Tribunal relating to the status of an individual's employment, all of which depended on the specific facts of the specific cases. We are bound by the High Court's decisions but not those of the Tribunal, although we are bound to consider them. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 433 (*Ready Mixed*) MacKenna J listed three conditions for a contract of service to exist:

> (1) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master
>
> (2) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make the other master
>
> (3) The provisions of the contract are consistent with its being a contract of service

These conditions are fundamental to the creation of a contract of services and if any one of them cannot be met then the contract is not a contract of service.

21. Lawspeed wrote to HMRC on 6 July 2007 setting out in considerable detail the reasons why they considered Miss Richardson was not an employee. Mr Boddington has adopted those matters for the purposes of this appeal. The numerous cases identify the various matters which need to be considered, which overlap with those in Lawspeed's letter. We propose to use the headings in the letter and to indicate where Mr Burke, on behalf of HMRC, is in disagreement.

Substitution

22. Both of the contracts allowed for substitution. Mr Burke suggested that the contracts named Miss Richardson as the operative and the substitution clauses required VDS to consent to a substitute. As a result the service was personal to Miss Richardson and as the substitution clauses required the consent of both parties they were fettered and, as such, were not absolute in their terms. Mr Holmes, a senior manager at VDS, stated, in the meeting that HMRC had with him and Mrs Brown on 8 April 2010 that the use of contractors was a budgetary matter. Contractors were employed to control risk in relation to expenditure. This was evidenced by the need to pay £600 per day for Miss Richardson on the first contract reduced to £350 in the second. VDS needed to bring in appropriate people with the necessary skills on a short term basis to help out with various projects. Both Mrs Brown and Mr Holmes said that VDS would not have accepted a substitute. Given that VDS was prepared to employ Miss Richardson on a contract at £600 without ever having met her, we are satisfied that if she had been unable to attend through illness or had been unsatisfactory, VDS would have returned to Best/Spring under the substitution clause for them to supply another contractor with sufficient, skills, qualifications and experience. Miss Richardson confirmed that she could have sent other people to do the work as she knew of at least 6 others who were suitably qualified

Control

23. A working relationship which involves no control at all from a manager is unlikely to be classed as employment. Mrs Brown stated that she had overall control of Miss Richardson. We accept that she needed to advise Miss Richardson of the way in which VDS worked, although she accepted that VDS had no manuals or directions as to office procedures specifically for either the employees or the contractors. We do not accept, even with the qualifications she advised us of, that she was able to tell Miss Richardson how to do the work or the time she should expend in doing so. Miss Richardson produced to the Tribunal her internal time sheets for the time she worked on the project. These had been completed to comply with the European working directives, but bore no relationship to the time records kept by VDS. The records, prepared for the purposes of the agency contracts and invoices for Best, merely identified that she had worked for 37 ½ hours each week. Miss Richardson's time sheets reveal variations from 31 hours to 45 hours each week. From these time sheets it is clear that the hourly rate she was paid was based on 37 ½ week. If she worked longer or shorter hours she received no more money. The fact that she could work the hours she pleased clearly shows that she was not controlled by Mrs Brown in relation to her working practices.

24. The two contracts, clauses 7(b) Best and 1.8 (Spring) provided that the agreements cannot be varied without the consent of Best/Spring, therefore VDS cannot be said to have daily control. Clauses 1(g) (Best) and 2.6 (Spring) indicate that Best/Spring is to decide the method of working and use its own skill and expertise to provide the services. VDS has no control over how the work is done nor when the services are to be performed save for obvious opening times of the offices and the fact that the work had to be carried out there. The fact that Miss Richardson was given a personal pass does not in our opinion make her an employee.

25. The IR Employment Status Manual states

> " …if working on large sites where access is limited to normal working hours, the worker is not going to be able to work as and when she or he pleases [and] the limitations put on when the work can be carried out tells us nothing about the status".

Mr Burke commented that *Ready Mixed* suggested that*:*

> *"* Control includes the power of deciding the thing to be done., the way in which it shall be done, the means employed in doing it, the time when and the place where it shall be done. It is the right of control not whether it is exercised".

Mrs Brown explained that she was the Design Team Leader at the time Miss Richardson was engaged to work for VDS and that Mr Holmes was her immediate Line Manager. The design team consisted of between 12 and 14 workers and included VDS employees. The project team moved from their original base in Manchester to its Bolton office. Miss Richardson was part of the design team that would produce a technical specification that identified the changes required to the IT system. The VDS employees performed the same type of work as Miss Richardson. We accept that Mrs Brown had experience in the implementation of the system and that she was responsible for allocating and prioritising the work for the team. She told us that VDS operated a Peer Review system for the monitoring and maintenance of standards. We do not accept that these reviews were to ensure that Miss Richardson had dealt with the system correctly, but rather for the whole team to examine how the project was progressing with a view to resolving problems.

26. During her first contract, when she worked in Bolton, she had rented accommodation, and had had to continue the payments, although VDS had terminated the first contract earlier than was expected. It is unlikely that an employee would have been left with the liability to

pay the additional rent. Mrs Brown indicated that all the individual on her team were engaged because of their professional experience and skill. Further, her own annual salary was on the region of £30,000 compared o Miss Richardson's initial pay which equated to £140,000. There has to be a sufficient degree of control exercisable, consistent with the contract of employment. We have decided that VDS did not have sufficient control.

Financial risk

26. Mr Burke suggested that Miss Richardson took no financial risk. She did not have to buy any equipment to carry out her work. The invoices were all paid on time so there was no risk of a bad debt. She had no opportunity to carry out any other work during the time she worked for VDS, so that there was no opportunity for her to make an additional profit. We do not accept that there was no financial risk. Given the amount that VDS was paying on all the contracts it would have been justified in suing Best, Best would then have sued ECR if there was negligence on the part of Miss Richardson. Clauses 3 (a) (Best) and 7.1 (a) (Spring) created an obligation to indemnify VDS. We note that consequential loss has not been excluded, so that the liability could have been substantial. If the contracts were not handled with the appropriate skill, the contracts could be terminated immediately. Clause 5 (e) (Best) and 9.3 (Spring). Miss Richardson advised us that ECR carried comprehensive insurance as the growing compensation culture increased the risk of being sued.

Opportunity to profit

27. In *Hall (H M Inspector of Taxes) v Lorimer* [1992] 1 WLR 939 (CA) Mummery J stated of somebody who is self-employed:

"He has the opportunity of profiting from being good at being a vision mixer. According to his reputation so there will be a demand for his services for which he will be able to charge accordingly. The more efficient he is at running the business of providing his services the greater his prospect of profit. "

Miss Richardson did, in fact, perform services for two other clients whilst working for VDS. These involved providing advice as to the most appropriate hardware and software required by the businesses, and the procurement, installation and set up of that equipment for them.

Personal factors

26. Miss Richardson provided the details of the contracts that ECR had had since starting in business in June 1993 referred to in paragraph 6 above. In *Hall (H M Inspector of Taxes) v Lorimer* [1992] 1 WLR 939 (CA) Mummery J stated:

> " If a skilled worker works for a number of clients throughout the year and has a business-like approach to obtaining his engagements (perhaps involving expenditure on office accommodation, office equipment, etc) this will point towards self-employment"

Mr Burke pointed out that all of the contracts named Miss Richardson as the operative. He considered that that meant that the contracts were personal to her and that this fulfilled the first of the conditions set out in *Ready Mixed.* Mr Holmes made it clear in the interview with HMRC on 8 April 2010 that the contractors were used as a budgetary measure and we are

satisfied that VDS were not concerned who did the work so long as they were suitably qualified. They appear to have been content to leave the choice of operative to Best/Spring. We cannot therefore accept that the work was personal to Miss Richardson.

27. Miss Richardson told us that she tended to take holidays when she was not working as she needed to provide a specialist service to the clients. She accepted that all the services had to be provided at VDS to tie in with their computer systems and, as the information was sensitive, VDS did not want information either taken off the site or downloaded on to her equipment at home.

In business on her own account.

28. In *Market Investigations Limited v Minister of Social Security* [1969] 2 QB Cook J said the test to be applied is;

> "Is the person, who has engaged himself to perform those services, performing them as a person in business on his own account? If the answer is Yes then the contract is a contract for services. If the answer to the question is No then the contract is a contract of services."

ECR is in business on its own account. Miss Richardson produced to the Tribunal copy business cards and company stationary. ECR operates from a dedicated business area at her home. It has company domain and website. ECR advertises its services and is a member of the PCG. It has retained reserves and invested in development and has over the years taken on fixed price work for a variety of clients.

Right of dismissal

29. By Clause 5 (e) of the Best agreement Best can terminate the contract with ECR if the services are not satisfactory. By (9.3 of the Best/ Spring) agreement Spring can terminate the contract with ECR "forthwith" for lack of performance. This is reflective of a commercial agreement and is an indicator of self-employment. Mr Burke suggested that a typical self-employment contract will come to an end on the completion of the work for which the contractor was engaged, whereas an employment contract usually contains provisions allowing one or other party to give notice of termination. A power to terminate an engagement for reason other than a serious breach of contract is indicative of a contract of employment. Miss Richardson had worked for VDS for a considerable length of time and the proposals in the contracts are at best neutral. We can not accept that terms in the contract are neutral, as VDS did terminate the first contract early, which effectively meant that Miss Richardson was no longer working.

Intention

30. Mr Burke suggested that intention is only relevant as a "tie breaker" in determining status (when indicators are evenly balanced). In the IR35 situation, it is not possible for the parties to have any intention over a hypothetical contract. Lawspeed have pointed out that in *Stoddart v Cawder Golf Club* [2001] EAT/87300 it was suggested

> " Where persons intend to create a self-employment situation and the ingredients of such can be found, such as the method of payment, potential exposure to VAT and the

lack of consent to be an employee, it is very difficult for any Tribunal to conclude that the contrary to what the parties had intended to achieve had resulted".

Clause 7 (c) (Best) and 1.2 (Spring) explicitly states that there is no intention to form an employment relationship. Mr Burke noted that clause 7.2(b) (Best/Spring) agreement with ECR provided that ECR would indemnify Best from any liability for income tax national insurance contributions and otherwise. In *Dragonfly Consultancy Limited v The Commissioners for her majesty's Revenue and Customs*[2008] EWHC 2113 (Ch) Henderson J said:

" In the majority of cases, however, such statements will be of little, if any, assistance in characterising the relationship between the parties….If the actual contractual arrangements between the parties do include statements of intention, they should in my view be taken into account, and in a suitable case there may be material which would justify the inclusion of such a statement in the hypothetical contract. Even then, however, the weight to be attached to such a hypothetical contract would in my view normally be minimal".

We consider that the contracts cannot be ignored and their intention can be consider when considering the terms of the hypothetical contract.

Mutual obligations

24. 31. The agreements indicate that no mutual obligation exists between VDS and ECR (Clause 2 (c) (Best) and 1.2 (Spring)) explicitly state that Best/Spring shall be under no obligation whatsoever to offer further work to ECR nor will ECR be under any obligation to accept any future work, if offered. Ditto 1.2 (Spring). Mr Burke suggests that under the terms of the hypothetical contract Miss Richardson would be required to provide her own work and skill in return for agreed pay. Thus the irreducible minimum of mutual obligations would be present in the hypothetical contract. We cannot accept that. As indicated earlier we believe that VDS was unconcerned as to who the contractor should be they were merely interested in obtaining a necessary skill for the shortest period of time as cheaply as possible. We do no accept that there was any mutuality of obligation.

Submissions

Mr Burke

32. We do not propose to re-iterate matters which have already been considered when reviewing the evidence, but rather to record the principle matters which Mr Burke and Mr Boddington have raised in their final submissions to the Tribunal. Mr Burke submitted that Henderson J set out the reasons for IR35 in *Dragonfly Consultancy Limited v The Commissioners for her majesty's Revenue and Customs*[2008] EWHC 2113 (Ch) in the following terms:

"The background to the IR35 legislation … is fully set out in the judgment of Robert Walker LJ in *R(Professional Contractors Group) v IRC*[2002] STC 165. In paragraph 51 of his judgment…he described the aims of both the tax and NIC provisions as being.. .. 'to ensure that individuals who ought to pay tax and NIC as employees cannot, by the

assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation' ".

The legislation requires the Tribunal to accept that the hypothetical contract that Miss Richardson is deemed to have entered into with VDS is one of employment. That, he submitted, is best achieved by 'painting a picture' [as suggested by Mummery J in *Hall (H M Inspector of Taxes) v Lorimer* [1992] 1 WLR 939 (CA)]. As a result it is necessary to give appropriate weight to each of the matters, which have been considered.

33. In that context he submitted that

- as Miss Richardson was named in the schedule to the agreements she was required to work for VDS in her personal capacity;
- she had worked for a considerable time with VDS
- and she had been paid on a monthly basis
- there was, therefore, a clear contract of employment with VDS

That proposition was further enhanced when it was realised that Miss Richardson had to work under the control of Mrs Brown in the Design Team. She was not free to come and go as she pleased and was required to work at VDS's premises. The suggestion that Best/Spring had the right to substitute another contractor for Miss Richardson was illusory. Best/Spring could only do that if VDS were dissatisfied with her performance and consented to the next contractor. In those circumstances the basis of the substitution was fettered and did not amount to a right to substitute at all. Such a right could not be incorporated in the hypothetical contract.

34. There was no prospect for her to make any further profit as she had to work full time for VDS. The agreement between Best and ECR required ECR to be responsible for paying the PAYE and NIC liabilities as would a contract of employment. In addition, Miss Richardson took no financial risks nor did she need to supply any of her own equipment to carry out the employment. In those regards, the terms of her hypothetical contract would be the same as the employees for VDS. She was, through the employment, part and parcel of the organisation and as a result the hypothetical contract would be one of employment and she would not have been engaged by VDS on a self-employed basis. The hypothetical contract incorporated the 3 prerequisites set out by MacKenna J in *Ready Mixed* and the assessment must be upheld.

Mr Boddington

35. Mr Boddington confirmed that the parties have agreed that for the purposes of this appeal there is no material difference between the test under the Tax legislation and the NIC legislation. The legislation does not assume what the nature of the contract is: it seeks to determine the type of contract the hypothetical contract would be either a contract of employment or a contract for services by reference to the 'circumstances' and '

arrangements'. This requires a hypothetical or notional contract to be inferred from those 'circumstances' and 'arrangements' as required by Regulation 6 (1) (c) of the NIC legislation and the equivalent tax legislation. He submitted that superficially it was difficult to tell the difference between the two types of contract. The work being done was similar to that carried out by the employees of VDS. It is necessary to consider the written contracts between the parties. There is no such contract between Miss Richardson and ECR. There were, however, contracts between ECR and Best/Spring and Best/Spring and VDS. The contract of 5 March 2002 between ECR and Best pre-dates the period of the assessment. The material parts of that contract should, therefore, be imported into the hypothetical contract.

36. In *Express and Echo Publications Limited v Ernest Tanton* [1999] EATRF 98/0528/3 Peter Gibson LJ held that as Mr Tanton's contract had a specific provision to the effect that he could supply a substitute driver, the contract had to be one for services. As a result the case did not pass the irreducible minimum of mutual obligations as set out in *Ready Mixed.* The right to substitute means that the contract cannot be personal to the contractor. The agreements between Best/ Spring and VDS make provision for a substitute. The reality of the case is that VDS would have requested that Best/Spring should find a replacement for Miss Richardson, if the occasion arose. The substitution clause is still affective even if the consent of VDS is required. If Mr Burke is right and the clause is fettered it is still a clause which would not appear in a contract of services, but in a contract for services.

37. ECR was engaged for the performance of a specific project. There has never been any other obligation on Best/Spring or VDS to offer work to ECR or on ECR to accept such work. What occurred was the impact of market forces typical of the freelance contracting market place. It is a situation and a relationship that is typical of self-employment and atypical of an employer/employee relationship.

38. Clause 1(g) in the agreement between ECR and Best provided that ECR 'shall be expected to exercise a degree of control as to the method of the performance of the services'. It also provided that the contractor would use reasonable endeavours to see that VDS standards and methods were complied with. Mrs Brown exercised no real control over the way Miss Richardson carried out the contract. There appears to have been no employee policies, procedures or guidance available for any of the contractors. Miss Richardson was able to decline to work for VDS after the early termination of the first contract and was always free to do the same at any time. These rights are not normally found in a contract of services.

39. There was no provision in the agreements for holiday entitlement, holiday pay, sick pay, the provision of a vehicle, or a contribution to a pension fund. Most of these provisions would appear in a contract of service. Further the case of *Lime-it Ltd v Justin (office of the Board of Inland Revenue)*[2003] STC (SCD)15 and *Tilbury Consulting Ltd v Margaret Gittins (H M Inspector of Taxes)* [2003] SPC 3020 are similar to this appeal as they dealt with contractors in the computer industry and found that the contracts were contracts for services. In the circumstances the assessment should be dismissed and the appeal allowed

The decision

40. We have considered the facts and the law and have decided that Miss Richardson was employed under a contract for services. Miss Richardson decided to become self employed when she was made redundant and in 1993 set up ECR. We consider that given the level of responsibility she has taken over the years that it was prudent of her to operate under the

protection of a limited company. We accept that that in itself would not prevent the hypothetical contract being a contract of services. We have however considered the matter in the round and concluded that the hypothetical contract would be one for services for the following reasons:

a. Unlike many of the case we have been referred to, this case has two agencies- Best/Spring and ECR. Miss Richardson was not a party to the contract between VDS and Best/Spring. As submitted by Mr Boddington, we accept that, where the parties have entered into formal contracts, the terms of those contracts have to be imported into the hypothetical agreement between Miss Richardson and VDS.

b. The HMRC interview of 8 April 2010 clear shows that VDS used their contractors on the basis that they could obtain the best advice at the most reasonable price. VDS appear to have relied on Best/Spring to provide the contractors. It appears that it was immaterial who was appointed, so long as that person had the necessary skills. We do not accept that in reality the substitution clause was in any way fettered as suggested by Mr Burke. On that basis we are satisfied that the hypothetical contract would have to have a valid substitution clause, which could only be found in a contract for services.

c. VDS were prepared to negotiate the best price at the time, which in this case, was £600 for the first contract and almost half that amount for the second contract. The hypothetical contract would have to have a clause, which gave VDS the opportunity to fix the remuneration to be paid on their terms. It would not be possible to control an employees pay in that manner and a contract of service would make no such provision.

d. Whilst we accept that Mrs Brown represented VDS with regard to the management, we do not accept that she had any real control over the way in which Miss Richardson worked. It is unusual that VDS were content to accept invoices showing the work for the week as being 37.5 hours when it is clear from Miss Richardson's internal records that the hours she worked varied from week to week. That is consistent with a contract at an agreed price, which leaves the contractor to deliver the same as best he or she might. A contract of services would specify a 37.5 hours working week and would make no provision for the employee to provide variable cover without consent.

e. The termination provisions made it clear that there was no obligation on either party to employ the other or work for the other. This was demonstrated when Miss Richardson refused initially to work for VDS, also when VDS subsequently terminated the first contract prematurely. The hypothetical contract would have to make provision for this. This is not a provision that would be found in a contract of services.

f. In 'painting the picture' it is clear to us that ECR is a genuine business and therefore not a target of the IR35 legislation. The terms of the hypothetical contract would result in a contract for services.

The findings of fact and the application of the statutory assumptions to those findings do not support the decisions appealed against. We therefore allow the appeal. We make no order for costs as none have been requested.

41. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

TRIBUNAL JUDGE
RELEASE DATE: 11 May 2011

TC01264

Appeal reference: TC/2009/12134

Income tax and NIC – IR35 legislation – worker supplied through intermediary – whether worker was an employee or a subcontractor – a subcontractor – appeal allowed

FIRST-TIER TRIBUNAL
TAX

MARLEN LTD **Appellant**

- and -

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

Tribunal: Lady Mitting (Judge)
Rayna Dean (Member)

Sitting in public in Birmingham on 10 January 2011 and 28 March 2011

Mr. Matthew Boddington and Ms. Nicola Smith of Accountax Consulting for the Appellant

Kelvin Shorte of HMRC for the Respondents

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DECISION

1. Marlen Ltd has appealed against a decision that a series of engagements under which the services of a Mr. Gary Hughes were provided to JC Bamford Excavators Limited ("JCB") were subject to what is commonly known as IR35 legislation. Determinations were made in respect of National Insurance Contributions for the years ended 5 April 2003, 5 April 2004, 5 April 2005, 5 April 2006 and 5 April 2007. Similarly determinations were also made for income tax for the same years. The notices and determinations were made on 28 January 2009.

2. We heard oral evidence from Mr. Gary Hughes and the Appellant also put in an unchallenged witness statement from a Mr. Ken Walton, the international engineering manager for JCB. The Respondents called no oral evidence.

The legislation

3. Regulation 6(1) of the Social Security Contributions (Intermediaries) Regulations 2000 provides:

> "These Regulations apply where—
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client"),
>
> (b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and
>
> (c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act [the Social Security Contributions and Benefits Act 1992] as employed in employed earner's employment by the client."

"Intermediary" is defined in Regulation 5 and it is common ground that the Appellant is an intermediary for this purpose.

4. Similar provisions applying for PAYE purposes are contained in Schedule 12 to the Finance Act 2000 and Part 2, Chapter 8 Income Tax (Earnings & Pensions) Act 2003.:

> "1—(1) This Schedule applies where—
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ("the client"),

(b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and

(c) the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client."

5. The approach to be taken by the Tribunal has been set out by His Honour Stephen Oliver QC in the IR35 case of *Tilbury Consulting Ltd v Gittins* [2004] STD (SCD) 72:

> "The legislation calls for a two stage exercise. The first is to find the facts as they existed during the period covered by the decision. The facts to be found are those that serve to identify the "arrangements" involving the intermediary and the circumstances in which those arrangements existed and the nature of the service performed by the "worker". The second is to assume that the worker was contracted to perform services to the client and to determine whether in the light of the facts as found (the worker) would be regarded as the (client's) employee."

6. The issue to be determined by the Tribunal therefore is whether, had the arrangements taken the form of a contract between Mr. Hughes and JCB, Mr. Hughes would have been regarded as employed by, ie an employee of, JCB.

The evidence

7. Marlen Ltd ("Marlen"), of which Mr. Hughes is the sole director and shareholder, was incorporated in 1989. It provides its clients through various agencies with the engineering, design and drafting services of Mr. Hughes. In 2002 Marlen registered with an agency, DDC Precisions Ltd ("DDC"), through which Mr. Hughes' services were supplied first to a company called Compact Products Ltd (a satellite of JCB) in Cheadle, Staffordshire, from April 2003 to January 2004, and then for JCB itself at its Rocester site from February 2004 to April 2007.

Contractual arrangements

8. There is no written contract between Mr. Hughes and Marlen.

9. In April 2003, JCB and DDC entered into an arrangement whereby DDC became the "sole preferred supplier to JCB for contract engineering resources". This arrangement was evidenced by a single-page agreement dated 5 March 2003 under which DDC was given two working weeks to fulfil each request from JCB. The requests from JCB were subject to a set of JCB's "Conditions of Purchase". This eight-page document was in no way personalised, referred to supplies of goods and services and contained no clauses of particular relevance to the determination of the issues before us. We were also referred to an Agreement between DDC and JCB dated 2 April 2007 (ie post-dating the periods under appeal). This Agreement sets out

very fully the terms and conditions governing the supply by DDC to JCB of contract personnel, but no evidence was given as to whether this was the first such contract or a replacement for earlier ones and we therefore cannot say whether the contractual terms set out would have been in force during the periods under appeal. We therefore take no account of the terms of this contract.

10. Each engagement which DDC procured for Mr. Hughes was offered by DDC to Mr. Hughes by way of a Purchase Order letter. This was in the form of a personal letter to Mr. Hughes from DDC beginning:

> "We have pleasure to advise the following purchase requirements referring to the above purchase order subject to the attached Terms and Conditions of Contract for Services."

The letter set out the description of the role as "engineering resource support" and the commencement and completion dates. The first engagement with Compact Products Limited was covered by four such contracts running from 31 March 2003 to 6 February 2004, the first three for three months each and the last one for four weeks. The second engagement with JCB was covered by nine contracts, again running continuously but for varying numbers of months. The evidence which we heard from Mr. Hughes, and supported by Mr. Walton in his witness statement, was that towards the end of each of the contract periods, Mr. Hughes would speak to Mr. Walton to see if he was to be offered a renewed contract. JCB was under no obligation to offer an extension or a further contract but given the volume of the work, a contract was on each occasion offered and accepted. Mr. Hughes would inform DDC who would then liaise with JCB and Mr. Hughes to generate the relevant paperwork. Mr. Walton stressed that Mr. Hughes would not expect further work from JCB automatically, which is why he continued to ask for work. Mr. Walton describes speaking to the contractors about a month before their project is to end to see if the contractor had anything else lined up or if they were clear for, say, another six months. He stressed that any arrangement had to be agreed with DDC.

11. The final contract with Compact Products Limited commenced on 5 January 2004 and was due to end on 5 February 2004. However, Mr. Hughes was given notice under that contract on Monday 20 January that his final working day and last paid day of work was to be Friday 25 January. The early termination was said to be as a result of a budget deficit at Compact Products. Mr. Hughes was then out of work for two weeks before being offered his first contract with JCB. Mr. Hughes terminated the engagement with JCB by serving one week's notice to take up a contract on higher pay with Rolls Royce.

12. We were referred to two written contracts between Marlen and DDC dated 6 – 8 February 2004 and 28 March 2004 respectively. The terms which are relevant to this case were in each version identical. These documents were headed "Terms and Conditions of Contract for Services" and were the terms and conditions referred to in the engagement letters. The relevant terms and conditions included the following:

- Marlen was obliged to complete the services provided within any agreed timescale and was to devote such time as might be necessary for the proper performance of the services.

- Marlen was obliged to perform the services with reasonable care and skill - rectification of unsatisfactory work being at Marlen's cost.

- Marlen was to provide DDC with progress reports.

- Marlen was to ensure that its personnel observed health and safety regulations at the premises where the services were being carried out.

- In case of illness or injury to Marlen personnel, Marlen was to report the matter to DDC. Marlen was obliged to provide a suitably qualified replacement, incurring any additional training costs.

- If DDC or the client considered any of Marlen's personnel unsuitable, there was provision for either an agreed replacement or termination of the contract.

- DDC undertook to make all reasonable efforts to arrange access to the client's premises and to make available information necessary for Marlen to carry out the services.

- The services were to be carried out at a location agreed between DDC and Marlen.

- DDC was to pay Marlen monthly.

- DDC was not obliged to offer future contracts to Marlen and Marlen was under no obligation to accept future contracts offered by DDC.

- Marlen was entitled to enter into contracts with other parties, other than the client provided by DDC.

- Nothing in the contract was to make Marlen and DDC partners or to make Marlen personnel employees of DDC.

- Marlen and its personnel were excluded from any right against DDC or the client in respect of employment protection legislation and benefits etc.

- The contract could be terminated by one week's notice.

- Marlen was obliged to carry its own public liability and professional indemnity insurance.

- There were the usual provisions about indemnity and intellectual property rights.

13. The documentation referred to above therefore sets out the contractual arrangements. The practical arrangements of Mr. Hughes' role and the circumstances of his engagement, we gleaned from the following :

1. Mr. Hughes' oral evidence
2. Mr. Hughes' witness statement
3. The unchallenged witness statement of Mr. Walton
4. The notes of an interview between Mr. Forster of HMRC and Mr. Walton dated 20 June 2008, annotated and agreed by Mr Walton
5. A written response dated 19 October 2007 from Mr. Hughes to HMRC answering various questions raised of him
6. A written response from Mr. Walton dated 21 May 2007 to HMRC answering various questions raised of him

We do not refer in detail to all of these documents but extract the relevant information and note the odd points of contradiction.

The nature of Mr. Hughes' work

14. The purchase orders from DDC to Mr. Hughes referred to the provision of engineering resource support, further defined as mechanical design engineering expertise or checking expertise. Mr. Walton said that Mr. Hughes would have been engaged for a specific contract. This accorded with Mr. Hughes' evidence that he would normally at any one time have been working on one particular project, for example the development of a machine to be marketed in Brazil which required an engine to be fitted, the parts of which had to be 60% locally sourced in Brazil. Mr. Hughes could however be asked by JCB management to drop whatever he was doing and attend to another job if an emergency arose which required attention or which requires a skill which he was thought to possess. In the main Mr. Hughes worked in the Development Department but agreed on occasion to work on projects within the Production Department. The evidence of Mr. Walton (paragraph 21, witness statement) and Mr. Hughes' oral evidence was that JCB used its contractors for two purposes. One was to provide a skill or an aptitude which the employees did not necessarily possess, or secondly to "smooth out overloads where resource requirements exceeded availability". This accorded very much with Mr. Hughes' oral evidence that he personally was not brought in to apply a specific skill or expertise which JCB did not already have in house. His evidence was that the employed senior design engineers would all have an equivalent degree of skill and expertise to his own, but his recruitment arose out of a shortage of such skilled manpower on specific projects.

Substitution

15. The evidence as to substitution was confused. The contract between Marlen and DDC clearly provides (paragraph 4.11) that the contractor (Mr. Hughes) is obliged to provide a suitably qualified replacement in the event that he is prevented by illness or injury from performing his services. Mr. Hughes, in his witness statement and in his oral evidence, confirmed this, saying that he had the right of substitution; where he acquired the substitute from was up to him, and if he could not find someone suitable he would then have approached DDC. Mr. Hughes would have paid the substitute direct. It is equally clear and indeed undisputed that Mr. Hughes never did appoint a substitute. There is in fact no evidence that Mr. Hughes was ever off through illness or injury or for a sufficient period for the need for a substitute ever to arise. Mr. Hughes was asked by Mrs. Dean if he had considered appointing a substitute when he terminated his contract, to which he replied that he had not as he then considered that the contract and all his obligations under it were at an end, the contract having been to provide Gary Hughes.

16. Mr. Walton's evidence is somewhat at variance with this arrangement. At paragraph 23 of his witness statement he sets out that JCB would give DDC its requirements. He would not have accepted a substitute from Mr. Hughes, but that if a situation had arisen where Mr. Hughes has been unable to provide the services then he, Mr. Walton, would have contacted DDC to provide someone else with the same skill set. Mr. Walton saw his contract as being with DDC to provide someone suitable to do the job. Further, in his interview with HMRC, Mr. Walton was asked if Mr. Hughes had been unable to attend personally whether he was obliged to offer a substitute. Mr. Walton replied "definitely not" and that no substitute had been provided in practice. He stated that Mr. Hughes had never offered a substitute and had he done so one would not have been accepted. He did however go on to say that if Mr. Hughes had been absent for a month or more, then Mr. Walton would have gone back to DDC for a replacement contractor. To be noted here is that when Mr. Walton was asked to sign the interview note, Mr. Walton added in the following manuscript note which we set out in full:

> "On this particular issue it may have more to do with Mr. Hughes' contract with DDC which I have not seen. Our arrangement is with DDC and they get the personnel and recommend candidates that they feel are suitable for JCB's requirements. If there is a long term absence then this would be a matter between DDC and Mr. Hughes to find a replacement."

17. Without the benefit of hearing and probing this in more depth with Mr. Walton, we take the view that Mr. Walton's note in fact probably solves the contradiction. As far as JCB was concerned, its arrangement was with DDC, to whom they would look to fulfil its needs. If JCB felt that the need for a substitute had arisen it would be to DDC whom they would go. However, as between DDC and Mr. Hughes, Mr. Hughes had taken on the contractual responsibility for finding and funding a replacement for himself. There is no evidence and no suggestion is made that Mr. Hughes was ever absent from work for long enough to justify the recruitment of a substitute. Again it should be noted that in paragraph 23 of his witness statement, Mr. Walton states that he never expected Mr. Hughes "to give his personal service to carry out the job". JCB would give DDC its requirements and would expect DDC to match them.

Mr. Hughes' hours of work and working arrangements

18. This is another area where there is an apparent conflict of evidence between what is set out on paper and what appears to have happened in practice. In Mr. Walton's written response of 21 May 2007, the question is asked "whether or not the hours of starting and finishing were fixed, and if so the daily times". Mr. Walton's response is that there were fixed hours Monday to Thursday, 8:30am to 5:00pm and on Friday 8:30am to 4:00pm with 30 minutes' lunch each day. The next question was whether the number of hours worked each day or days per week and whether or not the worker was free to vary them without permission. Mr. Walton's response was that "hours worked in accordance with above. Permission given to work the fixed shutdown". In his interview with HMRC, Mr. Walton refers to the working hours as being set in stone but does also refer to them as the "minimum hours required to fit in with employee's work times".

19. This in fact is in contradiction not only with Mr. Hughes' own evidence but also with Mr. Walton's description of what happened in practice. Mr. Hughes' evidence was that the employed staff's core working hours were indeed 8:30am to 5:00pm and he understood that he was expected to work a basic 39 hour week, but in practice this rarely happened. Such was the volume of work Mr. Hughes would almost invariably work a greater number of hours. Equally, he never worked fixed hours but would start work earlier - at around 7:30am – and would leave later. On Fridays (72 out of 90 in his first two years with JCB) he normally left at 2:00pm. This flexibility was something that was not open to the employees. First, Mr. Hughes told us that he could work whatever hours he wished without seeking permission, although he would as a matter of courtesy tell the management. Secondly, if any employee wanted an afternoon off he would be expected to not only obtain permission but also to make up the time.

20. There is documentary support for Mr. Hughes' evidence in various JCB-generated documents which we saw. These list Mr. Hughes' working hours in any given week and we note for example that in week ending 6 June 2004 he worked 34.5 hours; week ending 5 September 2004 he worked 44 hours; week ending 12 September 2004 30.5 hours; week ending 19 September 2004 42.5 hours and week ending 26 September 2004 42.5 hours.

21. In Mr. Walton's interview with HMRC he adds an additional manuscript note at the end as follows:

> "Mr. Hughes was a conscientious worker and as stated there was plenty of work so invariably he would come in early and go later than the fixed hours to ensure the work was done. On some days he would arrive later or leave earlier."

22. In his witness statement Mr. Walton repeats that when a project began JCB would tell DDC the general hours of work "although Gary was always in before me and left after me" (paragraph 19). We find as a fact that, in practice, Mr. Hughes did not work the fixed hours laid down for employees but hours of his own choosing, and

that he did so without having to seek permission but that he did as a matter of courtesy inform Mr. Walton or his project manager. It may well be that this arrangement worked and was allowed to work because it was clear to everyone that Mr. Hughes did not take advantage of this flexibility and in any event worked in excess of the core hours. It could have been that if a contractor had been found to be under-performing he would have been reined back into the set hours, but this was not the case with Mr. Hughes.

23. Mr. Hughes told us - and this was confirmed by Mr. Walton – that there were at least a couple of occasions when the computer servers broke down and the contractors were sent home, without pay, whereas the paid staff were not sent home.

24. JCB, being a manufacturing plant, had set holidays, one week in May and three in July / August when the whole manufacturing plant closed down and the entire paid staff, with the exception of the maintenance and security staff, took their holidays. This was inflexible and all employees took their holidays within the compulsory shutdown. The only flexibility within the system was that in reward for long service employees were given, on a staged basis, one day's extra holiday as a "service day". None of this applied to Mr. Hughes. He worked throughout the time the plant was closed down and took his holidays whilst the plant was operational. He did not have to seek permission but again would tell the management as a matter of courtesy. At no time was permission ever refused to Mr. Hughes to work the hours he wished or to take the holidays he wished.

25. It was the evidence of both Mr. Hughes and Mr. Walton that the contractors worked within teams with the employees. They sat with them and there was no physical demarcation between them. Mr. Hughes was provided with a desk, a computer, a phone line and email access, his email address being given g.hughes@jcb.com. The rest of Mr. Hughes' equipment he took in himself – a calculator, micrometer, a steel rule and a measuring tape. There was a stationery cupboard which he, as a contractor, was not allowed to access. Apart from a high-visibility jacket, Mr. Hughes, unlike employees, had to provide his own clothing – fleece, safety shoes, woolly hat and a waterproof jacket.

26. The JCB computer operating system used by Mr. Hughes could only be used on site and he would not be allowed to bring his own systems into work or take any work home. Contractors were not allowed, for security reasons, to work off-site, and indeed, as Mr. Walton pointed out in his statement, the way in which Mr. Hughes' drawings were moved in the server was so complex that it was for this purely practical reason that work could only be done on site.

27. The contractors received no induction. Mr. Walton stressed that unlike employees, they were given no training. The training given to employees was lengthy, as befitted the extremely complex operating systems being used, but the contractors were expected to have all the necessary skills and knowledge to be able to operate the system without training and to be able to work, again without training, to the company and statutory legal standards. The contractors accessed the buildings, as did the employees, by simple swipe card, this being part of the site security system.

There were a number of miscellaneous benefits which the employees enjoyed but which were denied to the contractors – free canteen meals; membership of the company social club; entry into the private medical and dental scheme and access to the on site doctor and nurse; subsidised use of the gym facilities; participation in the bonus scheme. Equally the contractors received none of the usual employment benefits of holiday pay, sick pay, or membership of the pension scheme. They were not covered by the company's grievance or disciplinary procedure but equally did not participate in the appraisal scheme.

Financial arrangements

28. Mr. Hughes at the commencement of his contracts would agree with DDC an hourly rate of pay, and he was throughout paid for the hours worked, nothing more, nothing less. He had no knowledge of the financial arrangement between JCB and DDC. Mr. Hughes maintained a weekly timesheet which he had signed off by JCB management at the end of each week. There was no occasion when the accuracy of his timesheets was challenged. The timesheet would be faxed through by Mr. Hughes to DDC who would then invoice JCB in accordance with the contractual arrangements within the two companies. As far as Mr. Hughes was concerned he would, on a monthly basis, generate his own invoice for the total number of hours worked, which he would submit to DDC, who paid him on receipt. He accepted in cross-examination that other than DDC refusing to pay him, he in fact ran no financial risk.

Supervision / control

29. This was another area where there was an apparent conflict of evidence. It was common ground between Mr. Hughes and Mr. Walton that at the outset of a job, Mr. Hughes would be briefed by the project or engineering manager. They would outline exactly what was being built, what Mr. Hughes' role was to be and what was expected of him. He would then use his own knowledge and skill to design his particular part, get it manufactured and ready for testing and development. In interview with HMRC, Mr. Walton stated that a contractor "would be under the control of the project leaders… who would brief the contractor". It should be noted however that this was in response to the specific question as to how Mr. Hughes would know what work JCB wished him to undertake.

30. We see Mr. Walton's evidence as being very much in line with Mr. Hughes' oral evidence, which was that the only form of real control exercised over his work was by Mr. Walton "overseeing the project and checking on progress". The way in which Mr. Hughes carried out the work and the priority which he gave to different aspects of it were not of concern to JCB but were a matter entirely for Mr. Hughes. Mr. Hughes likened Mr. Walton's role to that of a householder monitoring the progress of an extension being built by professional builders. That householder would be interested in the progress of the extension, would be ensuring it was running to time, but would have no input into how it was being built. Mr. Walton, according to Mr. Hughes, would not in any event have been able to exercise any practical control as he would not have the necessary degree of knowledge or skill or be able to access Mr. Hughes' computer, which was subject to a personal password. We believe

it may well be useful at this stage to incorporate within this decision three paragraphs of Mr. Walton's witness statement which in effect sum up on the position as Mr. Walton saw it:

> "17. At the beginning of a typical project the principle engineer would sit down with Gary and explain what needed doing. Gary would decide how to do the job using standard industry guidelines books of the material that were available and steel standards as only certain nuts and bolts can be used on JCB machines. For example if Gary would be require to maybe design a part of a digger arm this would not be the whole arm just a small part of it. How he actually designed it was for him to decide using his own skill and knowledge.
>
> […]
>
> 32. During the period Gary was working at JCB once Gary accepted the project it was down to Gary to break down the project requirements and design the different parts. There were different parts of machines to design and each guy had a different way of working. The total machine design would be an assembly of these different pieces of work which would all come together at the end.
>
> 33. There is no standard way of working as each individual uses his / her own calculations and method of working. How Gary got to the end result was down to him. None of the contractors have been taken on to do the total machine conceptual design work."

31. The conflict in evidence in fact comes between Mr. Hughes' oral evidence and what he wrote in response to questions from HMRC. The question he was asked was the frequency with which he had to report, to which he replied "daily discussions were held to discuss the progress of the project". He went on to say that he would provide technical details of the design. However he also went on to say that he was not monitored or controlled on the services provided, merely having to apply JCB and European standards.

32. Mr. Hughes was unable to explain why he had written that there was daily reporting as there just wasn't. Subject however to this, we do not see there is a major discrepancy. It is clear from Mr. Walton and from Mr. Hughes that the work to be done was handed down by the project manager who briefed Mr. Hughes, as indeed he would have to otherwise Mr. Hughes would not have known what he was expected to do. However beyond that, it was up to Mr. Hughes to carry out the work in the way which he saw fit. This is also supported by a manuscript note which Mr. Walton made to his interview with HMRC:

> "To clarify further how the work was handed out. After a brief with the project manager or engineering manager, Mr. Hughes would be left to get on with the work. The manager would oversee the project to check what progress was being done. The way the work was done was up to Mr. Hughes as long as he worked within the agreed deadlines and health and safety guidelines."

33. It was common ground between Mr. Walton and Mr. Hughes that although Mr. Hughes was engaged initially on a particular project, he was on occasion asked to move to other jobs and he never refused, although Mr. Hughes told us that in practice he could have done had he wished to. Mr. Walton clearly believed that he had the authority to reassign Mr. Hughes to any other project within his unit, and he was indeed asked on occasion by management to help solve any unexpected problem which might arise.

Case law

34. We were referred by the parties both orally and in their opening and supplementary closing skeleton arguments to a number of cases which have been the subject of analysis in many tribunal decisions. We do not propose to repeat that analysis here but would reassure both parties that we have considered all the passages in all the cases to which we were referred, and the mere fact that we do not repeat a reference in this decision does not indicate that it has been overlooked. The widely accepted approach to determining employment status, which was adopted here by both parties, can be found in the judgment of MacKenna J. in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515:

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service, he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

35. In *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 Cooke J stated at (184-185):

> "… the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes," then the contract is a contract for services. If the answer is "no," then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

36. In *Hall v Lorimer* [1992] STC 599 Mummery J stated at (612) (in a passage approved by Nolan LJ – [1994] STC 23 at (29)):

> "In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The process involves painting a picture in each individual case. As Vinelott J said in *Walls v Sinnett (Inspector of Taxes)* [1986] STC 236 at 245: "It is, in my judgment, impossible in a field where a very large number of factors have to be weighed to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are common, what are different and what particular weight was given by another tribunal to the common facts. The facts as a whole must be looked at, and a factor which may be compelling in one case in the light of the facts of that case may not be compelling in the context of another case"".

37. The need for mutuality of obligation and of control have been referred to as "the irreducible minimum" in any contract of employment.

Submissions

38. We now set out the advocates' arguments and our own considerations and conclusions on the various elements which go towards painting the picture in this case. Again, as in our reference to case law, we should say the advocates very helpfully made lengthy oral and written submissions. These have all been carefully considered and the fact that we have not expressly included in our decision any particular submission does not mean we have overlooked it.

Mutuality of obligation

39. Although Mr. Hughes' engagement with JCB lasted from 31 March 2003 to April 2007 (less the two-week period when he was out of work following the early termination of his contract with Compact Products), the engagement was made up of a number of short-term contracts. It was submitted by Mr. Shorte and accepted by Ms. Smith that there could be mutuality within the individual contracts despite there being no long-term or ongoing mutuality. This is clearly correct as JCB were under no obligation to continue to offer Mr. Hughes a further contract every time an existing one came to an end, but this does not affect the position under each individual contract.

40. In putting forward his own submission, Mr. Shorte adopted the summary of case law set out by Judge John Clarke in J and *Littlewood v Revenue & Customs* [2009] UKSPC 00733 at paragraphs 57 to 84. Mr. Shorte contended that the JCB recruitment process involved identifying the work to be done and the suitability of the individual contractor before a contract was offered to DDC. DDC accepted the work and supplied Marlen to do it. For each period of engagement there would have been an offer of work, an agreement to do that work and an agreement to pay for it. Mr. Shorte went on to contend that the hypothetical contract would contain a requirement to provide Mr. Hughes personal service; there would be consideration paid for the provision of that service and there would be a period of notice required to terminate the contract. Consequently, Mr. Shorte submitted, the irreducible minimum of obligation was present.

41. It was Ms. Smith's contention that there was no mutuality of obligation within any of the individual contracts. She cited the fact that Mr. Hughes was sent home when the computers were down; the early termination of the contract with Compact Products and Mr. Hughes' early termination of his final contract with JCB.

42. It appears to us that Ms. Smith is correct in her view. Mr. Shorte's submission that within each contract there was "an obligation on JCB to provide work, or at least to pay for it, and on Mr. Hughes to undertake the work" is not borne out by the facts. When the computers were down the employees remained in place and were paid, whereas Mr. Hughes was sent home, crucially, and this was accepted by Mr. Walton, unpaid. Both parties terminated a contract partway through. The contract with Compact Products was terminated because of a budget deficit. Mr. Hughes terminated his own contract with JCB when a better offer came up. In sending the contractors home when the computers were down, it appears to us that JCB demonstrated that it did not consider itself to be under any obligation to provide work or pay even after an offer had been made and accepted. Both parties demonstrated by their conduct in terminating contracts midway through their belief that these contracts could be terminated at any time without consequence. That this happened is not consistent with a relationship in which mutuality of obligations is present.

Control

43. Both advocates referred to the tribunal to the words of MacKenna J in *Ready Mixed Concrete* that control in this context means the power of deciding the thing to be done, the way in which it should be done, the means to be employed in doing it, the time when and the place where it shall be done.

44. It was Mr. Shorte's submission that Mr. Hughes was under a large degree of control. Mr. Shorte saw Mr. Hughes as a resource used by JCB as they saw fit – in reality no different from an employee. He pointed to Mr. Hughes' acceptance that he brought no particular skill not already possessed by the senior employees. He reminded us of Mr. Walton's view that Mr. Hughes was under the control of the project leaders and that by his own admission Mr. Hughes told us he had to report daily. Further, Mr. Hughes had accepted that he would take instructions from the senior designers who "were very clear what they wanted". Mr. Hughes had to carry

out his work in JCB's premises, not being allowed to take it home. Mr. Shore also referred us to Mr. Walton's initial statement that Mr. Hughes had to work fixed hours and that he could be reassigned to other projects. JCB, contended Mr. Shorte, defined what was to be done, where the work was to be done and the time within which it had to be completed. His progress was at all times monitored and such was the degree of control that it could only lead to the conclusion that this was a contract of service.

45. Ms. Smith, adopting the words of MacKenna J, stressed that the control had to be substantial enough to render the worker the servant of the master, and it was her submission that control to that degree did not exist here.

46. The degree of control that is exercised has to be looked at in the context of what is being done, what is being produced. There is no absolute standard which can be universally applied. Mr. Hughes was working on but one small part of a very much larger project. As Mr. Walton pointed out – "the total machine would be an assembly of these different pieces of work which would all come together at the end". They couldn't possibly "come together" if there was not a measure of control over precisely what Mr. Hughes was producing. His work had to be coordinated and fitted into the greater whole. Every part that was being produced for any particular machine was interdependent with every other part. Equally JCB would have time limits to meet – time limits which had to be passed down to their contractors and employees alike. Every single person employed and contracted had to work together to produce a specific machine within a specified timeframe. This could only be achieved by a reasonably rigorous direction and supervision by senior management. We believe that in reality, the degree of supervision and direction exercised over what Mr. Hughes was doing would be broadly similar to that exercised over all the other contractors and senior employees simply because the nature of the project demanded it. We got the impression that the senior employed designers worked in very much the same way as Mr. Hughes – being told what needed to be done and then left to use their skill and knowledge to design it. In summary therefore, when we look at "the thing to be done" and "the way in which it shall be done" we find that management dictated what had to be done, but the way in which he did it was very much down to Mr. Hughes, but having said that we believe that this would be no different from the way in which similarly qualified senior employees worked. This similarity extends to an examination of where the work had to be done. Mr. Hughes had no latitude in this. He could not work at home but had to work on site – the only practical place to carry out such work.

47. However, as McKenna J made clear, there are other aspects to control and it is in an examination of these that a clear distinction can be drawn between employees and contractors and as a contractor Mr. Hughes was subject to markedly less control than employees. No employee had Mr. Hughes' flexibility of working hours. In practice he came and went virtually as he wished, advising management only as a matter of courtesy. No employee had the ability to take a Friday afternoon off or work through the mandatory staff holidays when the plant was closed down. No employee could take holidays when he wished. Mr. Hughes went through no induction process and was not subject to appraisals. He was not subject to the company's disciplinary or grievance procedures. He was under a contractual

obligation to rectify errors at his own expense. Examining the question of control as a whole and putting together all the individual factors which make it up, we conclude that Mr. Hughes was not subject to the degree of control which would be necessary to constitute a contract of employment. The control to which he was subject was significantly less than that exercised over employees and demonstrates a clear distinction between the two.

48. We pause here to review our findings so far. We have considered two factors – mutuality of obligation and control. These are the two factors which make up the irreducible minimum required to demonstrate a contract of employment. Whilst we have found some evidence of control, that which does exist falls short of that which is required in the terms of the test propounded by MacKenna J. The picture in relation to mutuality is even clearer. It is our conclusion that there is no mutuality of obligation and the degree of control which would have been needed to establish a contract of employment just did not exist. The appeal therefore should succeed on this basis, but for the sake of completeness we go on to examine the remaining aspects of Mr. Hughes' working activities, thus enabling us at the conclusion to stand back and take an overview of the entire relationship.

Personal service / substitution

49. It was Mr. Shorte's submission that if there was no requirement for personal service there could not be a contract of service. He further submitted that in this case there was such a requirement. Ms Smith on the other hand submitted the evidence of the relationship between JCB and Mr. Hughes did not so demonstrate. In her view, JCB would have been satisfied with any qualified and skilled resource which DDC could provide to them.

50. As we have already indicated in paragraphs 15 to 17, the evidence on this point is not totally clear. Had the issue arisen in practice, it would have been a relatively straightforward matter of establishing what had taken place, but we do not have that advantage. The best and most objective evidence we have are the contracts and Mr. Walton's statements and these come together in paragraph 23 of Mr. Walton's statement, which we have summarised in paragraph 16 of this decision.

51. On balance it would seem to us that Mr. Hughes' personal services were not required. JCB wanted a job doing and they wanted it done by a skilled and properly qualified and competent designer. If it was not Mr. Hughes, no doubt DDC could have provided another. However, so ambiguous is the evidence and so untested the proposition that we do not feel this is a factor to which we can attribute much if any weight.

Financial risk

52. Mr. Shorte is correct in his assertion that Mr. Hughes has had no capital at risk, but he is not correct when he said that there was no possibility of Mr. Hughes making a loss on the contract. On the contrary, as was demonstrated in the contract with Compact Products, Mr. Hughes did carry a financial risk – the risk of termination

without compensation. Equally, Mr. Hughes, as we have seen, was sent home unpaid when the computers crashed. In both these instances, Mr. Hughes lost income and it was a risk which he bore and accepted as a contractor but would not have been borne by an employee. The risk, we accept, was not great in financial terms, but it did go beyond the risk of mere late payment of invoices which Mr. Shorte submitted was the only risk which Mr. Hughes carried.

53. There was also the contractual obligation on Mr. Hughes to put right at his own expense any defective workmanship. This was not a risk borne by employees.

54. Mr. Shorte submitted that the opposite side of financial risk was the opportunity to profit – the reason why a businessman will risk his capital. It was Mr. Shorte's contention that Mr. Hughes had no scope for increasing his profits and, as with employees, he was effectively on a fixed rate of pay. There is some strength in this argument. Certainly as Ms. Smith argued, it was open for Mr. Hughes to negotiate with DDC a higher hourly rate, but similarly presumably a senior employee of JCB could try and negotiate a better rate of remuneration for himself.

55. Looking overall at financial risk, there is evidence that Mr. Hughes carried some financial risk, albeit not great and this would if anything point towards a contract of services rather than employment.

The provision of equipment

56. Again this is a factor which could be consistent with either a contract of services or employment. JCB provided Mr. Hughes with his computer and software, but he provided his own calculator, steel rule and micrometer. Additionally Mr. Hughes had no access to the stationery cupboard, which was the preserve of the employees. We see this factor as effectively neutral, not giving any strong indicator either way.

Part and parcel

57. This is another of those aspects of the relationship where there is evidence which could support the existence of either a contract of service or a contract of services. As Mr. Shorte pointed out, Mr. Hughes was clearly integrated to a degree into the organisation. He was provided with a desk, not having to hot-desk, and worked alongside employees with whom, he accepted, he was working as part of a team. On the other hand he received none of the employee benefits to which we have referred in paragraph 27. True, he had an email address which on the face of it indicated that he was a part of JCB, but he signed off his emails describing himself as a "contractor".

58. There is clearly evidence that could be consistent with either a contract of employment or a contract of services. We treat this factor as neutral, not giving any strong indicator in either direction.

Intention of the parties

59. It was accepted by both advocates that the intention of both parties would have been to avoid employment and create self-employment. Equally it was accepted that there would not be an issue of actual intention because the contract is a fiction. The position is that in a borderline case intention can be critical, but we do not believe this to be such a case.

Summary

60. We have already summarised in paragraph 48 our views on the two principal issues of mutual obligation and control. In considering the remaining features we have also set out our views on each and what to us they revealed of the relationship between Mr. Hughes and JCB. In taking our overview, we make two preliminary points. First it is clear that Mr. Hughes was a member of a team and the team consisted of both employees and contractors. We do not believe this to be of any significance because not every member of a team has to have the same employment status. A team will be made up of a number of individuals who may bring identical skills or may bring different skills. They may all perform a similar role or their roles may be varied, and it does not follow that merely because they are part of a team their employment status has to be identical. It is not therefore indicative that Mr. Hughes had to be an employee merely because he was working in a team with employees. Secondly, Mr. Hughes, by his own admission, was brought in as a resource, in effect to make up numbers. He did not bring in a specific skill that the senior designers did not themselves have. They all possessed similar skills to Mr. Hughes but there were not enough of them, and therefore Mr. Hughes was brought in. We do not see that this is a relevant distinction to make. It does not matter whether Mr. Hughes is bringing in a skill which no employee already possesses or whether he is being brought in because JCB just did not have enough employees possessing the skill. What matter is the terms upon which he was taken on, and that is where we come back to the analysis of the working relationship.

61. In taking an overview of the relationship, feature by feature, a number of aspects are in effect neutral in that they don't give a particular indicator either way but could be consistent with either a contract of service or a contract of services. We would include within this category, for example, the monitoring of what Mr. Hughes was to be doing, where he was to be doing it, the provision of equipment and the fact that he worked as an integral part of a mixed team of employees and contractors. There were other aspects which gave a small but reasonably insignificant steer towards it being a contract of services, and we would include within this category the degree of financial risk. We did not find one single aspect which was consistent only with a contract of employment. On the contrary however we did find certain aspects which in our view were compelling indicators that our hypothetical contract would have been one of services. We would include here the fact that both JCB and Mr. Hughes treated the contracts as being capable of being terminated mid-way through with little notice and no payment in lieu; the flexibility which Mr. Hughes was allowed in his working hours and perhaps most importantly of all the fact that JCB, when the computers were down, merely sent Mr. Hughes home unpaid. This latter feature is one which we believe is only consistent with a contract of services, as witness the fact that none of the employees were similarly sent home.

62. For the reasons given above, the appeal is allowed in full.

This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

LADY MITTING
JUDGE

Release Date: 24 June 2011

TC01306

Appeal number TC/2009/15647

NATIONAL INSURANCE CONTRIBUTIONS – INCOME TAX (PAYE) – worker supplied through intermediaries – "IR 35" – whether worker would be employee if there were a contract between the worker and the client – no –Regulation 6, Social Security Contributions (Intermediaries) Regulations 2000 – s 48 Income Tax (Earnings and Pensions) Act 2003 – appeal allowed

FIRST-TIER TRIBUNAL

TAX

PRIMARY PATH LTD **Appellant**

- and -

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

TRIBUNAL: EDWARD SADLER (TRIBUNAL JUDGE)
NIGEL COLLARD

Sitting in public at 45 Bedford Square, London WC1 on 12 April 2011

Matthew Boddington, of Accountax Consulting, for the Appellant

David Lewis, of Her Majesty's Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This is an appeal by Primary Path Ltd ("the Appellant") in relation to what is commonly referred to as the IR 35 legislation. That legislation has effect so that a company which makes available to its client the services of an individual (usually the controlling shareholder of the company) can be liable both to pay National Insurance contributions and to a charge under the Pay As You Earn regulations in relation to earnings attributed to the individual in question if the circumstances of the arrangements are such that the individual would have been an employee of the client (rather than a self-employed independent contractor) had the client engaged the services of the individual directly.

2. As detailed below, the Appellant provided the services of Mr Philip Winfield ("Mr Winfield") to the Appellant's client, GlaxoSmithKline plc ("GSK") (through the services of agency companies) on two occasions during the period 4 June 2001 to 14 March 2003. The Commissioners for Her Majesty's Revenue and Customs ("the Commissioners") took the view that the circumstances of those arrangements were such that, had they taken the form of a contract between Mr Winfield and GSK, Mr Winfield would have been regarded as an employee of GSK. Accordingly, the Commissioners:

(1) Issued a Notice of Decision dated 5 October 2007 addressed to the Appellant pursuant to section 8 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 and Regulation 6(4) of the Social Security Contributions (Intermediaries) Regulations 2000 for the period 6 April 2001 to 5 August 2002 treating the Appellant as liable to pay primary and secondary Class 1 National Insurance contributions in respect of Mr Winfield's attributable earnings from the arrangements (rendering the Appellant liable to a net contribution, after credit for contributions paid, of £9,676.89); and

(2) Issued two Notices of Determination, each dated 5 October 2007, under Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 for the tax years 2001/2002 and 2002/2003 requiring the Appellant to pay in total £15,420.84 in relation to the attributable earnings of Mr Winfield from the arrangements with GSK.

3. The Appellant appealed against both the Notice of Decision and the two Notices of Determination on 24 October 2007.

4. At the hearing before us the Appellant agreed that if its appeal were decided in favour of the Commissioners, then the Commissioners were entitled to require further National Insurance contributions, for the period up to 14 March 2003, which is the date on which the arrangements between the Appellant and GSK were terminated. Accordingly, we were asked to give our decision in principle as to liability, leaving it to the parties to agree the final amounts due should we dismiss the Appellant's appeal.

5. The issue we have to decide is whether, had Mr Winfield been engaged directly by GSK (rather than providing his services under the arrangements actually entered into), he would have been regarded as an employee of GSK or as an independent contractor providing his services. In our judgment, and for the reasons given below, had there been such an engagement, the nature of that engagement would have been that of an independent and self-employed contractor providing services to a contractor, and not that of an employee providing services to an employer under an employment contract. Therefore the special provisions (that is, the IR 35 legislation) relating to workers supplied through intermediaries are not applicable in this case. We therefore allow the Appellant's appeal against the Notice of Decision and the two Notices of Determination referred to above.

The relevant legislation

6. The relevant provisions, as they relate to National Insurance contributions, are found in Regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000 (SI 2000 No. 727), and are as follows:

> *(1) These Regulations apply where –*
>
> *(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),*
>
> *(b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and*
>
> *(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client.*
>
> *(2) Paragraph (1)(b) has effect irrespective of whether or not –*
>
> *(a) there exists a contract between the client and the worker, or*
>
> *(b) the worker is the holder of an office with the client.*
>
> *(3) Where these Regulations apply –*
>
> *(a) the worker is treated, for the purposes of Parts I to V of the Contributions and Benefits Act, and in relation to the amount deriving from relevant payments and relevant benefits that is calculated in accordance with regulation 7 ("the worker's attributable earnings"), as employed in employed earner's employment by the intermediary, and*
>
> *(b) the intermediary, whether or not he fulfils the conditions prescribed under section 1(6)(a) of the Contributions and Benefits Act for secondary contributors, is treated for those purposes as the secondary contributor in respect of the worker's attributable earnings,*
>
> *and Parts I to V of that Act have effect accordingly.*

(4) Any issue whether the circumstances are such as are mentioned in paragraph (1)(c) is an issue relating to contributions that is prescribed for the purposes of section 8(1)(m) of the Social Security Contributions (Transfer of Functions, etc) Act 1999 (decision by officer of the Board).

7. Regulation 7 of the Social Security Contributions (Intermediaries) Regulations 2000 sets out the way in which the amount of "the worker's attributable earnings" for any tax year is calculated. The calculation is a complex, nine-step, exercise. In this case the figures are not in dispute, and so we need not consider these provisions further.

8. In relation to the collection of income tax under the PAYE regulations, the charge to income tax is now found in Part 2 of Chapter 8 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") (for the periods covered by this appeal the legislation was to be found in Schedule 12 to the Finance Act 2000, but nothing turns on that, so the parties were content to refer to the current form of the legislation). Section 49 ITEPA 2003 sets out the situation in which the income tax charge arises, and, so far as relevant to this case, is as follows:

(1) This Chapter applies where –

(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),

(b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and

(c) the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client.

(2) ...

(3) ...

(4) The circumstances referred to in subsection (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided.

(5) ... .

9. Section 50 ITEPA 2003 treats the worker whose services are provided in this way as receiving earnings from an employment in respect of any payment or benefit he receives from the intermediary (other than a payment or benefit that is otherwise employment income), and the amount of such earnings is calculated under the provisions of sections 54 and 55 ITEPA 2003, in a complex eight-step process. Section 56 ITEPA 2003 applies the general taxing provisions (and in particular the PAYE provisions) in relation to the amounts treated as earnings from an employment, so that the intermediary is treated as the employer of the worker, and hence is brought within the PAYE provisions in respect of the deemed earnings of the worker. Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 entitles the

Commissioners to determine, to the best of their judgment, the amount of any income tax which an employer has failed to pay to the Commissioners under those Regulations.

10. There is no dispute between the parties as to the construction of these various provisions. Nor is there any dispute as to the arrangements under which Mr Winfield ("the worker") performed services for GSK ("the client") under a contract with the Appellant ("the intermediary") – the point of difference between them is whether Mr Winfield would have been an employee of GSK had he been engaged directly by GSK. In arguing their respective cases the parties therefore referred to the extensive case law (in tax, employment law, and other jurisprudence) on the distinction between an employment contract and a contract for the services of an independent contractor.

11. One final point to note in relation to the legislation is the difference in the wording between the two hypothetical contracts predicated by, respectively, the NIC legislation and the income tax legislation. In the case of the NIC legislation the hypothetical contract is formulated by reference only to the arrangements entered into between worker, intermediary and client: in the case of the income tax legislation the hypothetical contract is not so strictly constrained – it is the contract which the client and worker would have entered into had they contracted directly for the services provided, having regard to the circumstances including the terms of the contracts comprising the arrangements under which the worker's services were made available to the client (see the case of *Dragonfly Consultancy Ltd v HMRC Commissioners* SpC 655 at paras. 32 to 34 and that case on appeal to the High Court, *Dragonfly Consultancy Ltd v HMRC Commissioners* STC 3030 at paras. 14 to 19). As is noted in the decision of Henderson J in the decision in that case in the High Court, in the great majority of cases an analysis of the two different hypothetical contracts to determine whether or not they are contracts of employment will lead to the same conclusion. In *Usetech Ltd v Young (HM Inspector of Taxes)* 2004 TC 811 Park J noted that the respective wordings of the provisions relating to National Insurance contributions and to income tax are not identical, but that both provisions have an identical meaning in that the hypothetical contract must be constructed from a consideration of all the circumstances – not simply by reference only to the terms of the actual contracts entered into by the various parties.

The evidence

12. We had in evidence before us three bundles of documents comprising correspondence between the Commissioners and the Appellant and its representatives; notes of meetings between the Commissioners and GSK and correspondence between those parties; contracts between agency companies and the Appellant for the provision of the services of Mr Winfield to GSK; contracts between GSK and the agency companies for the supply by the agency companies of the services of a consultant; time sheets completed by the Appellant in respect of the services of Mr Winfield supplied to GSK; and invoices rendered by the agency companies to GSK in respect of the services of Mr Winfield.

13. Mr Winfield gave evidence at the hearing for the Appellant. Mr Winfield had prepared a witness statement, and he was cross-examined by Mr Lewis, who represented the Commissioners at the hearing. For the Commissioners Mr Matthew Lamming gave evidence at the hearing. Mr Lamming has worked for GSK as an IT/business consultant for twenty years and for the period from April 2001 to August 2002 he was the project manager responsible for a team of ten workers engaged on a particular project for GSK. That team was a mix of employees of GSK and independent contractors engaged through agencies. Mr Winfield was engaged as a member of that team. Mr Lamming had prepared a witness statement, and he was cross-examined by Mr Boddington, who represented the Appellant at the hearing.

The findings of fact

14. There was no dispute between the parties as to the primary facts in this case. Our findings of the facts are set out in the following paragraphs 14 to 37.

15. The Appellant was incorporated in May 2000 and began trading in October 2000. The Appellant's business is the provision of services in the field of database software development, and in particular the development of software for the Oracle database. The Appellant's business address is Mr Winfield's home address, and the Appellant has an office with the usual office and business facilities and equipment at that address.

16. The Appellant's sole shareholder and director is Mr Philip Winfield. Mr Winfield is not an employee of the Appellant and has no contract with the Appellant for the supply of his services. For the periods relevant to this appeal the Appellant's business services were provided solely through the services of Mr Winfield. Mr Winfield's expertise is in the design and development of database software, and in particular interface software, that is, software which enables two or more different database systems to work together. He has a particular specialisation in database software in relation to medical, pharmaceutical and healthcare sectors.

17. In the period from 16 October 2000 to 1 June 2001 the Appellant entered into a sequence of contracts with different contract agencies for the supply of services to British Telecom. Thereafter the Appellant entered into the following contracts for the period from 4 June 2001 to 31 August 2004:

Contract with	End Client	Start Date	End Date
Abraxas	GSK	4 June 2001	21 December 2001
Abraxas	GSK	21 December 2001	29 March 2002
Abraxas	GSK	30 March 2002	26 April 2002
Galt Associates		1 May 2001	1 May 2003
Spring	GSK	26 November 2002	28 February 2003

Spring	GSK	3 March 2003	14 March 2003
Galt Associates		17 March 2003	29 August 2003
Galt Associates		1 August 2003	29 February 2004
Harvey Group		20 September 2003	
Galt Associates		1 March 2004	31 August 2004

18. The Appellant marketed its services through its website, through its membership of a professional body and by searching and responding to websites specialising in finding contract workers in the relevant specialist fields.

19. The first sequence of contracts to provide services to GSK (for the period from 4 June 2001 to 26 April 2002) was entered into through the agency of Abraxas plc. GSK approached Abraxas plc with details of the specification for the particular project it intended to carry out and its specifications for the contractors it required for the team for the project. GSK required the services of independent contractors to add particular skills to its existing employee team and to give flexibility in staffing the project – independent contractors were hired usually for the short-term and for a particular project, that is, for situations where GSK did not require the continuing services of an employee. Abraxas plc put forward candidates it thought met the specification, who would then be interviewed by GSK. Following interview GSK selected the candidates acceptable to it and the appropriate contracts were then entered into.

20. The contract between GSK and Abraxas plc is dated 1 February 2001 and is entitled "IT Agency Staff Agreement". It recites that GSK requires from time to time expert help in the performance and completion of various IT projects and that Abraxas plc has agreed to supply contract IT staff with the required knowledge and expertise. The principal provisions of the contract relevant to this appeal include the following:

(1) GSK engages Abraxas plc to provide Consultants to carry out the specified project. For these purposes "Consultants" are independent computer or other consultants who may be either employees or sub-contractors of Abraxas plc appointed for the purposes of the agreement. Abraxas plc agrees to provide a list of potential Consultants who meet the specification drawn up by GSK, and GSK then selects the Consultants it requires for the project. The selected individual Consultants are then identified in a schedule to be appended to the contract. GSK can reject a Consultant at any time, in which case Abraxas plc must provide a replacement;

(2) The contract has effect from 13 December 2000 and continues until terminated by either party on three months' notice;

(3) GSK agrees to provide each Consultant with instructions, facilities, equipment and access to enable the Consultant to perform his obligations as per the agreed specification;

(4) GSK agrees to monitor the Consultant's performance, agree weekly timesheets provided by the Consultant as to the work he has performed, and to pay invoices submitted by Abraxas plc based on submitted timesheets and applying the hourly rate identified in the agreed specification;

(5) GSK agrees to allow the Consultant to take holiday or time off to attend training courses provided that the Consultant gives GSK ten days' notice, and that such holiday or time off does not affect the project or delay it. If it is appropriate, Abraxas plc can offer a substitute to continue with the project during the Consultant's absence;

(6) More generally, Abraxas plc may at any time offer a substitute for the Consultant, provided that such substitute meets the agreed specification and is accepted by GSK;

(7) Abraxas plc is required to ensure that each Consultant has in place adequate professional indemnity insurance to a specified minimum level of cover;

(8) GSK may require Abraxas plc to terminate the engagement of any particular Consultant;

(9) Abraxas plc is required to conclude an agreement with each individual Consultant to reflect the terms of the GSK/Abraxas plc agreement. Such agreement must include a substitution clause in a form agreed by GSK;

(10) GSK accepts that each Consultant is in business on his own account and therefore may be engaged by other parties during the currency of the agreement and may work simultaneously for other clients, but Abraxas plc is required to ensure that nothing will prevent the Consultant from working to carry out the project to the agreed specification and timetable.

21. The contract between Abraxas plc and the Appellant whereby the services of Mr Winfield were made available to GSK is undated. It covers three periods: 4 June 2001 to 21 December 2001; 22 December 2001 to 29 March 2002; and 30 March 2002 to 26 April 2002. It specifies Mr Winfield as the "Nominated Individual" and GSK as the "Client". The principal provisions of the contract relevant to this appeal include the following:

(1) The relationship between the parties is one of independent suppliers, and no partnership or employer/employee relationship is created;

(2) The Appellant agrees that the Nominated Individual will be provided to undertake the services specified in the Works Schedule (which mirrors the project specification drawn up by GSK). The Appellant "may change or replace [the Nominated Individual] provided that Abraxas plc and GSK are satisfied that the proposed replacement possesses the necessary skills and expertise to carry out" the project;

(3) The Appellant is required to invoice Abraxas plc for fees calculated using the hourly rates specified in the Works Schedule, and when submitting its invoice the Appellant is also required to provide a progress report on the project;

(4) The Works Schedule includes a "work pattern", being a standard commitment of 37.5 hours per week or such other times as may be agreed with GSK;

(5) The Appellant is entitled to undertake other assignments during the period of the contract provided that there is no conflict of interest in relation to GSK;

(6) The Appellant is required to ensure that by its actions it is an "Independent External Expert", and not an employee of GSK or Abraxas plc. The Appellant acknowledges that it has no authority to commit or bind Abraxas plc or GSK;

(7) The contract between Abraxas plc and the Appellant may be terminated by Abraxas plc on four weeks' notice, or without notice in certain specified "default" circumstances.

22. The project undertaken by GSK for which it secured the services of the Appellant through the agency of Abraxas plc was the design and build of interface software to permit the web-based synchronising and joint operation of various medical dictionary and database systems created and used by GSK and also to synchronise GSK's dictionaries with certain external industry-wide specialist dictionary and database systems. The project required close liaison between GSK and a US company, Galt Associates. GSK had no employees with specialist knowledge in this field.

23. Before the Appellant was engaged for the project Mr Winfield had discussions with GSK personnel to discuss the nature of the services required by GSK and the scope and extent of the project, Mr Winfield's skills, his experience in the relevant fields, and his availability for the project and the required visits to the US.

24. Mr Winfield brought a unique skill set to the project team. GSK required those skills specifically and only for the project in question. When the Appellant was engaged it was given a broad remit by GSK in terms of completing that part of the project for which it was responsible. It was required to work within a timeframe which was part of the overall timetable for completion of the project. It was for the Appellant to determine how to carry out and manage its part of the project, and Mr Winfield discussed matters with the project manager and reported to the wider project team at progress meetings to ensure delivery in accordance with, and consistent with, the project as a whole. The initial – and critical – part of the Appellant's work comprised the preparation by Mr Winfield of a design document setting out its plan for the design and build of the specialist interface software. That design document was prepared with little input from GSK. It required the approval of a business analyst engaged (as an independent contractor) by GSK for the purposes of the project. Throughout the project there was little involvement with GSK employees in respect of the technical aspects of the work undertaken by the Appellant, but the work was in support of the project undertaken by the team as a whole and was checked against the standards, quality requirements and conduct of the project stipulated by GSK.

25. Mr Winfield could determine his own working hours. There was an expectation (but not a contractual requirement) that he would be available during the "core hours" of the working day. Normally he worked at GSK's premises. If he chose to work at

home he could do so provided the requirements of the project did not require his presence at GSK's premises. He required a GSK laptop computer in order to connect to GSK's network, but could copy information onto the Appellant's own laptop computer in order to work on the project at his home.

26. Mr Winfield was required to make a business trip to the US for the purposes of the project. The trip was made in the company of the GSK project manager and two others from the project team. The travel, accommodation and other arrangements for the trip were made on his behalf by GSK through its central facility and were at GSK's cost.

27. Mr Winfield's holidays were notified in advance to GSK. In fixing holiday dates Mr Winfield was mindful of the requirements of the project and of the Appellant's responsibilities towards the project, and also of the need to retain the goodwill of GSK for the sake of possible future contracts. There was never an issue between GSK and the Appellant as to Mr Winfield's holiday dates.

28. The situation did not arise where either the Appellant or GSK had to consider a temporary replacement or substitute for Mr Winfield. Since Mr Winfield had specialist skills required by GSK for the project such a substitution would have been feasible (and acceptable to GSK) only if the substitute had had comparable skills. On another (later) contract undertaken by the Appellant for a different client it had proved possible to find a substitute for Mr Winfield, and on a different occasion the Appellant had provided Mr Winfield as a substitute for another contractor.

29. GSK paid for the Appellant's services on the agreed contractual terms, that is, by reference solely to the number of hours worked by Mr Winfield and the stipulated hourly rate of payment. The average number of hours worked per week was stipulated in the contract, and any additional hours of work done which would have resulted in an increase in the weekly average would have required the approval of GSK, since the project had been budgeted by reference to the stipulated hours of work.

30. GSK made monthly payments to Abraxas plc, the party with whom it contracted, and in turn Abraxas plc made monthly payments to the Appellant, against delivery of invoices (supported by timesheets of Mr Winfield's hours worked) and progress reports. The payments made by Abraxas plc were between one week and six weeks after invoices were submitted by the Appellant.

31. GSK did not make any payment in respect of holiday or sickness or other absence on the part of Mr Winfield. There was no additional payment for overtime or unsocial hours worked. Nor did GSK make any payment or other provision in respect of bonus, pension, health insurance, training or other employee benefits which it made for its employees. Mr Winfield was entitled to use the GSK canteen and staff car parking facilities. Mr Winfield was not appraised in the course of the employee appraisal programme conducted by GSK.

32. The second sequence of contracts to provide services to GSK (for the period from 26 November 2002 to 14 March 2003) was entered into through the agency of Spring IT Personnel plc ("Spring"). There is a contract referred to as the UK Master Services Agreement between GSK (in this case a group company called GlaxoSmithKline Services Unlimited) and Spring whereby Spring agrees to provide Contingent Workers to GSK. There is also a contract between Spring and the Appellant whereby the Appellant agrees to provide services to GSK (as a client of Spring) for a specific assignment, summary terms of which are set out in a scheduled Assignment Summary, which stipulates the start and end dates, the rate per hour and the number of hours per week to be worked on average, and the termination notice period.

33. The general tenor of these contractual arrangements corresponds to that of the GSK/Abraxas plc/Appellant contractual arrangements, so that it is not necessary to set out those arrangements in detail. It is worth mentioning specifically that the contract between GSK and Spring contains a provision as to the relationship of the parties which specifies that Contingent Workers are not employees or sub-contractors of GSK and that GSK has no right to control the manner, means, or method by which Spring provides services under the contract, save that GSK is entitled to direct where and when the services are to be performed. There is a corresponding provision in the Spring/Appellant contract, reserving to the Appellant the right to determine the manner, means and methods required to ensure its services are performed to GSK's satisfaction, and reserving to GSK the right to direct the Appellant as to where and when such services are to be performed.

34. The work undertaken by the Appellant for GSK under this second sequence of contracts was less specialised (and payment was at a lower hourly rate). It related to the development of interface software for synchronisation with the Oracle database system, and was the initial stage of a larger programme being undertaken within GSK for implementing new systems. This work was for a different team within GSK. Mr Winfield worked with one other contractor for the contract period on discrete tasks within the larger project, and there was limited interaction with the project co-ordinator and the rest of the GSK team as to the technical aspects of the work.

35. In the course of working on the first GSK project Mr Winfield developed a relationship with Galt Associates and the Appellant began to work for them in the design of an integration and interface system for medical dictionaries and a Galt Associates proprietary application. Some of the initial work was carried out for them on a speculative basis contemporaneously with the work for GSK on the first project and fee-paid work continued between the two GSK assignments. During the second GSK project the Appellant submitted timesheets to Galt Associates showing at least 21.5 hours of work undertaken for Galt Associates (other records of the Appellant indicated 58 hours of work undertaken for Galt Associates during this period). After the completion of the second GSK project further assignments came from Galt Associates as its customers required interface systems and the Appellant then worked extensively for Galt Associates. Mr Winfield worked from his office at his home address when working on the assignments for Galt Associates. In the course of working for them he made a substantial number of business trips to the US, making his own travel arrangements and recovering the cost from Galt Associates.

36. Also at this time the Appellant worked (in co-operation with another specialist IT contractor) on the speculative development of a management system aimed at GP surgeries – this work began in the period between the two GSK projects and continued whilst the Appellant was engaged on the second GSK project. The Appellant also carried out some work for a German company at this time.

37. Throughout this period (from before the GSK contracts and beyond) the Appellant maintained employer's liability and professional indemnity insurance cover.

The parties' submissions

The Appellant's submissions

38. For the Appellant Mr Boddington submitted that the legislation requires a hypothetical contract to be inferred from the circumstances in which the arrangements have been made (in the present case) by the Appellant for Mr Winfield to work for GSK. To determine the nature of that hypothetical contract it is necessary to look first at the actual contracts entered into (in this case the contracts between the Appellant and the agencies Abraxas plc or Spring and then the contracts between those agencies and GSK); then at what actually happened on a day to day basis in terms of the way in which Mr Winfield performed his services for GSK, looking at the evidence of both Mr Winfield and GSK; and thirdly at the broader business circumstances and general *modus operandi* of the Appellant. Once the nature of that hypothetical contract is established from those different sets of facts it can be ascertained whether, by reference to the extensive case law on the subject, it is a contract for the services of an independent contractor or a contract of employment.

39. In the present case the actual contracts between the Appellant and the agencies and the agencies and GSK as client were consistent with the services of Mr Winfield being provided to GSK as those of an independent contractor: they were for a specific task and for a specific period; they were for the provision of a specific person, but with a right to substitute another with equivalent skills; they allowed, within limits, the worker to undertake work for other clients during the contract period; they took great care to provide that the worker should not be regarded as an employee of the client.

40. As for the day to day reality of the arrangements, Mr Winfield had a great deal of autonomy as to the way he carried out his work provided it fitted in to the overall workings of the project; he was clearly regarded by the client as someone engaged for the short-term and for a specific project and in that regard different from an employee of the client; he was paid on an hourly basis for work done; he enjoyed no employee benefits beyond the use of certain on-site facilities. Again, that is all indicative of a relationship between one contractor and another.

41. The broader business circumstances and context of the Appellant are also consistent with a relationship which is that of an independent contractor: the Appellant is a small specialist consultancy which seeks work in a variety of ways and

markets, sometimes working speculatively and seeking ways to manage overlapping commitments, invoicing for work done and taking the financial risk of delay or default on the part of the contractor.

42. As to the case law, Mr Boddington referred to the "irreducible minimum" needed to create an employment contract as established in the authorities beginning with the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* 91968) 2 QB 497: the relationship between the parties must be that of mutual and personal obligation, that is, the provision of work by the employer and the doing of that work by the personal service rendered by the employee; there must be control of the worker by the employer to the extent consistent with a master and servant relationship; and all contractual provisions must be consistent with an employment contract.

43. As to the personal obligation, a right to send a substitute, which was available contractually to the Appellant, is inconsistent with the requirement for service to be a personal obligation: *Express Echo Publications v Tanton* [1999] IRLR 367; *Wright v Redrow Homes (Yorkshire) Ltd* [2004] 3 All ER 98; *Lime-IT v Commissioners of Inland Revenue* (2002 SpC). As to the mutuality of the obligation, for there to be a contract of employment there must be a continuing relationship under which the employer provides work to the employee (and continues to pay the employee if for any reason the work is not so provided) and the employee stands ready to carry out that work: *Propertycare Ltd v Gower* [2003] UKEAT 0547/03. In the present case this was not so: the Appellant was engaged to perform a specific project by a series of contracts which were renewed as the project progressed – there was no sense of the Appellant or Mr Winfield standing ready to carry out whatever tasks GSK required of them.

44. In relation to control, for a relationship to be that of employment, there must be a level of control which is more extensive than mere supervision or direction. Mr Winfield exercised considerable autonomy in how he worked, provided he fitted in with the development of the project as it proceeded. He had skills not otherwise available to GSK, and so no "employer" control could realistically be exercised over him – it was a "business to business" relationship.

45. As to the nature of the contractual provisions, that poses some difficulties where the contract under scrutiny is hypothetical. But in the Appellant's case it is clear that GSK sought to differentiate between its employees and those it wished to engage as independent contractors for the project, and the contractual documentation reflected that: GSK would not have entered into a contract of employment with Mr Winfield.

46. Looking beyond the "irreducible minimum" test of the *Ready Mixed Concrete* case, Mr Boddington referred to the test of whether the worker can be considered to be "in business on his own account": *Market Investigations Ltd v Minister of Social Scurity* [1968] 3 All ER 732, which looks at the degree of control exercised over the worker, the extent to which the worker is at financial risk, and the extent to which the worker benefits from investment in and management of his business. The Appellant was at financial risk in that it invoiced for the work done (and only for hours actually

worked) and was at risk of delay or default in payment on the part of either GSK or the intermediate agency. The Appellant managed its business by seeking out work opportunities as a specialist consultancy and running its affairs in a business manner – raising invoices, complying with its VAT obligations, managing "overlapping" contracts, undertaking speculative work, maintaining office premises at the home of Mr Winfield, maintaining appropriate insurance cover, ensuring Mr Winfield kept his skills up to date and his membership of the relevant professional bodies maintained, and keeping financial records.

47. Applying these various tests to the circumstances of the Appellant it is clear, in Mr Boddington's submission, that the hypothetical contract between Mr Winfield and GSK would be that of a self-employed freelance independent contractor, and not that of employer and employee.

The Commissioners' submissions

48. For the Commissioners, Mr Lewis largely accepted Mr Boddington's analysis of the way in which the hypothetical contract should be identified from the "circumstances" and "arrangements" comprising the actual relationships of the parties and the reality of the working relationship and conditions. He also agreed that the nature of the hypothetical contract must be analysed by reference to the tests which can be derived from the *Ready Mixed Concrete* and *Market Investigations* cases. Additionally, he referred to the case of *Hall v Lorimer* (1993) 66 TC 349, which makes it clear that the exercise is not a mechanical one of running through the items in a checklist, but of "painting a picture from the accumulation of detail", viewing the entirety of the arrangements in an informed and qualitative evaluation of the overall effect of the detail.

49. Where Mr Lewis differed from Mr Boddington was in his analysis of the evidence.

50. On the question of the extent and degree of control, the issue is whether there is a right to control, not whether in fact that control is exercised. That right of control must also be viewed in the context of the nature of the work and the worker – a skilled professional employee will not be subject to the same day-to-day control as an unskilled worker. The question is whether the "employer" has the power to decide what is to be done, the way in which it is to be done, the time when it is done and the place where it is done (see the *Ready Mixed Concrete* case and also *Dragonfly Consultancy Ltd v HMRC Commissioners* STC 3030). In the present case GSK had the right of control over what services had to be provided, and where and when those services had to be provided; work was allocated and monitored by GSK. GSK had sufficient rights of control to render the hypothetical contract one of employment.

51. As to the question of whether the Appellant could provide a substitute for Mr Winfield, Mr Lewis referred to the case of *Usetech Ltd v Young* (2004) 76 TC 811 and also to the decision of the Special Commissioner in the *Dragonfly Consultancy* case. The presence of a right to substitute in the hypothetical contract may be a pointer towards self-employment, but is not determinative of the matter. In the

Appellant's case Mr Winfield was specifically identified as the worker in the actual contractual documentation, and was hired for his specific skills. In practice he was engaged for the job and GSK, who had a veto right, would have been likely to resist any attempt by the Appellant or the agency to provide a substitute.

52. Mr Lewis referred to the concept of mutuality of obligation, referring to the cases of *Nethermere (St Neots) Ltd v Gardiner & Another* (1984) ICR 612, *Synaptek v Young* (2003) 75 TC 51, *Cornwall County Council v Prater* [2006] EWCA Civ 102, and *Dragonfly Consultancy*. He accepted that there must be an irreducible minimum of obligation on each side in order to create a contract of employment, but in his submission that went no further than an obligation on the worker to provide his work and skill and an obligation on the employer to pay for the work done. Those requirements were met in the Appellant's case.

53. As to other *indicia* as to the nature of the hypothetical contract, Mr Lewis argued that Mr Winfield was at little financial risk, and had little opportunity to increase his profit. He performed his services using equipment provided by GSK rather than his own equipment. The Appellant was paid on an hourly basis rather than by reference to a fee for the project undertaken. The termination rights in the contract were indicative of an employment arrangement (an independent contractor is usually engaged for a set period or to carry out a particular project: see *Morren v Swinton and Pendlebury Borough Council* (1965) 1 WLR 576). Mr Winfield was part of the team assembled by GSK (a mixture of employees and contracted workers) with similar working arrangements – he was effectively part and parcel of GSK's organisation: see the case of *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* 35 TC 311. Under the contractual arrangements Mr Winfield had a right to work for other contractors, but that was no more than a theoretical right, and in any event he was required to provide a minimum number of hours per week of service to GSK. Overall, there was little, if any, evidence to suggest that Mr Winfield could be regarded as a person in business on his own account: see the cases of *Market Investigations Ltd v Minister of Social Security* (1969) 2 QB 173 and *Lee Ting Sang v Chung Chi-Keung and Shun Shing Construction & Engineering Co Ltd* 2 AC 374.

54. Mr Lewis therefore submitted that the hypothetical contract between Mr Winfield and GSK which the IR 35 legislation required would, in the circumstances of the Appellant's arrangements with GSK, be one of employment, so that the disputed decisions made by the Commissioners rendering the Appellant liable to National Insurance contributions and PAYE liabilities should be upheld.

Decision and reasons for decision

55. In order to decide whether the relevant National Insurance contributions and income tax (PAYE) provisions apply to the Appellant in this case we are required to ascertain first what would be the terms of a hypothetical contract between Mr Winfield (the worker) and GSK (the client), and then to determine from the guidance in the cases whether such a contract would be a contract of employment or a contract for the supply of the services of an independent contractor.

The terms of the hypothetical contract between GSK and Mr Winfield

56. We are concerned with two sets of arrangements covering two periods of engagement: the first (through the agency of Abraxas plc) for the period from 4 June 2001 to 26 April 2002 (in itself a sequence of contracts for three contiguous periods, all those contracts being on the same terms); and the second (through the agency of Spring) for the period from 26 November 2002 to 14 March 2003 (a sequence of contracts for two contiguous periods, and again, all those contracts being on the same terms). As we have noted, the material contractual terms of the arrangements made through the Spring agency were, in their tenor, largely consistent with those made through the Abraxas plc agency, and the parties did not, in arguing their respective cases, significantly differentiate between the two. Where there are differences which we consider material to the terms of the hypothetical contract we have to construct, we identify those differences below.

57. We have noted at paragraph 11 above the discussion in recent cases as to the possible different bases for predicating the terms of the required hypothetical contract as appearing from the different language in the respective National Insurance and income tax provisions. The parties in this appeal made no issue of that point. The approach of Park J in the *Usetech Ltd* case is pragmatic. He said at paragraph 10, when comparing and contrasting the language of the respective provisions as they relate to the basis on which the hypothetical contract is to be predicated:

> "However, no-one has suggested to me, nor do I consider, that that or the other minor differences between the two statutory provisions affects this case or opens a possibility of the case being decided one way for NICs and another way for income tax and corporation tax."

He then went on to consider the terms of the hypothetical contract, in dealing with the question of whether it should include a right of substitution (which was one of the principal factors in that case) by reference to the wider circumstances including the conduct of the parties, and not simply the actual contractual terms (that is, by reference, in effect, to the approach inherent in the income tax provisions). We will follow that approach.

58. In this case, as with some others which have come before the tribunal, the exercise of constructing the hypothetical contract between the client and the worker is made more complicated by the interposition of an independent agency company between the appellant company and the client, so that in looking at the actual contractual terms governing the basis on which Mr Winfield's services were supplied to GSK in each of the contract periods it is necessary to look at the arrangements between GSK and the respective agency companies (Abraxas plc or Spring) and between those agency companies and the Appellant. In the present case the difficulties which this "two tier" situation may present are eased to an extent by the fact that there is a fair degree of consistency, or at least correspondence, of terms as between the "tiered" contracts.

59. Taking these points into account, the hypothetical contract between Mr Winfield and GSK would be on the following terms:

(1) The services of Mr Winfield are engaged for a series of fixed term contracts which may nevertheless be terminated before the expiry of the term by four weeks' notice.

We consider this to be the case because the Appellant has such arrangements in its contract with Abraxas plc, and notwithstanding that GSK can in the case of its agreement with Abraxas plc require the agency company to terminate the engagement of the worker, seemingly without notice. In the GSK/Spring agreement GSK must give thirty days' notice to terminate the engagement (Spring, in its contract with the Appellant, can terminate without notice if GSK exercises its termination right). In a "default" situation (misconduct or lack of performance) there can be summary termination.

(2) The services to be provided by Mr Winfield are specific and detailed.

In the first sequence of contracts (through the agency of Abraxas plc) the services relate to the development and testing of particular software programs and related database management and consultancy functions; in the case of the second sequence of contracts (through the agency of Spring) the nature of the services referred to in the documentation is general, but in fact Mr Winfield was engaged for the development of a specific interface software program.

(3) Mr Winfield is paid on the basis of a specified hourly rate for the number of hours actually worked: there is no payment in the case of absence for holidays, sickness or other causes. Over the contract period the average number of hours worked per week is set at 37.5, with scope to agree additional hours of work. Different hourly rates apply to the two respective sequences of contracts, to reflect the nature of the services provided and the market forces which influence fee or remuneration rates. Payment is made against invoices rendered with progress reports.

(4) Mr Winfield is not entitled to any pension or insurance benefits, benefits in kind, or bonus, share options or other incentive arrangements provided to actual employees of GSK.

(5) Mr Winfield must, in providing his services, co-operate with GSK and take account of its directions. Specifically, GSK has the right to direct Mr Winfield as to where and when and the timescale within which his services are to be performed, but Mr Winfield can at his discretion determine the manner, means and methods in or by which he performs the contracted services. On the days he works Mr Winfield is expected to be available during the "core hours" of the working day and to attend project team meetings, but otherwise he decides his working hours and whether he works in GSK's premises or at his office in his home.

(6) During his period of engagement Mr Winfield is entitled to undertake assignments for other contractors provided that there is no conflict with the interests of GSK and provided that there is no prejudice to the carrying out and completion of the GSK project.

This right is specifically provided in the arrangements for the first sequence of contracts and can be inferred in the case of the second sequence of contracts (during which Mr Winfield did in fact undertake work for other contractors).

(7) The contract is for the engagement of the services of Mr Winfield, but if Mr Winfield is not available for any reason he may propose a substitute for himself who may continue with the project during Mr Winfield's absence, provided that that substitute has comparable skills to those of Mr Winfield. GSK determines whether to accept such a substitute, depending on the appropriateness of the circumstances (including the proposed length of absence/substitution and the likely "learning curve" of any proposed substitute in terms of becoming familiar with the requirements of the project).

The arrangements for substitution in these terms are derived from the GSK/Abraxas plc contract and the Abraxas plc/Appellant contract. The second sequence of contracts (through the Spring agency) provide for a limited right of delegation under the GSK/Spring contract, and a right of replacement under the Spring/Appellant contract provided that GSK is satisfied that the proposed replacement has the necessary qualifications, skills and experience and is suitable to perform the services contracted for.

(8) There is no provision for training or other skills development for Mr Winfield other than a necessary and basic induction process. There is no provision for appraisal nor any grievance or similar employee rights procedures available to Mr Winfield.

(9) There is a requirement that Mr Winfield provides at his own cost public liability and professional indemnity insurance cover in the sum of not less than £1m (£250,000 in the case of the second sequence of contracts).

(10) The contract includes a declaration that Mr Winfield is not an employee of GSK.

The GSK/Spring contract provides that Contingent Workers shall not be employees or subcontractors of GSK, and the Spring/Appellant contract provides that the parties agree that their contract is a contract for services. There is no express provision on this matter in the GSK/Abraxas plc contract, but "Consultants" are stated to be independent consultants and GSK is expressed to have no responsibility for any payment of income tax or national insurance (with a corresponding indemnity from Abraxas plc) in relation to a Consultant. The Abraxas plc/Appellant contract contains an acknowledgement by the Appellant that the services supplied are those of an independent contractor.

The nature of the hypothetical contract: employment contract or contract for services

60. We now have to consider whether, having regard to the terms of this hypothetical contract, Mr Winfield is to be regarded as an employee of GSK or an independent contractor. In carrying out that task we note that in *Market Investigations Ltd v Minister of Social Security* it was stated that: "… the fundamental test to be applied is

this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'"

61. It is clear from the cases that although there is a range of factors or *indicia* which might usefully be taken into account in ascertaining whether a contract is one of employment or one for the provision of services by an independent contractor, there is no simple formula or process which can be applied to determine, in any particular case, which factors are relevant or the weight or significance which is to be attributed to any factors which are considered to be relevant. In *Hall v Lorimer* Mummery J expressed the nature of the process in these terms (subsequently approved by Nolan LJ when that case reached the Court of Appeal):

> "In order to decide whether a person carries on business on his own account, it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation another.
>
> The process involves painting a picture in each individual case."

62. The essential factors – the "irreducible minimum" – which must be present if an employment contract is to exist were set out in the *Ready Mixed Concrete* case by MacKenna J in terms which have since been recognised as the helpful starting point for the analysis of the true nature of contracts in this difficult area:

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

63. The first of these conditions has evolved into two distinct factors: first, that there should be what has commonly been called "mutuality of obligation"; and second, that a defining feature of an employment contract is that the employee, and he alone, is the person whose services are to be provided.

64. The question of "mutuality of obligation" has led to discussion as to whether all that is required on the part of the employing party is that it should simply pay the remuneration contracted for, or whether a defining characteristic of an employment contract is that the employer is required to provide a flow of work and to continue to pay the contracted remuneration even if at times there is no work. The Special

Commissioner in the *Dragonfly Consultancy* case provides a helpful review of the cases which deal with the employer's obligation (see paragraphs 50 to 59), and reaches this conclusion: for a contract to exist there must, of course, be mutual obligations, but that obvious requirement is met if the "employee" is obliged to provide his labour and the "employer" is obliged to make payment for it; and that "an obligation on the employer to provide work or in the absence of available work, to pay, is not a precondition for the contract being one of employment, but its presence in some form…is a touchstone or a feature one would expect to find in an employment contract and where absence would call into question the existence of such a relationship."

65. Turning to the hypothetical contract between Mr Winfield and GSK, there is an obligation for GSK to pay Mr Winfield for the work he has done in terms of payment at the agreed rate for each hour of work as invoiced. There is no obligation beyond that. It appear that there was an expectation that there would be, on average, 37.5 hours of work each week – in the Abraxas plx/Appellant contract it is expressed in these terms: "Work Pattern: the standard commitment is 37.5 hours per week or such other times as may be mutually agreed with [GSK]" – and no doubt in a substantial, well-planned, carefully budgeted and well-executed project such as that undertaken by GSK, that expectation had a sound basis. But the essence of the arrangement was that Mr Winfield was paid only for the hours he worked, and should at any time his strand of work within the overall project have suffered a hiatus for any reason, we cannot see that he had any contractual basis for demanding other work or payment whilst he waited for his work to resume. Nor is there anything to suggest that GSK had it in mind to offer work beyond the specific project for which Mr Winfield's services were engaged. This feature of his hypothetical contract we see as calling into question whether it is an employment contract – it is a feature which is more indicative of a contract for services.

66. It is convenient here to deal with a related point, which concerns the nature of the contractual remuneration. Mr Lewis made the point that hourly pay is an indication of employment in that an independent contractor customarily charges a specified fee for the carrying out of a particular task. We do not agree. For a highly-skilled specialist such as Mr Winfield we would expect an employment contract to remunerate him on a specified salary pro rated for each month. In the context of professional skills, remuneration by reference to hours worked at an hourly rate is, in the present world, a feature (although not necessarily the only feature) of the fee charging structure of professional service firms (and, for that matter, plumbers, electricians and other skilled technicians and craftsmen). Therefore, in so far as the nature of the remuneration in Mr Winfield's hypothetical contract points in any direction, it does so away from employment.

67. The second limb of MacKenna J's first condition relates to the personal nature of the "employee's" obligations. He said this by way of expansion of the point: "The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service though a limited or occasional power of delegation may not be."

68. The question of the ability of the person providing the services to supply someone in his place, and its relevance in determining the nature of the contract is reviewed in the *Usetech Ltd* case and also by the Special Commissioner in the *Dragonfly Consultancy* case. The conclusion reached in those cases is that if there is a general and unqualified right for the person providing the services to send along a substitute in his place, as in the *Express Echo Publications* case, then that is incompatible with the personal service nature of an employment contract, and determines the matter. Something less than that in terms of what the parties have agreed to by way of an ability to provide a substitute is unlikely in itself to be determinative of the question, but will nevertheless be a pointer away from an employment contract.

69. We agree with that: putting it baldly, no employment contract envisages that the employee will send along someone else in his stead to perform the duties he has been engaged to perform. Therefore any contract which has at least some recognition that the provider of the services can supply a substitute in certain circumstances must seriously be considered as being a contract other than for employment.

70. In Mr Winfield's case it is clear that his specific services were engaged by GSK in that his name, qualifications and experience were supplied to GSK by the agency company (initially, Abraxas plc and later Spring), he was interviewed by GSK, and he is named as the consultant to be provided to them. Mr Winfield had specialist skills which were required to make up the skills set put together by GSK in the team it was assembling for a particular project (this was more so for the first sequence of contracts). As matters transpired during the contract periods the question of substitution did not arise – Mr Winfield was able to fulfil the contract terms himself, and his only periods of absence (on holiday) were arranged to the satisfaction of himself and of GSK without any disruption to the project. There was some speculation on the part of both Mr Lamming of GSK and Mr Winfield as to how the question of substitution might have been dealt with had it arisen, but as mere speculation we did not find that to be helpful. Mr Winfield gave instances of other engagements he had undertaken where he had provided a substitute and where he had substituted for another contractor, which is some indication that the practice can be a feature of the business in which he works, and that therefore there is some foundation in practice for including substitution provisions in engagement contracts.

71. What is clear is that in the present case the contracts between the parties (that is, both "tiers" of contracts) contemplate the possibility of substitution. As we mention at paragraph 59(7) above, this is more specifically dealt with in the first sequence of contracts entered into through the Abraxas plc agency. Those provisions do not give the Appellant the right to substitute another consultant for Mr Winfield, but a substitute may be offered, and although GSK has the right to refuse to accept that substitute, there is a framework within which GSK is required to consider whether the circumstances are appropriate for a substitution to be made, of which a key feature is (not unexpectedly) whether the person substituted meets the specification by reference to which the original consultant was appointed. The hypothetical contract must reflect the terms of the actual contracts in this regard.

72. We do not regard a substitution clause in these terms to be determinative of the matter in the sense that it must lead us to conclude that the hypothetical contract between GSK and Mr Winfield cannot be an employment contract. But in the exercise of weighing up all the features and factors we consider that such a clause tilts the balance in that exercise away from employment.

73. MacKenna J's second condition relates to the degree of control which the "employer" has over the "employee". In amplification of this point the judge said this:

> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted."

74. The question of control – or the degree of control which points to a situation of employment – is problematic in the case of a person who is engaged for his specialist skills. The "master" himself may well not have the skills or experience to give specific direction to the "servant", and in the case of *Morren v Swinton and Pendlebury Borough Council* Lord Parker CJ said: "…clearly superintendence and control cannot be the decisive test when one is dealing with a professional man, or a man of some particular skill and experience." In such a case one must look to more general questions of the level of supervision.

75. In the present case there is little in the first sequence of contracts relating to the question of control. There is provision in the Abraxas plc/GSK contract requiring GSK to "provide the Consultant with sufficient instructions and facilities or access to facilities and equipment…to enable the Consultant to adequately perform his/her obligations under the Specification", and there is also provision that "[GSK] shall be responsible for monitoring the Consultant's performance of the Specification and for reporting any shortcomings to [Abraxas plc]." Neither of these provisions is dealing with the nature or extent of the supervision by GSK of the consultant's work.

76. In the second sequence of contracts (those made through the Spring agency) there is explicit provision (see paragraph 33 above) – GSK can direct where and when the worker's services are to be performed, but not the manner, means or method by which they are performed.

77. As to the evidence from Mr Winfield and Mr Lamming as to what actually happened (at least in the case of the first sequence of contracts), it was clear that Mr Winfield had responsibility for delivering his part of the project by applying the skills and experience for which he had been engaged, and that he was required by GSK to exercise that responsibility by carrying out his work in a way which fitted in with the requirements of the project on which the team was working – both as to timing and as to the technical compatibility of the work (see paragraph 24 above).

78. All in all we consider that there was a minimum supervision of Mr Winfield on the part of GSK – he was hired for his expertise to be part of a team for a particular project, and subject only to such supervision and direction as was necessary for and in the course of the management of the project as a whole he was left to do the work as he saw fit. The level of control or supervision exercised did not go beyond that which one would expect in the hiring of an independent contractor. Whilst we take note that the question of control should not be given too much significance in the case of a specialist worker, in so far as it is brought into the balance in this case it points away from a contract of employment.

79. MacKenna J's third condition in determining whether a contract is an employment contract is that the other terms of the contract should be consistent with its being an employment contract. In this context we refer to the following matters which the parties brought to our attention:

(1) Mr Winfield was not entitled to pension or other benefits or to participate in bonus or share incentive plans which GSK offered to its actual employees, nor was he entitled to training, the benefits of appraisal, or the sort of employee protection procedures now customarily incorporated into employment contracts. This demonstrates that GSK did not want to treat Mr Winfield in the way it treated its employees and as such it is an indication of the way in which they regarded the relationship. In itself, the absence of such benefits in the hypothetical contract does not give a particular indication as to the true nature of that contract – an employment contract is not required to include such benefits.

(2) A related point is the term in the hypothetical contract, derived from the actual contracts (see paragraph 59(10) above), that the relationship is not that of employer and employee. The issue is the true nature of the contract as seen from its terms and the way in which those terms were in fact given effect to, not what the parties considered the true nature of the contract to be. Despite the emphasis given to this point by Mr Boddington as an expression of the intention of the parties, we think that we should give only marginal weight to this point.

(3) The hypothetical contract is for a stipulated period but can be terminated, without cause, by a specified period of notice. We agree with Mr Lewis that this is a pointer towards a contract of employment, although in a contract for services, such as a retainer for a particular period, an early termination procedure may well be included in the terms to deal with the situation where for any reason the arrangement needs to be brought to an early conclusion.

(4) The hypothetical contract requires Mr Winfield to provide a specified level of public liability and professional indemnity insurance cover. We consider that this points towards a contract for services rather than an employment contract. As a factor it does not go to the heart of the issue as to the true nature of the contract, and therefore is certainly not determinative of that issue. But in an employment relationship it is generally the employer who is expected to bear the risks of such liability to third parties and to provide at its cost the insurance against such liability (although there are some professionally-qualified employees – for example in the medical field – who will provide their own insurance cover).

(5) The hypothetical contract provides that Mr Winfield may undertake assignments for other parties, subject to certain constraints which protect the interests of GSK and its need for the project to be completed to plan. This was a right which Mr Winfield exercised, especially in relation to the second sequence of contracts, when he undertook work for Galt Associates and also some speculative work for other parties when engaged to work for GSK. We return to this issue below, when considering whether or not Mr Winfield could be said to be carrying on business on his own account. For the present we observe that such a term in the contract is an indicator of the relationship being that of independent contractor, and not that of employer/employee.

80. The parties referred us to two other areas of enquiry based on case law, outside the immediate scope of the "irreducible minimum" conditions of an employment contract laid out in the *Ready Mixed Concrete* case. The first is the question of whether the worker carries the financial risk normally associated with being self-employed. The second (perhaps not entirely unrelated) is whether the worker can be regarded as carrying on business on his own account as one would expect to find if he were self-employed.

81. As to the question of financial risk, the general proposition is that a person who is self-employed carries the risks associated with running a business whereas an employee runs no risk other than that his employer will become insolvent owing him his wages or salary or that the employer will for some business reason make the employee redundant because a particular business operation has ceased or been reduced. Mr Boddington argued that the Appellant was bearing financial risk in a number of ways which would not be the case were Mr Winfield an employee of GSK: there was the risk of default by either GSK or the relevant agency company in paying the Appellant's invoices (and the fact that payment was irregular, at least as compared with a monthly salary payment); there was the risk of changes in the hourly rates (evidenced by the fact that the Appellant was able to negotiate only a reduced rate for the second sequence of contracts); there was the risk of sickness or other absence which resulted in loss of income; and there was the uncertainty as to the net return to the Appellant when it had to take account of its overhead and other costs such as insurance, keeping the skills of Mr Winfield up to date and maintaining membership of professional bodies, equipping and running the small office maintained in Mr Winfield's home, and marketing costs. Mr Lewis argued that the Appellant had invested minimal capital in the business, that in reality there was no way for the Appellant to increase its profits other than by having Mr Winfield work longer hours, that all the equipment required for Mr Winfield's work was provided by GSK, and that the risk of default in payment was very small.

82. We are of the view that the Appellant was exposed to financial risk in a manner and to an extent that Mr Winfield would not have been exposed to had he been an employee. Those risks are essentially the risks which are run by a self-employed worker. It is a definite pointer towards Mr Winfield being regarded as such in the assessment of his status which we are required to make.

83. Even more telling in that regard is the position if we apply the test as to whether the Appellant can be said to be providing services in business on its own account – if so, the case is one of a contract for services. As we have mentioned, this test was first formulated in the *Market Investigations Ltd* case. It looks not just to financial risk and the opportunity to create profit, but also to the wider business conduct of the person concerned and the context in which his activities are planned and carried out. It requires us in the present case to look beyond the immediate arrangements with GSK to the way in which the Appellant sought and obtained and conducted business.

84. The evidence of Mr Winfield is compelling in this regard:

(1) The Appellant actively sought out engagements by promoting itself through its website and by monitoring the websites of those who may have been seeking the expertise it has to offer.

(2) In the course of the first sequence of contracts with GSK the Appellant, through Mr Winfield, worked to secure business contacts with Galt Associates, a party involved in the GSK project, and carried out some work for them on a speculative basis: those contacts and that speculative work yielded a lengthy engagement for the Appellant once the GSK project was over and which continued concurrently with the second GSK project. (The extent of that concurrent work was not clear from the evidence – spreadsheets supplied by the Appellant to the Commissioners in the course of their enquiries indicated some fifty-eight hours of work for Galt Associates whilst the Appellant was engaged by GSK under the second sequence of contracts, but copy invoices related only to 21 hours of such work. In either event it was a material concurrent engagement.) That connection with Galt Associates resulted in further extensive work once the second GSK engagement was completed.

(3) In the period between the two GSK engagements, and whilst engaged by Galt Associates, the Appellant worked on speculative developments of at least two software products (in one case with another specialist computer software contractor) and some of that work continued during the period of the second GSK engagement, all with a view to maintaining or increasing a stream of fee income.

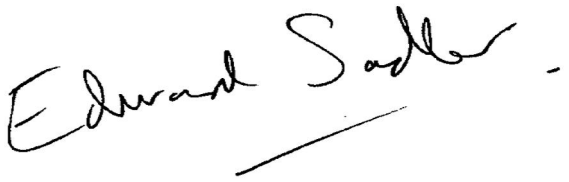
85. All this points firmly towards the conclusion that the Appellant was in business on its own account and that the services which it performed – including those it performed for GSK under the sequences of contracts which are the focus of this case – were performed in the course of that business.

86. If we stand back from the detail to view the overall picture, and make an informed, considered, qualitative appreciation of the whole as we are encouraged to do by *Hall v Lorimer*, we are clear that the picture we have of the relationship between GSK and Mr Winfield is one of an independent and self-employed contractor, and not that of employer and employee. This is the case not only by reason of the terms of the hypothetical contract we are required to construct for the purposes of the relevant legislation, where, as we have set out, the preponderance of factor or *indicia* point to this conclusion, but also in answer to the question of whether the services which were performed by the Appellant through Mr Winfield were performed as a person in business on its own account.

87. We therefore allow the Appellant's appeal.

Right to apply for permission to appeal

88. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.



EDWARD SADLER

TRIBUNAL JUDGE
RELEASE DATE: 6 July 2011

Authorities referred to in skeletons and not referred to in the decision:

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Secretary of State for Employment v McMeechan (1997) IRLR 353
Netherlane Ltd v York (Officer of the Board of Inland Revenue) (2005) STC (SCD) 305
F S Consulting Ltd v McCaul (Inspector of Taxes) (2002) SPC 305
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Massey v Crown Life Insurance Co (1978) IRLR 31
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Byrne Brothers (Farmwork) Ltd v Baird (2002) IRLR 96
Future On Line v Foulds (HM Inspector of Taxes) 76 TC 590
Montgomery v Johnson Underwood [2001] EWCA Civ 318
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Tilbury Consulting Ltd v Gittins (HM Inspector of Taxes (No 2) [2004] STC (SCD) 72
Sherburn Aero Club Ltd v HMRC Commissioners [2009] UKFTT 65
MBF Design Services Ltd v HMRC Commissioners [2011] UKFTT 35

TC01603

Income tax and National Insurance Contributions - IR35 case involving a company indirectly contracting to provide the services of an IT specialist to Allianz - change in the relationship after a period - Appeal allowed in part

FIRST-TIER TRIBUNAL **Reference no: TC/2009/15078**

TAX

JLJ SERVICES LIMITED

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: HOWARD M. NOWLAN (Tribunal Judge)
ANDREW PERRIN F.C.A.

Sitting in public at Vintry House in Bristol on 24 and 25 October 2011

Neil Awbery of Clearsky Accounting on behalf of the Appellant
David Lewis, Higher Officer of HMRC, on behalf of the Respondents

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DECISION

Introduction

1. This was a case of the type, usually referred to as an IR35 case, where the issue before us was whether Mr. John Spencer ("Mr. Spencer"), an IT specialist, would have been regarded as an employee of Allianz Cornhill Management Services Ltd ("Allianz"), had he rendered services to that company under a direct contract between himself and Allianz. As it was, he was employed by the Appellant, his own company, albeit that there was no written employment contract between himself and the Appellant; the Appellant then contracted to provide his services to Highams Recruitment Limited ("Highams"), Highams essentially being his and the Appellant's agent; whereupon finally Highams contracted to provide Mr. Spencer's services to the ultimate client, namely Allianz.

2. The tax and duty in dispute were PAYE income tax and National Insurance Contributions, both employer and employee Case I contributions. The dispute spanned from the tax year 2000/2001 to 2007/2008, and the total claimed amounts were £91,443.48 in tax, £61,268.35 in NIC, and interest of £48,048.46. It was accepted by HMRC that if the appeal was dismissed, such that the analysis was that Mr. Spencer should be regarded as always having been an employee, then tax already paid by the Appellant in Corporation Tax would be refundable, provided at least that earlier periods were still open for adjustment. Insofar as Mr. Spencer had received some salary and dividends from the Appellant, then tax already paid in respect of salary and dividends would also be deducted against the gross figures just mentioned. We were not concerned with the detailed figures, though it appeared that the net liability, for which the Appellant alone would have been directly liable was roughly £141,000. Whilst there is no direct relevance to this fact so far as this appeal and our decision are concerned, we were also told that by the time the Appellant had paid for the costs of the appeal, its retained funds would be only about £2000.

3. Our decision is that it is realistic to conclude that Mr. Spencer's notional status, either as an independent contractor or an employee of Allianz, actually changed during the period. The precise point at which the change occurred is not easy to define, but at the end of December 2003 there were various indications that the relationship did then change. Our decision is accordingly that in the early period, prior to the end of 2003, Mr. Spencer would not have been regarded as an employee, but that from the start of 2004 onwards, he would have been regarded as an employee. We will of course explain the reasoning for our conclusions for the periods on each side of that dividing line.

The evidence

4. Evidence was given before us by Mr. Spencer, and by two employees of Allianz, namely Karen Ballard and Mick Devereux, who gave evidence on behalf of the Respondents. There was no material dispute in relation to the evidence, and we will summarise the evidence in recording the facts below. We will also mention minor differences of emphasis, but nothing derogates from the fact that we were entirely satisfied that all three witnesses were describing aspects of the relationship in a broadly similar manner and all were entirely honest and trustworthy.

The law

5. The terms of the relevant legislation for income tax and NIC purposes is broadly the same. The current income tax wording, found in section 49 of the Income Tax (Earnings and Pensions) Act 2003 provides that:

> *"49(1). This Chapter applies* (i.e. meaning, in the circumstances of this case, that the Appellant would be treated as having paid employment income of a calculated amount to Mr. Spencer) *where:-*
>
> *(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services [for another person] ("the client"),*
> *(b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and*
> *(c) the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client.*
>
> ……
>
> *(4) The circumstances referred to in subsection (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided."*

6. We consider it unnecessary to quote the broadly similar NIC wording. The most material minor difference is that for NIC purposes there is not the same direction to consider the "circumstances" relevant to the notional direct relationship by *"including the terms on which the services are* [actually provided under the actual contracts]", in the manner referred to for income tax purposes by section 49(4), just quoted. Since however, neither party advanced any point in relation to any perceived difference in the wording for the different tax and duties, and since indeed section 49(4) only tells one to include the terms of the actual contracts amongst the circumstances to be taken into account in applying section 49(1)(c), and we conclude in this case that other general factors are of far more significance than the formal terms of the existing contracts, we will ignore any difference between the two forms of wording.

7. The sole question of principle for us, therefore, is whether, had Mr. Spencer performed his services for Allianz under a direct contract between himself and Allianz, he would have been treated as an employee or as an independent contractor.

The background

8. At the date of the hearing, Mr. Spencer, now 66 years of age, had been retired since 2007. He had clearly had a very long career in Information Technology ("IT"), and must have been one of the early computer specialists. We were told that from 1963 to 1991 (27 years) he had worked for STC, being made redundant in 1991. There is then some significance to the fact that he was unemployed for a 2-year period, trying but failing to gain replacement employment. In order to secure work he signed up with a firm specialising in finding placements for IT specialists, namely Highams. We understand that in 1993 and 1994, he was contracted to supply services to Highams, who made his services available first to Texas Instruments in Bedford for 14 months, and then to BAE systems for 2 months.

9. In 1994, there was again a period (of 4 months) when Mr. Spencer was out of work. It was also at this time that he formed his company, the present Appellant, with a view to the company providing his services to Highams, and Highams then on-providing the services to ultimate clients. We did not ascertain precisely why the Appellant was formed, and it may have in part been formed because Mr. Spencer might have gathered, or Highams might have suggested to him, that there would be some tax savings, and in particular NIC savings if the Appellant only paid on a modest proportion of its service fee income as salary to Mr. Spencer, paying Corporation Tax at the small companies' rate on the balance and paying out the after-tax income as dividends to Mr. Spencer. It seems, however, equally or more likely that the driver for the formation of the Appellant was an insistence by Highams that he form a company and provide his services through the company. The explanation for this suggestion is that, prior to the introduction of the IR 35 legislation, Highams would very likely have had a concern that if it continued with a direct contract with Mr. Spencer, and HMRC contended that Highams was then Mr. Spencer's employer, Highams itself would be exposed to the risk of PAYE and NIC liabilities by continuing with a direct contract with Mr. Spencer, and contending that that relationship was not one of employment. The interposition of the Appellant would insulate Highams from this risk. There was no specific evidence that this was the explanation for the formation of the Appellant, but we were certainly told that all similar work procurement agencies like Highams all insisted that their "casual" workers form a company, and that it was thus that company and not the underlying individual that contracted to supply services to the "work-placement" company. It very much sounded as if Mr. Spencer had found that he was unable to obtain full-time employment, similar to his original STC work, and unable to obtain work through agencies unless he formed the company that he did form.

10. From 1994 to 2000, Highams found work for the Appellant and Mr. Spencer with six different ultimate clients, the two shortest engagements being for 3 months, and the two longest for 18 months. There were 3-month gaps, with no available work, between the last three of those engagements.

The work for Allianz

11. After a 3-month gap without work, Highams obtained a 6-month engagement for the Appellant and Mr. Spencer with Allianz, the German insurer that had taken over Cornhill, at their Guildford offices. This engagement commenced in May

2000. Allianz were particularly keen to engage someone very quickly to undertake a project geared to installing and writing programmes for systems referred to as Unix systems. The reason for needing to engage someone quickly was because the person who had previously been doing the work was leaving, and Allianz particularly wanted the replacement to be able to attend handover sessions with the predecessor. Accordingly the Appellant and Mr. Spencer were essentially given the engagement following a telephone interview. Mr. Spencer was at the time living in Harlow, a journey round the M25 from Guildford, which was why, once he had convinced the relevant people at Allianz that his speciality was indeed everything to do with Unix systems, he was engaged without a face-to-face interview and with a view to starting the project immediately. We were certainly convinced that Mr. Spencer seemed to be a very knowledgeable expert in relation to his particular field of installing and writing programmes for Unix systems, and can well believe that he would have immediately struck those at Allianz as well able to deal with their requirements.

12. Although we were shown written contracts between the Appellant and Highams and Highams and Allianz, those contracts all commenced at a slightly later date, and nobody now had copies of the contracts that operated for the initial engagement. We were told, however, that the initial contracts were very similar to the later contracts that we were shown.

13. In relation to contractual arrangements, we should mention the following points. Firstly, Allianz entrusted all its requirements for procuring computer specialists to a firm called Omni Recruitment ("Omni"). Omni dealt with securing both employees for Allianz, and, where appropriate, contract workers as well. We were told that it was not clear whether Mr. Spencer's services were provided via a chain of contracts, namely the unwritten employment contract between Mr. Spencer and the Appellant, the contract between the Appellant and Highams, an unseen contract between Highams and Omni, and then finally one between Omni and Allianz. That actually seems wrong to us since we were shown an actual written contract between Highams and Allianz, with no reference to any interposition of Omni. We assume therefore that Omni was simply acting as Allianz' agent.

14. The wording of the two written contracts that we were shown, namely the ones between the Appellant and Highams, and between Highams and Allianz were virtually identical, and were in particular identical in relation to various of the terms that were drawn to our attention. We will deal with them below but in summary those terms were the terms relating to the Appellant having a qualified right to provide a substitute worker for Mr. Spencer, the terms in relation to "control", and the terms in relation to hours of work and termination. At present we will simply record that there seemed to be every indication that the Allianz/Highams contract was the one that initially governed the terms; it seemed that the Highams/Appellant contract had then been drafted to match and mirror the terms of the Allianz contract; and it also seemed virtually certain that the initial Allianz/Highams contract would have been a general one in use for any contract workers working through "their companies", that might be engaged by Allianz, though Omni.

15. We have already mentioned that the first engagement was for a 6-month period, and in a schedule given to us of the dates for the various contract extensions and projects within each extension period, the project required to be done in that first

period was referred to as "Upgrade systems". In the period between commencement in May 2000 and 31 December 2003, the pattern of engagements and agreed extensions was fairly similar. With the sole exception of one 10-month extension, all of the later extensions were for short periods, one for 1month, two for 2 months, three for 3 months and two for 4 months. Most but not all of those contract extensions gave an indication of the particular project to be undertaken, and the name of the manager within Allianz for whom the project was essentially being done.

16. By contrast to the position prior to the end of December 2003, the position thereafter (until the last few months before the very end of the overall engagement in 2007), was that the contract extensions were for 12-month periods, and no project descriptions were given thereafter. We were also told that at the end of December 2003, Allianz sought to engage Mr. Spencer on an indefinite basis. There was slight confusion as to whether he was actually offered employee status, and if he was he definitely said that he declined that. He was certainly offered an indefinite appointment, and whether he actually declined that or not, as we have just indicated the contract extensions were for the entire years of 2004, 2005 and 2006, and there was no mention of identified projects against those extensions.

The particular terms of the contracts, and surrounding evidence in relation to each particular term

17. We will now summarise the terms of the two contracts in relation to the points material to the dispute, and then add the evidence of the parties in relation to each.

Substitution

18. The Appellant's representative placed considerable reliance on the clauses of each contract that sought to entitle the supplier to send a substitute worker, in place of Mr. Spencer. The relevant wording of the contract between the Appellant and Highams was that:

> *"3.1.5. The services shall be performed by the Contractor. However, the Company may send a substitute of equal experience and ability to perform the Services as set out in the Schedule. In the event of a change, the Company and/or the Contractor shall submit to Highams the names of suitably qualified substitutes and shall permit the Client an opportunity to interview such proposed substitutes."*

Whilst we are not at this point giving our own view on the proper interpretation and the relevance of this clause, we should just refer to two obvious ambiguities. Firstly, it was not clear what would happen if the Appellant proposed a substitute with the requisite "experience and ability", but Highams, and indirectly under the other contract Allianz, did not approve of the offered substitute at the interview. Could Allianz reject such a substitute? Secondly the defined term "Contractor" was also somewhat curious. We accept that where we were shown letter agreements extending or rolling over one contract to the next period, Mr. Spencer was generally identified as "the Contractor". However the contract itself defined the "Contractor" as "the individual undertaking the specified services on behalf of the Company". On one interpretation, that indicated that even Mr. Spencer was not identified as the

relevant supplier. We accept that this was never even advanced in argument, and as we have said, the renewal schedules did generally identify the ultimate supplier as Mr. Spencer.

19. Mr. Spencer's evidence was that he attached some importance to this clause, in that if he was ill or unable for some period to do the work, were he able to offer a substitute, this would protect his company's continuing ability to retain its contract, and the connection to Allianz, and thus give him a better chance of resuming work.

20. Mr. Spencer admitted that the Appellant had no other employees, and certainly none that could meet the requirements for acting as a substitute. He did, however, say that during his career he had made many contacts, and that he knew of two people who did have the requisite experience to fulfil the substitute role.

21. The Respondents' witnesses did not dispute that if Mr. Spencer was unable, through illness or some other reason, to do the work, and the Appellant offered a substitute of whom they approved during interview, they would accept that substitute. They certainly indicated however that they would have a discretion in the interview process as to whether to accept the substitute. They also said that they would equally look to their normal supplier, Omni, to provide a replacement worker, and that it would take any substitute three weeks to be of any use, since the substitute would have to learn much about Allianz's existing procedures and systems. Mr. Devereux also said in evidence that he was unaware of the existence of the substitution clause. It was then pointed out to him that, in earlier interviews with HMRC, he had revealed that he had been aware of it, and had expressed some view in relation to it. We did not treat Mr. Devereux's statement in evidence that he was unaware of the clause as indicating that he was giving dishonest evidence. We rather took it to exhibit a realistic businessman's contempt for a clause that he probably found irrelevant, a view somewhat in line with the one that we will reach in explaining our decision below.

Control

22. Two clauses of the Appellant's contract with Highams related to "rights of control", though their emphasis was principally on regulations and health and safety matters. They read as follows:

> *"3.1.6. while on the Client site, to comply with all lawful and reasonable directions of the Client with regard to health and safety issues and rules pertaining to the management of the building and will conform to the Client's normal codes of staff and security practice;*
>
> *3,1,7. the Services shall be performed in compliance with all applicable laws, enactments, orders, regulations and other similar instruments (including but not limited to applicable health and safety legislation);"*

23. The general evidence in relation to Allianz's right of control over Mr. Spencer was very much as one would obviously expect in the relevant circumstances. In other words, Allianz would decide on the next project to which Mr. Spencer would be assigned, and there would then be discussion as to how long that project would be

likely to take, and what further support from Allianz's employees Mr. Spencer would need in order to complete the project. Since it was manifest that Mr. Spencer was an expert in his field, and Allianz conceded that there was nobody in their own organisation who would know in detail how Mr. Spencer was then approaching his task, and whether he was pursuing it in the best manner, there would be little intervention with the day-to-day work that Mr. Spencer would then be doing. Obviously Allianz would enquire about progress, particularly if a project was over-running the expected period assigned for completion of the project. Furthermore, Allianz also said that it had the right, if some emergency arose, to require Mr. Spencer to pause in work on a particular project if some other matter needed to be attended to first. The example given was that, since Allianz was quoted on the New York Stock Exchange, there could be occasions when US filings had to be made within some deadline and this might require Mr. Spencer to give his attention to ensuring that the programmes enabled people to marshal the required information for the US filings, only then resuming the earlier project when this urgency had been attended to.

24. There was a slight, and understandable, difference in the evidence as to whether Mr. Spencer's performance was assessed, and whether in other words he was subjected to "quality control". Mr. Spencer indicated that there was no quality control at Allianz, at least of the type that he had been used to at STC. In contrast the Allianz witnesses said that there was some quality control. A relevant overall summary seems to us to be that it is not surprising that when Mr. Spencer had worked for a major computer company such as STC, a one-time affiliate of the US's ITT, the entire business would have been filled with computer experts and there would have been extensive quality control. By contrast at Allianz there would have been sufficient quality control for the management to derive confidence that Mr. Spencer was well able to accomplish the projects assigned to him, but nobody in the company would have had the detailed knowledge of Mr. Spencer's field of expertise to judge whether in every respect he was tackling his projects in the best way.

Working hours, lack of employee benefits and termination terms

25. The contracts themselves were strangely silent about working hours, though the renewal schedules generally indicated the hours to be worked by Mr. Spencer. When he was working five days a week, that is in the period up to his home move from Harlow to Somerset in mid-2004, the renewal letters generally indicated that he was to work for 37 ½ hours a week. After the move, he worked a three-day week from Tuesday to Thursday, and was generally expected to work for 22 ½ hours a week.

26. In reality the position was reasonably flexible. The Appellant billed Highams, and Highams billed Allianz for hours actually worked. If Mr. Spencer worked slightly more hours or fewer hours than the target 37 ½ and 22 ½ he simply billed for the hours worked. Alternatively, and if more sensible, if he worked a few hours short in one week, he might make them up in the following week or following weeks. Mr. Spencer could not simply increase his earnings by working significantly longer hours, and billing for them, without discussing matters with the relevant managers. During the total period when Mr. Spencer was working for Allianz, Allianz introduced a time sheet system under which its own employees were required to fill in time sheets, and allocate their time to particular matters and projects for cost-control

purposes. Mr. Spencer was required to participate in this system, along with the company's general employees, but the remuneration due to the Appellant was still entirely governed by the invoices submitted by the Appellant to Highams.

27. Mr. Spencer was not required to "clock-in" as employees were required to do though he generally worked for normal working hours. On occasions, when a project required that he work when the computers were not being used by the normal staff, he would then work out of normal hours. In a practical common sense manner, such matters would simply be discussed and agreed with the relevant managers in the business.

28. Mr. Spencer almost always worked at the Guildford offices of Allianz. He occasionally worked at a disaster recovery site that the company had near Heathrow, and once attended meetings in Bristol. He always worked on the company's computers, for computer security reasons, and could not attach his own laptop computer to the company's systems. He did virtually no work at home, though occasionally took telephone calls, and might download information at home on his laptop that he might find of use in performing his services.

29. Since the Appellant billed Highams, and indirectly Allianz, simply for hours worked, there was the familiar position for contract workers that Mr. Spencer was not given paid holidays or payment when off work through illness. He also enjoyed no pension rights, and was not given any of the fringe benefits given to normal staff. He paid for meals even, we were told, the Christmas lunch, when other staff enjoyed certain benefits in this regard. He did not have a company car, and although he occasionally travelled as a passenger in a company pool car, he never drove one. It was even the case that if Mr. Spencer used his own car on Allianz business, he was not reimbursed for any costs. Needless to say, the Appellant's hourly charging rate was higher than the rate that Mr. Spencer might have commanded had he been an ordinary employee, and had he enjoyed the ordinary employee benefits of paid holidays, paid sick-leave etc.

30. There were no written terms that governed when Mr. Spencer might actually take holidays. As a courtesy he always agreed absences for holidays in advance, and generally at times when work projects made absence less disruptive.

31. Either party could terminate the contract with four week's notice. Obviously the contract could also be terminated immediately for gross misconduct etc., and somewhat oddly, although the contracts at both levels could not be terminated in the event of short illness, they could be terminated for any illness for a period of more than two weeks. In the seven years during which Mr. Spencer worked with Allianz, he was in fact never ill.

The parties' intentions

32. Both contracts contained an identical clause, indicating that "any Contractor supplied by [the Appellant] shall not be deemed to be an employee, agent or partner of Highams or the Client."

Other relevant evidence

33. We will now summarise a few more matters revealed in evidence that were not directly related to any terms of the contracts.

The German parent company's requirements in relation to employee numbers

34. We were told that Allianz itself had an extraneous reason for preferring to engage Mr. Spencer as a contract worker, rather than as an employee, certainly in the period after 2003, when Mr. Spencer dropped down to working on a part-time basis. This was because Allianz's German parent company laid down internal rules for the numbers of strict staff members who could be engaged in particular areas of the business, and when 1 ½ staff members were designated as permitted for a particular area in which Mr. Spencer was working, it was highly convenient that, as a contract worker, he could be excluded from the headcount.

Other contract workers

35. We were told that, during the period when Mr. Spencer worked for Allianz, he was certainly not the only worker engaged on a contract basis. No evidence was given in relation to the other such workers, but we were certainly told that even today, at the date of the hearing, Allianz had a number of contract workers working for it, generally on a very short-term basis, and that so far as Allianz was concerned, it had not heard that any were being challenged under the IR 35 legislation. We repeat that no evidence was actually given about this, but the expectation that short-term workers of a particular category would not be challenged under the IR 35 legislation does seem realistic to us, and it forms part of the decision that we have reached.

The "own business" test, financial risk and the provision of tools

36. In view of the fact that one of the pointers in favour of saying that a worker is a contract worker rather than an employee is the feature of the worker having his own business, and financial risk, we should record the following evidence. It was accepted that Mr. Spencer worked almost entirely with "tools" provided by Allianz. The only business or financial risk referred to was the risk that even if Allianz paid Highams, Highams might become insolvent, such that the Appellant would not be paid for hours worked by Mr. Spencer.

The contentions of the parties

37. Cases of this nature are very familiar, and it is unnecessary to record the contentions of the respective parties in detail. The pointers towards employment and against employment are all well known. We simply add that both parties treated as their starting point the three tests laid down by MacKenna J in the case of *Ready Mixed Concrete (South-East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497. Those three tests are the provision of work on a personal basis, the "engager" having sufficient rights of control to make the engager "master", and the other provisions of the contract being consistent with the contract being one of service. The Appellant's representative placed particular emphasis on the feature that the substitution clause indicated that the contract was not one for the

provision of personal service, but one where the Appellant could provide an alternate to render the services.

Our decision

38. The case law authorities in relation to this subject have placed emphasis on a number of tests, and we will start by commenting on each test, and the relevance that it has in relation to this case. Those tests are:

- the feature of personal service;
- the degree of control;
- the consistency of other terms;
- the issue of whether the provider of services has his own business, and
- the slightly nebulous issue of "mutuality of undertakings".

The issue of personal service and the significance of the substitution clause

39. We stop short of saying that the substitution clause in this case was a complete "sham". We accept that if the Appellant had notified Highams, and indirectly Allianz, that Mr. Spencer was going to be unwell, or absent, for a long period for some reason, but that the Appellant had managed to engage a suitable substitute, and that substitute passed Allianz's interview test with flying colours, then it is indeed possible that the Appellant could have continued to bill for the services of the replacement.

40. That, however, is the extent of the reality of the substitution clause. It is perfectly obvious that, as with all similar contracts drafted to seek to sustain non-employee status, the clause was inserted to achieve the desired tax purpose, and it has virtually no bearing on our approach to the decision in this case. The reasons why we consider it to be irrelevant are as follows:

- Although the clause that we have quoted was ambiguous, in that it did not make it clear whether Allianz could reject an offered substitute, said to be experienced etc, if that substitute failed the interview test, it was pointless to provide for an interview if Allianz could not reject an offered substitute. We accordingly conclude that the substitution right was certainly not an unfettered right. The authorities make it clear that such a fettered right is of only modest significance.
- Substitution should be considered in at least two contexts. In a case where substitution is a reality, it is perfectly possible that a substitute might be offered just on an isolated day. Take the case of a company offering a driver to drive a firm's office cars, with the clause that Mr. X would generally be provided, but that in his absence another of the firm's available drivers would be provided, it would then be clear that this contract was not a contract for the personal service of Mr. X. In the present case, it is inconceivable that the Appellant could have sent a substitute on this basis, when Allianz has indicated that it would take a replacement three weeks to be of any use. This means that the only context in which substitution could be a conceivable reality is where Mr. Spencer was going to be absent for a long period.

- There seems, however, little reality to the proposition that the Appellant might have even been able to offer a replacement where Mr. Spencer would be unavailable for a long period. It had no other employees. Even if Mr. Spencer knew of two people who might be suitable, there could be no knowing whether either might be available. In all probability they would have existing engagements, or be working or living miles away. In the improbable scenario that one might have been available, it is far from clear that such a person could have, or would have wished to provide services indirectly by entering into some contract with the Appellant.
- In seven years, no substitute was ever offered, because it was never relevant, and it was perfectly clear that Allianz was interested in the qualifications and the individual suitability of Mr. Spencer, and would have been equally interested in the personal suitability of any replacement.

41. It seems to us that the substitution clause was one of the type always inserted in cases of this nature, having very little reality and that it should play virtually no part in influencing our decision.

The degree of "control"

42. When a worker is engaged on a part-time basis, engaged to undertake a particular project, the project is unique and not one that the engager would need undertaken repeatedly, and is one where the person engaged alone has the expertise to implement the task, we consider that the degree of control to be exercised is very modest. We accept here that in the early period when Mr. Spencer was engaged for his first single project, and even when he was re-engaged for defined projects, it is realistic to say that the control over his work was limited. Of course Allianz could say what it wanted done, and what the project was. Of course Alliance could divert Mr. Spencer to something that was suddenly urgent if some US filing requirement required urgent attention for a short period on some different work. But whilst Mr. Spencer was undertaking the project for which he was specifically engaged, we consider that he was using his expertise in a manner that could not be controlled in the sense of "how" he did his work. The control was therefore limited.

43. At the end of 2003, if not before, it became clear that Allianz wanted Mr. Spencer's services permanently. It no longer engaged him for projects. It either offered him employment, or permanent engagement, and even if he rejected that, he was thereafter engaged on an annual basis. In other words he became one of Allianz's key computer experts, available for work that was likely to be available indefinitely. He certainly ceased to be engaged just for identified projects. By breaking the link with projects, and indicating that Mr. Spencer would work generally within the organization, we consider that from 2004 onwards, there was more reality to control.

The supplier's own business

44. There are three features that we should consider in relation to the issue of whether Mr. Spencer would have been considered to be undertaking "his own business" on the notional direct contract with Allianz that we are required to assume.

In our view he fails on the first two, but there is something to be said in relation to the third.

45. The first respect in which Mr. Spencer would fail the "own business" test is that when engaged, he had no opportunity to make more or less profit according to how efficiently he worked, how he managed to minimise and control costs, and manage the cost of tools, assistants etc that would be involved if he was conducting a business in the ordinary sense. Mr. Spencer was simply paid for hours worked.

46. It was suggested that since he might suffer financial loss if Highams went bankrupt, this was a financial loss that supported the "own business" case. We do not agree. The sort of financial risk that sustains the business case is the loss, or the diminished profit that results from costs not being controlled, or a project being undertaken on an inefficient basis when a price has been quoted for a project, rather than the supplier being paid on an hourly basis.

47. We do consider, however, that in one respect there was some reality to the contention that Mr. Spencer should be considered to have been conducting his own business. This was not raised in argument, but it still appears to us to have some degree of reality.

48. When Mr. Spencer was made redundant by STC, he sought replacement employment and for two years he was unemployed. He then concluded that he was only likely to obtain work through agencies, and the work that he did obtain was all short-term project work. It very much seems to us that he had a particular skill to exploit and market (that of setting up Unix systems and writing programs for them), but that that was not a service for which companies engaging him expected to need his services on an indefinite basis. They had short-term projects. They wanted Mr. Spencer for the project, but then foresaw no continuing role for him. Therefore he was exploiting a specific skill that he had, for which different clients had short-term demands, and he did indeed take the risk that there would be very significant periods during which he would have no work. Totalling up the periods during which Mr. Spencer did not work, following his redundancy at STC, there were periods of 24, 4, and three periods of 3 months without work (namely 40 months).

49. We consider that there is a distinction to be made between someone in the situation Mr. Spencer was in, in the period from 1993 to 2003, and the situation of many other part-time employees. If a seaside hotel engages someone to be a waiter in the summer season, that person works in exactly the same way as all other waiters, entirely under the control of the management, and it would be quite unrealistic to say that the waiter was exercising a special skill, rendered to different clients, in some continuing business of being a waiter. Mr. Spencer did appear, however, to have a somewhat "niche" specialty skill that he could only exploit on a part-time basis that clients would only want for the duration of the projects, and in a very modest respect we consider that would have given some modest support to his "own business" case, had he been engaged directly by Allianz, at the time when he was engaged for specific projects.

The "mutuality of undertakings" test

50. There is considerable case law in relation to this test, progressively indicating that the test is of diminished importance, or that it is indeed nearly meaningless. Some case law relates to the situation of "umbrella contracts" between separate periods of admitted employment, and it is far from clear to us that the "mutuality of undertaking" test is of much assistance to us in this case.

51. There is a feature in this case where the phrase "mutuality of undertakings" has some resonance. A touchstone of being an employee is the hope and expectation that there will be some relationship of faithfulness between employer and employee. In other words, the employer will generally endeavour to keep staff employed even when work is short. Contract workers will be dispensed with first. Employees will commonly have several "employee benefits", and in particular pension rights. With short term engagements, none of this will be relevant with contract workers. Particularly in the early period, with the first and few following projects, we accept that Mr. Spencer never knew whether the various contracts would be renewed. He had been used to short-term engagements with worrying gaps between most of them, and would certainly not have felt confident that he had been taken on, with some hope or prospect of being engaged, and looked after, as a valued employee of Allianz.

The German motivation to engage contract workers rather than employees

52. We referred, in paragraph 34 above, to the rather curious way in which Allianz had some motive for engaging people as contract workers, to circumvent the limitation on employees for particular projects laid down by its German parent company. No evidence was given to the effect that this practice was deliberately undertaken in wholly unrealistic circumstances, but we nevertheless record the obvious point. This fact tends to indicate that, for irrelevant reasons, Allianz might have had a temptation to regard people as not being employees, when in reality they had all the hallmarks of being employees. Thus, to some degree, this factor tends to undermine the feature that Allianz allegedly regarded it as realistic to engage, or rather to continue to engage, Mr. Spencer indirectly for a very long period, purely as a contract worker.

The parties' intentions

53. We attach very little or no importance to the protestation by the parties to the contracts that they regarded Mr. Spencer as not being an employee. Quite apart from the fact that we must address a notional contractual situation that was not the one that the actual parties were in fact considering, their opinion on what is a matter of realistic construction of the overall facts is of very minor significance.

The distinction that we draw in this case

54. Our decision is that in testing whether Mr. Spencer would or would not have ranked as an employee at the point in mid-2000 when we must first address the key question, posed by the notion that he had a direct contract with Allianz, the answer is that he would have been a contract worker, and not an employee.

55. The type of situation, where we consider the contract worker analysis to be realistic is the one where:

- an individual has a particular area of expertise;
- that area of expertise is one that he has found has not enabled him to gain full time employment;
- the explanation for not gaining full-time employment is that the area of expertise is likely to be one that various companies might need, but not on an indefinite basis, but rather simply to complete a particular project;
- the type of work for which the worker is engaged is likely to be work outside the core work of the business.
- the individual has only been able to gain work through rendering his specialist expertise available through placement agents;
- the past pattern of work has confirmed all the above points of short engagements with different companies, and many unwanted gaps between engagements;
- the area of expertise is likely to be one where the client would indicate the project to be done, and the hoped-for time frame for completion of the project, but would not expect to be able to supervise or "control" the worker in any way, simply because the expert would be engaged to do something outside the expertise or competence of the company; and
- the company engaging the individual, engaging him for a project, would consider it quite inappropriate to provide holiday pay, pension benefit, and the other normal incidents of employment because they would all be inappropriate for such contract workers.

56. When the Appellant first indirectly entered into contracts with Allianz, we consider not only that all the above criteria were satisfied, but we take note of the fact that the fact pattern from the recent past would have rendered it very unrealistic (had the IR 35 rules then been in force) for HMRC to have contended that Mr. Spencer would have been an employee of VAI, the company for which he worked for 3 months (with a 3-month gap both before that engagement, and also after it and before the Allianz engagement). The past pattern seems to us to have been entirely consistent with the factors that we have just indicated seem to us to make "contract" status realistic.

57. We also note that shortly after the contracts were entered into in mid-2000, and indeed even at the time of the hearing, Allianz confirmed that it had engaged, and was now engaging, some workers on a contract basis, without regarding them as employees. Obviously we were given no evidence in relation to these cases, albeit that we were told that there had been no indication of any challenge by HMRC other than in the case of Mr. Spencer. Where, however, the criteria that we have summarised at paragraph 55 were satisfied, then it seems to us that non-employee status would have been perfectly realistic.

58. The situation altogether changes, however, certainly by the point in late 2003, when Allianz offered Mr. Spencer either employment, or indefinite engagement, and when in any event the parties moved to a pattern of annual renewals on a non-project basis. It seems perfectly evident to us that from that date onwards, Allianz regarded Mr. Spencer as someone who they wished to engage and retain indefinitely, and when

Mr. Spencer continued to work for Allianz, and accepted yearly contract extensions, it seems realistic to say that his status must have changed. He would by then plainly not satisfy many of the tests included in the bullet points in paragraph 55 above. He was engaged on an entirely personal basis. The substitution argument was basically irrelevant "window-dressing". If he was to be engaged indefinitely on a non-project basis, it seems likely that he was proving useful in numerous respects in relation to computers and IT, and no longer just undertaking his defined projects. So the "control" argument becomes stronger. And fundamentally Allianz wants to engage him as a permanent member of the team.

59. Our decision is accordingly that initially it would not have been appropriate to classify the notional relationship as one of employment. Certainly from January 2004, it would have been appropriate to regard the notional relationship as one of employment. We put the dividing line at 31 December 2003 because it was at that time that he was offered indefinite work, and it was from that date that renewals were agreed on an annual basis, and from which no further reference was made to particular projects.

60. We consider that it is possible that we have put the dividing-line in the wrong place, and that if we have done, the change-over to notional employee status would in fact have taken place well before 31 December 2003. We still consider, however, that the reason underlying the point in the last sentence of paragraph 59 is cogent, and we confirm that as the date when the status changed.

61. This Appeal is accordingly allowed in part.

Right of Appeal

62. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

HOWARD M. NOWLAN (Tribunal Judge)

Released: **28 November 2011**

Appeal number: TC/2015/07115

FIRST-TIER TRIBUNAL
TAX CHAMBER

ARMITAGE TECHNICAL DESIGN SERVICES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE RUPERT JONES
MR MICHAEL SHARP FCA

Sitting in public at Liverpool Civil and Family Court on 15 November 2016

John Hill of John Hill & Associates, representative for the Appellant

Gill Carwardine, Presenting Officer of HMRC for the Respondents

1. The Tribunal has decided that the appeal should be allowed.

The appeal

2. The appeal is made against the following decisions of HMRC which it issued against the appellant company to pay the following sums:

Determinations made on 30 June 2015 in accordance with Regulation 80, Income Tax (Pay As You Earn) Regulations 2003

- 2009-10: £8,442.40
- 2010-11: £8,593.20
- 2012-13: £4,833.80

- 2013-14: £10,794.40

Decisions made on 30 June 2015 in accordance with Section 8, Social Security Contributions (Transfer of Functions etc) Act 1999

- Period 6 April 2009 to 11 March 2011: £18,881.35
- Period 23 July 2012 to January 2014: £16,622.65

Penalty Assessment issued on 25 February 2016 in accordance with Schedule 24, Finance Act 2007

- 2009-10: £3,482.31
- 2010-11: £3,521.70
- 2012-13: £2,158.26
- 2013-14: £4,165.39

3. On 23 July 2015 Walker Begley appealed the determinations and decisions on behalf of the appellant.

4. On 21 April 2016 John Hill & Associates appealed the penalty charges on behalf of the appellant.

Point at Issue

5. The point at issue is whether the income of the appellant company, Armitage Technical Design Services Ltd (ATDSL), from the company Diamond Light Source Ltd (DLS) for the years 2009-10 to 2013-14 inclusive falls within the Intermediaries Legislation (IR35) under Chapter 8, Part 2 of the Income Tax (Employment & Pensions) Act 2003 (ITEPA).

6. This in turn involves determining the single question as to whether or not a notional contract of employment (a contract of service) would have existed between DLS and Mr Armitage so that he would be considered an employee rather than self-employed (subject to a contract for services).

Background to Intermediaries Legislation

7. Service companies are typically owned by the person (or persons) whose services it provides (the worker). The company acts as an intermediary between the engager and the worker. The worker has a contract with the services company, and the service company has a contract with the engager, but there is no contract between the engager and the worker.

8. A company's income cannot be employment income. A service company receives its income gross and is charged to corporation tax. The worker's remuneration from the service company is employment income.

9. The purpose of a service company is to act as an intermediary between the worker and the engager, which makes the service company an agent for the purposes of Section 44 ITEPA 2003 and as such any remuneration received by the worker, if not otherwise chargeable to tax as employment income, will be caught by the agency legislation. This will apply, for example, to workers claiming to be providing their services to the service company on a self-employed basis.

10. The intermediaries legislation, or IR35, became effective from 6 April 2000, and works differently to agency legislation. IR35 creates a deemed employment payment (DEP): deemed to be paid by the intermediary and received by the worker. It is based on income received by the intermediary that would, had the worker been employed directly by the engager, he or she would have been treated for tax purposes as an employee of the client.

11. The legislation applies to intermediaries that are companies, to partnerships and to individuals. IR35 may apply where there are "relevant engagements":

(1) The services were provided on or after 6 April 2000;
(2) The worker personally performs, or is under an obligation to perform, services for another person (until 2003 the legislation would only apply if that other person was 'in business' – this was exploited by wealthy private households);
(3) The services are provided not under a contract between the client and the worker but under arrangements involving an intermediary;
(4) The circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded as an employee of the client for tax purposes; and
(5) The worker (or an associate of the worker), receives from the intermediary (directly or indirectly) a payment or benefit that is not employment income; or has rights which in any way would entitle the worker or associate to receive from the intermediary (directly or indirectly) any such payment or benefit;
(6) Certain types of liability are satisfied according to the type of intermediary.

12. By virtue of condition (4), employment status is therefore critical as it determines whether or not IR35 applies.

13. In order to determine whether IR35 applies it is necessary to construct a hypothetical contract from the arrangements in place between the worker and the client and to determine the employment status.

14. In an IR35 case it is necessary to construct a notional contract, therefore the evidence gathered may override the actual contractual evidence as to whether the individual would be considered an employee (subject to a contract of service) or self-employed (subject to a contract for services).

15. The factors encompass the following:

- Whether personal service is required

- The provision of significant equipment

- Whether the worker has any financial risk
- The basis of payment
- Whether there is mutuality of obligation
- If there is holiday pay, sick pay and / or pension rights
- Whether the worker is part and parcel of the organisation
- The rights to terminate a contract
- The opportunity to profit from sound management of the task
- Personal factors
- The length of engagement
- The intention of the parties
- Control

Summary of the Facts

16. Mr David Armitage gave oral evidence for the appellant company ATDSL, through which he operated, and Mr James Kay gave evidence for HMRC.

17. Mr Armitage is a very skilled Electrical Control and Instrumentation Designer with over 25 years' experience contracting in the nuclear industry. The work is very highly specialised and demands precision drawings be made. The individual projects he has worked on for DLS are design drawings for Beamlines which are used by scientists at DLS for third party customers.

18. The DLS Headquarters is located in Didcot (Bucks). DLS wanted Mr Armitage of ATDSL to be based at Didcot (where the beamline science actually takes place). Mr Armitage declined and set himself up in another group location in Warrington which was convenient for him and his family although no one else from DLS worked there having been relocated to Didcot some time before.

19. Mr Armitage of ATDSL visited the DLS headquarters when required (only twice a year) to discuss new project work to be carried out with the responsible Beamline electrical project Engineer who had been nominated by DLS to provide EC&I design support.

20. The responsible electrical project engineer within the DLS organisation would orally inform Mr Armitage of ATDSL of the skeleton design philosophy but which might be complemented by hard copies documentation from the site visit.

21. A DLS nominated electrical project engineer would provide further supporting documentation as the project progressed direct by email or available on the network. Mr Armitage would then produce the necessary design drawing packages from the information received.

22. To put the design drawings together, Mr Armitage would access his own company's server and software to provide supporting British Standards and relevant specifications for each stage of the work required.

23. The designs were completed using standard Autodesk and Microsoft software. Mr Armitage is highly skilled and proficient in using this software package which had been developed over many years previous work experience.

24. The subsequent drawing documentation was checked and approved by the responsible electrical project engineer of DLS via the industry standard Microsoft server sharepoint software.

Respondent's case

25. Regarding the substantive point in issue, HMRC submitted as follows.

26. The information provided to HMRC supports that the contracts considered caught by the IR35 legislation are the contracts a) between Assystem and Diamond Light Source Ltd (DLS) and b) between Champion and Diamond Light Source Ltd (DLS). Assystem and Champion were the intermediary service companies, employment agencies, through which ATDSL was engaged with DLS.

27. HMRC's understanding of the position was issued in an opinion letter dated 28 November 2014 which set out that: HMRC had considered the relationship between ATDSL and Diamond Light Source Ltd for the periods 25 October 2010 to 11 March 2011 and subsequently from 23 July 2012 to 25 January 2013 in respect of electrical engineering services provided. HMRC were of the opinion that had there been a contract between Diamond Light Source Ltd and Mr David John Armitage that it would have been considered to be a contract of service, and that as such the engagement would be subject to the Intermediaries Legislation, or IR35.

28. HMRC submitted that, in effect, in constructing the hypothetical contract, Mr Armitage would be considered to be an employee of Diamond Light Source Ltd.

29. They relied on various factors such as:

a) Mutuality of Obligation - based on the contracts examined, HMRC's opinion was that the mutuality of obligation requirement had been met between Mr Armitage and Diamond Light Source Ltd (DLS);

b) Control - the performance of Mr Armitage's duties was considered by HMRC to be subject to a sufficient degree of supervision and control by DLS;

c) Personal Service / Substitution - from the information as provided by Mr Kay of DLS Ltd, personal service of Mr Armitage was a requirement and there was no entitlement for Mr Armitage to send a substitute in his place or any obligation upon him to pay a substitute; and

d) Financial Risk, from the information held there was no risk of Mr Armitage making of a loss of the contract.

Appellant's case

30. It was the appellant's case that the picture painted of Mr Armitage, through his company ATDSL, is that of someone in business on their own account, ie that in a notional contact he, through his company, would hold a contract for services (be self-employed) and that he would not be considered an employee of DLS (under a contract of service).

31. The appellant's case is that all three tests in *Ready Mixed Concrete* have not been met. It is submitted that the picture painted is of Mr Armitage, through his company, being someone in business on his own account.

Summary of the law

32. A summary of the Intermediaries Legislation, IR35 and its purpose is set out above.

33. The onus of proof is on the appellant to show that the company's income from Diamond Light Source Ltd (DLS) for the tax years 2009-10 to 2013-14 inclusive does not fall within the Intermediaries Legislation, IR35, and if the appellant is unable to do so the Regulation 80 Determinations and Section 8 Decisions shall be upheld.

34. Section 50(6) TMA 1970, as extended by paragraph 16 (1), Schedule 24, FA 2007, places the ultimate onus on the appellant in all of the appeals against the Regulation 80 Determinations and the Section 8 Decisions.

35. The onus of proof is on HMRC in respect of the appeal against the Penalty Assessment, and for HMRC to demonstrate the penalty is due because of the appellant's failure to take reasonable care.

36. The standard of proof is the ordinary civil standard of balance of probabilities.

37. There is no statutory definition of "employment" – whether a contract is one of employment (a contract of service) or self-employment (a contract for services) depends upon a number of factors and the working terms and arrangements that are in place: *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [2010] BTC 497 where Mackenna J held that a contract of service exists if all three conditions are fulfilled:

(1) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master (this mirrors the IR35 leg where there is a requirement to provide a personal service)*;*
(2) He agrees, expressly or impliedly, that in the performance of that service, he will be subject to the other's control in a sufficient degree to make that other master; and
(3) The other provisions of the contract are consistent with it being a contract of employment.

38. In *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173 Cook J stated (at 184-185):

"…. The fundamental test to be applied is this: Is the person who has engaged himself to perform these services, performing them as a person in business on his own account? If the answer to that question is "yes" then the contract is a *contract for services"*.

39. In *Hall (HM Inspector of Taxes) v Lorimer* [1993] BTC 473Mummery J said:

'In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. The test outlined is to stand back and evaluate the overall effect of the individual factors and paint a picture.'

Summary of discussion and decision

First Test - Personal Service - the right of substitution

40. The contract between Assystem UK Ltd (employment agent) and ATDSL (the supplier) of 27 April 2007 for services of provision of electrical designing expertise to the client, CCLRC Daresbury Laboratory (DLS) attached Terms and conditions. Paragraph 2.4 of those terms states

"The Supplier is obliged to provide suitably qualified resources of its choice but is not obliged to provide any named individual".

41. The contract between Champion Employment Ltd and ATDSL (the Consultancy) dated 13 July 2012 was for the supply of consultancy services to the Client. It states at the bottom of each page 'Agreement with a self-employed consultancy who has opted out of the conduct regulations Outside IR35) March 2012'. The heading under 'Consultancy Staff' acknowledges that the Consultancy, ATDSL, shall be able to use its own staff members or third parties subcontracted with the prior approval of the client.

42. The terms of the contracts are not determinative.

43. It was Mr Armitage's understanding that a right of substitution existed.

44. The Human Resources department of DLS also confirmed that Mr Armitage had this right provided the substitute was suitable, a not unreasonable caveat, in a document drafted by ATDSL and signed by Alison Roblin of DLS on 11 September 2013. The document states:

"subject to the proposed replacement possessing the necessary levels of expertise, skill and qualifications required to carry out the services satisfactorily you acknowledge that the Company (ATDSL) may provide a substitute where it is considered to be appropriate or necessary, and that your agreement to a substitute will not unreasonably be withheld where the required expertise, skills and qualifications are met."

45. Ms Roblin (who signed off the contractor contracts) also agreed the other terms applied to the relationship in practice and not just the generic contract terms. Ms Roblin should not have been in a position to sign this document had Mr Armitage simply been regarded as someone akin to an employee.

46. HMRC's guidance is that the right of substitution must be unfettered. Furthermore in the evidence put forward by HMRC, Mr James Kay, the Senior engineer for DLS based in Didcot indicated that if Mr Armitage was not available he would go back to the employment agency for a replacement rather than allowing ATDSL to provide a substitute. This may well be what might have happened in practice but it was never tested by events.

47. The very reason DLS originally agreed that ATDSL would provide the services of Mr Armitage from Daresbury in Warrington was because Mr Kay and DLS were unable to recruit anyone with ATDSL's experience. Mr Armitage did and does have contracts from his work in the nuclear industry and may have been able to provide a qualified and skilled replacement on a temporary basis if needed.

48. The Tribunal accepts that that the right to send a substitute existed in writing in a limited form, subject to DLS's approval. If DLS were unlikely to give such approval then it existed more in theory than in practice but it did exist in a limited form. The seeking of approval by Mr Armitage from DLS for a substitute was never tested.

49. This factor tends suggests there being a requirement for personal service to DLS from Mr Armitage but the Tribunal is not satisfied it was absolute.

Second test - Control

50. The second test in the *Ready Made Concrete* case is that there should be "sufficient control exercised to make one the master". It is the appellant's case Mr Armitage worked remotely, without supervision and under limited control from DLS. HMRC's case, supported by James Kay, head of engineering at DLS was that there was a significant degree of control over Mr Armitage in his work for DLS.

51. Control includes control over how, when and where a person works but the most important is the "how" – ie does the contractor decide on the method of how the services are provided or does someone tell him what to do.

52. On the "control over where" test, Mr Armitage provided his services from the site in Daresbury in Warrington rather than the DLS headquarters in Didcot. It was necessary for the work to be carried out at the Science and Technology Facilities Council's Daresbury Laboratory in Warrington location, rather than primarily at Mr Armitage's home, because that is where the computer connected to the mainframe was situated. There were no other DLS employees working at this location – only contractors. The reason Mr Armitage worked there is because of the practical realities of the job specification.

53. In terms of the 'control over how' test, the working arrangements with ATDSL/Mr Armitage for the provision of the services to DLS were as follows:

- ATDSL used Autocad software to produce all fundamental drawings for each specific project;
- ATDSL provided its own electrical drawing symbols to produce schematic drawings;
- Mr Armitage had previously attained training at previous organisations and was highly skilled using this software;

- ATDSL attended the DLS headquarters in Didcot to meet up with the responsible electrical project Engineer only at the start of the projects;
- He was not invited to and did not attend social and training functions;
- Regular staff meetings were held at DLS HQ in Didcot with the responsible DLS electrical project engineer together with the nominated DLS employed Beamline scientists and other professional engineering disciplines to discuss their specific Beamline Design requirements. However, Mr Armitage was never invited to nor attended those meetings and remained in Warrington (Daresbury) where he worked;
- ATDSL used other purchased Microsoft software to produce cable schedules for the projects;
- ATDSL also used the industry standard Microsoft Sharepoint software to save the AutoCAD drawings;
- ATDSL never checked or approved any other drawings but only performed the electrical design duties required by the contract;
- Mr Armitage worked on his own at Warrington. No-one at the location was available to supervise him physically. Mr Kay stated that all his work was supervised and reviewed by a Diamond employee in Didcot. Mr Armitage provided drawings to fit in with the overall project and the senior project engineer in Didcot quality assured (approved) the drawings and ensured they were what the job specification required;
- HMRC's witness, Mr Kay, stated that the staff senior engineer (Suren Patel) kept regular contact with Mr Armitage, by email or telephone, however the Tribunal accepts Mr Armitage's evidence that this would not be very regular and a week could easily pass without contact. Mr Armitage also worked to his own deadlines to complete work; and
- The package of work was provided to Mr Armitage via a secure internet connection within the Science & Technology Facilities Council (STFC) firewall which allowed direct access to DLS data. However, the fact that "packets" went up and down the internet was merely ATDSL Design work being saved on the remote server.

54. There was a reasonable degree of control over how Mr Armitage, through the appellant, worked but it was not such that clearly made DLS the master. On balance the Tribunal considers the appellant's case to be on a similar footing to that in *Marlen Ltd v HMRC [2011 UKFTT 411 (TC)] 29 and 30:*

(29). "This was another area where there was an apparent conflict of evidence. It was common ground between Mr. Hughes [Appellant] and Mr. Walton [Client representative] that at the outset of a job, Mr. Hughes would be briefed by the project or engineering manager. They would outline exactly what was being built, what Mr. Hughes' role was to be and what was expected of him. He would then use his own knowledge and skill to design his particular part, get it manufactured and ready for testing and development. In interview with HMRC, Mr. Walton stated that a contractor "would be under the control of the project leaders… who would brief the contractor". It should be noted however that this was in response to the specific question as to how Mr. Hughes would know what work JCB wished him to undertake.

(30). We see Mr. Walton's evidence as being very much in line with Mr. Hughes' oral evidence, which was that the only form of real control exercised over his work was by Mr. Walton "overseeing the project and checking on progress". The way in which Mr. Hughes carried out the work and the priority which he gave to different aspects of it were not of

concern to JCB but were a matter entirely for Mr. Hughes. Mr. Hughes likened Mr. Walton's role to that of a householder monitoring the progress of an extension being built by professional builders. That householder would be interested in the progress of the extension, would be ensuring it was running to time, but would have no input into how it was being built. Mr. Walton, according to Mr. Hughes, would not in any event have been able to exercise any practical control as he would not have the necessary degree of knowledge or skill or be able to access Mr. Hughes' computer, which was subject to a personal password."

55. Mr Kay in his witness statement states that there was no difference between Mr Armitage and DLS employees in how the work was allocated, carried out or reviewed, save that he had less personal contact with DLS employees after the project work was moved to Didcot.

56. However, Mr Armitage's work was not supervised other than approval of his work as set out above because he worked 200 miles from DLS office and no-one in his location worked for DLS.

57. In terms of the 'Control over When' test and time control, although flexi working was available to DLS employees, Mr Armitage worked his own hours and for 95% of his working time he finished at lunchtime on Fridays unlike the DLS employees working in Didcot who had to work the core hours. DLS employees in Didcot were required to work core hours until 3.00pm. It is right that Mr Armitage was required to work a fixed number of hours per week between the hours of 9am and 5pm.

58. Mr Armitage was required to complete time sheets to be approved by the senior DLS engineer but he was not subject to the same level of time control as employees in Didcot. Thereafter invoices would be provided by ATDSL through the intermediary service companies.

59. DLS Staff members were all subject to an electronic time management system that clocked them in and out and their time was supervised and managed by DLS this way. Mr Armitage was not subject to this system. He simply kept a note of the hours he worked. The time management system (digital card access) also allowed staff to come and go in the firm's buildings but Mr Armitage was never provided with this facility.

60. Again, Miss Roblin of DLS signed a document on 11 September 2013 on behalf of DLS which states it to be representative of the working relationship in practice with ATDSL. It stated 'Control – subject to meeting the required standards of delivery, time and scope of the project, the manner in which the services are performed rests with the Company ie. ATDSL'.

61. Paragraph 3.7 of the agreement between Champion and ATDSL stated that that the consultancy shall be permitted to determine how it will provide the consultancy services and subject to complying with any reasonable operational requirement the client will have the flexibility to determine the number of hours required to provide and the times during which it will provide the Consultancy Services.

62. On balance, Mr Armitage was inevitably subject to less control than DLS employees in Didcot. While there was a reasonable degree of control over how, when and where he worked it is not necessarily consistent with him being subject to contract of service.

The third test - the other provisions of the contract are consistent with it being a contract of employment.

63. The first consideration is the provision of significant and essential equipment.

64. ATDSL, for its business generally, invested in specialist equipment at a cost of £7,025, equipment required solely for his role as a technical design consultant. This included Autocad software costing £1,647 and a 30" precision high end monitor costing £2,139. Mr Armitage did set up his own wireless 3G/4G network at the location because of the frustrations of the firewall restrictions imposed on the hardwired network preventing him from accessing his own server which contained the relevant working British standards documents and specifications.

65. However, the Tribunal is of the view that DLS provided Mr Armitage with the essential tools, both hardware and software to complete his work for them. It is not clear when the extra equipment was bought but this was Mr Armitage's choice to do so.

66. The second consideration is the Financial Risk/Opportunity to profit.

67. It is accepted that there were limited opportunities for Mr Armitage to profit from the contracts under review and only a limited risk but the Tribunal accepts HMRC's submission that the absence of financial risk/opportunity to profit does not point to employment (whereas its presence does point to self-employment). There was only a limited financial risk to ATDSL in its contracts but if there was an obligation on the contractor to remedy defects at own cost although this did not arise in practice. Again, this is not a generic agency contract term but DLS's own procedures for its independent contractors.

68. The third consideration is the basis of payment**.**

69. Mr Armitage did not necessarily work the same hours as the client's employees although he did work core hours. He worked much longer hours to complete the project and was paid by the hour for work done. Mr Armitage was paid £31 per hour: set by Assystem and not inclusive of variables/costs/overheads.

70. Payment of a wage or salary would be a pointer to employment and quoting a price for a job would be a pointer to self-employment but payment of an hourly/daily rate or by piece could apply in either employment or self-employment, so this factor is not generally one that affords much assistance and is not indicative of self-employment.

71. The fourth consideration is Mutuality of Obligation**.**

72. HMRC's witness Mr Kay has advised that on or around 12 May 2003 DLS entered into a contract for services with Assystem Ltd in terms of which Mr David Armitage's services were made available to DLS to provide engineering design services for the DLS project. Thus one party agreed to work for the other, and did so, in return for payment.

73. On or around July 2012 DLS entered into a contract with Champion for Mr Armitage's services and on 23 July 2012 Mr Armitage attended his first day back at

Daresbury. Thus one party agreed to work for the other, and did so, in return for payment.

74. From the above, the Tribunal considers mutuality of obligation exists, that the irreducible minimum exists and contracts were indeed in place.

75. However, in our view the irreducible minimum obligation required for a contract of service is not particularly helpful in determining whether the intermediaries legislation applies or whether a contract of employment exists. HMRC's case is that where one party agrees to work for the other in return for payment then this satisfies mutuality of obligation between the two parties. That would be true of every contract both employment and for services otherwise the contract would not exist at all. The mere offer and acceptance of a piece of work does not amount to mutuality of obligations in the context of employment status. Again the Tribunal considers this factor to be neutral.

76. The fifth consideration is employee type benefits.

77. HMRC, in its skeleton argument submits that the absence of employee benefits is neutral and absence of other benefits received by employees may point to self-employment. Entitlement to employee-type benefits by virtue of the contractual terms and conditions is regarded as a pointer to employment. Absence of entitlement may point to self-employment.

78. Mr Armitage received no employee benefits - no holiday pay, no sick pay and could not partake in any grievance procedures etc. He was not even provided with a locker at his location.

79. The sixth consideration is whether the appellant was part and parcel of DLS.

80. Mr Armitage was never regarded as part of the DLS organisation. All DLS employees worked in Didcot at this time. The client would have preferred him to work in Didcot and all staff were required to work in Didcot.

81. Mr Armitage never attended functions that other employees attended, was not invited to internal training courses and did not attend internal departmental events that were considered a requirement for employees of DLS (including social functions).

82. Documents displaying the organograms for the Electrical Engineering Team and DLS Technical Division and Engineering team do not list Mr Armitage. They show the DLS Electrical Engineering team headed by Mr Kay. Mr Armitage is not included in any of the DLS team-sheets and has never done so. Mr Armitage believes he was not regarded as part of the DLS team but an independent contractor.

83. Mr Kay stated that Mr Armitage worked alongside the rest of the team in a virtual working environment but the Tribunal considers this to be stretching Mr Armitage's coordination and integration with DLS.

84. Mr Kay has advised that engineering service providers who have an electrical engineering role at DLS report to a responsible DLS staff senior engineer, all of whom are DLS employees, and who have ultimate responsibility for any issues arising. However, Mr Armitage was not 'reporting' to a senior engineer in any real sense other than having his designs quality assured.

85. From the above, the Tribunal considers Mr Armitage's working terms and arrangements in practice did not mean that he was fully integrated him into the DLS business structure. While Mr Kay did not perceive him as working as an independent operative he was not integrated in the same way as DLS employees.

86. The seventh consideration is the right to terminate a contract.

87. It is not considered that this is a fundamental factor but the Tribunal notes from the contracts that in the Champion contract the contract may be terminated without notice in several (nine) instances and in the Assystems contract, notice is only 7 days which would be the statutory notice period for an employee having worked less than a month. The right to terminate contract with the giving of notice points to employment. The right to terminate without notice is neutral. Overall this is neutral.

88. HMRC's witness Mr Kay stated that during the course of March 2011 Mr Kay made the decision to terminate the contract with Assystem, Mr Armitage was one of these engineering service providers and the contract with Assystem for Mr Armitage's services was terminated on or around 8 March 2011. HMRC's witness, Mr Kay, stated that on 23 December 2015 Mr Armitage's services were no longer required and the contract with Champion was terminated. Overall this is neutral.

89. The eighth consideration are personal factors including exclusivity and length of engagement.

90. HMRC guidance in ESM3363 outlines the distinction between a contractor working on specific tasks or projects (pointing towards self-employment) and someone who provides services on a continuous process of giving support. Mr Armitage worked on three distinct Beam Line projects under the first contract with DLS. His contact was then terminated and he took a contract with a different client, AMEC (which HMRC agreed was outside of IR35) followed by three new projects in the second term with DLS. They were all defined tasks and there was no ongoing support after the projects finished.

91. The DLS project is the largest science facility to be built in the UK for over 25 years. ATDSL provided EC&I support for various milestone phases of the project.

92. During the first period under investigation ATDSL worked independently and provided EC&I designs on phase II Beamlines as previously documented and liaised solely with the DLS nominated responsible electrical project engineer namely Geoff Preece. During the second period under investigation ATDSL worked independently and provided EC&I design on phase III Beamlines as previously documented and liaised solely with the DLS nominated responsible electrical project engineer namely Suren Patel. All projects undertaken by ATDSL for DLS were individual contracts by nature due to the DLS funding during its construction.

93. There was no exclusivity at any time and from 2012 Mr Armitage worked for other clients. The Assystems contract at 7.1 with ATDSL states *"Assystem understands and accepts that the Supplier is entitled to seek, apply for and accept contracts to supply goods and services to other parties and to supply goods and services to other parties during the currency of this contract"*. The Champion contract with ATDSL says: *"Save as otherwise stated in this Agreement, the Consultancy shall be entitled to supply its services to any third party during the term*

of this Agreement provided that this in no way compromises or is to the detriment of the supply of services to the Client or amounts to a breach of this Agreement"

94. The work undertaken for DLS and AMEC between 2010 and 2011 initially took up most of Mr Armitage's time, so income came only from those contracts. However, he decided to diversify in 2012 by setting up a satellite installation business resulting in an additional income stream for the business. In 2012/13, the business issued 32 invoices to DSL but also 14 to other customers including satellite customers and in 2013/14, 46 invoices to DLS and 27 to other customers.

95. In 2014, whilst still engaged on projects with DLS, Mr Armitage attended a Satellite Exhibition in Cologne and although outside the current assessments under appeal, later attended trade fairs on integrated systems in Amsterdam and followed this up with a meeting with franchisees. The Tribunal considers these actions are consistent with someone in business on their own account and not consistent with someone who is effectively acting as an employee.

96. Where engagements are short-term or there are contemporaneous engagements, there is no dependence on a single paymaster. It may be that a worker has been taken on to complete a specific assignment with the contract ending on the completion of that assignment. It follows that the personal factors outside of the working terms and arrangements of the particular engagement can be considered.

97. HMRC accepts there were different contracts – the IR35 legislation must be considered on a contract to contract basis. HMRC further accepts that the company ATDSL was not set up / created with a view to taking on the DLS contracts, but was already in existence before either one started. Indeed it was DLS who originally approached ATDSL to invite them to apply and be engaged as a contractor through the relevant employment agencies. If they had sought Mr Armitage as an employee they could have done so and have benefited from the terms of such an arrangement which has avoided the payment to Mr Armitage of employee type benefits.

98. The final consideration is the intention of the parties.

99. The intention of the parties is clear: In the Champion contract at paragraphs 2.2 and 3.1 and in the Assystems contract at paragraph 7.4. the services are deemed to be contracts for services and not contracts of service.

100. However, the Tribunal considers there is no requirement in an IR35 case to consider intention of the parties, despite the stated intentions in the contracts regarding either parties' intentions. This is on the basis of the view taken by the Special Commissioner Dr Avery Jones on this factor in the case of *Netherlane Ltd v York (HMIT) 2005 SpC 457*.

Conclusion

101. Standing back and looking at the overall picture, it is very much a mixed one. However, on balance, the Tribunal considers that in a notional or hypothetical contract between Mr Armitage and DLS there are more factors that suggest it would be a contract for services (that he would be self-employed) than those which suggest a contract of service (that he would be employed).

102. There was a theoretical and limited right of substitution for Mr Armitage even if it may not have eventuated in practice. The belief that it would not have been accepted by DLS was never engaged or tested to determine whether it was right. There was a fair degree of control by DLS over Mr Armitage but it was not the same level as for its employees working in Dicot. The balance of other factors point to a contract for services rather than a contract of employment.

103. On balance, the notional contract between DLS and Mr Armitage was not a contract of service as an employee. Therefore, the appeal is allowed in full against all determinations, decisions and penalties.

104. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 27 JANUARY 2017

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[2018] UKFTT 0069 (TC)

TC06334

Appeal number:TC/2016/04992

INCOME TAX AND NATIONAL INSURANCE – intermediaries legislation – IR35 – sections 48-61 ITEPA 2003 – personal service company – if the services were provided by the worker directly to the client, would there be a contract of employment – expenditure reimbursed by appellant to employee – whether tax relief available – appeal dismissed in principle

FIRST-TIER TRIBUNAL
TAX CHAMBER

CHRISTA ACKROYD MEDIA LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MR NIGEL COLLARD

Sitting in public in Leeds on 26-28 September 2017

Mr Grant Summers of Grant Thornton UK LLP for the Appellant

Mr Adam Tolley QC and Mr Christopher Stone instructed by HM Revenue & Customs Solicitor's Office and Legal Services for the Respondents

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DECISION

Background

1. Christa Ackroyd is a television journalist who has been engaged in a variety of media roles since the 1970's. She co-presented a daily news digest known as "Calendar" for Yorkshire Television between 1990 and 2001. In 2001 she moved to present "Look North" on BBC1 which she continued to do until 2013. Ms Ackroyd worked at the BBC pursuant to two fixed term contracts between the BBC and the appellant, Christa Ackroyd Media Ltd ("CAM Ltd"). The first contract was dated 29 May 2001 and was followed by a later contract dated 4 May 2006 ("the Contract"). The Contract was terminated by the BBC on 28 June 2013.

2. This appeal is specifically concerned with the Contract. CAM Ltd is what is known as a "personal service company". HMRC have issued determinations to CAM Ltd in respect of income tax and notices of decision in respect of national insurance. Those determinations and decisions were made on the basis of the "intermediaries legislation" contained in sections 48-61 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") and equivalent provisions in the Social Security Contributions (Intermediaries) Regulations 2000 ("the 2000 Regulations").

3. The determinations under appeal cover tax years 2008-09 to 2012-13. The decision notices under appeal cover tax years 2006-07 to 2012-13. Together they total some £419,151 and were issued between March 2013 and October 2014. The extent to which there should be a set off of corporation tax paid by CAM Ltd and tax paid on dividends from CAM Ltd to Ms Ackroyd has not been agreed. Ms Ackroyd contends that the liability to tax and national insurance even if the appeal is not successful is approximately £207,000. At the invitation of the parties this decision will deal with the appeals in principle. The question of quantum may be referred back to the tribunal if necessary.

4. HMRC made the determinations and decisions on the basis that the hypothetical contract between the BBC and Ms Ackroyd which must be considered pursuant to the intermediaries legislation would have been a contract of service rather than a contract for services. In slightly simplified terms, HMRC contend that Ms Ackroyd's status for the purposes of the intermediaries legislation is that of an employee and that CAM Ltd should account for tax and national insurance accordingly. Ms Ackroyd contends that her status for the purposes of the intermediaries legislation is that of a self-employed contractor, and there is no further liability on the part of CAM Ltd.

5. We understand that the present appeal is one of a number of other appeals involving television presenters and personal service companies. However, this is not a lead case as such.

6. There is also an appeal against determinations and notices of decision for income tax and national insurance in connection with various payments by CAM Ltd to Ms Ackroyd to reimburse expenditure incurred by Ms Ackroyd. Those payments relate to subscriptions for Sky TV and additional expenditure said to have been

incurred as a result of home-working. The determinations and decisions cover periods 2007-08 to 2011-12 and together they total some £14,469. We shall deal with the legal basis for those determinations and decisions, our findings of fact and our reasoning in a separate section of this decision once we have considered the principal issue relating to the intermediaries legislation.

7. HMRC also imposed penalties on CAM Ltd in relation to both income tax and national insurance in connection with non-compliance with the intermediaries legislation. The income tax penalties were suspended and there is no appeal against those penalties. It appears that penalties were also imposed in relation to national insurance but were not suspended. It was not clear to us what if any penalties were imposed and under appeal in relation to the Sky subscriptions and the home-working expenditure. It is fair to say that the parties did not focus on the penalties in their submissions. In the circumstances the parties shall be at liberty to make further submissions in relation to penalties in the light of this decision.

8. Both parties produced helpful skeleton arguments and written notes incorporated into their oral closing submissions. In addition to the documentary evidence before us, we heard oral evidence from Ms Ackroyd and from two other witnesses on her behalf. We set out below the nature of that evidence and our findings of fact based on that evidence. All our findings are made on the balance of probabilities. Before considering the evidence we set out the legal framework which defines the principal issue to be resolved, namely whether for the purposes of the intermediaries legislation Ms Ackroyd should be treated as an employee or a self-employed contractor. The parties referred us to a considerable body of caselaw in relation to that issue which we consider in more detail when giving reasons for our decision.

Legal Framework

9. The principal issue in the present appeal is whether the intermediaries legislation applies on the facts to the relationship between Ms Ackroyd, CAM Ltd and the BBC. If the legislation does apply then it is agreed that there will be a liability on the part of CAM Ltd to income tax and national insurance, although the amount of that liability will a matter for agreement or a subsequent hearing.

10. The purpose of the intermediaries legislation was identified by Robert Walker LJ as he then was in *R (Professional Contractors Group & Others) v IRC [2001] EWCA Civ 1945* at [51]:

> " to ensure that individuals who ought to pay tax and NICs as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation."

11. The question whether the intermediaries legislation applies to any particular set of circumstances is determined by reference to section 49 ITEPA 2003. The equivalent provision for national insurance purposes is regulation 6 of the 2000 Regulations. Both parties agreed that the effect of section 49 and regulation 6 for

present purposes is identical and focussed their submissions on section 49. We shall do the same in this decision. Section 49 provides as follows:

> " (1) This Chapter applies where —
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),
>
> (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and
>
> (c) the circumstances are such that —
>
> (i) if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under the client, or
>
> ...
>
> (4) The circumstances referred to in subsection (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided."

12. The parties agree that section 49(1)(a) and (b) are satisfied on the facts. Ms Ackroyd is "the worker", the BBC is "the client" and CAM Ltd is "the intermediary". The issue between the parties is whether 49(1)(c) is satisfied. The issue may therefore be shortly stated as follows:

> " If the services provided by Ms Ackroyd were provided under a contract directly between the BBC and Ms Ackroyd, would Ms Ackroyd be regarded for income tax purposes as an employee of the BBC?"

13. This is what is referred to as "the hypothetical contract" (see *Usetech Ltd v Young [2004] EWHC 2248* at [9]). There is no dispute that the actual contractual arrangements involved CAM Ltd contracting to provide services to the BBC which it fulfilled through Ms Ackroyd. It is not suggested that Ms Ackroyd was in reality an employee of the BBC.

14. There is of course a wealth of caselaw in relation to whether an individual is an employee or self-employed. We shall deal with relevant aspects of that caselaw in our reasons below.

15. The parties agree that in this appeal the burden of establishing that Ms Ackroyd would not be regarded as an employee of the BBC pursuant to the hypothetical contract lies on CAM Ltd as the appellant.

Findings of Fact

(1) Generally

16. The evidence before us comprised witness statements and oral evidence on behalf of CAM Ltd. The witnesses were Ms Ackroyd, Ms Kathryn Apanowicz and Mr Paul Stead. Ms Apanowicz is a radio presenter on BBC Radio York. During her career she has worked as a television presenter, an actress and as a radio presenter. She was the partner of the late Richard Whiteley who presented Yorkshire Television's Calendar with Ms Ackroyd. Mr Stead is the managing director of Daisybeck Productions Ltd, an independent production company. He acts as the executive producer on all programmes made by Daisybeck. We refer to their evidence below in so far as it is relevant to the issues.

17. Ms Ackroyd's evidence did, we think, reflect the fact that she is more used to interviewing than being interviewed. It seemed to us that at various points in her cross-examination she was more concerned with understanding where the line of questioning was going than in giving direct answers to the questions being asked. We had to remind her to answer the questions being asked on several occasions. We do not consider that she was deliberately trying to evade difficult questions, but we did form the impression that she was keen to identify opportunities to present her case in the best light. She was clearly aware that cases such as this turn on value judgments as to the significance of various features, some pointing towards employment and some pointing towards self-employment. In her evidence she was keen to highlight those features which she considered would help her case, occasionally at the expense of directly answering the questions being asked.

18. There are underlying reasons for Ms Ackroyd's approach to her evidence which we shall touch on later in the decision. Broadly, Ms Ackroyd has a genuine belief that towards the end of the contract between CAM Ltd and the BBC she was victimised by the BBC and made a scapegoat following an internal inquiry into the BBC's use of "freelancers". She clearly now has a deep mistrust of the BBC and of HMRC, the latter based in part on HMRC's reliance on material provided by the BBC for the purposes of their enquiry into her tax affairs. It is not appropriate for us in the course of this decision to make any findings as to whether Ms Ackroyd's belief that she was being victimised by the BBC is justified or not. Indeed, we did not hear any evidence from any relevant BBC employees and we are not in a position to make such findings.

19. There were also a number of inconsistencies between what was said and/or confirmed by Ms Ackroyd in correspondence and meetings compared to what Ms Ackroyd said in her oral evidence. We note some of those inconsistencies below. We have to say it would have helped to clarify the position if HMRC had interviewed Ms Ackroyd in connection with their enquiry in its early stages and in any event prior to reaching their initial status opinion on 14 September 2012 and issuing determinations and decisions in March 2013. In the event they spoke only with her accountant, her husband and BBC employees before expressing their initial opinion. Ms Ackroyd had been keen to have a meeting with HMRC before they reached any sort of conclusion but the investigating officer did not consider it necessary.

20. We take all these features into account in assessing the reliability of Ms Ackroyd's evidence. We do not consider that Ms Ackroyd was deliberately trying to mislead us in any way. We are satisfied that all the witnesses were honest witnesses

doing their best to assist the Tribunal. However, where there are disputes as to facts or the inferences to be drawn we do not simply accept Ms Ackroyd's evidence at face value.

21. Ms Ackroyd is a director of and shareholder in CAM Ltd. Her husband, Mr Christopher Sutcliffe is also a director and shareholder. Ms Ackroyd has been a professional journalist for 40 years. She started with the Halifax Evening Courier and her career progressed through radio and television. By 1999 Ms Ackroyd was a co-presenter with Richard Whiteley of Yorkshire Television's Calendar, an early evening news and current affairs programme. It had ratings well above those of the equivalent BBC programme, Look North. The Yorkshire region was one of the few regions where the BBC was not winning its ratings battle with ITV. The BBC wanted to change the fortunes of Look North and Ms Ackroyd was approached to join the BBC on a "freelance basis". Ms Ackroyd turned the offer down because at that time the BBC could not say who her co-presenter would be. Subsequently the BBC announced that Harry Gration would be presenting Look North.

22. In May 2001 the BBC made a second approach to Ms Ackroyd. Ms Ackroyd regarded the offer as a "defining role" in which she could use her considerable experience to change, mould and shape Look North and she accepted the offer. Ms Ackroyd started working on BBC Look North in September 2001. She entered into a contract with the BBC dated 29 May 2001. Ms Ackroyd's evidence was that she was given control over Look North and that it was agreed she could make whatever changes she wanted to the programme. She regarded Calendar as having a strong regional identity which dealt with hard news brilliantly and which was trusted by viewers. In contrast, she regarded Look North as being staid, dull and formulaic.

23. This first contract was for a period of 5 years. The parties were expressed to be the BBC and Ms Ackroyd herself, but we understand payment was made to CAM Ltd. We were not referred to this contract in terms and neither party sought to rely on its specific terms in construing the Contract. Indeed, we understand it was common ground that this contract should be treated as being between the BBC and CAM Ltd.

24. Ms Ackroyd's evidence which we accept is that it was the BBC who suggested that she should work using a personal service company and that Ms Ackroyd agreed to do so. This contract and later the Contract were drafted and negotiated by the "Talent Rights Group" of the BBC rather than by BBC News. In 2001 CAM Ltd had already been incorporated by Ms Ackroyd and when the BBC suggested she should use a personal service company she decided to use CAM Ltd. The BBC did not want Ms Ackroyd to be an employee and we also infer that they did not want any potential liability for PAYE and national insurance if she were to be classified as an employee. Ms Ackroyd had never previously come across the term "personal service company". She checked the terms of the arrangement with her accountant, Mr Biggin, who advised her that everything was in order.

25. In 2006, CAM Ltd was offered a new fixed term contract. Ms Ackroyd's evidence is that her role did not change and we accept that evidence. In contrast we understand that Harry Gration at that time had a two year "freelance contract" but that

he became an employee of the BBC in or about 2006. Ms Ackroyd was never offered an employment position at the BBC.

26. The viewing figures improved almost immediately following Ms Ackroyd's move to Look North in 2001. Look North went from a position of being substantially behind its ITV rival to being substantially ahead.

27. Ms Ackroyd's evidence is that when she came to work for the BBC she was given a guarantee of "independence" and "control". We do not accept that was control of the programme itself and the BBC's output. If anything, it would have been control over the way in which she provided her services to the BBC. We consider these aspects of control later in the decision

(2) The Contractual Arrangements

28. We set out in the Appendix to this decision all relevant terms of the Contract. Ms Ackroyd said in evidence that she had other contracts in relation to other work which she did for the BBC but if those contracts were in writing they were not in evidence. We had no other evidence as to the terms of those contracts.

29. As stated, the Contract was drafted by the BBC Talent Rights Group. There was no evidence before us as to the relationship between that group and, for example, BBC News in terms of the engagement of presenters.

30. The Contract followed on from Ms Ackroyd's original contract in 2001 which was for 5 years. In 2006 she was offered a new 5 year contract but she turned that offer down because she wanted a 7 year contract. At the same time there were discussions about Ms Ackroyd giving up a newspaper column which she wrote for the Sunday Express. The BBC wanted her to give up the column and she also had personal reasons for wanting to do so, including a family illness and the amount of time she had to devote to the column. In due course she negotiated a new 7 year contract with the BBC together with an ex gratia payment of £40,000 plus VAT which appears to have been linked to Ms Ackroyd giving up her newspaper column. Clause 8.2 of the Contract provided that Ms Ackroyd could not provide her services for publications of any kind for anyone other than the BBC without first obtaining consent from the BBC.

31. Ms Ackroyd was reluctant to accept in evidence that she had a contract of employment with CAM Ltd. We put that reluctance down to the fact that she had not really addressed her mind to her relationship with CAM Ltd beyond being a director and shareholder of the company. Certainly there was no written contract of employment but we find that work carried out by Ms Ackroyd for the BBC was pursuant to what must have been a contract of employment between Ms Ackroyd and CAM Ltd. Ms Ackroyd acknowledged that CAM Ltd effectively controlled her working activities, as recorded in Clause 1 of the Contract. She was paid for that work and CAM Ltd properly accounted for tax and national insurance on her employment income under the PAYE regulations.

32. Ms Ackroyd also received dividends as a shareholder in CAM Ltd. Income tax was properly accounted for on those dividends. Ms Ackroyd was not aware of the tax advantages associated with dividends. She appears to have left such matters entirely to her professional advisers, namely Mr Biggin and Mr Sutcliffe.

33. Ms Ackroyd considered herself to be in control of her own work, through CAM Ltd. She acknowledged that CAM Ltd was controlled by herself and her husband together but there were no outside influences. CAM Ltd was therefore in a position to ensure that Ms Ackroyd fulfilled the obligations of CAM Ltd under the contract.

34. Ms Ackroyd did not accept that the BBC had any control over her as a presenter, either in terms of the continuing changes she introduced to Look North or indeed in relation to editorial matters. She considered that she had "day to day editorial control", whilst accepting that the BBC had "editorial responsibility". We do not accept that Ms Ackroyd did have day to day editorial control over her work. That would have been inconsistent with clause 5 of the Contract.

35. Ms Ackroyd in oral evidence contended that she had the last say, for example in relation to the stories she would cover and present, but that the BBC would have responsibility for her actions. That may well have been the case for practical purposes in relation to issues arising whilst Ms Ackroyd was live on air. However, if issues or differences of opinion arose during pre-production meetings then we have difficulty accepting that Ms Ackroyd had the ultimate decision-making authority in relation to Look North or her work on the programme. Indeed, in a letter dated 4 December 2012 from Mr Biggin responding to HMRC's initial status opinion it was accepted that "the BBC is the ultimate arbiter". Elsewhere, its was accepted on Ms Ackroyd's behalf that "of course she could be told who she was interviewing".

36. Clearly in relation to what might happen whilst Ms Ackroyd was on air in a live programme she would have de facto control. She could ad lib, change the scripts and effectively decide how long an item would last. That is the nature of her professional expertise. One example was given, when the script described three murder victims as "prostitutes". Ms Ackroyd would not use the word. This was the only example in 13 years at the BBC when Ms Ackroyd felt so strongly about something that she insisted her voice should prevail and where the BBC effectively deferred to her view. We regard this as a professional difference of opinion. The fact that the editor on that occasion deferred and Ms Ackroyd's view prevailed does not in our view reveal much if anything about where control lay. If it had been so minded the BBC could have informed Ms Ackroyd pursuant to clause 14 of the Contract that she would not be presenting Look North that evening. There could still have been an issue as to whether that day counted towards her obligations under clause 3.1. In practice however, the relationship was never adversarial and no such issue ever arose.

37. The Contract is silent on the point but the context suggests to us that the BBC through the Editor would have control over content given the BBC's editorial responsibility. That is also consistent with the BBC's Editorial Guidelines which we consider further below.

38. Ms Ackroyd complained that she had provided a list of people from the BBC who could confirm her evidence, but HMRC had not approached those people. Whether there is substance to that criticism, it was always open to CAM Ltd to call BBC employees as witnesses in the tribunal. If for any reason they were reluctant then she could have applied for a witness summons. On the evidence before us we find that the Editor had the right on behalf of the BBC to decide which stories were covered and in what order. There was room for professional disagreement but we are satisfied that ultimately these were decisions for the BBC.

39. Clause 2 of the Contract provided for a fixed term of 7 years, subject to the termination provisions. In oral evidence Ms Ackroyd did not consider that a 7 year fixed term contract was unusual at the BBC. She was then taken to comments she had provided in relation to a meeting between HMRC and the BBC on 22 May 2012. At that time Ms Ackroyd's comment on the notes of that meeting was that a 7 year contract was "not normal" and that her contract was unique in this regard. In the end she accepted that the Contract was unusual and unique, especially for an older woman at the BBC. We find that it was unusual for someone in Ms Ackroyd's role to have a 7 year fixed term contract.

40. Clause 3 gave the BBC "first call" on Ms Ackroyd's services for up to 225 days per year. The Contract did not provide any means to deal with any dispute as between the BBC and CAM Ltd over the availability of Ms Ackroyd. In our view however Clause 3 gave the BBC the right to require CAM Ltd to provide Ms Ackroyd's services on any particular day subject to reasonable notice and also that she had not already worked 225 days for the BBC at the time of year they required her services. In practice the days Ms Ackroyd worked at the BBC were mutually agreed.

41. Clause 3 is not well worded but we are satisfied that the BBC could require Ms Ackroyd not only to work on a particular day, but also it could direct what work she did. They could require her if necessary to report on a particular story without also presenting the Look North programme. That is the effect of the words "as it may require". There is no evidence that happened in practice, but we find that the BBC was contractually entitled to do so. Ms Ackroyd accepted in cross-examination that the BBC ultimately had the right to specify what services CAM Ltd would provide, subject to it being in connection with her role as a presenter and reporter on Look North.

42. Ms Ackroyd did not have a desk at the BBC and used her own computer and mobile phone. The Contract specified that Ms Ackroyd could be required for up to 225 days per year. The contract is silent on the point, but the understanding was that those days were in relation to Look North. In practice Ms Ackroyd would tell the BBC which days she was not available for Look North. Ms Ackroyd was not aware of the BBC keeping a log of the days she worked and there was no reliable evidence that they did so. She kept her own diaries.

43. In addition to the 225 days where the BBC would have first call on Ms Ackroyd's services, clauses 3.2 and 3.4 envisaged the BBC might request her services for BBC radio or other contributions. We say request, because the provision of

services pursuant to clauses 3.2 and 3.4 was subject to mutual agreement. In theory Ms Ackroyd could have withheld agreement unless she was paid an additional fee if she had been minded so to do. In contrast clause 3.3 enabled the BBC to require Ms Ackroyd's attendance at public events. We construe this to be in addition to the 225 days referred to in clause 3.1 which relate only to the output of BBC Yorkshire.

44. Ms Ackroyd's evidence was that in practice, attendance at public events amounted to two events per year: Children in Need, where she would act as a regional presenter, and possibly at annual BBC open days. Ms Ackroyd regarded this as part of the 225 days, but little if anything turns on that. There was no contractual right to additional remuneration for attendance at public events.

45. Ms Ackroyd's evidence was that the 225 days under clause 3.1 left her plenty of time to do other things, although she also said that part of the reason why she wanted to end her Sunday Express column in 2007 was that it increasingly took up too much time. 225 days is equivalent to 45 working weeks of 5 days, but as a professional journalist we accept she might often work 7 days a week. There were no set hours in the Contract and she would work a 60-80 hour working week if that was what was needed to do the job. We are quite satisfied that Ms Ackroyd was devoted to doing a job she loved and was prepared to work long and hard to ensure the output she was involved in was as professional as possible.

46. Clause 7 provided for CAM Ltd to be reimbursed travel and subsistence payments at the rates payable to freelance contributors. In addition, Ms Ackroyd was entitled to a payment of up to £3,000 per year for the purchase of suitable clothing, on production of receipts. This sum was paid in each year of the Contract.

47. Clause 8.1 restricted Ms Ackroyd from providing any services in respect of television or radio in the UK or Republic of Ireland without the consent of the BBC, or for online services for anyone other than the BBC. Ms Ackroyd described this as "mutually beneficial" in that it was consistent with what she wanted to achieve with Look North. We do not consider that the clause itself was "mutually beneficial". It was a clear restriction on what Ms Ackroyd could do in relation to other activities, whether or not she wanted to engage in such activities. The effect was that she could not provide services as a television presenter or broadcaster in the UK or the Republic of Ireland without the consent of the BBC. She could not provide services for publications other than for the BBC without the consent of the BBC.

48. Clause 9 refers to the BBC's undertakings in relation to "Programme Standards" pursuant to an agreement it had with the Secretary of State for Culture Media and Sport, in particular in relation to impartiality. Ms Ackroyd was obliged pursuant to clause 9 not to engage in any conduct which would compromise or call into question the impartiality or integrity of the BBC or Ms Ackroyd. The clause goes on to restrict Ms Ackroyd in relation to certain activities without the prior written consent of the BBC. The restricted activities included involvement or association with anyone having a trading relationship with the BBC, providing interview training, being publicly associated with any charity or government initiative or promoting goods or services.

49. Ms Ackroyd did not consider that these restrictions had any impact on her. For example, she considered that the restriction on being associated with a charity only applied to "Christa Ackroyd BBC" and not "Christa Ackroyd the person". We do not accept that there was any such distinction. The restrictions applied to Ms Ackroyd generally. In practice the BBC had no real cause to enforce these restrictions until shortly before termination of the contract in 2013 when the BBC appears to have decided to enforce strictly the terms of the Contract.

50. Clause 12 provided for CAM Ltd to indemnify the BBC for any breach of the warranties given in clauses 5 and 11, including any liability for breach of copyright or defamation by Ms Ackroyd.

51. Clause 14 provided that the BBC were not obliged to call on Ms Ackroyd's services, although they would still be obliged to pay CAM Ltd its fees under the Contract if they did not do so. In practice the BBC did always call upon Ms Ackroyd's services for Look North until March 2013.

52. Clause 18 prohibited CAM Ltd from using a substitute for Ms Ackroyd.

53. Ms Ackroyd did not have a line manager as such and she was not subject to formal appraisals. In contrast, Harry Gration's line manager was Editor of Look North, who was Mr Tim Smith for at least part of the period up to 2013. Ms Ackroyd had no set hours and subject to programming commitments she was able to come and go as she pleased. She had to give reasonable notice if she was not available to present Look North. That would usually be 2-3 weeks notice if there was something else in her diary. She had no entitlement to sick pay, holiday pay, maternity leave, pension rights or other benefits. That was because the Contract was with CAM Ltd. Such matters would have been subject to Ms Ackroyd's employment contract with CAM Ltd.

54. The material before us contained a sample BBC employment contract and freelance contract. We were not referred to those contracts in detail and we heard no evidence as to the detailed terms of any other BBC employees. In our view it is not a worthwhile exercise to compare the contract with CAM Ltd to employment contracts entered into by the BBC. We must construe the hypothetical contract on its own terms.

(3) Payment of Fees

55. Clause 6 provided for fees to be paid by the BBC to CAM Ltd in respect of the services to be provided by Ms Ackroyd. Fees were payable in accordance with the Schedule and the sums payable were exclusive of VAT. The BBC produced what are known as "self-billed" invoices for VAT purposes and CAM Ltd accounted for VAT accordingly.

56. The payments provided for in the Schedule started at £163,233 for the year ended 31 December 2007, increasing in line with the RPI in each subsequent year of the Contract. The amount payable was a single amount in respect of each year, payable by monthly instalments. It was not dependent on the number of days or hours

worked by Ms Ackroyd, provided Ms Ackroyd was available for work when required by the BBC pursuant to clause 3. In the event that Ms Ackroyd failed for any reason to render the services in clause 3 then clause 6.2 provided that the payment was to be reduced proportionately unless the BBC decided otherwise. In practice the question of reduction never arose. Provided Ms Ackroyd made herself available and performed the services for at least 225 days, which she did, then CAM Ltd was entitled to the payment

57. Paragraph H of the Schedule provided for CAM Ltd to receive a further payment of £7,500 for each 6 month period if ratings for the programming of Ms Ackroyd consistently and significantly exceeded the ratings of the BBC's commercial competition. All parties understood this to mean the ratings of Look North against the ratings of Calendar. Ms Ackroyd objected to this being described as a bonus and preferred to describe it as a success fee. She did acknowledge that it was a performance related payment. Ms Ackroyd understood that she was the only person ever to negotiate such a clause at the BBC but we have no evidence that is in fact the case. In every year during which Ms Ackroyd worked at the BBC the performance related bonus was paid because the ratings of Look North significantly exceeded those of Calendar.

58. Ms Ackroyd's evidence was that she was paid much more than the equivalent rate for a newsreader, a journalist or a producer. She said that she was paid "as talent". It was not clear what Ms Ackroyd meant by this, but in her evidence she described herself as unique within the BBC because of her role and what was expected of her in terms of initially winning the ratings battle with ITV and then keeping Look North ahead of the ITV equivalent. We have already made findings as to the nature of Ms Ackroyd's role. We cannot say that it was unique but we are satisfied that she was expected to drive ratings and was entitled to a performance related bonus in that regard.

(4) Working Practices

59. Ms Ackroyd's witness statement described her involvement in Look North at the time she joined the BBC as follows:

> "I was genuinely consulted with from the beginning … on the very fabric, style and perception of BBC Look North. I was asked for my views on style and delivery and then tasked with changing the format in line with my ideas… In particular, I suggested (and it was acted upon) that the BBC change and soften the actual set in order to make the programme more reflective of the light and shade of the county of Yorkshire and to encourage the Producers to do so. It was also my suggestion and indeed, written into negotiations, that a make-up department be established, because I advised (on the basis of my past experience) that guests and contributors to the programme needed to feel better supported and nurtured than in the past."

60. We accept that evidence entirely. Ms Ackroyd was a very successful television journalist and presenter. We are satisfied that her journalistic and presenting skills contributed in large measure to the success of BBC Look North after she joined the programme. It is notable in this passage of her evidence in chief, derived from a letter

which Ms Ackroyd sent to HMRC on 11 April 2013, that Ms Ackroyd uses phrases such as "I was asked for my views", "in line with my ideas", "I suggested", "it was also my suggestion" and "I advised". It is clear from that phraseology and from clause 3 of the Contract that Ms Ackroyd was not being paid to produce an end product. We are satisfied that the ultimate decision as to how the programme might be changed lay with the BBC. Having said that, Ms Ackroyd made editorial contributions and was expected to drive change and maintain strong viewing figures. She did drive change including changes to the lighting, the sound, the sets, introducing make-up facilities for guests and in other areas.

61. Ms Ackroyd acknowledged that producing Look North was a "team effort" with some tremendous journalists and incredible people on the team. She maintained that she was "leading that team". We accept that Ms Ackroyd drove the changes that enabled Look North to stay significantly ahead of Calendar. We also accept Ms Ackroyd's evidence that she ran training programmes for on-air staff and mentored technical staff. We do not accept solely on the basis of Ms Ackroyd's evidence that she led the team in the sense of control and decision-making.

61. Ms Ackroyd was the "anchor" for Look North together with Harry Gration. This role was usually carried out in the studio, but she would also anchor the programme when conducting an outside broadcast. There was no typical day. She may have a major interview to prepare for. She would do her own research. Arranging such interviews could take days, weeks or months. In one case she led a small team for nine months investigating the background to a series of murders known as the Crossbow Cannibal killings. She controlled the research, filming and subsequent broadcast material. She described herself as the researcher, producer and presenter in relation to this work and we are satisfied that is an accurate description. However, we are satisfied that it was a matter for the BBC to decide whether and in what way to use the story. They also had the right to edit Ms Ackroyd's material.

62. More usually, Ms Ackroyd would present Look North 5 days a week. This would involve presenting the flagship programme at 6.30pm. It might also include presenting lunchtime and late night news programmes which came under the Look North title.

63. A working day would usually start with a blank sheet of paper. There would be a producers' breakfast meeting at 9.30 – 10.00 am with discussions about what to include in the programme. Ms Ackroyd would not be at that meeting. She would already have had discussions with the producers and may have set off to cover a particular story. The producers would dispatch various reporters to various stories. Ms Ackroyd would go out and research a news story or conduct an interview on camera. She would cover the biggest stories, or the stories in which she had most interest. If she had a major interview she might be forceful in demanding that it should be a lead news item. There were no set timings or shifts. Production discussions would take shape during the day. The only constant was that Look North would be on air at 6.30pm and Ms Ackroyd would be presenting it with Harry Gration unless either was unavailable for some reason.

64. Discussions about content would take place throughout the day to shape the programme. There would be a 3pm meeting in the newsroom when the material from various reporters came in. Usually there would be a natural running order for the stories. There may be a debate, but it was a collaborative effort. That meeting would involve the Editor, the producers, the sound and floor-manager and the Director. Harry Gration would be there. Ms Ackroyd would be there as often as she could but she might still be out covering a story. The other journalists would not attend because they would probably still be out covering stories.

65. In practice Ms Ackroyd would use her time as she saw fit during the day, but she would almost always be back at the BBC studios in Leeds by 3.30pm for pre-production. She would oversee the editing of her material. Look North had a number of editors who would edit pieces, dealing technically with the recorded image and sound. Ms Ackroyd chose to oversee the editing of her material as part of her professional approach to working on the programme. By virtue of clause 3 the BBC could if necessary have required her to do that work as part of the "reasonable ancillary services" it could require CAM Ltd to provide.

66. The producers would prepare outlines of the running order and the scripts which would be accessible by computer. Those details would be sent as a package to the Director. In broad terms the Director's job was to make the programme happen, including how the programme looked and what camera shots to use.

67. According to Ms Ackroyd the scripts would then be "greened" by a producer. This involved finalising the wording of a script and the length of an item, but Ms Ackroyd could and would change the script constantly right up to final delivery on air. Back at the studio Ms Ackroyd might completely re-write her script on the computer. For example, she might want to ensure that it used language that "sounded like" her. That process could take place right up to the last minute and continue whilst on air.

68. In late 2011/early 2012 Tim Smith the Editor of Look North spoke with Ms Ackroyd about last minute changes to scripts. Mr Smith wanted such changes to be made earlier and Ms Ackroyd agreed, although it is in the nature of a live news programme that changes may have to be made right up to the end of the programme. We are satisfied that Ms Ackroyd would lead such changes and that her role was not simply reading a script from an autocue. Interviews, whether with high profile individuals or others simply caught up in a news story, would almost always be unscripted.

69. Ms Ackroyd would wear an earpiece during a programme whether she was in the studio or on an outside broadcast. The earpiece enabled "talkback" from the gallery of the studio. It was not used to give Ms Ackroyd instructions, but to give her information such as timings to ensure the smooth running of the programme.

70. Immediately after each programme there would be a post-production meeting to hear feedback about the programme. It was not in any sense an appraisal. It would be

a short discussion usually about what had not happened in the programme. There would be no recriminations as such if anything had not gone to plan.

71. Ms Ackroyd maintained that she "was in charge of [her] part" of the programme and effectively could not be overruled. However, following a meeting she had with HMRC on 13 August 2013 Ms Ackroyd accepted that she could be told who she was interviewing. She maintained that how the interview was conducted was a matter for her. We accept that is the case, particularly in relation to a live interview. To a very large extent Ms Ackroyd was expected to use her professional judgment in the work she did.

72. The role of the Editor was to have an overview of the whole programme each day. In particular the Editor would oversee and have responsibility for the producers. The Editor was also Harry Gration's line manager.

73. It is in the nature of a news programme that a story may break during the day or indeed during the programme. For example Ms Ackroyd covered the kidnapping of Shannon Matthews on location from Dewsbury. She anchored the programme by way of outside broadcast. Similarly, Ms Ackroyd anchored the programme from Hebden Bridge when the town was flooded and from London during the 2012 Olympics. In those circumstances there may be no producer on site, no director, no script, no autocue and no monitor. The broadcast would effectively be controlled by Ms Ackroyd.

74. Ms Ackroyd was part of the public face of the BBC in the Yorkshire region through her role as a presenter of Look North. Having said that, some members of the public still associate her with her time as a presenter of Calendar for ITV.

(5) Other Activities

75. The scope of the services to be provided by CAM Ltd were defined by clause 3. That clause was supplemented by clause 11.1 by which CAM Ltd warranted that no other contract or engagement or any other reason would inhibit or prevent Ms Ackroyd from fulfilling her obligations under the Contract.

76. At the time Ms Ackroyd was approached by the BBC to present Look North she had a newspaper column in the Daily Express, later in the Sunday Express. In 2004 the BBC wanted Ms Ackroyd to give up the column but Ms Ackroyd refused. She continued to write the column until January 2007 as previously described. At that time her fee for writing the column was approximately £40,000 per year.

77. Ms Ackroyd does not make personal appearances in what she described as a "show and go". She did not do what she considered to be "inconsequential appearances" such as the opening of an event or "cutting a ribbon". She did however offer her services as a presenter at conferences and events in which she had a particular interest. For example, presenting a "Women in the Workplace" conference for Morrisons Supermarkets, presenting award ceremonies for various emergency services and supporting organisations such as Bradford University and the Yorkshire

Tourist Board. Ms Ackroyd also appeared as herself in a TV network drama called "The Syndicate" and in the film "The Calendar Girls".

78. Ms Ackroyd's evidence was that she did not seek permission from the BBC before accepting such engagements, although she might inform the Editor of Look North as a courtesy. We accept that evidence, although strictly CAM Ltd was required to ensure that Ms Ackroyd had consent from the BBC for such activities pursuant to clauses 1, 8 and 9 of the Contract.

79. Ms Ackroyd had a high profile in Yorkshire. Many people would contact her directly about engaging her services. If anyone tried to contact her through the BBC then they would be told they should contact Ms Ackroyd directly.

80. Ms Ackroyd told us and we accept that she had a lot more freedom and flexibility to take on other engagements compared to colleagues who were employed by the BBC, such as Harry Gration. Prior to 2013 she was never prevented from undertaking any activity. In relation to many events Ms Ackroyd made no charge for her services because she considered they were worthy causes. It was common ground that Ms Ackroyd was not pro-active in seeking other clients. She did not need to be because she regarded the Contract as very lucrative and she was content to devote her energies to Look North. In early 2012 Harry Gration and the weatherman on the show were told by the Editor that they could no longer charge for outside appearances. In contrast it was accepted by the Editor that Ms Ackroyd could continue to charge because she was not an employee.

81. It is clear that the vast majority of Ms Ackroyd's income during the period of the Contract, until the Contract was terminated in 2013, came from the BBC. Her income from other sources was very small by comparison as indicated by the following figures:

Year ended 31 December	**Gross Income from BBC £**	**Other Gross Income £**	**Proportion from BBC**
2009	202,316	4,000	98%
2010	176,596	6,416	96.5%

82. Ms Ackroyd obtained some work through The Speakers Agency. In one contract with the Speakers Agency dated 15 January 2010 Ms Ackroyd's address was given as c/o BBC Look North. On occasion correspondence in relation to Ms Ackroyd's other activities would be addressed to Ms Ackroyd c/o BBC Look North. That is not surprising because the BBC published Ms Ackroyd's profile and contact details on its website and it was well known that Ms Ackroyd worked at the BBC in Leeds.

83. There was one example of CAM Ltd invoicing the BBC for work other than in relation to Look North. That was in September 2004 when Ms Ackroyd presented a

national news programme from London. This seems to have been an isolated example. Ms Ackroyd had no desire to work outside the Yorkshire region.

84. We heard evidence from Mr Paul Stead. He has known Ms Ackroyd for many years and engaged Ms Ackroyd to do a voice over for a television documentary called Georgia's Story which told the story of an obese 15 year old girl. The engagement was arranged directly between Mr Stead and Ms Ackroyd, not via the BBC. Ms Ackroyd re-wrote the script. The programme was shown on the BBC and sold around the world. Ms Ackroyd invoiced Daisybeck £500 plus VAT for her work. Mr Stead would discuss ideas with Ms Ackroyd a couple of time a year, although Georgia's Story is the only time Ms Ackroyd has worked for Daisybeck. He described her role as akin to a producer.

85. The Contract required Ms Ackroyd to attend public events as required by the BBC. Ms Ackroyd said that these would be few and far between. If she was attending an awards dinner then she considered she was attending as herself, and not on behalf of the BBC.

(6) Control Generally

86. Ms Ackroyd provided extracts from her diary entries between 2007 and 2013, principally to demonstrate that she was able to choose when she worked, coming and going outside the established shift pattern subject to fulfilling her obligation to work 225 days per year. We accept that evidence. On occasion she worked for other organisations without question from the BBC. We are satisfied that is what happened in practice. Having said that, there was no reason for the BBC to assert its rights under the Contract to restrict the activities of Ms Ackroyd unless the BBC considered there was a significant breach of contract.

87. Ms Ackroyd was able to use her journalistic skills to identify and develop stories however as she chose. She worked on high profile stories such as the kidnap of Shannon Matthews, the shooting of PC Sharon Beshenivsky and many others. At the time of the shooting of PC Sharon Beshenivsky Ms Ackroyd received a tip off that a police officer had been shot in Bradford. Her contacts confirmed that it was a female PC. At the time she was hosting an outside broadcast in relation to Children in Need. She told us that she "demanded to go back to the studio" so that she would be there as the story developed. We accept that evidence.

88. We are satisfied that Ms Ackroyd had a high degree of autonomy in carrying out her work and in identifying the stories she wished to follow. We heard evidence from Ms Kathryn Apanowicz who had been interviewed by Ms Ackroyd on a number of occasions and her evidence is consistent with that finding.

89. Ms Ackroyd considered herself to be unique at the BBC in this regard, reflected in the amount she was paid which she described as far more than any other regional presenter and many national newsreaders. Ms Ackroyd suggested that this was because she was much more than a newsreader. We cannot say whether Ms Ackroyd was unique in this sense, but we are satisfied that she was not simply a newsreader.

90. Ms Ackroyd's relationship with the BBC and its employees working on Look North was not adversarial. No-one ever tried to stop her from doing anything. It was understood that if there was a big story, Ms Ackroyd would be there. Ms Ackroyd considered that HMRC were seeking to portray her as someone who is given a script and reads from an autocue. We are satisfied that is not the case. Indeed, it was not how Mr Tolley put the case on behalf of HMRC.

91. HMRC allege that Ms Ackroyd attended BBC training events. Ms Ackroyd accepted that she attended a training session on social media on 24 March 2011. Having been invited, she asked rhetorically why she would not go. She also accepted that she attended a training session on Safeguarding BBC Values on 13 February 2013, shortly before she was told by the BBC that she was being withdrawn from presenting Look North. She also recalled telling the trainer that the restriction on associating with charities did not apply to her because she was freelance.

92. Ms Ackroyd denied attending a training session on Safeguarding Trust – English Regions on 26 February 2008 because her dairy indicated this was in the middle of the Shannon Matthews abduction. In a meeting with HMRC, Ms Helen Thomas the BBC Head of Region for Yorkshire said that no-one could read the news if they had not done the Safeguarding Trust training session. This training session appears to relate to the BBC's Editorial Guidelines. It is not clear however whether Ms Ackroyd attended this particular training session.

(7) BBC Editorial Guidelines

93. The BBC's "Editorial Guidelines" encapsulate the values of the BBC and the editorial standards that every producer of BBC content is expected to follow. They are revised every four or five years. New editions were produced in 2005 and in October 2010. It is HMRC's case that Ms Ackroyd was contractually bound by the Editorial Guidelines, and that this is one aspect of the BBC's control over Ms Ackroyd's work.

94. The suggestion that Ms Ackroyd was bound by the Editorial Guidelines appears first to have been made by Ms Thomas in a meeting she had with HMRC on 2 August 2013. The notes of that meeting suggested that Ms Thomas equated the Editorial Guidelines with the Programme Standards referred to in Clause 9.1 of the Contract. In written comments by Ms Ackroyd on the notes of that meeting Ms Ackroyd, who was not present, states "these were the guidelines". At first sight it seemed that Ms Ackroyd was accepting that the Programme Standards were the Editorial Guidelines. In oral evidence however she was adamant that was not the case.

95. The Editorial Guidelines were mentioned in emails from Mr David Smith of the BBC Tax department to HMRC in 2014. Mr Smith also suggested that a reference to Programme Standards in clause 9.1 of the Contract was a reference to the Editorial Guidelines.

96. Mr Tolley put to Ms Ackroyd and submitted to us that the reference to Programme Standards in Clause 9 of the Contract was a reference to the BBC's Editorial Guidelines.

97. It is striking that there is no evidence from the BBC in this appeal, in relation to this issue and others. It is common ground that the Editorial Guidelines were previously called the Producers' Guidelines. There was an extract from the fourth edition of the Producers' Guidelines in evidence. It is not clear what date these were published but it was sometime before June 2005 when they became the Editorial Guidelines. The introduction to the Producers' Guidelines was by Mr Greg Dyke, the then Director General. He states:

> " These Guidelines are a public statement of [the BBC's] values and standards and how we expect our programme-makers to achieve them. They detail the BBC's approach to the most difficult editorial issues and provide guidance which programme makers at all levels need to be aware of and follow
>
> …
>
> These Guidelines are a working document for programme teams to enable them to think their way through some of the more difficult dilemmas they may face …
>
> Our staff, those freelances working with us, and the independent producers we commission – all need to be familiar with these Guidelines and to apply their underlying principles. **This is more than just a moral responsibility; it is also a contractual obligation for everyone who makes programmes for the BBC** …"
>
> Emphasis added

98. The Producers' Guidelines comprise some 359 pages dealing with values such as impartiality, fairness, taste and decency; issues in programmes such as children in programmes and the reporting of suffering and distress; programme funding and external relationships; politics and various other matters.

99. In June 2005 a new version of the Editorial Guidelines was published. They were said to be shorter and clearer, but were still 201 pages in length dealing with similar issues as the previous Producers' Guidelines. The introduction by Mr Mark Thompson, the then Director General, included the following:

> " Many of the guidelines are advisory, but some are mandatory and have the force of instructions… So please read the guidelines and keep them by your side as you work …"

100. The Editorial Guidelines were available on the BBC website. A section on the BBC's Editorial Values contained the following remarks:

> " The BBC Editorial Guidelines are a statement of the Values and standards we have set for ourselves over the years. They also codify the good practice we expect from the creators and makers of all BBC content, whether it is made by the BBC itself or by an independent company working for the BBC …"

101. In 2010 a new version of the Editorial Guidelines was published. They were described by Sir Michael Lyons, the Chairman of the BBC, as "one of the most important documents the BBC publishes". By way of introduction he said:

" … these Guidelines set out the standards required of everyone making programmes and other content for the BBC."

102. A section on Using the Guidelines contained the following:

" The BBC Editorial Guidelines apply to all of our content whoever creates or makes it and wherever and however it is received.

…

Any proposal to step outside the Editorial Guidelines must be editorially justified. It must be discussed and agreed in advance with a senior editorial figure or, for independents, with the commissioning editor. Director Editorial Policy and Standards must also be consulted.

…

2.2.1 Editorial responsibility in the BBC rests with the editorial chain of management from programme or content producer, whether in-house or independent, through to divisional director, and to the BBC's Director-General, who is the editor-in chief."

103. Ms Ackroyd's evidence was that there was no discussion of the Producers' Guidelines at the time she first started to work at the BBC. Her evidence was that she had only ever been given one copy of any guidelines. She said this was in 2004 when a copy was put in everyone's pigeonhole. There was no reference to the Editorial Guidelines at the time the Contract was being negotiated in 2006. She said that she had never referred to the Editorial Guidelines nor was she ever referred to them. She considered the Editorial Guidelines she had been given were guidance for less experienced journalists which simply described what was best practice. She had read the Editorial Guidelines but would have no need to refer to them specifically. She felt they were more a part of the BBC's "mission statement" and that they were there to demonstrate the BBC's values to the public. Ms Ackroyd said that "they didn't apply to me". She would operate her own professional guidelines such as honesty, integrity and respecting human dignity.

104. Ms Ackroyd said that she would expect a reference to the Editorial Guidelines in her contract if she was bound by them as a matter of contract. She did not regard them as contractually binding but she did regard them as "of great interest".

105. On a number of occasions Ms Ackroyd referred to having received only one copy of guidelines throughout the time she was working at the BBC, which was in 2004. When she was taken to the 2010 Editorial Guidelines she said that she had never seen the document or read the introduction. However, we are satisfied that Ms Ackroyd received a round robin email from Mr Thompson dated 11 October 2010 drawing her attention to the launch of the new BBC Editorial Guidelines. The email expressly said as follows:

" The Guidelines show you how to ask and answer important questions like these – and where we have to follow rules, they'll tell you what the rules are too.

> As before, the new Guidelines are being published as a book – everyone involved with our content should get a personal copy by the end of the week. From tomorrow we are also launching a new Guidelines website … It contains the whole of the Guidelines, together with Editorial Policy Guidance …
>
> Whatever your role in making the BBC's content, what you do and how you do it makes a difference. Using the Guidelines, and reflecting their values in your work, is at the heart of making the BBC's content something we can be proud of."

106. There was some suggestion that Ms Ackroyd went to a roadshow explaining the Editorial Guidelines at the time the 2010 version was introduced but she had no recollection of doing so. There is no reliable evidence that she did and we make no finding in that regard.

107. Ms Ackroyd's approach to the Editorial Guidelines seems at odds with the introductory remarks contained in various versions of the Editorial Guidelines, including the Producers' Guidelines which she received in 2004 and Mr Thompson's email. However, we are not satisfied that the Programme Standards referred to in Clause 9 of the Contract is a reference to the Producers' Guidelines or the Editorial Guidelines. There is no direct reliable evidence that is the case, nor is there any evidence as to the content of the "agreement" with the Secretary of State referred to in Clause 9.

108. Mr Tolley submitted that even if compliance with the Editorial Guidelines was not a contractual obligation, Ms Ackroyd was still obliged to follow them. The source of that obligation was not explained but in practical terms we accept the submission. If Ms Ackroyd did not act in accordance with the Editorial Guidelines then her contract might not be renewed, albeit she had a 7 year contract. Alternatively, in any particular situation the BBC could decide not to call on Ms Ackroyd to present or work on Look North, although arguably they would remain liable to make payments under the contract. In our view the real significance of the Editorial Guidelines in the present case is that they provide part of the context in which the parties entered into the Contract. We also consider that they were in part the standards by reference to which Ms Ackroyd would be judged professionally by the BBC and others working on Look North. We return to the Editorial Guidelines in our reasons below.

(8) HMRC's Enquiry

109. HMRC's enquiry into the tax affairs of CAM Ltd commenced on 22 February 2011. It was described as a "check of employer and contractor records". It was not clear from the opening letter that it was an enquiry into Ms Ackroyd's status for the purposes of IR35. In the circumstances Ms Ackroyd did not attend the initial meeting on 1 September 2011 which was attended by Mr Sutcliffe and Mr Biggin. Ms Ackroyd's husband is a director of CAM Ltd. He is an accountant and acts as a bookkeeper for CAM Ltd. The meeting covered in detail the nature of Ms Ackroyd's work for the BBC. It is unfortunate that the significance of that meeting was not made apparent to Ms Ackroyd because HMRC rely on answers provided by Mr Sutcliffe concerning the relationship between Ms Ackroyd and the BBC. However, Ms Ackroyd did at least have an opportunity to comment in correspondence on the notes

of what was said at the meeting and at other meetings between HMRC and BBC employees.

110. Notes of the meeting were provided by HMRC and CAM Ltd was invited to agree the notes. Mr Biggin replied setting out points where issue was taken in relation to the notes. Thereafter Ms Ackroyd said that she tried to meet with the HMRC officers but they would not meet with her until after they had made their decision that IR35 was engaged.

111. The enquiry was conducted by Mr Ian Pannett and he set out his opinion and reasons for the application of IR35 to CAM Ltd on 14 September 2012. It was a decision in principle and there was no assessment at that stage. CAM Ltd was invited to provide any further information within 35 days. Documentation to quantify the tax and national insurance that would be due was also requested in separate correspondence.

112. The first decisions and determinations in relation to years 2006-07 and 2007-08 were issued to CAM Ltd on 7 March 2013. There was a subsequent meeting between Ms Ackroyd and HMRC on 13 August 2013, after Ms Ackroyd's contract had been terminated.

113. In the course of HMRC's enquiry, Mr Pannett spoke with Mr Smith of the BBC tax department and with Ms Thomas. Ms Ackroyd was critical of the enquiry because she did not consider that these individuals had any first hand knowledge about her role. She had never met Mr Smith. She knew Ms Thomas very well but as Head of Region she would rarely have contact with her. Ms Thomas trusted Ms Ackroyd to work "without interference". Neither individual was involved in negotiating the contracts between the BBC and CAM Ltd. Ms Ackroyd considered that the officer had reached his conclusion on inadequate information as to her role. In particular, that he wrongly understood she was simply a presenter using an autocue who was fed questions and controlled by the producers.

114. Mr Summers submitted that the evidence of HMRC's dealings with the BBC during the enquiry suggested that there may have been some "collusion" between the two bodies. We do not accept that any such case is made out.

115. Ms Ackroyd said that when HMRC contacted the BBC for the purposes of their enquiry in or about May 2012 the BBC became very concerned. The enquiry led the BBC to question Ms Ackroyd's integrity and "out of the blue" in early 2013 she was taken off air. Thereafter the BBC refused to meet with Ms Ackroyd or her advisers.

116. Between 3 May 2013 and 17 May 2013 there was a chain of email correspondence between Ms Ackroyd, Ms Thomas and Mr Tim Smith in which Ms Ackroyd effectively asked for permission from the BBC to be involved in various engagements. In particular, to become President of the Friends of the Bronte Church, to attend a Marie Curie lunch in aid of Bradford Hospice and to demonstrate cooking at the World Curry Festival in Bradford. Permission to become President of the Friends of the Bronte Church was refused on the basis of the Editorial Guidelines.

The Editorial Guidelines provided that those involved in the production of BBC content must have no significant connection with the organisations featured and it was suggested that a story about the church roof might be featured in future. The appearance at the World Curry Festival was approved. Ms Ackroyd said that she sent these email requests 'tongue in cheek'. She was trying to make a point by asking permission for every little event which previously she would never have asked permission for. By then the relationship had completely broken down.

117. We do not consider that much weight is to be given to this email correspondence. Nor do we consider that Ms Ackroyd's failure to challenge the refusal based on Editorial Guidelines adds much weight to HMRC's case that Ms Ackroyd was contractually bound by the Editorial Guidelines. We accept Ms Ackroyd's evidence that at this stage there were stories in the newspapers about her relationship with the BBC. She felt that the BBC was effectively trying to establish control retrospectively and she did not take it seriously. More likely in our view is that the BBC began relying on what they understood to be their strict contractual rights.

(8) Termination of the Contract

118. On 22 May 2012 there was a meeting between Ms Thomas and Mr Smith of the BBC and HMRC in connection with CAM Ltd and Ms Ackroyd's work at the BBC.

119. On 5 July 2012 Helen Thomas wrote a rather opaque letter to Ms Ackroyd ahead of any negotiations there might be at the end of the Contract in 2013. The underlying message was that the "market value" for presenters had fallen since 2007. In fact it does not appear that any negotiations followed this letter.

120. Ms Ackroyd considered that the BBC's attitude towards her changed from the beginning of 2013. This followed evidence from the BBC given to the House of Commons Public Accounts Committee in July 2012 and the publication of a review undertaken by Deloitte on behalf of the BBC into freelance engagements at the BBC. We know that the review was published on 7 November 2012. The review recognised that the BBC required a large number of freelancers to make its programmes and referred to the BBC's policy of engaging a small number of "on air" individuals via personal service companies. As a result of the review the BBC changed the way it viewed personal service companies. It no longer intended to engage on air talent with long term contracts through personal service companies. The BBC anticipated that a number of such individuals would be offered employment contracts when their current contracts expired. No employment contract was ever offered to Ms Ackroyd.

121. There was a meeting between Ms Ackroyd and Ms Thomas on 21 February 2013 where the HMRC investigation was discussed. On 4 March 2013, following a conversation, Helen Thomas wrote to Ms Ackroyd to say that she was being withdrawn from her presenting duties with immediate effect. The BBC purported to be exercising its rights under clause 9 of the Contract. Relevant parts of the letter read as follows:

" … [as] HMRC has now issued a formal demand against you for unpaid tax which you are unable to pay and propose to challenge, the BBC has decided that it is in both your interests and the BBC's that you be withdrawn from your presenting duties…

We feel it is important to allow you to focus on the dispute with HMRC, but also, and importantly, the BBC must ensure that it complies with its obligations of impartiality and avoids any conflict of interest with your role as a presenter … For reference the relevant obligations are set out in the BBC Charter and Agreement, and in the BBC's Editorial Guidelines, including in sections 4, 14 and 15. We are also concerned to ensure that the BBC is not brought into disrepute.

…

Finally, I wish to remind you of the obligations under clauses 8 and 9 of the contract, as imposed upon you by clause 3 of the inducement letter dated 11 May 2006."

122. Shortly thereafter Ms Ackroyd herself became a news story. We were told that there were newspaper stories about her being a "tax cheat", although we were not taken to any specific stories. We stress that HMRC have never suggested that is the case, or that Ms Ackroyd has ever acted in any way dishonestly.

123. Ms Ackroyd did not recall receiving any "inducement letter" from the BBC. The existence of an inducement letter was also referred to in subsequent letters from Ms Thomas to Ms Ackroyd on 12 and 14 March 2013. It is true that Ms Ackroyd did not question the existence of an inducement letter in her replies dated 12 and 13 March 2013 and 5 April 2013. She did however question the reasons given by the BBC for withdrawing her from presenting duties. In particular she maintained that whilst there was a routine enquiry by HMRC, her tax affairs and those of CAM Ltd were perfectly in order, and no tax demand had been made by HMRC.

124. HMRC relied on the existence of an inducement letter but they were unable to produce a copy. What was produced in evidence was said to be an example of a standard inducement letter from a broadcaster to the BBC in 2006 and read as follows:

"BBC NEWS

CONTRACT FOR TRADING WITH SERVICE COMPANY FOR SERVICES OF BROADCASTER

FROM:

TO: BRITISH BROADCASTING CORPORATION

Dear Sirs,

In order to induce you to enter into an Agreement with Limited (hereinafter referred to as 'the Lender') dated the day of 2006 ('the Agreement') for the rendering of my services as a broadcaster and in consideration of your execution and delivery thereof I the undersigned hereby:

1. …

2. …

3. Subject to all the terms and conditions thereof agree to render all of the services therein required of me and to be bound by and duly perform and observe each and all of the terms and conditions of the Agreement requiring performance or compliance on my part .

…

SIGNED by

In the presence of:"

125. Ms Ackroyd had taken legal advice in relation to her responses in March and April 2013. Whilst her responses did not question the existence of an inducement letter her evidence was that she did not recognise the example and had no recollection of receiving such a letter. She was sure that she had not signed such a letter. The only contemporary correspondence at the time the Contract was signed was a formal letter from a BBC lawyer in the BBC Talent Rights Group dated 11 May 2006 enclosing a signed copy of the Contract. There was no reference to any inducement letter of the same date.

126. We note that the example of an inducement letter was headed BBC News, whereas Ms Ackroyd's contract negotiations were with BBC Talent. In the absence of any copy of an inducement letter or any evidence from Ms Thomas as to what caused her to think that there was an inducement letter we are not satisfied that Ms Ackroyd did sign or send any inducement letter to the BBC.

127. On 28 June 2013 the BBC Litigation Department wrote to CAM Ltd terminating the Contract. The BBC relied on Clause 13.1 of the Contract on the basis of a material breach of Clause 9.1 of the Contract dealing with conflicts of interest. In particular the BBC relied on:

(1) Determinations by HMRC that CAM Ltd and Ms Ackroyd had failed to account for tax and national insurance in accordance with the IR35 Legislation.

(2) The making of inappropriate claims for relief from tax in relation to expenditure incurred.

(3) The making of inaccurate representations to HMRC.

(4) An unauthorised personal appearance at an event allowing the Look North brand to be used in advertising amounting to a breach of the Editorial Guidelines.

(5) Accepting invitations to at least one event without obtaining prior consent of the BBC

128. It is not part of our role in this appeal to make any finding as to whether there was a material breach of the Contract by Ms Ackroyd, and we say nothing about whether the Contract was validly terminated.

129. HMRC again relied on Ms Ackroyd's failure to question the BBC's reliance on the Editorial Guidelines as recognition that she was bound by the Editorial Guidelines. It is notable that Ms Ackroyd did not dispute in her response that she was bound by the Editorial Guidelines. However, Ms Ackroyd was having to deal with the media fallout. She also understood that Ms Thomas had described her as "toxic". She had become isolated. We can understand that Ms Ackroyd's main concern was to refute the fact that her integrity was being questioned. We do not treat Ms Ackroyd's responses to correspondence referring to the Editorial Guidelines as an acceptance by her that she was contractually bound by them.

Reasons

130. It is worth re-stating at this stage the principal issue which we must decide as follows:

> " If the services provided by Ms Ackroyd were provided under a contract directly between the BBC and Ms Ackroyd, would Ms Ackroyd be regarded for income tax purposes as an employee of the BBC?"

(1) General approach

131. There was no real disagreement as to the principles we should apply in determining this issue. We were referred to a number of relevant authorities. There is no statutory definition of employee or employment in this context. The classic statement on the conditions required for a contract of service is that of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497* at 515:

> " (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

132. The first condition is what is known as "mutuality of obligation". The second condition is that of control to a sufficient degree. The third condition operates as a negative condition. If the first two conditions are satisfied, the contract will be a contract of employment unless there are other provisions of the contract which are inconsistent with that conclusion and of sufficient importance that the Tribunal can conclude that the contract is not one of service (see *Ready Mixed Concrete* at p516 to 517 and *Weightwatchers (UK) Ltd v HMRC [2012] STC 265* per Briggs J at [41] to [42] and [111]).

133. The mutuality of obligation to perform personally work offered and to pay remuneration is the "*irreducible minimum ... necessary to create a contract of service*" (see *Carmichael v National Power Plc [1999] 1 WLR 2042* at 2047). The requirement of mutuality will be satisfied where there is a contractual requirement on the employer to provide payment, in the nature of a retainer for a minimum number of hours per year, irrespective of whether those hours are actually worked (see *Usetech Ltd v Young* at [64]).

134. The right of control in respect of what is to be done, and where when and how it is to be done is an important indicator of an employment relationship, but is not by itself decisive. The key question in this regard is not whether in practice the worker has actual day to day control over his own work, but whether there is, to a sufficient degree, a contractual right of control (see *White v Troutbeck [2013] IRLR 286* at [40]-[43] per Richardson J, upheld in the Court of Appeal at *[2013] IRLR 949*, and *Morren v Swinton and Pendlebury BC [1965] 1 WLR 576*). The question whether control is "sufficient" for this purpose must take into account the practical realities of a particular industry, considering those aspects of the performance of work that could be controlled in that industry.

135. The significance of control was considered by the Court of Appeal in *Montgomery v Johnson Underwood Ltd [2001] EWCA Civ 318*. That was a case of an agency worker seeking to establish that she was an employee of the agency. Buckley J (with whom Brooke and Longmore LJJ agreed) considered the position of employees with a high degree of autonomy. He stated as follow at [19]:

> " 19. MacKenna J made plain [in Ready Mixed Concrete] that provided (i) and (ii) are present (iii) requires that all the terms of the agreement are to be considered before the question as to the existence of a contract of service can be answered. As to (ii) he had well in mind that the early legal concept of control as including control over how the work should be done was relevant but not essential. Society has provided many examples, from masters of vessels and surgeons to research scientists and technology experts, where such direct control is absent. In many cases the employer or controlling management may have no more than a very general idea of how the work is done and no inclination directly to interfere with it. However, some sufficient framework of control must surely exist. A contractual relationship concerning work to be carried out in which the one party has no control over the other could not sensibly be called a contract of employment. MacKenna J cited a passage from the judgment of Dixon J in *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 from which I take the first few lines only:
>
> > 'The question is not whether in practice the work was in fact done subject to a direction and control exercised by any actual supervision or whether any actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.'"

136. The same point was made by Vinelott J in *Walls v Sinnett [1987] STC 236* at p246c in relation to a professional singer who lectured in music at a technical college:

> " The other point that was very much stressed by the taxpayer is the modest degree of control which in practice was exercised by the governors and the principal of the college. In some contexts the degree of control exercised may be very important in deciding whether someone is an employee or servant, but in the case of a senior lecturer at a college of further education, more particularly one who like the taxpayer came into teaching from active work as a singer, it is not surprising to find that he was given a very wide degree of latitude in the organisation of his work and time."

137. In identifying whether there is a right of control, the starting point is the express terms of the contract. If the express terms do not answer the question, then it is necessary to consider the implied terms of the contract (see *Ready Mixed Concrete* at p516A).

138. Absence of control as to the detailed way in which work is performed is not inconsistent with the employment of a skilled person (see *Morren v Swinton and Pendlebury Borough Council [1965] 1 WLR 576* per Lord Parker CJ at 582A-C; *Lee Ting Sang v Chung Chi-Keung [1990] 2 AC 374* per Lord Griffiths at 384A; and *Montgomery v Johnson Underwood Ltd [2001] EWCA Civ 318* per Buckley J at [19]). The significance of control is that the employer can direct what the employee does, not necessarily how he does it (see *Various Claimants v Catholic Child Welfare Society & Ors [2012] UKSC 56* per Lord Phillips at [36].

139. If the genuine contractual right of control to a sufficient degree does exist, it does not matter whether that right is actually exercised (see *Autoclenz v Belcher [2011] UKSC 41* per Lord Clarke at [19]).

140. In *E v English Province of Our Lady of Charity [2012] EWCA Civ 938* at [76] Ward LJ said that the question of control is not merely about the legal power to control, but that it should be viewed more in terms of accountability and supervision by a superior. That was said in the context of vicarious liability of the Church for sexual abuse by priests. In our view Ward LJ was not suggesting here that the legal power to control was less important.

141. Mr Summers relied on the Court of Appeal decision in *Cowell v Quilter Goodison & Co Limited (1989) IRLR 392*. That was a case involving an equity partner in a firm of stockbrokers, and it was held that he was not an employee for the purposes of unfair dismissal rules. The Master of the Rolls said that as an equity partner "[he] was not the servant of anyone". Mr Summers suggested we should look to see whether Ms Ackroyd was a servant and submitted that she was not. However, the Master of the Rolls also described the terms 'master' and 'servant' as old terms and emphasised that it was the nature of the relationship that was important and not the terminology. We agree with Mr Tolley that in the light of subsequent authorities (see for example *Various Claimants v Catholic Child Welfare Society* at [36]) the question of whether an individual "looks like a servant" is not a helpful test.

142. It was recognised in *Ready Mixed Concrete* that the right to provide a substitute to carry out work is inconsistent with a contract of service. Again, it is the right to provide a substitute that is relevant. It does not matter that the right in practice was not used (see *Autoclenz Ltd v Belcher* at [19]). The existence of a right to substitute is

not determinative of self-employment (see *Usetech Ltd* at [53]). Mr Summers also accepted that the absence of a right to provide a substitute may suggest employment, but again it is not determinative (see *R (atao Professional Contractors Group Ltd) v IRC* per Burton J at [48v]).

143. Long term contracts where the whole or substantially the whole of the individual's working week is devoted to performing the services tend to suggest employment (see *Usetech Ltd* at [59]). *Hall v Lorimer [1992] 1 WLR 939; [1994] 1 WLR 209* was a case involving a freelance vision mixer who was found to be self employed. At 945B Mummery J viewed as relevant the degree of continuity in the relationship, how many engagements are performed and whether they are performed mainly for one person. He also considered it useful to consider whether the person performing the services was 'part and parcel' of the organisation of the other party. Similarly, at 218C Nolan LJ in the Court of Appeal suggested that the extent to which the individual was dependent upon or independent of a particular paymaster and the duration of engagements may be significant. Further, it is not inconsistent with a contract of employment that the individual is free to work for others (see *Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173* at 186G).

144. In *Market Investigations Ltd*, Cooke J suggested at 184G that the question of whether a worker is an employee could be answered by determining whether the individual who performs the services is performing them as a person in business on his own account. There is no exhaustive list of factors, but he identified a number of relevant factors at 185A-B as follows:

(1) whether the worker provides his own equipment;

(2) whether he hires his own helpers;

(3) what degree of financial risk he takes;

(4) what degree of responsibility for investment and management he has; and

(5) whether and how far he has an opportunity of profiting from sound management in the performance of his task

145. Financial risk involves the ability to earn a profit or make a loss from how the work is performed (see for example *Global Plant Ltd v Secretary of State for Social Security [1972] 1 QB 139* per Lord Widgery at 152). In this context, the risk only of not being able to find alternative employment is not a relevant factor as it is a risk shared by all casual employees (see *Lee Ting Sang v Chung Chi-Keung* at 384D).

146. In the case of a profession or vocation the question of whether the individual is in business on his own account may not be very helpful. In such cases a significant factor may be the extent to which the worker is dependent upon the client for financial exploitation of his talents; conversely whether the worker is able to exploit his talents in the wider market and to a number of clients (see *Hall v Lorimer* per Nolan LJ at 218).

147. It is not appropriate to adopt a mechanistic or 'check list' approach. Different factors will have difference significance and weight in each case. Having considered

all the relevant factors, it is necessary to stand back from the detail and make a qualitative assessment of the facts as found (see *Hall v Lorimer* per Nolan LJ at p216, approving the views of Mummery J in the High Court).

148. Each case must be determined on its own facts. However, Mr Tolley relied on a decision of the Employment Appeal Tribunal in *ABC News Intercontinental Inc v Gizbert EAT (21 August 2006) (unreported)*. The EAT concluded that a contract which provided for ABC to provide 100 days' work to an experienced journalist, or at any event 100 days' pay at agreed rates, involved mutuality of obligation (see [21]-[22]). It also concluded that the contract was one of service, notwithstanding the purported description of the contract as for the provision of freelance services. The conclusion took into account, amongst other matters the degree of control exercised, the individual's place within the organisation, the restrictions on working for competitors and a requirement to keep the company informed of commitments outside the agreement (see [23]).

149. Mr Summers referred us to a number of decisions of the Special Commissioners and the First-tier Tribunal, albeit they are not of course binding on us. He referred us to *Lewis t/a MAL Scaffolding v Revenue & Customs Commissioners [2006] STC (SCD) 253, Paya Ltd v HMRC [2016] UKFTT 660 (TC)* and *Tomlinson v Revenue & Customs Commissioners [2017] UKFTT 0489 (TC). Paya Ltd* was a similar case to the present involving BBC presenters but the decision concerned a procedural point which does not assist us, although incidentally it does indicate the BBC's position of not wishing to be aligned with HMRC or the appellant. *Lewis* and *Tomlinson* were both decided on their own facts, applying the authoritative principles set out by the higher courts to their own facts. Again, they do not give us much assistance.

(2) The Hypothetical Contract

150. In identifying the terms of the hypothetical contract the stated intentions of the parties, in this case Ms Ackroyd, CAM Ltd and the BBC, cannot prevail over the true legal effect of the actual agreements. This point was considered by Henderson J in *Dragonfly Consultancy Ltd v Revenue & Customs Commissioners [2008] EWHC 2113 (Ch)* as follows:

> " 53. … statements by the parties disavowing any intention to create a relationship of employment cannot prevail over the true legal effect of the agreement between them. It is true that in a borderline case a statement of the parties' intention may be taken into account and may help to tip the balance one way or the other: see *Ready Mixed Concrete* ([1968] 2 QB 497 at 513) and *Massey v Crown Life Insurance Co* [1978] 2 All ER 576, [1978] 1 WLR 676. In the majority of cases, however, such statements will be of little, if any, assistance in characterising the relationship between the parties.
>
> 55. I would not, however, go so far as counsel for HMRC who submitted that, as a matter of law, the hypothetical contract required by the IR35 legislation must be constructed without any reference to the stated intentions of the parties. If the actual contractual arrangements between the parties do include statements of intention, they should in my view be taken into account, and in a suitable case there may be material which would justify the inclusion of such a statement in the hypothetical contract. Even

then, however, the weight to be attached to such a hypothetical statement would in my view normally be minimal, although I do not rule out the possibility that there may be borderline cases where it could be of real assistance."

151. There was no issue between the parties that the hypothetical contract with which we are concerned in the present appeal is based on the terms of the Contract, with Ms Ackroyd herself agreeing to provide those services to the BBC on the terms set out in the Contract. We are satisfied that the hypothetical contract contained the following terms derived from the Contract:

(1) The contract was for a term of 7 years pursuant to clause 2, terminable only pursuant to clause 13.

(2) Ms Ackroyd was contractually obliged to perform the services in clause 3 and the BBC was contractually obliged to pay the fees set out in the payment Schedule in monthly instalments. If Ms Ackroyd failed to perform the services including a minimum of 225 days for Look North then the fees would reduce proportionately.

(3) The BBC was not bound to call on the services of Ms Ackroyd but it remained liable to pay the fees pursuant to clause 6 where it did not.

(4) The BBC was entitled to edit Ms Ackroyd's contributions to Look North and other contributions pursuant to clause 5.

(5) Travel and subsistence expenses would be reimbursed as for freelance contributors, together with a clothing contribution of £3,000 per year.

(6) There were no set hours or set working days, subject to Ms Ackroyd being available to present Look North at 6.30pm as required by the BBC. There was no set location where Ms Ackroyd would work, either in the studio or on an outside broadcast.

(7) Ms Ackroyd was subject to the restrictions in clause 8 and clause 9. Otherwise she was entitled to undertake other paid or unpaid activities outside the BBC.

(8) Ms Ackroyd was not contractually bound by the Editorial Guidelines. She did not have an identified line manager and was not subject to formal appraisal procedures.

(9) Ms Ackroyd had no right to provide a substitute to perform the services and was expressly prohibited from doing so by clause 18.

(10) There was no express provision for payment of holiday pay, sick pay or pension entitlement.

152. Mr Summers submitted that there were also terms of the hypothetical contract as follows:

(1) Ms Ackroyd would control stories covered, how they would be presented, who should be interviewed and whether there should be an outside broadcast.

(2) Ms Ackroyd could make such changes to the Look North format as she wanted.

(3) Ms Ackroyd could develop human interest stories of her own for future screening.

153. Based on our findings of fact we are not satisfied that these were terms of the hypothetical contract. These were matters in which she was subject to direction by the BBC.

154. Mr Summers also relied on the intentions of the parties that Ms Ackroyd should be employed by CAM Ltd and not by the BBC. We have found that was the intention of the parties. The services provided by Ms Ackroyd are described in Clause 3 as "freelance services". However, for the reasons which follow we do not regard this as the borderline case that Henderson J had in mind when he suggested that the intentions of the parties may tip the balance.

155. The burden is on CAM Ltd to establish facts that support its case that the hypothetical contract was a contract for services and not a contract of service. Ms Ackroyd criticised HMRC for the fact that during their enquiry they declined to approach certain BBC employees who would have been able to confirm facts to support her case. However, CAM Ltd could have adduced evidence from those persons in the present proceedings, obtaining a witness summons if necessary. The same applies to Mr Summers criticism of HMRC for not calling Mr Pannett to give evidence. If he considered that Mr Pannett had material evidence to give then again CAM Ltd could have applied for a witness summons.

156. The task we have to perform in deciding the principal issue in this appeal is essentially a balancing exercise taking into account all the factors described above. Some factors will have more weight than others.

(3) Mutuality of Obligation

157. It was not in dispute that a pre-requisite for a contract of employment was present, namely mutuality of obligation. Ms Ackroyd was required to work for the BBC for at least 225 days in any one year, and the BBC was required to pay the fees set out in the Contract. Mr Summers submitted that this was a neutral factor. We agree it is not a factor which points one way or the other. It is the "irreducible minimum" which must be present if a contract is to be construed as a contract of employment. We are satisfied that it is present in the hypothetical contract.

(4) Control

158. HMRC confirmed their determinations and decisions in a letter dated 19 August 2016. In that letter the right of control was described as a "crucial factor". In submissions to us Mr Tolley relied on control but he accepted that the BBC could not control the words which Ms Ackroyd chose to use during a live television programme. He submitted that she was given and exercised a professional discretion which was not inconsistent with control over Ms Ackroyd's work residing with the BBC.

159. Mr Tolley submitted and we accept that it is a necessary premise of clause 1 of the Contract that Ms Ackroyd was subject to the control of CAM Ltd. It states in terms that "*The Company [CAM Ltd] controls the services of Christa Ackroyd*". It is clearly possible therefore to control someone in the role Ms Ackroyd was performing at the BBC.

160. Clause 3 of the Contract gave the BBC first call on the services of Ms Ackroyd "as it may require". We consider that the reference to what the BBC may require was a reference to such of Ms Ackroyd's services that it may require, whether as presenter, reporter or providing reasonable ancillary services, for example assisting with the editing of material. The BBC could direct which of those services it required Ms Ackroyd to perform. The BBC could also require Ms Ackroyd to attend and represent the BBC at public events pursuant to clause 3.3.

161. Ms Ackroyd's evidence was that she would never have entered into a contract with the BBC if it meant that the BBC would control the way in which she worked. However, we are concerned with the hypothetical contract. At most this has only marginal relevance in a finely balanced case as a statement of intention.

162. Ms Ackroyd maintained that the BBC was obliged to accept and act upon her suggestions. We do not accept that evidence. There is no express term to that effect in the Contract. Further it is inconsistent with the terminology used by Ms Ackroyd when describing her role in her witness statement. We have found that the Editorial Guidelines were not incorporated as terms of the hypothetical contract, but they do form part of the context in which we must construe the hypothetical contract. In our view it would be inconsistent with the Editorial Guidelines if Ms Ackroyd were to have control over the content of Look North or her contribution to the programme as submitted by Mr Summers. It seems unlikely to us that the BBC would give Ms Ackroyd an entirely free role in Look North without at least an expectation that in carrying out her work she would abide by the Editorial Guidelines. It was not necessary for the BBC to bind Ms Ackroyd contractually to the Editorial Guidelines because it was entitled to direct what work she did and how she did it. Much would be left to her professional judgement but if the BBC considered that she was breaching the Editorial Guidelines in a material way then in our view it could direct her to work in a way consistent with the Editorial Guidelines.

163. We accept that the BBC did implement changes suggested by Ms Ackroyd, but there is no evidence that Ms Ackroyd would have the last word on the implementation of changes. There are no real examples of her having the last word, except in one instance where there was a difference of opinion as to how she should describe three murder victims. We do not consider that example carries much weight.

164. We are not satisfied that as a matter of contractual obligation the BBC was in any sense required to act on Ms Ackroyd's direction. If that was the intention of the parties at the time the Contract was negotiated then we have no doubt that express provision would have been made to that effect. In practice, the BBC did act on Ms Ackroyd's advice and suggestions. That is because she was an experienced,

professional and successful television journalist and presenter. CAM Ltd was engaged and the contract renewed because Ms Ackroyd possessed such qualities.

165. Mr Summers relied on the fact that Ms Ackroyd had no line manager and was not subject to the BBC appraisal procedure. Looked at in isolation this may suggest that the BBC did not control Ms Ackroyd's work. Looked at in context, however, for the reasons given we are satisfied that the BBC did have ultimate control over what work Ms Ackroyd did and how she did it. There was no evidence of examples where they exercised such control but we consider that as a matter of contract they were entitled to do so. It is consistent with the fact that the BBC were expressly entitled to edit Ms Ackroyd's contributions.

166. Mr Summers submitted that HMRC viewed Ms Ackroyd's role pursuant to the hypothetical contract as simply a newsreader. He accepted that if that were a true reflection of her work then she would properly be treated as an employee pursuant to the hypothetical contract. We accept that her role was much more than simply presenting the news and reading a script. Indeed, Mr Tolley acknowledged as much.

167. Mr Summers rightly submitted that the contract had no express term dealing with control. Control of Ms Ackroyd's work pursuant to the hypothetical contract must lie somewhere, either with Ms Ackroyd or with the BBC. We are not satisfied that it lay with Ms Ackroyd. We consider that the BBC did have ultimate control in how, where and when Ms Ackroyd carried out her work. We accept a submission by Mr Tolley that this was an implied term of the hypothetical contract in order to give that contract business efficacy. In the context of Ms Ackroyd's role it was necessary for the BBC to at least have the power to direct Ms Ackroyd's work, otherwise Look North as a programme ran the risk of not complying with the Editorial Guidelines. For example, if Ms Ackroyd consistently failed to comply with the Editorial Guidelines, it is inconceivable that the parties intended that the BBC should be obliged to continue to pay Ms Ackroyd for her work even if as a result she was not called on to present Look North.

(5) Other Relevant Factors

168. There was no right pursuant to the hypothetical contract for Ms Ackroyd to provide a substitute. In fact, the hypothetical contract went further and expressly provided that Ms Ackroyd could not provide a substitute. We accept Mr Summers submission that this is not determinative of the issue and Mr Tolley did not suggest that it was determinative. Mr Summers acknowledged that it was a pointer towards an employment contract. We agree that it points towards employment, but it is not a significant factor. In the context of the anchor of a current affairs programme, whether or not that person is self-employed it is unlikely that they would be entitled or expected to provide a substitute save possibly where production of the actual programme was being contracted out. That was not the position here.

169. Ms Ackroyd was inevitably seen as a part of the BBC because she presented a nightly news and current affairs programme. However, an external observer would not know the details of the hypothetical contract. Ms Ackroyd had a BBC email

address and for example she received the round robin email from Mr Thompson. She attended training seminars. We accept that anyone approaching the BBC to engage her services would be directed to Ms Ackroyd. Further, it was known to those she worked with that she was entitled to undertake outside activities, although they did not necessarily know on what terms. It seems to us that Ms Ackroyd was to some extent part and parcel of the BBC, but we do not consider this to be a significant factor in this case.

170. It is a relevant factor that Ms Ackroyd had the benefit of a 7 year contract. This was unusual at the BBC. Mr Summers' argued that the length of the Contract simply reflected the BBC's desire to tie Ms Ackroyd to a lengthy contract because of the value she added to Look North, and did not reflect the fact that they regarded her as an employee. We do not accept that submission. Whether the BBC regarded Ms Ackroyd as an employee is of marginal relevance, and in any event we are not satisfied that they did. She could not be an employee because the BBC had contracted with CAM Ltd. There is no suggestion that the Contract could ever have established Ms Ackroyd as an employee, unless it was a sham which has never been suggested. Indeed, we have found that the BBC wanted to contract with a personal service company to avoid any possibility of Ms Ackroyd being an employee. In our view a hypothetical contract of that length for at least 225 days per year and terminable only for a material breach points towards a contract of employment. The existence of a 7 year contract meant that Ms Ackroyd's work at the BBC was pursuant to a highly stable, regular and continuous arrangement. It involved a high degree of continuity rather than a succession of short term engagements. That is a pointer towards an employment contract.

171. We do not consider that the fact the fees were payable on a monthly basis akin to the way an employee might be paid is significant. Nor is the absence of any provision for holiday, sick pay or pension entitlement. The Contract was between CAM Ltd and the BBC and both parties accept that the Contract was not an employment contract. It would not be expected to contain such provisions. Mr Tolley suggested that as a "worker" Ms Ackroyd would have a statutory entitlement to such rights, but he accepted that did not assist the Respondents in establishing whether Ms Ackroyd was an employee. Mr Summers relied on the fact that if Ms Ackroyd had been an employee then she would have been entitled to employment rights on the eventual termination of the Contract. Again, this is not a relevant factor because the BBC and CAM Ltd were governed by the Contract, and not the hypothetical contract.

172. The authorities suggest that it may be helpful to consider whether Ms Ackroyd was in business on her own account. Mr Summers submitted that under the hypothetical contract Ms Ackroyd should be seen as being in business on her own account. In particular he relied on the fact that she was able to profit from sound management of her business because she was entitled to "success payments" of £15,000 per year if the ratings of Look North were consistently and significantly in excess of those for ITV's Calendar.

173. It was not realistically possible for Ms Ackroyd to make a loss in performing the Contract. She could increase her income by way of the success fee. We do not

regard that result as being referable to sound management of a business, but from sound performance of her role in Look North. We are satisfied that the success of Look North was in large measure due to the changes Ms Ackroyd drove, her performance as a journalist and presenter and the contributions of other team members. As such Ms Ackroyd was not managing a business, but performing her significant role in the team to a high standard.

174. Ms Ackroyd was entitled to payment of an additional fee of £7,500 for each 6 month period in which the ratings of Look North exceeded those of Calendar. Mr Tolley referred to this as a "bonus" whereas Ms Ackroyd preferred to describe it as a "success fee". The terminology is not important. It was a performance related payment amounting to approximately 9% of the principal fee payable at the beginning of the Contract in 2007. We consider that such a performance payment is a neutral factor in our decision. It is certainly not inconsistent with a contract of employment.

175. To a limited extent Ms Ackroyd did provide her own equipment. She used her own laptop and mobile phone. That is not unusual in the case of an employee. She also had her own Sky subscription. Otherwise she used BBC equipment to produce her contributions to Look North. It was not suggested that she invested in her business, other than the investment of her own expertise. Nor was there significant management of any such business. She performed professional services but she did not profit from sound management of a business nor did she take any financial risk as such. The amount of other work she performed for payment was very small compared with the fees she received by virtue of the hypothetical contract. It was not a case of managing a number of separate contracts in addition to the hypothetical contract. The most significant example of other activities was Ms Ackroyd's contract with Express Newspapers but this was terminated at the time she entered into the Contract.

176. We do not consider that Ms Ackroyd could fairly be described as being in business on her own account. She was economically dependent on the hypothetical contract with the BBC which took up most if not all of her working time.

177. There were restrictions as to what other work Ms Ackroyd could do, subject in some circumstances to consent from the BBC. We are satisfied that those restrictions did not in practice prevent Ms Ackroyd from undertaking various outside activities that she wished to pursue, at least until 2013 prior to termination of the Contract. However, the fact remains that those restrictions were part of the hypothetical contract. The BBC could refuse permission for any reason and was not obliged to give reasons.

178. Mr Summers relied on a submission that certain well known presenters at the BBC were permitted to work for other broadcasters. We had no evidence as to the terms on which those presenters were contracted to the BBC and we do not consider that this adds anything to Ms Ackroyd's case.

Overall Assessment

179. We must consider all the factors above and the relative weight attaching to those factors. In our view the most significant factors in the present case include the fact that the BBC could control what work Ms Ackroyd did pursuant to the hypothetical contract. It was a 7 year contract for what was effectively a full time job. Standing back and making an overall qualitative assessment of the circumstances we consider that Ms Ackroyd was an employee under the hypothetical contract. If the services provided by Ms Ackroyd were provided under a contract directly between the BBC and Ms Ackroyd, then Ms Ackroyd would be regarded for income tax purposes as an employee of the BBC.

180. We acknowledge that this is a value judgement. It is in the nature of a value judgement that different people may come to different conclusions. We do not criticise Ms Ackroyd for not realising that the IR35 legislation was engaged. She took professional advice in relation to the contractual arrangements with the BBC and she was encouraged by the BBC to contract through a personal service company.

Tax Relief for Expenditure

181. CAM Ltd reimbursed Ms Ackroyd for the costs of her subscription to Sky TV in tax years 2007-08 to 2011-12. The average cost in those years was approximately £750 per year. Mr Sutcliffe and Mr Biggin who prepared Ms Ackroyd's accounts and self-assessment tax returns were content for tax relief to be claimed in relation to these sums.

182. The BBC did not require Ms Ackroyd to have a subscription to Sky TV. The subscription covered various sky channels including Sky Sport and Sky Movies. Ms Ackroyd said that she "deemed it necessary to have access to news and sport". Sport and popular culture was part of the Look North programme. For example, she considered it necessary to know how the Yorkshire County Cricket team was doing. She did not accept that the subscription was in part for personal use. Ms Ackroyd's evidence was that she would not often watch television with her husband. She would go to a separate room keeping abreast of news and current affairs.

183. Mr Summers argued that Ms Ackroyd's role and working pattern meant that it was necessary for her to have a Sky TV subscription. She was a journalist and not just a newsreader. She needed to keep up to date on current breaking news and to research stories with a regional angle.

184. We accept that Ms Ackroyd watched Sky TV in the way she described but we do not accept that there was no element of personal use and enjoyment. It seems likely to us and we are satisfied that at least part of the reason for having a Sky TV subscription was for Ms Ackroyd and her husband to enjoy watching the content at leisure.

185. It was common ground that the reimbursement of Ms Ackroyd's liability to Sky constituted earnings for the purposes of PAYE and NIC pursuant to section 62 ITEPA 2003. CAM Ltd did not treat the payments as such. The issue arising is whether CAM

Ltd was entitled to treat the payments as being subject to relief pursuant to section 336 ITEPA 2003 which provides as follows:

> " (1) The general rule is that a deduction from earnings is allowed for an amount if—
>
> (a) the employee is obliged to incur and pay it as holder of the employment, and
>
> (b) the amount is incurred wholly, exclusively and necessarily in the performance of the duties of the employment."

186. In *Fitzpatrick v CIR [1994] 1 WLR 306* the House of Lords was concerned with journalists claiming relief for the cost of purchasing newspapers. It was held that relief was not available. Lord Templeman said this:

> " … in the present cases it seems to me that a journalist does not purchase and read newspapers in the performance of his duties but for the purpose of ensuring that he will carry out his duties efficiently… A journalist who reads newspapers does so in order to be able to perform his duties to the highest possible standard but he does not read in performance of his duties."

187. There is no evidence that CAM Ltd required Ms Ackroyd have a subscription to Sky TV. More significantly, we are not satisfied that the amounts spent by Ms Ackroyd were incurred exclusively in the performance of her duties as an employee of CAM Ltd. They were incurred for the purpose of ensuring that she could carry out her duties efficiently. We are also satisfied that Ms Ackroyd's object in subscribing to Sky TV included obtaining the private benefit for herself and her husband of being able to watch the content at leisure (see *Mallalieu v Drummond [1983] 2 AC 861* and *MacKinlay v Arthur Young McClelland Moores & Co [1990] 2 AC 239*).

188. We are satisfied therefore that CAM Ltd ought to have treated the payments to Ms Ackroyd as being subject to PAYE and NIC.

189. CAM Ltd also made payments to Ms Ackroyd said to be additional household expenditure arising from the fact that Ms Ackroyd had to work from home.

190. We are satisfied that Ms Ackroyd had no desk or computer at the BBC offices and that she regularly worked from home. She is a journalist and she has an office at home which she calls 'the snug'. This is where she would write her newspaper column and work on stories for Look North. She received secretarial support paid for by CAM Ltd. She would use the snug as a base to do her work for the BBC and for her small number of other clients.

191. During the enquiry HMRC required information from CAM Ltd by way of a notice pursuant to Schedule 36 Finance Act 2008. That information included details of the arrangements between Ms Ackroyd and CAM Ltd for home working, together with details of the additional household costs incurred by Ms Ackroyd from working at home. The information was not provided.

192. Section 316A ITEPA 2003 provides as follows:

"(1) This section applies where an employer makes a payment to an employee in respect of reasonable additional household expenses which the employee incurs in carrying out duties of the employment at home under homeworking arrangements.

(2) No liability to income tax arises in respect of the payment.

(3) In this section, in relation to an employee—

"homeworking arrangements" means arrangements between the employee and the employer under which the employee regularly performs some or all of the duties of the employment at home; and

"household expenses" means expenses connected with the day to day running of the employee's home."

193. There was no evidence of any conscious agreement between CAM Ltd and Ms Ackroyd in relation to her homeworking arrangements. More importantly there was no evidence as to the additional costs incurred by Ms Ackroyd as a result of working from home. In those circumstances we are not satisfied that relief under section 316A was available. CAM Ltd ought to have treated the payments to Ms Ackroyd as being subject to PAYE and NIC.

Conclusion

194. For the reasons given above we dismiss the appeal in principle, subject to:

(1) any reference to the Tribunal in relation to the quantum of the determinations and decisions concerning the intermediaries legislation, and

(2) any issues which remain outstanding in relation to penalties.

195. The parties shall inform the Tribunal in writing within 42 days from the date of release of this decision whether they wish the Tribunal to determine either of these matters in which case we will give further directions.

196. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 10 FEBRUARY 2018

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APPENDIX

Extracts from the Contract

1. THE COMPANY

The Company controls the services of CHRISTA ACKROYD ('the Broadcaster') and agrees to provide the services of the Broadcaster to the BBC and further agrees with the BBC that it shall observe and perform and (where appropriate) shall ensure that the Broadcaster observes and performs the terms and conditions of this Agreement.

2. TERM

This Agreement shall (subject to any other terms providing for prior termination) be for a period of Seven Years from the First day of January Two Thousand and Seven to the Thirty First day of December Two Thousand and Thirteen ('the Term').

3. SERVICES

During the Term the BBC shall (subject to reasonable notice) have first call on the freelance services of the Broadcaster (including acting as presenter reporter and reasonable ancillary services normally associated with such a role) as it may require to the output of the BBC, to include in particular:-

3.1 up to Two Hundred and Twenty Five (225) days in each year of this Agreement for the output of BBC Yorkshire

3.2 such days as may be mutually agreed for BBC radio stations in the North region

3.3 attendance at/representation of the BBC at such public events as required by the BBC

3.4 such other contributions as shall be mutually agreed.

5. MORAL RIGHTS

The Company grants the BBC the unlimited right to edit copy alter add to take from adapt or translate all the Broadcaster's contributions made under this Agreement and warrants that the Broadcaster has waived irrevocably any 'moral rights' which he may have now or in the future ….

6. FEE

6.1 In respect of the services of the Broadcaster the rights granted under Clause 4 above and the waiver given in clause 5 above the BBC shall pay to the Company the sums set out in the Schedule hereto during the term which sums exclusive of VAT shall be payable by equal monthly instalments not later than 14 days after the end of the relevant month.

6.2 In the event of the Broadcaster failing for any reason to render the services under this Agreement the payment shall (unless the BBC otherwise decides) be reduced by an amount proportionate to the period during which the Broadcaster failed to render the services.

7. EXPENSES

7.1 The Company shall be entitled to the appropriate BBC travel and subsistence payments for freelance contributors.

7.2 The BBC shall make a contribution of up to Three Thousand Pounds (£3,000) in each contract year to the Broadcaster in respect of the purchase of suitable clothing … subject to the supply of suitable receipts. Beyond this contribution the Broadcaster will be required to provide appropriate contemporary clothing for carrying out the services …

8. ENGAGEMENTS FOR THIRD PARTIES

8.1 During the Term the Broadcaster shall not without the prior written consent of the Head of Regional and Local Programmes, BBC Yorkshire (referred to hereafter as 'the BBC Representative' ….) provide services of any kind in respect of any form of television or radio intended for audiences in the United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland or for on-line services for any party other than for the BBC.

8.2 The Broadcaster shall not provide her services for publications of any kind for any party other than the BBC without first obtaining the prior written consent of the Head of BBC Yorkshire.

9. CONFLICTS OF INTEREST

9.1 The Company acknowledges that the BBC under its Agreement with the Secretary of State for Culture Media and Sport has given certain undertakings in relation to Programme Standards including in particular impartiality and accordingly agrees in furtherance of the mutual interest of the BBC and the Broadcaster that the Broadcaster will not engage in any conduct which compromises or calls into question the impartiality or integrity of the BBC or any of its programmes or the Broadcaster and in particular without limitation thereto the Broadcaster will not without the prior written consent of the BBC Representative

9.1.1 be involved or associated in any way with any person or organisation which has a trading relationship with the BBC its subsidiaries or associates or which is itself or in association with others in competition with the BBC its subsidiaries or associates or which is tendering for work from or which supplies goods or services to the BBC its subsidiaries or associates

9.1.2 provide training in how to be interviewed for radio or television#

9.1.3 be publicly associated with the work of any charity or government initiative …

11. WARRANTIES

The Company warrants that:-

11.1 there is no other contract or engagement or other reason (including prior conduct) which would inhibit or prevent the Broadcaster from entering into or fulfilling the terms of this Agreement

11.2 the Broadcaster's contributions under this Agreement are and will be the Broadcaster's original work and do not and shall not contain anything which is an infringement of copyright or related rights or which is defamatory or which may bring the BBC into disrepute …

12. INDEMNITY

The Company shall at all times keep the BBC fully indemnified in respect of any consequences which may ensue upon breach of any of the warranties given by the Company pursuant to Clauses 11 and 5 hereof

13. TERMINATION

13.1 If the Company or the Broadcaster shall commit a material or irremediable breach of this Agreement … then the BBC shall have the right to terminate this Agreement forthwith …

14. ENHANCEMENT OF REPUTATION

The BBC shall not be obliged to call on the services of the Broadcaster hereunder or to use all or any of the Broadcaster's contributions and if it does not do so it shall not be liable to the Company or to the Broadcaster for any loss or damage suffered by the Company or the Broadcaster …

18. ASSIGNMENT

The Company shall not assign transfer charge or deal in any other manner with this Agreement or sub-contract any or all of the Broadcaster's obligations under it.

…

THE PAYMENT SCHEDULE

(referred to in clause 6.1)

A 1st January 2007 to 31st December 2007

One Hundred and Sixty Three Thousand Two Hundred and Thirty Three Pounds (£163,233) which shall be payable via equal monthly instalments in arrears

[B-G contain provision for annual increases (if any) in the Retail Prices Index in the previous year up to 1st January 2013 to 31 December 2013]

H In addition the BBC agrees to make payment to the Company of Seven Thousand Five Hundred Pounds (£7,500) at the end of June and the end of December in each year of this Agreement SUBJECT TO the programming of the Broadcaster consistently and significantly exceeding the ratings of its commercial competition (in the opinion of the BBC) over the relevant preceding Six Month period.

which sums are all expressed as exclusive of VAT.

Appeal number: TC/2017/00667

INCOME TAX AND NATIONAL INSURANCE - intermediaries legislation - IR35 - sections 48-61 ITEPA 2003 - personal service company - contract for services or contract of service – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JENSAL SOFTWARE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JENNIFER DEAN

Sitting in public at Manchester on 4 – 6 October 2017

Mr A. Vessey of Qdos Consulting Ltd for the Appellant

Ms G. Hicks, Counsel instructed by HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. By Notice of Appeal dated 27 December 2016 the Appellant appealed against a regulation 80 determination assessed in the sum of £14,658 and notice of decision in respect of Class 1 NICs assessed in the sum of £12,011 arising from the application of the intermediaries legislation (commonly referred to as "the IR35 legislation").

2. The purpose of the IR35 legislation was set out by Robert Walker LJ as he then was in *R (Professional Contractors Group & Others) v IRC* [2001] EWCA Civ 1945 at [51]:

> "…the aim of both the tax and the NIC provisions (an aim which they may be expected to achieve) is to ensure that individuals who ought to pay tax and NIC as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation."

3. The effect of the legislation, where it applies, is to treat the fees paid to a service company not as company revenue upon which corporation tax is payable but rather as deemed salary to the worker which is subject to income tax and NIC. The legislation applies to those workers who would be treated for NIC and income tax purposes as being employed under a contract of service by the client were it not for the involvement of the personal service company or agency.

4. By way of background, between 28 May 2012 and 4 April 2013 Mr Ian Wells provided business analyst services through a personal service company, Jensal Software Limited ("the Appellant") via an agency, Capita Resourcing Ltd ("Capita") to the Department of Work and Pensions ("DWP").

5. HMRC concluded that had there been a direct contract between Mr Wells and the DWP during the period of engagement it would have been a contract of service, not a contract for services; the Appellant was therefore required to account for income tax and NICs in the relevant period.

6. The Grounds of Appeal relied upon by the Appellant can be summarised as follows: it is disputed that IR35 applies to its contract with the DWP via Capita during the relevant period as the three prerequisites for a contract of employment to exist are not present (relying on *Ready Mixed Concrete (South East) Limited v Minister of Pensions & National Insurance* [1968] 1 All ER 433). During their investigation HMRC reviewed two contracts involving the Appellant during the period of enquiry, those being with the DWP and Lloyds Banking Group; HMRC agreed that the latter fell outside of the intermediaries legislation. The Appellant contends that the contract with the DWP also falls outside of IR35.

Issues to be determined

7. The Appellant does not dispute the amount of tax owed, subject to the determination as to whether the legislation applies. The issues therefore remaining between the parties can be summarised as follows:

(i) Whether Mr Wells personally performed or was under an obligation to perform services for the DWP, who was the client for the purposes of s49(1)(a) ITEPA 2003; and

(ii) Whether for the material time the provision contained in s49(1)(c) ITEPA 2003 is satisfied; namely, whether the hypothetical notional contract between Mr Wells and the DWP would have been a contract of service, as HMRC contends, or a contract for services as the Appellant contends.

Legal framework and authorities

8. The legislation for income tax purposes is found in section 49 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). The equivalent provision for national insurance purposes is contained in Regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000 ("the 2000 Regulations").

9. Section 49 provides as follows:

> (1) This Chapter applies where –
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),
>
> (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and
>
> (c) the circumstances are such that-
>
> (i) if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under the client...
>
> (4) The circumstances referred to in subsection (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided."

10. It is unnecessary to quote the broadly similar wording in respect of NICs; the parties agreed that the effects of the provisions as applicable to this appeal are materially similar and neither advanced any point in relation to the minor differences which are immaterial to the issues to be determined.

11. I was referred to a large number of authorities, all of which I considered carefully and about which I will say more in due course. However as a starting point many of the cases consider the conditions set out by MacKenna J in *Ready Mixed*

Concrete (South East) Limited v Minister of Pensions & National Insurance [1968] 1 All ER 433 [at 439-440] for the existence of a contract of service:

> "A contract of service exists if the following three conditions are fulfilled: (i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master (iii) The other provisions of the contract are consistent with its being a contract of service."

12. The first condition is commonly known as "mutuality of obligation", the second relates to the degree of control and the third is a negative condition, i.e. where it is shown that there is:

> "requisite mutuality of work-placed obligation and the requisite degree of control, then it will prima facie be a contract of employment unless, viewed as a whole, there is something about its terms that places it in a different category"

(see *Weightwatchers (UK) Ltd v HMRC* [2012] STC 265 per Briggs J at [42]).

13. In *Market Investigations v Minister of Social Security* [1969] 2 Q.B. 173 Cooke J stated [at 184-185]:

> "… the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task. The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him."

14. Nolan LJ in the Court of Appeal in *Hall v Lorimer* [1994]1 W.L.R. 209 [at 216] specifically approved of the comments made by Mummery J in the same case in the High Court [1992] 1 W.L.R. 939 at [944]:

> "In order to decide whether a person carries on business on his own account, it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation another. The process involves painting a picture in each individual case."

15. In *Usetech v Young* (2004) 76 TC 811 Park J explained (at [9] and [36]) that the court is required to construct a hypothetical contract between the worker and the company and then enquire what the consequences would have been if it had existed. The court may take into account all relevant circumstances, including any existing contracts. However, statements within the contracts between worker, intermediary and client as to whether the parties intended their relationship to be one of employment will be given minimal weight, if any, in construing the hypothetical contract between worker and client. In *Dragonfly Consulting Ltd v HMRC* [2008] EWHC 2113 (Ch) Henderson J stated:

> " 53. … statements by the parties disavowing any intention to create a relationship of employment cannot prevail over the true legal effect of the agreement between them. It is true that in a borderline case a statement of the parties' intention may be taken into account and may help to tip the balance one way or the other: see *Ready Mixed Concrete* ([1968] 2 QB 497 at 513) and *Massey v Crown Life Insurance Co* [1978] 2 All ER 576, [1978] 1 WLR 676.In the majority of cases, however, such statements will be of little, if any, assistance in characterising the relationship between the parties.
>
> 55. I would not, however, go so far as counsel for HMRC who submitted that, as a matter of law, the hypothetical contract required by the IR35 legislation must be constructed without any reference to the stated intentions of the parties. If the actual contractual arrangements between the parties do include statements of intention, they should in my view be taken into account, and in a suitable case there may be material which would justify the inclusion of such a statement in the hypothetical contract. Even then, however, the weight to be attached to such a hypothetical statement would in my view normally be minimal, although I do not rule out the possibility that there may be borderline cases where it could be of real assistance."

16. With these authorities in mind I have approached this case by making a value judgment on the circumstances as a whole rather than focussing on isolated features.

Facts

17. The DWP required "contingent labour to take forward some business critical work for the [Universal Credit] programme as [they] could not secure civil servants for a temporary period." The DWP contacted Capita to source suitable candidates. Capita sent the CVs of suitably qualified candidates to Mr Gary McDonald at the DWP who interviewed the candidates by telephone and Mr Wells was offered the job.

18. The DWP did not enter into a direct contract with Mr Wells, instead it had a framework agreement with Capita. There was also no contract between Capita and Mr Wells but rather Capita engaged Mr Wells' services through a personal services company – the Appellant. The series of contracts between Capita and the Appellant which form the basis of this appeal were:

- 28 May and 25 August 2012;
- 26 August to 24 November 2012;
- 25 November 2012 to 23 February 2013; and
- 10 March to 29 June 2013.

19. Each of the contracts was fulfilled with the exception of the final contract which was terminated by Mr Wells on 4 April 2013. There were three chains of contracts:

- The contract between Mr Wells and the Appellant;
- The contract between the Appellant and Capita; and
- The written framework between Capita and the DWP.

Evidence

20. I was provided with witness statements and heard oral evidence from Mr Wells on behalf of the Appellant and Mr Andrew Lemon and Mr Gary McDonald on behalf of HMRC.

21. Mr Wells is the Director and majority shareholder of the Appellant which provides IT services to private and public sector clients on a contract basis. The Appellant has operated successfully in the contract/freelance market for approximately 25 years. Mr Wells explained that he is well-versed in the IR35 legislation and has applied his understanding of the legislation to the Appellant's engagements. Mr Wells explained that he has experience of IR35 from a previous HMRC enquiry in 2003. His experience is significant, having worked with approximately 20 private and public sector clients comprising in the region of 60 contracts, having been subject to periods of non-payment, summary termination and early closure of contracts with engagements varying in duration from 3 months to 2 years.

22. Mr Wells highlighted his complaint to HMRC who had extended their enquiry, in his view, without justification thereby causing severe delay, loss of time and

inconvenience to the Appellant. He also noted that HMRC had been satisfied following their enquiry that his engagement with Lloyds Banking Group did not fall within the IR35 legislation; in Mr Wells' view the engagement with the DWP was no different and HMRC was not justified in reaching a different conclusion.

23. Mr McDonald has worked as a project manager in the Universal Credit Programme in the DWP since 2012 and had responsibility for the strategic design of a number of operational services. Mr McDonald had limited recollection of the working arrangements in place with Mr Wells; partly due to the passage of time, partly because he was not closely involved in the day to day work of Mr Wells and partly because he has worked with many contractors since that time. However Mr McDonald was able to provide the following evidence relating to the general practice of the DWP in working with contractors.

24. At the relevant time the DWP used a private sector organisation, Capita, to secure contractors at short notice in order to progress urgent or significant pieces of work which could not be resourced internally or quickly. The recruitment process involved completing a work specification for Capita, Capita considering suitable candidates and providing Mr McDonald with CVs which he would consider and then advise Capita of those he wished to interview and when. Mr McDonald recalls completing a number of telephone interviews and advising Capita of those he considered suitable in merit order.

25. As far as Mr McDonald recalled, Mr Wells' remit was to design and develop "demand and workflow" management arrangements in Universal Credit. Mr McDonald believed he would have met with Mr Wells to consider his proposals and discuss any changes required to meet the needs of the DWP. Once the approach and proposals were agreed Mr McDonald would have expected Mr Wells to take responsibility for leading delivery of the work agreed and to report progress to the DWP lead for the work area, Mr Lemon.

26. Mr Lemon has worked as a project manager in the Universal Credit Programme in the DWP since 2012. Mr Lemon confirmed that he was not personally involved in the recruitment process involving Mr Wells and that his role working alongside Mr Wells commenced after the contract began. He explained that Mr Wells was tasked to provide expert input into the design of a new national workflow process to be adopted in Universal Credit from April 2013. As far as he recalled, Mr Lemon believed that Mr Wells had responsibility for setting out proposals for and implementing the final design of the organisational structure to be adopted. Mr Lemon was unable to recall the specifics of the work.

27. Mr Wells explained that he was required to provide expert advice in relation to the operational readiness of approximately 16 components of the Universal Credit Programme. Mr Wells had seen the engagement advertised by Capita and provided his CV. He stated that he was unaware that the DWP had looked to recruit internally. He was paid a daily rate; Mr Wells explained that the number of working hours was never specified but he was paid for a "professional working day".

28. Mr Wells explained that initially he was engaged in a broad role to look at the operational aspect and assess the design readiness of the areas involved; the completeness of the designs for the areas were coded as red, amber and green. At that point Mr Wells stated that he probably spoke with Mr McDonald about once each month about the project. He identified the status of a number of areas, for instance one key area was identified within telephony as being critical and required Mr Wells to take the initiative in completing the design to an appropriate level of detail. Mr Wells explained that this typically required visits to a number of site visits according to a schedule set by him and identification of tasks for incorporation in plans used by the DWP. The Appellant did not set work hours as the work was goal orientated and focussed on delivery to projected timescales; consequently the hours varied.

29. Mr Wells explained that he took the initiative in terms of the way forward and determined how best to discharge consultancy across the project. There was liaison with the DWP management regarding progress and task identification however the Appellant was the driving force in setting out the tasks for completion and timescales. There were no limitations on location at which work was completed although a significant amount of time was spent across various DWP sites in order to gather and disseminate information central to design and assessment. The Appellant had no line management responsibilities nor was the Appellant provided with a document entitled "HMRC Questions DWP Engagement Jensal" which was completed by Mr McDonald and Mr Lemon on 11 January 2016 and in respect of which Mr Wells had had no input; the questionnaire was completed at HMRC's request by the DWP (hereafter referred to as "the HMRC questionnaire").

30. Mr Wells explained that very low levels of supervision underpinned the engagement; initially Mr Wells worked with one other consultant to understand the operational readiness across 13 areas supporting the Universal Credit Programme following an initial high level briefing by Mr McDonald. Thereafter meetings took place every three to four weeks to present progress. Approximately six months into the engagement Mr Lemon joined the team and spent time familiarising himself with Mr Wells' work; it was only towards the end of the contract that Mr Lemon took a lead role as opposed to deferring to Mr Wells' direction.

31. Mr Wells stated that he had a right of substitution which was confirmed by Capita. He explained that although in practice it was not common within the sector to appoint a substitute and, in his view, deeming the right as fettered on the basis that the end client needs to approve it is completely unrealistic within mainline IT given the specialist/expert nature of the appointment.

32. Mr Wells was shown the DWP's internal recruitment document relating to the project; he explained that this had not been provided to him when he was engaged nor had it been disclosed until the documents for the appeal hearing were served. Under "Background" the document stated:

> "To successfully support and deliver design activity within the Business Process and Products strand of the Universal Credit Programme on budget, to

specification and compliant with DWP governance, ensuring the processes and experience are in line with departmental and ministerial requirements"

33. Mr Wells agreed that the statement was generally accurate but did not tell the whole story as it was too broad. He agreed that the skills required on the document such as "proven experience in designing and delivering change in a high profile, complex and fast moving business environment" were not incorrect but added that many more skills were required; he has specialist skills which he thought would be useful to the project. Mr Wells agreed that the DWP would have looked for an individual with experience rather than a company; he stated that the scale of the tasks involved did not require a company with multiple personnel.

34. Mr Wells was asked about the HMRC Questionnaire. The document stated:

"Describe how the work was found and if there was a tender process…or interview/selection process please describe any process that took place?

To the best of my recollection. We needed contingent labour to take forward some business critical work for the UC Programme as we could not secure civil servants for a temporary period. Capita were asked to advertise help us find people to take the work forward for a temporary period and they sourced a number of CVs. I conducted telephone interviews with Ian and a number of other candidates and offered a temporary position to Ian via Capita and based on the CV and telephone interview."

Mr Wells was unaware of the terms used within the DWP such as "line manager" but confirmed that Mr McDonald set out the scope of the investigations and areas to be assessed. Mr Wells stated that he expected to work with minimum supervision and he met Mr McDonald about once a month to keep him updated as to progress. He believed that the onus rested more with himself than Mr McDonald in terms of setting timescales and so as with any project there were nominal target dates. Mr Wells drew an analogy between Mr McDonald's role and that of a project manager; he did not know where Mr McDonald was based, although he believed it was Cambridge, and he was aware that Mr McDonald oversaw a number of other projects. The amount of contact between the two was commensurate to the skill and expertise expected of consultants. Mr Wells explained that there was an internal DWP hierarchy but he did not agree that he was supervised, instead he explained that he had discussions with Mr McDonald which did not, in his view, amount to him being "checked up on". Mr Wells did not recognise time constraints as he was the one who planned how the work would take place and when it would be completed.

35. Mr Wells explained that his level of contact with Mr Lemon was minimal. He did not agree with Mr Lemon's recollection that they had spoken daily as it had taken Mr Lemon time to familiarise himself with the work which was not Mr Lemon's area of expertise, although he accepted that contact may have been more frequent towards the end of the project as Mr Wells prepared to leave and hand over the project. Mr Wells explained that being "answerable" to Mr Lemon did not capture the spirit of the relationship; Mr Wells directed the work as he believed it needed to proceed, he did not agree that Mr Lemon drove the work although the pair "touched base". Mr Wells

confirmed that Mr Lemon was responsible for approving his time and expense sheets. He stated that there was no expectation for him to call in each day and explain his location. He agreed that he would have let Mr Lemon know if he was not going in to work, stating that this would be a reasonable expectation in any working relationship. Mr Wells travelled to any locations he believed necessary, particularly in the latter stages of the project when he visited call centres on an ad hoc basis in order to talk to experts. Mr Wells did not need permission for the trips; generally his whereabouts would be known and the reasons for the trips but not always.

36. The DWP framework with Capita stated:

> "Interim Personnel assigned to the Authority shall be under the supervision and control of the Authority and the Authority shall be responsible for the operational direction, supervision and control of Interim Personnel assigned to the Authority under any Services Order."

37. Mr Wells fully disagreed with the suggestion that he was answerable to or under the control of the DWP; he stated he had never seen the document and if he had read such a clause he would not have accepted the contract. Mr Wells explained that it was unreasonable for the DWP to assert such control over an expert and although he accepted that he was working at DWP sites on a programme devised by the DWP he stated that the clause was inaccurate and inappropriate for the work he did. Mr Wells agreed that Mr McDonald and Mr Lemon would have been responsible if he had failed to fulfil the work required but stated that errors can be made in all contractual situations and had this happened he would have made good the error.

38. Mr Wells agreed that the contract between the Appellant and Capita confirmed that his work was owned by the DWP. He stated he was unaware of any "core hours"; he worked between 6am and midnight and was paid a daily rate irrespective of the hours he worked. Mr Wells stated it had never been established whether or not he could work from home; he probably worked at home only 10% of the time as his task involved meeting and eliciting information from people. Mr Wells was not instructed on the DWP standards and policies; he assumed that his own working practices would be compatible.

39. Mr Wells was never informed that his expenses were limited until the end of the project when he was advised that the limit had been reached at which point he simply carried out the task irrespective of whether he would be reimbursed the expenses as the task needed completing. Mr Wells did not recall ceasing travelling as a result of expenses nor could he recall a specific occasion when he personally covered any costs. Mr Wells explained he was exposed to financial risk if his contract was terminated or he had to make good defective work which is why he had contractual insurance. He also risked prosecution if, for instance, there was an error in the user domain.

40. The contract between the Appellant and Capita contained a clause allowing substitution if agreed by the client. Mr Wells agreed that the situation did not arise but explained it was an option. Mr Wells was unaware of (having never seen) the clause in the contract between Capita and the DWP which required a contractor to be vetted.

He confirmed that he had a security pass for the DWP buildings which identified him as a contractor and that he had a DWP laptop and password protected profile. Mr Wells had not considered how a substitute would have been paid or how he/she would have accessed his laptop. However he did not agree that substitution was not a viable option stating that it existed in the contract and was entirely feasible. Mr Wells confirmed that he could have taken on other work at the same time as that for the DWP but stated that the task needed full commitment and chose to work full time on it.

41. Mr McDonald highlighted from his experience the difference between Mr Wells' role as a contractor and DWP employees; the level of management direction and day to day support provided to contractors is less than that for DWP staff. Mr McDonald explained that contractors are employed for their specific skills and experience and are expected to work independently. Contractors receive lower levels of feedback than DWP staff which is limited to their specific work contract, unlike feedback for DWP staff which is regular and follows a formal structure and sits within a personal performance and development process. Contractors are generally expected to manage their own time, whereabouts and activities. They are also expected to advise the DWP if they are unable to work unexpectedly. Contractors sourced via Capita provide worksheets to confirm days/hours worked and expenses incurred via a bespoke system.

42. Mr McDonald confirmed that had he not been satisfied with Mr Wells' proposals to complete the work or if Mr Wells had been unable to deliver the outcomes required, he would have advised Capita that he wished to terminate the arrangement. If Mr Wells had wished to provide a substitute, Mr McDonald stated that he would have contacted the DWP HR department for advice, although he has since been made aware that there is provision for the DWP to accede to such a request although he was unaware of this previously. The DWP would have no objection to Mr Wells working for other contractors as long as it did not affect his ability to meet his commitments to the DWP.

43. Mr McDonald confirmed the evidence given by Mr Wells as to his role; he had explained the programme and parameters after which Mr Wells devised a plan to achieve those results and, once agreed, points of contact were arranged. Mr McDonald explained that this is how he works generally with all contractors. Mr Wells' work was monitored in terms of meeting time scales and ensuring the product was evolving as it should and whether any issues had arisen that Mr McDonald needed to deal with. Mr Wells would provide Mr McDonald with assurances that the work was being done but Mr McDonald would not give instructions as to how the work should be done. Mr McDonald confirmed that the level of supervision with DWP staff differed to that of Mr Wells; the DWP employees would report to him in relation to work progression but he also monitored personal performance, health and wellbeing. In contrast his focus with contractors was product output. Mr McDonald viewed and treated Mr Wells as a contractor as opposed to a DWP staff member. There was also a difference in terms of the duty of care and knowing the whereabouts which was monitored more closely with DWP staff than contractors; where Mr Wells chose to work was not a concern to Mr McDonald.

44. Mr McDonald agreed that he met with Mr Wells approximately every four weeks, increasing as the work came closer to delivery. Mr McDonald stated that he did not line manage Mr Wells. Mr McDonald explained that once Mr Wells had completed his task he would not fill the role as the task was complete; Mr Wells' role was to undertake a specific piece of work over a specific time.

45. Mr Lemon confirmed that the arrangement with Mr Wells was flexible in terms of the location from which he worked. He recalled that Mr Wells based himself at the DWP office in Leeds for the majority of time and that he worked at home at least one day per week. Mr Lemon could not comment on what time Mr Wells arrived at the office although he recalled that Mr Wells worked late on the majority of occasions and finished after 6pm on a regular basis. Mr Wells managed his own time and location around the demands of the role, occasionally travelling to DWP sites when needed. He explained that it was not unusual for DWP members of his team to work flexibly. Mr Lemon drew a distinction between line managing his direct DWP employees and the limited supervision of Mr Wells. He stated that to a large extent he would take Mr Wells' advice and decide if it was plausible. Mr Lemon did not monitor Mr Wells' time and expense sheets; he simply approved them and monitoring was limited to ensuring they did not seem excessive. Mr Lemon did not know if any hours of work were specified in the contract but as far as he was aware Mr Wells regulated his own hours; Mr Wells did not need to account for the hours he worked nor did Mr Lemon have any expectations beyond reasonable working hours.

46. Mr Lemon described Mr Wells' role as acting in an advisory capacity to his (Mr Lemon's) team on the organisation and job roles for the new operational model for workflow management. He stated that instructions for Mr Wells' work were discussed on an ongoing basis and that Mr Wells managed his own work within a broad remit. Mr Wells was provided with a DWP laptop and access to internal systems, although he also used his own laptop and software. Mr Wells attended meetings when required to do so and occasionally arranged meetings with DWP colleagues to assist in his work.

47. In oral evidence Mr Lemon explained that his own work relied on that of Mr Wells and therefore he needed regular sight of the designs. He agreed that they did not necessarily discuss work on a daily basis but they were often in the same location and contact was therefore regular albeit there was no formal 'checkpoint' of contact. In relation to who had the ultimate decision making authority Mr Lemon explained that he would take the design advice of Mr Wells and how his own work developed from there was a matter for him. Mr Lemon did not have direct responsibility for Mr Wells' work; he explained that he was accountable to Mr McDonald for his work and that part of that involved input from Mr Wells from which he was able to give Mr McDonald assurances regarding work that had been done. Mr Lemon explained that he had more accountability for his direct employees in terms of their development and work as compared with Mr Wells in respect of whom he checked that the work was within the remit of the project but did not check how the work was delivered or the quality of it.

48. Mr Lemon could not recall a conversation in which Mr Wells stated he would absorb the cost of expenses once the limit was reached, as far as Mr Lemon could remember Mr Wells had stopped travelling at that point. He confirmed that Mr Wells had travelled at his own discretion; Mr Lemon's input was limited to advising who was based where. He stated that for health and safety reasons and a good working relationship it was preferable for him to know Mr Wells' whereabouts. On the issue of substitution Mr Lemon could only state that the situation did not arise.

49. Having recited the evidence I will now set out the parties' submissions as to how that evidence should be applied to the factors to be considered in deciding whether the hypothetical contract would have been a contract for services or a contract of services. Thereafter I will set out my findings on the evidence in so far as is relevant to the issue to be determined.

HMRC's submissions

50. On behalf of HMRC Ms Hicks made the following submissions:

Mutuality of obligation

51. The hypothetical contract between Mr Wells and the DWP would be one of employment as there would be an obligation on the DWP to provide work and for Mr Wells to perform that work in return for remuneration. Mr Wells was engaged between 28 May 2012 and 4 April 2013 with a gap of only 10 working days. That the work was performed under a series of contracts is not a factor that can be usefully considered in isolation but rather it must be considered alongside the general question of whether the worker was in business on his own account (see *Market Investigations Ltd* (ibid at [13]). Ms Hicks contended that where, as in this case, there are a series of contracts, the fact that there is no obligation on the company to offer further work outside those contracts is irrelevant for the purposes of IR35, as noted by Mummery LJ in *Cornwall County Council v Prater* [2006] ICR 731 at [40]:

> "The important point is that, once a contract was entered into and while that contract continued, she was under an obligation to teach the pupil and the council was under an obligation to pay her for teaching the pupil made available to her by the council under that contract."

52. The Tribunal need only determine whether or not there was sufficient mutuality of obligation within each period and whether the hypothetical contract covering the entire period under review would have been a contract of service or not. The Appellant did not dispute that Mr Wells personally performed the services provided and the statutory test under s49(1)(a) ITEPA is met. The work that the DWP was obliged to provide was performed by Mr Wells in return for remuneration; therefore the hypothetical contract between Mr Wells and the DWP would be one of employment. Mr Wells accepted in evidence that there was an obligation on him to turn up for work and agreed that there was always work for him to do. Mr Wells stated in evidence that to not turn up to work would have been unacceptable and that the DWP rightfully expected and required him to do so.

53. Mr Wells provided the *"contingent labour"* needed by the DWP as described in the document provided by HMRC for completion by the DWP in relation to the engagement of the Appellant. He was in the terms of the Capita/DWP contract under *"Service Specification"* described as*" Interim Personnel"* (at section 3 clause 1) and was filling the role of an employee.

54. The DWP was obliged to pay Mr Wells a daily rate as specified in the contract between the Appellant and Capita; Mr Wells was not paid per project or on completion of a given project. HMRC submitted that the daily rate is analogous to a salary.

55. Mr Wells' work was not casual; he was engaged almost continuously for over 10 months, was obliged to turn up for work each day and worked the core hours of 8am/9am until 6pm or beyond as described in the document provided by HMRC for completion by the DWP in relation to the engagement of the Appellant.

Substitution

56. Ms Hicks submitted that the right of substitution may be a pointer away from employment; either it is *"fatal to the requirement that the worker's obligation is one of personal service"* or the right to avoid doing a piece of work may be so broadly stated as to be *"destructive of any recognisable obligation to work"* (see Briggs J in *Weightwatchers (UK) Ltd v HMRC* [2012] STC 265 at [32] – [35]). However a limited right to cover, for example in the case of ill health, is not inconsistent with an employment relationship.

57. Ms Hicks highlighted the substitution clause in the contract between the Appellant and Capita which states:

> "3.5 The Contractor (the Appellant) may use an alternative named Consultant in place of the Initial Consultant as named in Schedule 1 provided that:
>
> > 3.5.1 the Client and Capita state in writing that they are satisfied the alternative Consultant possesses the necessary skills, expertise and resources to fulfil the Client's reasonable requirements and meet the standards applicable to the Services…"

58. On behalf of HMRC it was submitted that the clause is not so widely drafted such that Mr Wells could decide never to turn up for work at all. Ms Hicks contended that the clause is far removed from an unfettered right of substitution. The HMRC Questionnaire which stated that Mr Wells' services *"could have been delivered by other suitably competent and qualified workers at the discretion of Jensal"* is misleading as consent had to be sought from both Capita and the DWP which would only have been provided if the proposed replacement had the necessary skills and expertise. Whilst Mr McDonald acknowledged that there was provision for the DWP to accept substitution, HMRC submitted that it is evident that permission would be required and would not be automatically granted. Moreover HMRC submit that the stringent vetting process and security requirements at the DWP meant, in reality, that

it was unlikely that anyone could have replaced Mr Wells and the suggestion that Mr Wells could easily and readily send someone as his substitute is fanciful.

59. HMRC submitted that in the hypothetical notional contract Mr Wells would not have a right to substitute; the DWP sourced through Capita the services of an individual not a company, Mr Wells was identified by Capita as a suitable candidate and his CV (not the company portfolio) was sent to the DWP. Following interview Mr Wells was offered the job and named in the contract between the Appellant and the Capita. The substitution clause was contained in the contract between the Appellant and Capita, not the Capita and the DWP. The statement of intention in the contract between the Appellant and Capita was included in order to not create a contract of service and any such statement of intention should be given no weight (see *Dragonfly* at [55]).

60. In evidence Mr Wells explained that he always looked for a substitution clause *"because it is one of the indications for IR35 compliance"*; the right to substitution was therefore sought by Mr Wells in order to comply with the legislation, rather than an intention to send a substitute.

Control

61. The right of a company to control a worker in respect of what, how, when and where work is undertaken can be an important indicator of an employment relationship, however control will not be the decisive test as per Lord Parker CJ in *Morren v Swinton and Pendlebury BC* [1965] 2 All ER 349 at [351]:

> "…control cannot be the decisive test when one is dealing with a professional man, or a man of some particular skill and experience. Instances of that have been given in the form of the master of a ship, an engine driver, a professional architect or, as in this case, a consulting engineer. In such cases there can be no question of the employer telling him how to do work; therefore, the absence of control and direction in that sense can be of little, if any, use as a test."

Ms Hicks contended that the key question is not whether in practice the company exercises control but whether it has a contractual right of control, as per *White v Troutbeck* [2013] IRLR 286 at [290]:

> "…the key question is whether there is, to a sufficient degree, a contractual right of control over the worker. The key question is not whether in practice the worker has day-to-day control of his own work….In my judgment what was required was to analyse the terms of the agreement between the parties to see whether, expressly or by implication, Troutbeck…retained a right of control to a sufficient degree….Moreover, for the reasons I have given, it is not inconsistent with the concept of employment for an absentee owner to want someone to be responsible for maintaining and managing their property. The question is not by whom day-to-day control was exercised but with whom and to what extent the ultimate right to control resided."

62. Relying on *Autoclenz Ltd v Belcher* [2011] ICR 1157 (per Lord Clarke at [1163]) Ms Hicks submitted that if a right of control exists within the contract, the fact that the company does not exercise it does not detract from that fact:

> "Three further propositions are not I think contentious: (i) As Stephenson LJ put it in *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612, 623, "There must … be an irreducible minimum of obligation on each side to create a contract of service." (ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: *Express & Echo Publications Ltd v Tanton* [1999] ICR 693, 699 g, per Peter Gibson LJ. (iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg the *Tanton* case, at p 697 g."

63. As to how control was exercised, Mr Wells' evidence was that he was hired as "a specialist/expert appointment"; as such it is not inconsistent with an employment relationship for there to be little control in how he worked. There was however, HMRC noted, a contractual right to control how Mr Wells fulfilled the role; the Capita/DWP contract stated at section 2 clause 12.4:

> "Interim Personnel assigned to the Authority shall be under the supervision and control of the Authority and the Authority shall be responsible for the operational direction, supervision and control of Interim Personnel assigned to the Authority under any Services Order."

64. HMRC relied upon the evidence of Mr McDonald that feedback would be provided on the progress made by Mr Wells and the regular meetings and discussions that took place with Mr Lemon with whom the ultimate decision making responsibility lay. Ms Hicks submitted that Mr Wells was treated as a senior but temporary member of staff; his work was steered by Mr McDonald, the ultimate decision would be made by Mr Lemon as team leader and the DWP monitored the work, as Mr Lemon stated in evidence: "I had to check he was producing what he should have."

65. The contract between the Appellant and Capita provided for progress reports to be requested from Mr Wells and controlled his conduct outside of work to the extent that he would: "not engage in any conduct detrimental to the interests of Capita or the Client."

66. Mr Wells worked 37 hours and was expected to come to work each day. He was required to work from the DWP site at Leeds and did so for the majority of his engagement, occasionally travelling to meetings at other sites and with the permission of the DWP.

67. Ms Hicks highlighted *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC at [36] in which Lord Philips explained:

> "Today it is not realistic to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee. Many employees apply a skill or expertise that is not susceptible

> to direction by anyone else in the company that employs them. Thus the significance of control today is that the employer can direct what the employee does, not how he does it."

Ms Hicks submitted that the facts of this appeal are analogous to those in *Dragonfly Consulting Ltd v HMRC* [2008] EWHC 2113 (Ch) at [41] and [52] and that the degree of control needs only be sufficient as opposed to tantamount to that over an employee; that the DWP did not rely on or invoke its right is immaterial, the important fact is that the right existed:

> "Everybody agrees that control is in some sense an essential ingredient of a contract of employment. It is the second of the three conditions to which MacKenna J referred to in *Ready Mixed Concrete*. By way of amplification, he said at 515F:
>
> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted . . . . To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication."
>
> …
>
> On the strength of the oral evidence, the Special Commissioner was in my view fully entitled to conclude that Mr Bessell's performance of his duties was subject to a degree of supervision and quality control which went beyond merely directing him when and where to work. In the case of a skilled worker, you do not expect to find control over how the work is done. Conversely, in the case of a self-employed worker in business on his own account you would not normally expect to find regular appraisal and monitoring of the kind attested to by Mr Palmer and Miss Tooze. The weight and significance to be attached to this evidence was a matter for the Special Commissioner, and in my view it was open to him to conclude that the nature and degree of the control by the AA under the hypothetical contract was on balance a pointer towards employment."

Business on own account

68. Ms Hicks referred to *Market Investigations v Minister of Social Security* [1969] 2QB 173 in which Cooke J suggested that the test to be applied was whether the worker was an employee *"as a matter of economic reality"*. In making that assessment the following factors may be relevant:

- provision of own equipment,;
- whether he hires his own helpers;
- what degree of financial risk he takes;

- what degree of responsibility for investment and management he has; and

- whether and how far he has an opportunity of profiting from sound management in the performance of his task.

69. HMRC submitted that Mr Wells was not operating in a business on his own account; he bore no financial risk, he was paid a daily rate and expenses were reimbursed. There was no documentary evidence to support the suggestion that Mr Wells ever absorbed travel costs when the expense allowance ran out and Mr Wells' evidence was uncertain as to whether such an issue ever arose. The risk of a contract not being renewed is immaterial as it is faced by all employees who move from one job to another (see *Lee Ting Sang* [1990] 2 AC 374 (Privy Council))

70. There was no opportunity for Mr Wells to profit; as with an employee he could only make more money by working overtime; the HMRC Questionnaire stated at question 26:

> "Other than by working extra hours…are you aware of any way JSL could have made any additional…profit from the contract?
>
> No"

71. In assessing whether Mr Wells carried on business on his own account Miss Hicks highlighted that this is not a "mechanical exercise of running through items on a checklist" but rather the full picture "from the accumulation of detail" must be considered followed by standing back to make an "informed, considered, qualitative appreciation of the whole" (per Nolan LJ in *Hall v Lorimer*).

Other relevant factors

72. HMRC rely on the following as indicators of employment:

(i) The background to Mr Wells' engagement; the DWP was looking for temporary employees or "contingent labour";

(ii) The recruitment process bears the hallmarks of recruiting temporary employees as shown in DWP contract document under sections entitled "Hiring of Resource" and "Processes", namely by using a search for candidates and interview process as opposed to a self-employed person or independent contractor pitching for work or entering a tendering process;

(iii) The contract between the DWP and Capita bears the hallmarks of a temporary employee recruitment provider, for instance the vetting process, employment history checks and the existence of an equality and diversity policy;

(iv) The manner in which Mr Wells carried out work, for instance reporting to Mr McDonald and attending meetings when requested;

(v) Mr Wells was integrated into the DWP team; the only difference in Mr Lemon and Mr McDonald's management of Mr Wells related to the absence of pastoral care and personal development given to DWP employees. This is not indicative, either way, of an employment relationship given Mr Wells' fixed term contract.

The Appellant's submissions

73. On behalf of the Appellant Mr Vessey made the following submissions.

74. HMRC have breached Article 9 of the Taxpayer's Charter in their handling of the enquiries. The Appellant's complaint was upheld by HMRC in relation to its extension of the enquiry and the distress caused to the Appellant. HMRC have not acted impartially, for instance by seeking information from the DWP in the HMRC Questionnaire; the job of HMRC is to check if the correct amount of tax has been paid not to only seek evidence to support its own case.

Mutuality of obligation

75. Clause 13.2 of the Appellant/Capita contracts reads as follows:

> "Neither Capita nor the Client is under any obligation to offer work to the Contractor and the Contractor is under no obligation to accept any work that may be offered. No party wishes to create or imply any mutuality of obligation between themselves either in the course of or between any performance of the services or during any notice period. Capita is not obliged to pay the Contractor at any time when no work is available during this agreement."

76. This demonstrates the absence of mutuality of obligation both during and after the contract.

77. Mr Vessey submitted that mutuality of obligation can exist in both a contract of services and contract for services. Relying on *JLJ Services Ltd v HM Revenue and Customs* [2011] UKFTT 766 (TC) at [51]:

> "There is a feature in this case where the phrase "mutuality of undertakings" has some resonance. A touchstone of being an employee is the hope and expectation that there will be some relationship of faithfulness between employer and employee. In other words, the employer will generally endeavour to keep staff employed even when work is short. Contract workers will be dispensed with first. Employees will commonly have several "employee benefits", and in particular pension rights. With short term engagements, none of this will be relevant with contract workers."

78. Mr Vessey contended that further evidence must be found to support either a contract of service or a contract for services; that there was a contract for services is supported by the fact that there was no attempt by the DWP to keep Mr Wells

employed, the contracts were each of short duration with no expectation of renewal and the Appellant terminated the final contract early in order to start work elsewhere.

Substitution and personal service

79. The Appellant had a genuine right of substitution set out at clause 3.5 of the Appellant/Capita contract which stated:

> "3.5 The Contractor may use an alternative named consultant in place of the Initial Consultant as named in Schedule 1 provided that:
>
> 3.5.1 the Client and Capita state in writing that they are satisfied the alternative Consultant possesses the necessary skills, expertise and resources to fulfil the Client's reasonable requirements and meet the standards applicable to the Services;
>
> 3.5.2 the Contractor keeps Capita fully and effectively indemnified against any reasonable costs, claims or expenses that may be incurred by it or the Client as a result of such submission or substitution of staff including the reasonable cost of all instruction (necessitated by the substitution) for the substitute named Consultant; and
>
> 3.5.3 the Contractor shall, at the request of Capita, provide such alternative Consultant free of charge for such period as Capita may reasonably require so that the Consultant can get up to speed on the Services."

80. Clause 4.6 implies an absence of personal service by its reference to sub-contractors and employees of the Appellant. Clause 14 indicates the ability of the Appellant to assign and/or sub-contract the services:

> "The rights and obligations of the Contractor under this Agreement shall not be assigned or transferred without the prior written consent of Capita, for which Capita may charge an administration fee of up to £100 for such assignment or transfer. Capita shall not be obliged to give any reason for withholding such consent."

81. In *Express & Echo Publications Ltd v Tanton* [1999] IRLR 367 Peter Gibson LJ said (at [370]):

> "It is, in my view, plain that Mr Swift is right in his submission that it is necessary for a contract of employment to contain an obligation on the part of the employee to provide his services personally. Without such an irreducible minimum of obligation, it cannot be said that the contract is one of service."

82. In an email dated 23 May 2016 Capita confirmed an absolute right of substitution and that the contractual clause was a reality. Capita confirmed that once all regulatory procedures were satisfied a substitute worker could be sent at any time:

Email from Mr Vessey to Emma Smedley, Compliance Officer at Capita, on 23 May 2016:

"…Can I just clarify two points…

- Jensal Software Ltd could have utilised a substitute at any time during the contract, i.e a named substitute did not have to be disclosed at the very outset?

- As an estimate, if Jensal Software Ltd had wanted to send a replacement worker, how long would it have taken for Capita & DWP to have satisfied themselves that the proposed substitute being suitably qualified & skilled?"

Response from Emma Smedley to Mr Vessey dated 23 May 2016:

"Absolutely, this is something that could be done at any time during the contract and does happen.

A substitute consultant can start as soon as they have provided all of the necessary vetting and screening requirements to Capita. By this, I mean everything we need from a regulatory perspective (proof of right to work in the UK, any required references, identity documents etc), and any proof of specifics for the role (required qualifications, experience). Once this has been obtained they can start working."

83. Mr Vessey submitted that Mr Lemon's evidence on this point was contradictory; at first saying substitution was not applicable and later that he was unsure. Mr McDonald accepted that the right of substitution existed. Although the Appellant had no need to invoke the right it nevertheless existed as a genuine right of substitution.

84. As to mutuality of obligation Mr Vessey submitted that the length of each contract, namely 3 months, suggests that the relationship was not expected to last any length of time. He highlighted the two week period between 24 February 2013 and 9 March 2013 when the Appellant was "left in limbo" and no fee was payable where services were not provided. The last contract was terminated by Mr Wells with immediate effect prior to the end date in order that Mr Wells could take work elsewhere which indicates a lack of mutuality of obligation (see *Marlen Ltd v HMRC* [2011] UKFTT 411 (TC)).

Control

85. The Appellant had full autonomy as to how the services were carried out as set out in Clause 3.1 of the Appellant/Capita contract:

"The Contractor shall provide the Services with all reasonable skill and care. The Contractor shall decide the appropriate method and manner of performance of the Services but shall have due regard to the reasonable requests of the Client, and the documented requirements of the Assignment (if any)."

86. Clause 3.4.5 states that the rules applicable to DWP employees are not extended to contractors:

"3.4 The Contractor agrees on its own part and shall procure that the Consultant agrees:…

> 3.4.5 to comply with any rules or obligations in force at the premises where the Services are performed to the extent that they are reasonably applicable to on-site visitors or independent contractors in the provision of the Services…"

87. Once work specification was communicated to Mr Wells he was left to carry out the work as it saw fit and manage his own workload. Mr Wells could not be moved from task to task at the whim of the DWP as any variation to contractual terms had to be agreed by both parties (see Clauses 12.1 and 13.3).

88. Mr Wells had discretion as to whether to attend DWP meetings and the degree of control must be placed in context, relying on *Marlen Ltd v HMRC* [2011] UKFTT 411 (TC) in which it was stated:

> "The degree of control that is exercised has to be looked at in the context of what is being done, what is being produced. There is no absolute standard which can be universally applied."

89. Mr Wells decided what needed to be done and the timescale in which it should be delivered. As Mr McDonald confirmed, once the proposals were accepted by the DWP the Appellant took responsibility for the work; the only feedback to report to the DWP was progress and products. In that regard the Appellant acted in an advisory capacity to the DWP. Both Mr McDonald and Mr Lemon accepted in evidence that the Appellant was not line-managed and although they were accountable for Mr Wells' work they had no direct responsibility for it; in that regard the Appellant's case is analogous to *Primary Path Ltd v HM Revenue and Customs* [2011] UKFTT 454 (TC).

90. The Appellant's assessments were peer reviewed which does not amount to control as noted in *ECR Consulting Ltd v HMRC* [2011] UKFTT 313 (TC) at [25]:

> "…VDS operated a Peer Review system for the monitoring and maintenance of standards. We do not accept that these reviews were to ensure that Miss Richardson had dealt with the system correctly, but rather for the whole team to examine how the project was progressing with a view to resolving problems."

91. The 37.5 hour working week was not recognised in the lower level contract or by the Appellant; 7.5 hours per day was stated as a minimum requirement in the DWP internal document "Terms of Reference". The hours worked by Mr Wells varied and the time sheets completed by Mr Wells did not exercise control but were produced for the purposes of budgetary control and payment to the Appellant. Mr Wells did not have to seek permission to take leave as DWP employees were required to do; the HMRC Questionnaire stated:

> "Time off was taken by agreement with Project Colleagues and with consideration of forward project demands and timescales. Jensal received NO payment for any break or holiday. No requests for time off were refused by DWP mainly due to compromise and forward thinking.
>
> It was not necessary for Jensal to seek permission to take time off in the same manner as DWP employees."

92. Mr Vessey highlighted the fact that Mr Wells was not restricted as to where to work as the nature of the work sometimes dictated location. He chose to base himself at the DWP site at Leeds but retained discretion as to where to carry out the work. Mr Vessey highlighted the absence of any reference in the Appellant/ Capita contract to core working hours and noted that Mr Wells did not adhere to any set working hours. Mr McDonald and Mr Lemon also confirmed that Mr Wells managed his own time and no permission was required to take leave. The Appellant was free to provide services to other clients.

93. Clauses 4.3 and 13.1 demonstrate that all parties intended to create a self-employed relationship:

> "4.3 For the avoidance of doubt, neither the Contractor nor the Consultant shall have any direct contractual relationship with the Client.
>
> 13.1 Nothing in this agreement shall be construed as a contract of employment between the Contractor or its Consultant on the one part and Capita or Client on the other. All parties agree that this Agreement is a contract for services only."

Financial risk

94. Mr Vessey highlighted the fact that the DWP could terminate the contract with the Appellant immediately in certain circumstances:

> "2.3 Unless explicitly changed in Schedule 1, Capita may terminate this Agreement immediately for any reason by giving notice, written or in person, to the Contractor without liability or cost.
>
> 2.4 Capita shall have the right to terminate this Agreement for breach forthwith, without liability or cost, in the event that:
>
> 2.4.1 the Contractor is at any time in breach of Clause 4.6; or
>
> 2.4.2 Capita has good reason to believe that the Contractor is, or will, in future, be in breach of Clause 4.6; or
>
> 2.4.3 any competent authority (including, without limitation, Her Majesty's Revenue and Customs) instigates any investigation or brings any charges against the Contractor in relation to the use of a scheme of the type identified in clause 4.6; or
>
> 2.4.4 the Contractor is in breach of any warranty or undertaking contained in this Agreement at any time."

95. Mr Vessey noted that any defective work had to be remedied by the Appellant at its own cost (see clause 3.8). Moreover the Appellant was responsible for certain costs and losses in the event of negligence or breach of contract and was required to hold the necessary business insurance. There was also an administration fee payable of £100 if the Appellant wished to assign the contract. These factors point towards a contract for services.

96. Although Mr Wells was provided with a laptop by the DWP this was for security reasons and should not be seen as indicative of employment (relying on *Marlen Ltd v HMRC*). He initially used his own laptop and only later used that provided by the DWP for security reasons. Mr Wells provided his own projection equipment for on-site presentations.

97. Clauses 10 and 11 of the Appellant/Capita agreement set out requirements on the Contractor relating to indemnity, liability and insurance. Clause 14 contains a similar requirement on the Contractor to keep Capita indemnified against any reasonable costs, claims or expenses where the work is sub-contracted which, Mr Vessey submitted, points away from a contract of services.

Business on own account

98. Mr Vessey submitted this factor was of little assistance to someone carrying on a profession/vocation (see *Hall v Lorimer*). It is also possible for a person to be in business on his own account when supplying his own services (see *Turnbull v HMRC* [2011] UKFTT at [20]:

> "We find support from the decision in Barnett v Brabyn [1996] STC 716 where it was successfully contended for HMRC before the General Commissioners that it was quite possible for a person to be in business on his own account when all he supplied was his own services without providing any equipment or having any risk of loss of prospective profit."

99. As regards integration Mr Wells had no managerial responsibilities for DWP employees and the short contractual periods indicates that the Appellant was no more than an accessory required on an *ad hoc* basis. Furthermore no specific on-site facilities were provided to Mr Wells nor was he entitled to any DWP benefits.

100. Mr Vessey submitted that the parties' intention must be taken into account as stated in *Dragonfly*. The clear intention of the parties to create a self-employed relationship is reflected in the Appellant/Capita agreement at clauses 4.3 and 13.1 (see paragraph 94 above).

Discussion and Decision

Ancillary issue

101. The complaints raised by the Appellant as to HMRC's extending of, and conduct during the enquiries have no bearing on the issue for me to determine. The complaints were, as I understand the position, addressed through HMRC's complaints procedure. In those circumstances I make no further comment upon the complaints and I have reached my conclusion on the facts and evidence before me in relation to the issue in the substantive appeal.

The appeal

102. The issue for me to determine is whether Mr Wells personally performed or was under an obligation to perform services for the DWP and whether the hypothetical contract between Mr Wells and the DWP would have been a contract of services or a contract for services.

103. In this appeal there were three chains of contracts; the contract between Mr Wells and the Appellant (in respect of which there appears to have been no written contract and no such document formed part of the evidence before me), the contract between the Appellant and Capita and the "Interim Personnel Framework" ("the Framework") between Capita and the DWP. I note at this point that the Framework appears to be a standard form document intended for use with all contractors engaged to provide "essential specialist skills not available within the Department" and therefore it covered a range of matters, many of which were not relevant or of limited assistance to the issue in this appeal. I should also note that Mr Wells and the Appellant were not aware of the detail of the agreement between Capita and the DWP, however this does not mean that the terms contained therein would not have formed part of the hypothetical contract. The relevance of Capita, which was not 'the worker', 'the client' or 'the intermediary' but was clearly involved in the arrangements, is that its part in the arrangements must be taken into account. In reaching my decision I have considered as a starting point the express terms of the contract and Framework. Where the express terms are unclear or do not assist I have considered the evidence of the witnesses in reaching a value judgment as to the terms of the hypothetical contract.

104. As explained in *Primary Path Ltd and HMRC* [2011]UKFTT 454 (TC) the terms of all contracts must be considered:

> "…the exercise of constructing the hypothetical contract between the client and the worker is made more complicated by the interposition of an independent agency company between the appellant company and the client, so that in looking at the actual contractual terms governing the basis on which…services were supplied…in each of the contract periods it is necessary to look at the arrangements between GSK and the respective agency companies…and between those agency companies and the Appellant."

105. Both parties accept that the burden of proof rests with the Appellant. The standard of proof is the balance of probabilities which I have applied in reaching my findings of fact.

106. I note at this point that in assessing the reliability of the oral evidence I am satisfied that all of the witnesses gave honest accounts to the best of their recollection. The oral evidence provided assistance where the terms of the contracts were unclear. However in relation to the minor matters where a difference in recollection arose, I preferred the evidence of Mr Wells which I found clear and cogent and I bore in mind that Mr McDonald had explained that the passage of time and numerous contractors with whom he had worked over the years had, understandably, affected his specific recollection of events.

107. In *Primary Path Ltd* Judge Sadler helpfully set out the following at [61] – [64]:

> "It is clear from the cases that although there is a range of factors or indicia which might usefully be taken into account in ascertaining whether a contract is one of employment or one for the provision of services by an independent contractor, there is no simple formula or process which can be applied to determine, in any particular case, which factors are relevant or the weight or significance which is to be attributed to any factors which are considered to be relevant…
>
> The essential factors – the "irreducible minimum" – which must be present if an employment contract is to exist were set out in the *Ready Mixed Concrete* case by MacKenna J in terms which have since been recognised as the helpful starting point for the analysis of the true nature of contracts in this difficult area…
>
> The first of these conditions has evolved into two distinct factors: first, that there should be what has commonly been called "mutuality of obligation"; and second, that a defining feature of an employment contract is that the employee, and he alone, is the person whose services are to be provided.
>
> The question of "mutuality of obligation" has led to discussion as to whether all that is required on the part of the employing party is that it should simply pay the remuneration contracted for, or whether a defining characteristic of an employment contract is that the employer is required to provide a flow of work and to continue to pay the contracted remuneration even if at times there is no work. The Special Commissioner in the *Dragonfly Consultancy* case provides a helpful review of the cases which deal with the employer's obligation (see paragraphs 50 to 59), and reaches this conclusion: for a contract to exist there must, of course, be mutual obligations, but that obvious requirement is met if the "employee" is obliged to provide his labour and the "employer" is obliged to make payment for it; and that "an obligation on the employer to provide work or in the absence of available work, to pay, is not a precondition for the contract being one of employment, but its presence in some form…is a touchstone or a feature one would expect to find in an employment contract and where absence would call into question the existence of such a relationship."

108. In reaching my conclusion I have had regard foremost to the nature of the hypothetical contract and the principles to be applied from the authorities cited. I have considered the cumulative features and considered all of the relevant circumstances as per Park J in *Usetech Ltd v Young (Inspector of Taxes)* [2004] All ER (D) 106 (Oct) at [53]:

> "As it seems to me the present state of the law is that whether a relationship is an employment or not requires an evaluation of all of the circumstances."

109. From the authorities I derive the following as relevant factors:

(i) Mutuality of obligation to perform personally work offered and to pay remuneration is the "irreducible minimum ... necessary to create a contract of service" (see *Carmichael v National Power Plc* [1999] 1 WLR 2042);

(ii) Whether the worker is subject to "a sufficient degree" of control in terms of what is to be done, and where, when and how it is to be done as a contractual right (see *White v Troutbeck [2013] IRLR 286*);

(iii) The existence of a right to substitute, irrespective of whether or not that right was exercised in practice (see *Autoclenz Ltd v Belcher* [2011] ICR 1157);

(iv) Whether the worker was in business on his own account, including consideration of factors such as whether the worker had to provide at his own expense the necessary equipment, hires his own helpers, whether the worker bears a financial risk, whether the worker has the opportunity to profit and whether the worker engaged himself to perform services in the course of an already established business of his own; and

(v) The duration of the contract, degree of continuity and whether the worker was "part and parcel" of the organisation (see *Hall v Lorimer*).

110. In considering these factors I conclude that the hypothetical contract between Mr Wells and the DWP would be on the following principal terms:

(1) The services of Mr Wells are engaged on a fixed term or for a series of fixed term contracts which can be terminated before the expiry of the term.

The reason I am satisfied that this is the case, is that the contract between the Appellant and Capita at Clause 1 provides:

> "Unless explicitly changed in Schedule 1, Capita may terminate this Agreement immediately for any reason by giving notice, written or in person, to the Contractor without liability or cost".

The contracts also contain provision for immediate termination in specific circumstances.

The Contractor is at liberty to terminate the Agreement by agreement with Capita and the DWP on such notice period as agreed or, in the event of certain circumstances, on 4 weeks' notice (or such other period as Capita is obliged to provide the Client).

The Framework also contains provision for termination of the contract at any time or upon change of control, insolvency and default.

I am satisfied that the hypothetical contract in respect of the right to terminate would reflect the position between the parties which occurred, namely that Mr Wells ended the final contract early without any issue arising as to breach of contract.

(2) The services and obligations of Mr Wells relate to a specific project within the DWP in respect of which Mr Wells agrees to furnish the DWP with progress reports as requested. There is no set location from which to work nor are there set core hours. The ultimate responsibility for the project lies with the DWP although it is up to Mr Wells to devise the proposal for what is needed and how to implement the proposal once agreed.

Schedule 1 to the contract between the Appellant and Capita sets out a description of the assignment role of "Business Process Design Leads." In the same contract the terms provide that the contractor:

> "…shall decide the appropriate method and manner of performance of the Services but shall have due regard to the reasonable requests of the Client, and the documented requirements of the Assignment (if any)."

The Framework provides only a general outline, stating:

> "Interim Personnel assigned to the authority shall be under the supervision and control of the Authority and the Authority shall be responsible for the operational direction, supervision and control of Interim Personnel assigned to the Authority…"

The statement is generic and I am satisfied on the facts of this case that Mr Wells' particular expertise was to be utilised in determining how best to design and meet the task. I take the view that the Framework does not assist in determining the terms of the hypothetical contract in this case; it was clear from the evidence that no such operational direction or supervision existed and the ultimate responsibility held by the DWP was no more than would exist in the case of an independent contractor.

I am satisfied that the hypothetical contract did not require Mr Wells to be located at any particular site on the basis that the contract between the Appellant and Capita gives a principal location of Leeds with Mr Wells permitted to work from home. In contrast the HMRC internal recruitment document specified Sheffield or Warrington as the main base location with other sites permitted. The evidence on this matter was not contentious and I accept it as fact; Mr Wells was permitted to work at any site he deemed necessary to perform his duties.

(3) Payment is made on the basis of authorised weekly timesheets presented**.** Expenses are reimbursed and there is no entitlement to payment for absences such as holidays, sickness, etc.

Schedule 1 to the contract between the Appellant and Capita set a daily rate of £450 inclusive of expenses etc. Due to its generic nature I am satisfied that the Framework does not provide any further assistance in determining the terms of the hypothetical contract between Mr Wells and the DWP.

The HMRC internal recruitment document sets out that over the contract period the average number of hours worked per day is set at 7.5, with scope to agree additional hours of work. There is no other reference to set hours and I accept the evidence which was not in dispute; Mr Wells submitted timesheets, there was no requirement to work set hours and the hours worked by Mr Wells varied.

(4) Mr Wells may propose a substitute for himself subject to agreement and satisfactory security checks.

The contract between the Appellant and Capita contains provision for a substitute subject to the agreement by the DWP that the skills and requirements applicable to the services are met. I infer from the verification process and security checks required of Mr Wells prior to undertaking the role that the same would be required of a substitute.

The Framework is widely drafted and requires approval before the contract is assigned, sub-contracted or in any other way disposed of; I am satisfied that this provision would include the issue of substitution.

(5) Mr Wells is entitled to engage in other contracts provided that there is no diminution in the standard of his services to the DWP.

This provision is expressly included in the contract between the Appellant and Capita. The Framework contains a guarantee by the contractor which I am satisfied is drafted sufficiently widely so as to cover other engagements, namely that:

> "it is not subject to any contractual obligation, compliance with which is likely to have a material adverse effect on its ability to perform its obligations under the Contract".

(6) Mr Wells is liable to rectify defects in the services at his own expense and maintain public liability insurance and professional indemnity insurance.

Both the contract between the Appellant and Capita and the Framework contain express provisions as to indemnity and liability requirements on the Appellant.

111. In applying the terms of the hypothetical contract between Mr Wells and the DWP I make the following findings.

Mutuality of obligation

112. In *Usetech* at [60] the Court said:

> "I would accept that it is an over-simplification to say that the obligation of the putative employer to remunerate the worker for services actually performed in itself always provides the kind of mutuality which is a touchstone of an employment relationship. Mutuality of some kind exists in every situation where someone provides a personal service for payment, but that cannot by itself automatically mean that the relationship is a contract of employment: it could perfectly well be a contract for free lance services."

113. On the particular facts of this case I take the view that although Mr Wells provided his services for payment, the mutuality of obligation does not of itself demonstrate a contract of services. The DWP paid Mr Wells a daily rate for the work carried out in accordance with the agreed rate as invoiced. There is no contractual obligation beyond that. The internal recruitment document sets a daily work minimum

of 7.5 hours which accorded with Mr Lemon's evidence. However I am satisfied that it was no more than an expectation as to the hours that would be worked each week and I accept the evidence of Mr Wells that the daily rate was paid irrespective of the hours worked.

114. HMRC relied on the HMRC Questionnaire as support for the proposition that Mr Wells was obliged to work core daily hours. However I take the view that no weight should be attached to this document which was completed after the period with which I am concerned and for the purpose of HMRC's enquiry. I am satisfied that the document would not form any part of the hypothetical contract.

115. Each contract lasted a short duration. The break between the penultimate and final contracts of approximately 2 weeks indicates that there was no contractual obligation for the DWP to provide continuous work. It was also clear from the evidence of all of the witnesses that Mr Well's engagement did not extend beyond the specific project in respect of which his skills were required; as Mr McDonald explained once the task was completed there was no role for Mr Wells to fill. The position as borne out by the facts is that there was a period during which one contract ended and the DWP was under no obligation to continue to offer a further contract. No further work was offered for a short period. Moreover Mr Wells was under no obligation to perform the work and in relation to the final contract Mr Wells terminated the final contract when a better offer presented itself.

116. The essence of the relationship was that there was no continuing obligation on the part of the DWP to provide work; if it chose to abandon the project there was no contractual basis upon which Mr Wells could demand further work. I am satisfied that these factors point away from a contract of service.

Substitution

117. The second limb of MacKenna J's first condition considers the nature of the worker's obligations. In *Weightwatchers (UK) Ltd v HMRC* [2012] STC 265 at [32] – [37] Briggs J said:

> "Substitution clauses may affect the question whether there is a contract of employment in two ways. First, the right to substitute may be so framed as to enable the person promising to provide the work to fulfil that promise wholly or substantially by arranging for another person to do it on his behalf. If so, that is fatal to the requirement that the worker's obligation is one of personal service: see for example Express & Echo Publications v Tanton [1999] IRLR 367, in which the contracting driver was, if unable or unwilling to drive himself, entitled on any occasion, if he wished, to provide another suitably qualified person to do the work at his expense. He was, plainly, delivering the promised work by another person, and being paid for it himself.
>
> At the other end of the spectrum, contracts for work frequently provide that if the worker is for some good reason unable to work, he or she may arrange for a person approved by the employer to do it, not as a delegate but under a replacement contract for that particular work assignment made directly between the employer and the substituted person.

> The true distinction between the two types of case is that in the former the contracting party is performing his obligation by providing another person to do the work whereas in the latter the contracting party is relying upon a qualified right not to do or provide the work in stated circumstances, one of the qualifications being that he finds a substitute to contract directly with the employer to do the work instead.
>
> The second possible relevance of substitution clauses is that, even if the clause is of the latter type, so that the substitute is not performing the contractor's obligation, his right to avoid doing any particular piece of work may be so broadly stated as to be destructive of any recognisable obligation to work. Mr Peacock submitted that the relevant distinction was between clauses providing for substitution only where the contractor was unable to work, and clauses permitting substitution wherever the contractor was unwilling to work, relying upon Tanton and MacFarlane as illustrative of that distinction.
>
> I am not persuaded that that is the relevant distinction. It is, in the real world, unrealistically rigid. Take the example of a teacher who is, otherwise, obviously an employee, but whose contract permits her to absent herself, and find a replacement to be engaged for that purpose by her school where, although able to work, she would for understandable reasons rather attend a wedding, or funeral, of a close relative. It would be absurd to treat that sensible provision as incompatible with a contract of employment.
>
> In such cases the real question is in my judgment whether the ambit of the substitution clause, purposively construed in the context of the contract as a whole, is so wide as to permit, without breach of contract, the contractor to decide never personally to turn up for work at all. That was indeed held to be the true construction of the relevant clause in Tanton."

118. I considered the ambit of the right to substitution which I find exists in the hypothetical contract in this case. Although the right is fettered by requiring the agreement of the DWP in relation to the proposed substitute's skills and security checks, I am satisfied that, purposively construed in the context of the contract, the right falls at the wider end of the spectrum. There is no restriction on the substitution clause being used only in specified circumstances, for instance in the event of Mr Wells' inability to carry out the work. In reality, if Mr Wells had simply decided he no longer wished to work on the project he could have relied on his contractual right of substitution. I take the view that given there is some restriction on the right (i.e. the requirement for the agreement of the DWP) this factor is not determinative but in the context of this case I am satisfied that it points away from an employment contract.

119. In my view the reason for Mr Wells' insistence on the inclusion of such a provision in the Appellant/Capita contract (namely his familiarity with the legislation) does not negate the existence of the right. The question is not whether, as Mr Wells accepted, substitution is uncommon in the industry, but rather whether or not the right actually existed. I accepted the evidence of Mr Wells that the right of substitution was always included in his contracts and there is no basis upon which to conclude that this

would not have been the case had he contracted directly with the DWP. I did not find the evidence of Mr Lemon assisted on this issue as he could only say that the issue did not arise and he was unsure as to whether the right existed. Mr McDonald accepted that the right to substitution existed and I am satisfied that the oral evidence, together with the supporting evidence in the form of the email from Emma Smedley at Capita demonstrates that although the question of substitution did not arise the hypothetical contract recognised the possibility of substitution which shifts the balance away from employment.

Control

120. As to the condition relating to control, MacKenna J explained:

> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted."

121. The Court of Appeal in *Montgomery v Johnson Underwood Ltd [2001] EWCA Civ 318* said:

> "Society has provided many examples, from masters of vessels and surgeons to research scientists and technology experts, where such direct control is absent. In many cases the employer or controlling management may have no more than a very general idea of how the work is done and no inclination directly to interfere with it. However, some sufficient framework of control must surely exist. A contractual relationship concerning work to be carried out in which the one party has no control over the other could not sensibly be called a contract of employment."

122. The authorities recognise that absence of control in the case of a skilled worker is not an automatic indicator away from employment (see *Morren v Swinton and Pendlebury Borough Council* [1965] 1 WLR 576). As explained in *Various Claimants v Catholic Child Welfare Society & Ors [2012] UKSC 56* per Lord Phillips at [36]:

> "In days gone by, when the relationship of employer and employee was correctly portrayed by the phrase 'master and servant', the employer was often entitled to direct not merely what the employee should do but the manner in which he should do it. Indeed, this right was taken as the test for differentiating between a contract of employment and a contract for the services of an independent contractor. Today it is not realistic to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee. Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus the significance of control today is that the employer can direct what the employee does, not how he does it."

123. The issue is whether a contractual right of control existed to a sufficient degree, irrespective of whether that right was exercised (*Autoclenz v Belcher* [2011] UKSC 41 at [19]).

124. In this appeal I am concerned with the engagement of Mr Wells for a particular task and in determining the level of control I have considered the fact that Mr Wells possesses an expertise in his field which was not available within the DWP and which I have taken into account in the context of assessing what Mr Wells did and how he did it.

125. The Appellant/Capita contract (at 3.1) is widely drafted, allowing Mr Wells the freedom to decide the method and manner in which to undertake the work with "due regard to the reasonable requests of the Client, and the documented requirements of the Assignment (if any)."

126. The documented requirements are in my view, vague. I took into account the Framework which stated

> "Interim Personnel assigned to the Authority shall be under the supervision and control of the Authority, and the Authority shall be responsible for the operational direction, supervision and control of Interim Personnel assigned to the Authority under any Services Order."

127. However the oral evidence indicated that the DWP engaged Mr Wells for his expertise in assessing the operational readiness what was ultimately to become the Universal Credit Programme. The witnesses were consistent in their evidence from which I am satisfied that any instructions in relation to the assignment were, in reality, limited and that Mr Wells utilised his skills to decide what was needed, how those needs could be met and the timescales in which the task could be completed. I bore in mind the evidence of Mr MacDonald that he was presented with Mr Wells' proposals for consideration and agreement. However I am satisfied that this did not amount to "supervision" as such, but rather to ensure that Mr Wells understood the nature of the DWP's request and that all workers understood how the task was to be carried out and any timeframes involved which would have a bearing on the work to be undertaken once Mr Wells' task was completed. The control aspect is also limited both in the Framework, which states that Mr Wells could not be directed to undertake tasks outside the scope of the engagement, and in the Appellant/Capita contract which required any variation to the terms of the agreement to be agreed in writing.

128. Although there was an expectation that Mr Wells would attend meetings with Mr MacDonald or Mr Lemon there was no contractual obligation on him to do so and it was clear from the evidence that this was no more than a practical necessity in order to keep the DWP up to date with progress of the project as a whole. Mr Lemon and Mr MacDonald agreed that Mr Wells was not line managed nor was he subject to the same level of supervision as employees at the DWP. I considered the evidence of Mr MacDonald and Mr Lemon that they were ultimately accountable for Mr Wells' work; in my view this did not amount to control such as would be expected of a manager over an employee but is more akin to the responsibility of ensuring the needs of the DWP are met as would be required of any independent contractor engaged to provide a specific service.

129. The witnesses agreed that Mr Wells decided where to work, which was dependent on the nature of the task in hand, and I do not consider the fact that Mr

Wells chose a base for the occasions he was office based as an indicator of a sufficient degree of control.

130. I agreed with the submission of Mr Vessey that a parallel can be drawn between the facts of this appeal and *First Word Software Ltd v Revenue & Customs* [2007] UKSPC SPC00652 (11 December 2007) in which it was said at [62]:

> "In considering whether Mr Atkins was subject to "a sufficient degree" of control by Reuters I bear in mind that Mr Atkins was engaged for his specific expertise and was engaged only for a particular project. To the extent that the provisions of the 1998 agreement are inconsistent with the oral evidence and the 2000 agreement I prefer the latter. Clause 6.1 of the 2000 agreement provided that his method of work should be his own. The evidence was that Mr Atkins was engaged to provide "a small piece of a large jigsaw" and the way in which that was done was left to him. Although Reuters decided the thing to be done, (namely the migration of the legacy computer systems) Mr Atkins decided the way in which the migration of the human resource and payroll systems was to be undertaken. He also decided on the means to be employed in doing it and the time when it was to be done so long as it met the overall requirements of the main project. Mr Atkins could, and did, choose his hours of work so long as he met the timescales and milestones of the project. During the period of the relevant contract Mr Atkins worked at Reuters' office in London because he needed to access Reuters' computer; however he also chose to do work on the train and at home. Although Mr Atkins sent up-dates to a technical manager in Geneva, the evidence was that the manager did not control Mr Atkins in the way he worked in the way that an employer controls an employee, even a senior professional employee. Finally, Mr Atkins was free to work for others at the same time as he worked for Reuters. The arrangements were consistent with the conclusion that Mr Atkins acted as a sub-contractor, with responsibility for part only of a larger project, and not as an employee."

131. There was no dispute that Mr Wells was subject to minimum checks. The evidence of all of the witnesses, taken together with the documentary evidence indicates that the control to which he was subject was substantially less and clearly distinct from that over employees. Mr Wells' involvement with the team of employees and frequency of meetings with Mr MacDonald and Mr Lemon was no more, in my view, than an indication of a professional and close working relationship. The level of control exercised did not go beyond that which was usual for an independent contractor. In balancing all of the factors I conclude that Mr Wells was not subject to the degree of control which would be necessary to constitute a contract of employment.

132. The final condition laid down by MacKenna J in determining whether a contract is an employment contract whether the other provisions of the contract are consistent with its being a contract of service. Although there is mutuality of obligation it does not, in my view, extend beyond the irreducible minimum nor does it demonstrate that the relationship was one of a contract of employment. Moreover, the level of control falls far below the sufficient degree required to demonstrate a contract of service. On these two factors I am satisfied that the contract was one for services. Nevertheless, I

have considered the final condition in order to reach a conclusion as to whether other provisions of the contract indicate the contrary.

133. Mr Wells was not entitled to holiday or sick pay, pension or other benefits, he was not provided with training and he was not afforded the protection of personal performance and development processes provided to employees. Whilst there is no requirement for a contract of employment to include such features, in my view the absence of them indicates that Mr Wells was not considered to be or treated as an employee. He was also in business on his own account as evidenced by his evidence of similar engagements with Lloyds Banking Group.

134. Henderson J in *Dragonfly* made it clear that statements by the parties may assist in a borderline case, although little weight would normally be attached to such a statement. To the extent that the parties' intentions are a relevant consideration it is clear from the contract that neither party intended to create a contract of services however I am satisfied that the contract is sufficiently clear in this case and I therefore attach minimal weight to the statement at Clause 13.1 which stated:

> "Nothing in this agreement shall be construed as a contract of employment between the Contractor or its Consultant on the one part and Capita or Client on the other. All parties agree that this Agreement is a contract for services only."

135. I considered the submission on behalf of HMRC that the DWP has sought to recruit internally before outsourcing the work. In my view whether Mr Wells was engaged because he possessed expertise which could not be found within the DWP or whether there were simply no employees with such expertise available for the project does not alter the terms of Mr Wells' engagement and does not assist in determining whether the contract was one of services or for services.

136. In relation to financial risk and whether Mr Wells can be regarded as carrying on business on own account, there was no scope for Mr Wells to increase his profits as payment was a fixed daily rate. However looking at financial risk in a wider context, he was exposed to some risk which would not affect a worker with employment status. There was a contractual obligation for Mr Wells to remedy any defect at his own expense which was not an obligation imposed on employees.

137. Mr Wells was supplied with a computer by the DWP. Given the nature of the DWP and the security protections required by the organisation and, by extension, all those who work within it, I take the view that this is a neutral factor which does not point towards or away from a contract of service.

138. Mr Wells was obliged to take out public liability and professional indemnity insurance cover. I do not find this a particularly strong indicator but in so far as it tips the balance on way or other I take the view that it points towards a contract for services.

Conclusion

139. Looking at the overall picture and making a qualitative assessment I am satisfied that the relationship is consistent with a contract for services not a contract of service. In reaching this decision I have made a value judgment on the features in this case; some of which are neutral and some which provide a more compelling indicator that the hypothetical contract would be one for services.

140. The appeal is therefore allowed.

141. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JENNIFER DEAN
TRIBUNAL JUDGE

RELEASE DATE: 16 MAY 2018

[2018] UKFTT 147 (TC)

TC06400

Appeal number: TC/2017/01591

INCOME TAX - intermediaries legislation – IR35 – personal services company – hypothetical contract - whether contract of employment - no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MDCM LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE IAN HYDE
MOHAMMED FAROOQ

Sitting in public at Birmingham on 8 November 2017

Mr Daniels, director, appeared for the Appellant

Mr Burke, Officer, appeared for the Respondents

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DECISION

1. This appeal is concerned with whether the appellant's contractual arrangements are such that Mr Daniels, the appellant's principal employee, should be treated as an employee of the ultimate contracting company under Parts I to IV of the Social Security (Contributions and Benefits) Act 1992 ("the Intermediaries Legislation"), commonly known as "IR35".

Issues

2. On 8 September 2016 HMRC issued determinations under Regulation 80 of the Pay As You Earn Regulations 2003 for years 2012-13 and 2013-14 and decisions under Section 8 of the Social Security Contributions (Transfer of Functions) Act 1999 for the period 6 April 2012 to 5 April 2014 ("the Assessments"). The reason for the Assessments was that HMRC believed that the Intermediaries Legislation applied to treat the appellant's contract with an independent introductory company, Solutions Recruitment Limited ("Solutions") and Solutions' contract with a construction company, Structure Tone Limited ("STL"), as a contract of employment between Mr Daniels and STL.

3. The appellant appealed the Assessments on 4 October 2016.

4. It was accepted in the course of the hearing that this appeal concerned only the principle as to whether the Intermediaries Legislation applied. If the Tribunal determined that it did then it would be for the parties to try and agree the amount of tax due or otherwise revert to this Tribunal.

5. There was also an issue in the appeal as to whether HMRC were entitled to raise an assessment outside of the four year limitation set out in section 35 Taxes Management Act 1970 ("TMA") based on a discovery assessment within section 29 TMA. However, the appellant did not challenge that point in the hearing and so for completeness we find that HMRC were so entitled.

6. Finally Mr Daniels also took the point that HMRC had only taken the contract for STL when they had considered and accepted the tax position on other contracts on essentially identical terms. However, whilst the existence of those contracts are useful background material, this Tribunal can only consider the question put to it and it is irrelevant for this purpose that HMRC may have taken a different view on contracts which may or may not be identical but which are not part of this appeal.

7. Mr Daniels appeared for his company and gave oral evidence. Mr Philpott, the finance director of STL, provided a witness statement and gave oral evidence. Mr Ford and Mr Lightowler both being HMRC officers involved in the investigation also provided witness statements and gave oral evidence. We find the facts as set out below.

MDCM

8. The appellant is a company of which Mr Daniels and his wife are the directors and employees. The appellant's business consists of providing construction management services to construction companies.

9. Mr Daniels has a long experience in the construction industry, with a background in quantity surveying as an employee of a major construction company. He set up the appellant in 2004 to escape working for a large company and now provides construction services management services, including night shift management. Mrs Daniels is a director and employee of the appellant but no evidence was given as to her role in the business.

10. Mr Daniels explained the nature of his work. Many construction companies only employ a limited number of staff to keep down overheads. When there is demand for work on a specific project the company will hire in the additional staff for the duration of the project. On some construction contracts, particularly in London with tenanted buildings occupied during the day who have a right to quiet occupation, the work needs to carry on a night, hence the need for a night shift manager. The night shift manager, as with a day manager, is responsible for the site including the works done by subcontractors, co-ordination of suppliers, safety issues and other matters associated with overall site supervision.

11. This appeal concerns the contract with Solutions and STL but as background we were provided with copies of four other contracts between the appellant and Solutions in addition to the contract that related to the STL engagement but no contracts between Solutions and STL or any other construction companies. The terms on which the appellant contracted with STL were reasonably standard.

12. If a construction company needed workers with Mr Daniels' expertise, they would contact STL who in turn would contact Mr Daniels as director of the appellant. At this point STL would not reveal the name of the construction company but would indicate a day rate, typically around £310, the location of the work and the likely length of the project. If the appellant accepted the instruction, the appellant and STL would enter into a contract in standard form and STL would enter into a separate contract with the construction company at a higher day rate, for example £370.

13. The terms of the standard contract between the appellant and Solutions provided that the contract could be terminated on the "relevant period of notice" being given by the company, the format of the contract being that this period was to be specified in the "schedule of services" which was completed on each instruction. Often the notice period line in the schedule was completed as "N/A" or left blank. Mr Daniels gave evidence that there was in reality no notice period.

14. The standard terms of appointment would simply be for the day rate and so would not involve any reimbursement by either the construction company or Solutions for travel or subsistence expenses. Mr Daniels lives in the West Midlands and so when the work was in London Mr Daniels would drive to London and stay at a hotel, sleeping during the day. Mr Daniels would personally be reimbursed his expenses by

MDCM, presumably in effect out of the day rate. The hotel costs were typically £75-100 a day and food £25.

15. Mr Daniels would not routinely incur further additional costs in carrying out his work. However, on one occasion for a different company he ordered some £60,000 of bricks because they were short on the site. MDCM ordered the bricks and was reimbursed by the construction company with the addition of a 20 % margin. VAT was charged and recovered by MDCM. Whilst very profitable, because of the credit risk and potential delay in payment Mr Daniels would only do so for companies he was comfortable with. He did not do so for STL.

16. The terms of the standard contract between MDCM and Solutions provided that MDCM could provide a substitute for Mr Daniels;

> "You the Representative are the individual carrying on the Company business, and nominated by the Company to provide the Services; the Company may arrange for the Services to be provided by utilising a suitable substitute individual, provided that it has our prior written agreement which agreement will not be withheld in the case of a suitably qualified person…"

17. Indeed Mr Daniels suggested that MDCM need not at the outset have provided STL with Mr Daniels. Mr Daniels gave two examples where MDCM offered to provide substitute services in addition to or as cover for Mr Daniels. However, HMRC pointed out these were proposed substitutions which did not actually happen and in any event they were proposals for companies to provide services not individuals. We therefore find that whilst the contract with Solutions included a right to substitute another suitably qualified individual it was never exercised by MDCM.

The STL Contract

18. The terms of the MDCM contract with Solutions in respect of STL followed the same standard terms. Mr Philpott explained that STL is a construction company that specialises in the fit-out and refurbishment of buildings in London. On larger projects there is a need for night shift managers. STL has employees who can fulfil the role but when they have too many projects they look for external recruitment companies to provide additional staff.

19. In October 2012 STL required a night shift manager for the construction project at Prospect House in London and contacted Solutions. Solutions provided Mr Daniels who started work on 26 October 2012 and continued working full time including through the Christmas period. Mr Daniels was not interviewed for the job and Mr Philpott stated that he had never heard of MDCM until asked by HMRC as part of their enquiries. On or around April or May 2013 the Prospect House project was finishing but STL had need of a night shift manager at another project in London, Aldwych House. STL asked Solutions and Mr Daniels whether he would like to move over to be the night shift manager for Alwych House and he agreed. He continued to work until 19 July 2013. However the STL contract with Solutions was still treated as applying.

20. Mr Daniels had to work during established shift times of 5:30pm to 7am, although if all the work had been done for that shift he could leave early. This applied Monday to Friday and, at the outset also included some weekend work, although this stopped due to concerns about working excessive hours.

21. As night shift manager Mr Daniels reported to the project manager Mr Hawes who at the start of the shift provided him with a list of instructions on matters that needed to be done during that shift. He was also required to manage the site generally including making sure the correct workers were on site, ensuring that the work was being done and being done safely. Mr Daniels would be STL's representative on the site, wearing the company's branded high visibility jacket and hard hat in order to be identifiable as the contact point amongst the contractors.

22. Mr Daniels reported to Mr Hawes but according to Mr Daniels, Mr Hawes was only on site one a week for a cursory look around.

23. Mr Daniels represented STL as contact point for contractors. However, he did not participate in STL staff meetings or functions.

24. The day rate paid by Solutions to MDCM on the STL contract was £310 a day. Throughout the period of the STL contract Mr Daniels would at the end of the week submit a timesheet to Mr Hawes who would sign it off and send it to Solutions. Solutions invoiced STL based on the days worked and Solutions would pay MDCM.

25. In accordance with the normal arrangements STL was not responsible for any of Mr Daniels' travel, hotel or subsistence expenses which were paid for by MCDM.

26. In the Solutions contract that related to the STL engagement the notice period line in the schedule was completed as "N/A". There was also produced in evidence a copy of the "assignment" or terms of engagement between STL and Solutions. It describes the services as being provided by MDCM whose representative is Mr Daniels. The contract term is "ongoing", the day rate £370 and period of notice is described as "none".

27. Mr Daniels gave evidence that there was in reality no notice period and when the STL contract ended Mr Daniels left on 19 July 2013, the day he was told he was no longer required and received no pay for any days after that or any pay in lieu. We accept Mr Daniels evidence which supports the wording in the relevant contracts and find that there was no notice period on either party and no entitlement to any severance pay or pay in lieu.

28. We also find that, whilst he would presumably have been entitled to sick pay, holiday pay and other employee benefits from MDCM, neither MDCM nor Mr Daniels had no entitlement to any such payments or equivalent from the STL arrangements. The only payment obligation from STL was £370 a day for each day Mr Daniels attended the site. If Mr Daniels was sick he would call in, STL would find or ask Solutions for a substitute and that substitute would be paid under separate arrangements but MDCM would not be paid.

29. Mr Daniels did not purchase any goods on behalf of STL.

30. The contract between MDCM and Solutions which applied to the STL arrangements provided that MDCM could provide a substitute for Mr Daniels. Indeed Mr Daniels suggested that MDCM need not at the outset have provided STL with Mr Daniels. However, Mr Philpott gave evidence that STL required the services of Mr Daniels. On those days when Mr Daniels gave notice that he would not be on site STL would call Solutions and ask for a substitute. They did not ask Mr Daniels to provide one nor would they accept that Mr Daniels was entitled to provide one. We accept Mr Philpott's evidence notwithstanding the terms of the MDCM contract with Solutions.

31. STL provided third party insurance for Mr Daniels whilst he was carrying out his duties on site. However MDCM took out its own insurance as required by the Solutions contract.

32. STL provided Mr Daniels with personal protection equipment being a high visibility vest, gloves and hard hat. He had access to the STL computer on site but was not provided with a mobile phone and used his own when working on the site.

The Legislation

33. The Intermediaries Legislation provides in so far as is relevant to this appeal;

> "49(1) This Chapter applies where-
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),
>
> (aa) the client is not a public authority,
>
> (b) the services are provided not under a contract directly between the client and the worker under arrangements involving a third party ("the intermediary"), and
>
> (c) the circumstances are such that-
>
> (i) if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under client, or
>
> (ii) the worker is an office-holder who holds that office under the client and the services relate to the office.
>
> (2) ….
>
> (3) ….

(4) The circumstances referred to in subsection (1)(c) include the terms upon which the services are provided, having to the terms of the contract forming part of the arrangement under which the services are provided.

(4A)….

(5) In this Chapter "engagement to which this Chapter applies" means any such provision of services as is mentioned in subsection (1).

50 (1) If, in the case of an engagement to which this Chapter applies, in any tax year-

(a) the conditions specified in section, 51, 52 or 53 are met in relation to the intermediary, and

(b) the worker or an associate of the worker-

(i) receives from the intermediary, directly or indirectly, a payment or benefit that is not employment income, or

(ii) has rights which entitle, or which in any circumstances would entitle, the worker or a associate to receive from the intermediary, directly or indirectly any such payment or benefit,

the intermediary is treated as making to the worker, and the worker is treated as receiving, in that year a payment which is to be treated at earnings from employment ("the deemed employment payment")

50(2) ….

50(3) ….

50 (4)….

51(1) where the intermediary is a company the conditions are that the intermediary is not an associated company of the client that falls within subsection (2) and either-

(a) the worker has a material interest in the intermediary, or

(b) the payment or benefit mentioned in section 50(1(b)-

(i) is received or receivable by the worker directly from the intermediary, and

(ii) can reasonably be taken to represent remuneration for services provided by the worker to the client

51(2)…

51(3) a worker is treated as having a material interest in a company if-

(a) the worker, alone or with one or more associates of the worker, or

(b) an associate of the worker, with or without other such associates,

has a material interest in the company

(4) for this purpose the material interest means-

(a) Beneficial ownership of, or the ability to control, directly or through the medium of other companies or by any other indirect means, more than 5% of the ordinary share capital of the company; or

(b) possession of, or entitlement to acquire, rights entitling the holder to receive more than 5% of any distributions that may be made by the company; or

(c) where are the company is a close company, possession of, or entitlement to acquire, writes that would in the event of the winding up of the company, hoping any other circumstances, entitled the holder to receive more than 5% of the assets that would then be available for distribution among the participators"

The issues

34. It is agreed that the conditions in section 51 are met, the appellant not being an associated company of STL and Mr Daniels having a material interest in MDCM by virtue of owning all the shares. The only question in this appeal is therefore whether the conditions in section 49 are satisfied.

35. HMRC argues that Mr Daniels as the worker personally performs services for a client STL under a contract which is via an intermediary, MDCM, and that if these services were provided directly between Mr Daniels and STL then under that hypothetical contract Mr Daniels would be regarded for income tax purposes as an employee of STL. There is no statutory definition of employment and so the principles established in case law apply.

36. On the facts of the arrangements HMRC highlight;

(a) the personal services of Mr Daniels were required. Mr Philpott on behalf of STL confirmed that they would not accept any substitute. Further, Mr Daniels stated that he was not in a position to send a substitute even if STL were to accept someone.

(b) STL exercised a significant degree of control over Mr Daniels. STL set what work was to be done and how it was to be done, Mr Daniels being required to carry out in each shift the tasks set by the project manager. STL also decided where and when the work has to be done.

(c) Neither MDCM nor Mr Daniels incurred any financial risk

37. Mr Daniels only challenges HMRC's argument on the point that, had there been a direct contract between him and STL, he would have been an employee. Mr Daniels argues that a number of factors in the STL arrangements point towards this not being the case;

(a) there was no notice period– the contract was terminated on 19 July 2013 with no notice

(b) there was no entitlement to severance pay in the event of termination of the contract

(c) there was no entitlement to holidays or holiday pay

(d) there no entitlement to reimbursement of travel or accommodation expenses

38. Further, according to Mr Daniels, HMRC did not recognise or take into account the binding nature of the contracts between the three parties.

Authorities and case law

39. We agree with HMRC that the issue is whether Mr Daniels, on a hypothetical contract between Mr Daniels and STL, Mr Daniels would be regarded as an employee of STL. The task is to look at the relationship, stripping out the presence of the legal entities MDCM and Solutions. There is no statutory definition of employment and so, having set up the hypothetical direct relationship between Mr Daniels and STL, the principles established in case law apply to determine whether it is one of employment.

40. The employment test proposed by HMRC and which we accept is as set out by MacKenna J in *Ready Mixed Concrete (Southeast) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497;

> "A contract of service exists if these three conditions are fulfilled. (i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master (ii) he agrees, expressly or impliedly, that's in the performance of that service he will be subject to the others control in a sufficient degree to make that other master (iii) the other provisions of the contract are consistent with it being a contract of service"

41. MacKenna J went on to say;

> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The rights need not be unrestricted."

42. In *Hall v Lorimer* [1994] 1 All ER 250, an appeal from a decision of the Special Commissioners on this question of the hypothetical contract for the purposes of the Intermediaries Legislation, Nolan LJ in giving the judgment of the Court of Appeal rejected a prescriptive list of factors to take into account and said:

> "in cases of this sort there is no single path to a correct decision. An approach which suits the facts and arguments in one case maybe unhelpful in another. I agree with the view expressed by Mummery J in the present case, at page 944D of the report way he says;

> "in order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a checklist to see whether they present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of the evaluation of the overall effect of the detail, which is not necessarily the same as a sum total of the individual details. Not all details are equal weight or important in any given situation. The details may also vary in importance from one situation to another."
>
> Nonetheless, in deference to the submissions of Mr Goldsmith, I am prepared to follow his suggested path and see where it takes us."

43. HMRC have listed and considered a number of factors in considering the nature of Mr Daniel's relationship with STL under the hypothetical contract. Taking note of Nolan LJ's approach that the facts must be considered in the round, this list provides a convenient structure to consider the terms of the hypothetical contract we are directed to consider by the Intermediaries Legislation.

Control

44. HMRC argue that control by STL is the most important factor. Further, taking MacKenna J's comments in *Ready Mixed Concrete,* control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done. Further, it is not a question as to whether control was actually exercised, but the right of control that is important. Where the worker is a skilled professional then control is less important and in the case of an expert, neutral in determining the employment status.

45. HMRC point out that STL controlled the time Mr Daniels worked as he was required to work during the shift patterns, albeit he could leave early if the work was finished. Mr Daniels argues that this is not control but merely the way all construction sites are necessarily run.

46. HMRC made a submission that STL controlled where Mr Daniels worked because they redirected him to work on Aldwych House but this submission was withdrawn during the hearing after hearing witness evidence, it being clear that the STL had asked Mr Daniels whether he wanted to work on the Aldwych House site.

47. HMRC argued that STL controlled how Mr Daniels carried out the work in that he was required to report to the project manager Mr Hawes who directed what Mr Daniels did by giving him a list of instructions on matters that needed to be done during that shift. He was also required to manage the site including making sure the

correct workers were on site, ensuring that the work was being done safely and be point of contact for all workers.

48. Mr Daniels argued that the only control exercised was that which necessarily came with the operation of large-scale construction sites which lays down the structure of the programme and timeline for the execution of the construction activities. In other words when he came on the site there would be work to be done but that was dictated by the phase of the construction programme, what had happened on that day, for example if there had been delays or a problem had arisen. However, during the shift he could organise matters as he saw fit and his supervisor would only visit once a week.

49. We agree that STL directed what Mr Daniels had to do during the shift. However, we agree with Mr Daniels that that was no more than telling Mr Daniels what needed to be done on site by the contractors which Mr Daniels supervised. This followed from the stage reached in the work programme and dictated the work done by everyone on site whether employed or self employed.

50. Further, there was no evidence that STL controlled how Mr Daniels would carry out his role in fulfilling the work programme for that shift beyond wearing STL safety equipment to identify him as STL's representative. He was supervised by Mr Hawes but Mr Hawes only visited the site occasionally and Mr Nicholls was left to his own devices during the shift. We agree with Mr Daniels that STL did not exercise any more control on the site than they would over an independent contractor.

51. Further, the fact that STL had to ask for his agreement before Mr Daniels moved over to the Aldwych House site indicates no power to direct where Mr Daniels would work. In considering that point we have taken the view that both periods, Prospect House and Aldwych House are part of a single continuous hypothetical contract rather than two separate ones. Both parties assumed that this was the case and in the artificial world required by the Intermediaries Legislation, it seems to us that this is correct.

Personal services and mutuality of obligations

52. We have found that the appellant could not provide and STL was not required to accept a substitute for Mr Daniels. Accordingly we do not accept it would be a term of the hypothetical contract between Mr Daniels and STL. We therefore find that the hypothetical contract is one of personal services with no right of substitution and that there is a mutuality of obligation between STL and Mr Daniels.

Financial risk

53. HMRC say that employees do not tend to take financial risk and Mr Daniels took no financial risk and should not be treated as taking any in the hypothetical contract.

54. Mr Daniels argued that he bore the cost of the travel, hotel and food expenses. If he had been an employee he would have been put up in a hotel, had his vehicle funded and living away from home expenses. Where he was comfortable with the contractor

– as he had with a previous company – he might supply materials but this would be at his risk and he did not feel comfortable doing so with STL as he had not worked with them before.

55. It was debated at the hearing whether the travel, hotel and food expenses were relevant to the hypothetical contract. Under the hypothetical contract we must assume that MDCM does not exist. It matters therefore whether the under the hypothetical contract Mr Daniels is paid £310 a day and pays expenses of around £100 a day or is paid £210 a day and STL pays the expenses. The legislation does not direct us to an answer on this point.

56. In economic terms, whilst he was reimbursed by MDCM, Mr Daniels bore the cost via his ownership of MDCM. STL did not bear any risk. Accordingly we find that in the hypothetical contract Mr Daniels should be treated as being paid £310 a day and paying his own expenses. However, we do not find that this is a very significant as a financial risk factor for these purposes. Travel, hotel and food expenses are often borne by employees.

57. We accept that on occasion Mr Daniels would purchase goods for other contractors. However, that did not happen here because Mr Daniels did not know STL well enough and so we discount it from any financial risk or characteristic of the hypothetical contract.

Provision of equipment

58. We have found as a fact that STL provided safety equipment to Mr Daniels and accordingly find that it would do so in the hypothetical contract.

Right to terminate the contract

59. Mr Daniels points out that he was not entitled to any notice period in the contract or to any severance pay. He was notified on 19 July 2013 that the contract was terminated and he did no more work after that date with no severance payment.

60. We have found that there was no requirement on either party to give notice to terminate in the STL arrangements or entitlement to severance pay or pay in lieu. Accordingly we find as a fact that in the hypothetical contract between STL and Mr Daniels there would be no entitlement to notice either way or entitlement to severance pay or pay in lieu.

Length of engagement

61. HMRC do not ascribe any particular significance to this factor save that longer contracts tend to indicate employment and this contract was open ended.

62. The contract - and so the hypothetical contract - was necessarily open ended with, as set out above, no notice period for termination.

Employee benefits

63. By this HMRC means whether the individual in the hypothetical contract is entitled to pension contributions, sick pay, holiday pay or any other employee type benefits. Mr Daniels points out that he was not entitled to any of these benefits.

64. However, HMRC argue that as an employee of MDCM these were a matter for MDCM. If the hypothetical contract with STL was found to be one of service then he would have been entitled to these benefits.

65. We do not think that HMRC can dispense with this point so easily by saying it was a matter for MDCM or that there was no employment contract. Indeed it is necessarily circular for HMRC to argue that he would have had such rights were he an employee. The fact that Mr Daniels is an employee of MDCM, with consequential rights, cannot be relevant to the hypothetical contract. Nor can the availability of statutory entitlements be relevant, the hypothetical contract being necessarily concerned with contractual rights. As with the right of substitution we are concerned with what would be the terms of a direct relationship between Mr Daniels and STL. That cannot be answered by saying Mr Daniels was an employee of MDCM. We do not accept that were Mr Daniels to have a direct contract with STL, STL would give Mr Daniels sick pay, holiday pay or any other employee type benefits.

66. Accordingly, we find that in the hypothetical contract between STL and Mr Daniels he would not be entitled to any sick pay, holiday pay or any other employee type benefits.

Part and parcel of the organisation

67. Where the individual is integrated into the business – rather than working for their own account – then this would tend to indicate employment.

68. We have found as a fact that Mr Daniels was not invited to STL meetings or functions or other events run for employees. We find therefore that in the hypothetical contract Mr Daniels would also not be so invited.

Exclusive services

69. HMRC did not rely on this point as exclusivity can be a feature of employed and self employed contracts.

Basis of payment

70. HMRC accept that typically an employee would be paid a fixed wage or salary by the week or month and often qualify for additional payments such as bonuses and overtime payments. Self–employed workers tend to be aid a fixed sum for a particular job and tend to issue an invoice for the work carried out.

71. HMRC accept that as Mr Daniels was paid on a daily rate for work done this factor points towards Mr Daniels being self employed.

Mutual Intention

72. Any statement in a contract as to whether the parties intended there to be an employment relationship is of limited relevance in the context of the hypothetical world of the Intermediaries Legislation. However, whilst we are satisfied that neither Mr Daniels not STL wanted an employment relationship, we were not aware of any wording to that effect.

Decision

73. The Tribunal's task is to determine the terms of the hypothetical contract between Mr Daniels and STL and then, as outlined by Mummery J in *Hall v Lorimer* , "it is a matter of the evaluation of the overall effect of the detail".

74. The hypothetical contract can from our findings be summarised as follows;

a) Mr Daniels is not controlled any more than any other contractor and could refuse to work on another site

b) there was a contract for personal services as Mr Daniels could not provide a substitute to STL (even if Solutions contract said he could).

c) Mr Daniels was paid £310 a day and had to pay his own travel, hotel and other expenses.

d) Mr Daniels took no other financial risks

e) There was no requirement on either party to give notice to terminate or entitlement to severance pay or pay in lieu.

f) STL provided safety equipment to Mr Daniels

g) Mr Daniels was not integrated into the STL business

75. For the reasons set out above we do not accept HMRC's arguments about control but do agree that the requirement for personal services and lack of financial risk point to an employment relationship. However, we find that the nature of the payment arrangements, a flat rate per day with no notice period and no entitlement to any employee benefits are inconsistent with employment. Further, Mr Daniels was not treated as an employee.

76. On balance we find that under the hypothetical contract required by the Intermediaries Legislation Mr Daniels would not be an employment contract and so this appeal is allowed.

77. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to

"Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

IAN HYDE
TRIBUNAL JUDGE

RELEASE DATE: 19 MARCH 2018