TC07690

VALUE ADDED TAX – exemption – Items 1 and 4 Group 7 Schedule 9 VATA 1994 – supply of staff or supply of medical care – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/03030

BETWEEN

MAINPAY LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MR JULIAN STAFFORD

Sitting in public in Leeds on 27 and 28 November 2019

Mr Michael Firth of counsel, instructed by The Independent Tax and Forensic Services LLP for the Appellant

Ms Jennifer Newstead Taylor of counsel, instructed by HM Revenue and Customs' Solicitor's Office and Legal Services for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against an assessment to VAT for accounting periods 01/11 to 01/14 in the sum of £164,866 ("the Assessment"). The Assessment was made on the basis that during those periods the appellant ("Mainpay"), made standard-rated supplies of services which are properly characterised as supplies of staff. Mainpay contends that it made exempt supplies of medical care.

2. The broad issue on the appeal is the nature of supplies made by Mainpay to intermediary companies, principally a company called Accident & Emergency Agency Limited ("A&E"). The supplies were made in the period 1 November 2010 to 31 January 2014 ("the Relevant Period"). We shall describe the contractual arrangements in more detail below. Essentially, they may be summarised as follows:

   (1) Contracts between Mainpay and various medical consultants and doctors.

   (2) A contract between Mainpay and A&E.

   (3) Contracts between A&E and various clients, generally NHS Trusts.

3. The appeal has a long procedural history which it is not necessary to describe in this decision. The sole ground of appeal relied on by Mainpay is as follows:

> "HMRC's assessments are wrong because the Appellant made exempt supplies (falling within VATA 1994, Sch9, Group 7) rather than standard rated supplies"

4. This ground of appeal was supplemented by various arguments in support of the contention that the supplies were exempt medical care. Those arguments were dealt with by the parties at the hearing and we consider the arguments in detail below.

5. The burden is on Mainpay to establish that its supplies are supplies of medical care. To that end we heard evidence on behalf of Mainpay from the following witnesses:

   (1) Mr Graeme Harker, who was a director of Mainpay in the Relevant Period.

   (2) Dr Milan Bily, a consultant haematologist who has contracted with Mainpay and worked at various NHS hospitals.

   (3) Dr Colin Berry, a consultant anaesthetist who for a period worked as the clinical director for a department of critical care at an NHS Trust.

6. All the witnesses provided witness statements and gave oral evidence. We set out below our findings of fact based on their evidence and the documentary evidence before us.

THE LAW

7. The Principal VAT Directive 2006/112/EC ("the PVD") makes provision in Article 132(1)(b) and (c) (previously Article 13A(1) Sixth Directive) to exempt from VAT certain transactions:

> "1. Member States shall exempt the following transactions:
>
> …
>
> (b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;
>
> (c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned;"

8. These provisions are enacted in UK domestic law by section 31(1) and Schedule 9 Value Added Tax Act 1994. Group 7 Schedule 9 provides exemption for the following supplies:

> "Item No
>
> 1. The supply of services consisting in the provision of medical care by a person registered or enrolled in any of the following—
>
> (a) the register of medical practitioners; …
>
> 4. The provision of care or medical or surgical treatment and, in connection with it, the supply of any goods, in any hospital or state regulated institution."

9. It was not suggested that for present purposes there was any material distinction between Item 1(a) and Item 4. The issue is whether or not Mainpay is supplying medical care. In all cases the doctors under contract to Mainpay are on the register of medical practitioners and the care is provided in hospitals.

10. It is common ground that exemptions from VAT must be construed strictly, but not restrictively, and must be construed so as to be consistent with the objectives pursued by the exemption. They must be construed in a way which complies with the principle of fiscal neutrality and not in such a way as to deprive the exemption of its intended effect (see *Skandinaviska Enskilda Banken AB Momsgrupp Case C-540/09*).

11. The purpose of the exemption for supplies of medical care was described by the CJEU in *Commission v France* Case C-76/99:

> "22. It must be pointed out, second, that Article 13(A)(1)(b) of the Sixth Directive does not include any definition of the concept of activities 'closely related to hospital and medical care.
>
> 23. As the Advocate General noted in point 23 of his Opinion, that concept does not, however, call for an especially narrow interpretation since the exemption of activities closely related to hospital and medical care is designed to ensure that the benefits flowing from such care are not hindered by the increased costs of providing it that would follow if it, or closely related activities, were subject to VAT."

12. The scope of exemption for the provision of medical care was considered by the CJEU in *d'Ambrumenil and another v Customs and Excise Commissioners; Unterpertinger v Pensionversicherungsanstalt der Arbeiter* [2005] STC 650 ("d'Ambrumenil") and in *Ambulanter Pflegedienst Kugler GmbH v Finanzamt fur Korperschaften I in Berlin* [2002] ALL ER ("Kugler").

13. In d'Ambrumenil, the CJEU was concerned with services provided by an expert medical witness in conducting medical examinations and preparing reports. The facts are not relevant for present purposes, but the court did make some general observations as to the scope and purpose of the exemption as follows:

> "53. As the Commission has correctly observed, Article 13A(1)(c) does not exempt all the services which may be effected in the exercise of the medical and paramedical professions, but only provision of medical care, which constitutes an independent concept of Community law. It follows that services effected in the exercise of those professions remain subject to the general rule making them subject to VAT set out in Article 2(1) of the Sixth Directive, if they do not correspond to the concept of the provision of medical care, or to the terms of any other exemption provided for by that directive.
>
> …
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> 58. While it follows from that case-law that the provision of medical care must have a therapeutic aim, it does not necessarily follow therefrom that the therapeutic purpose of a service must be

confined within an especially narrow compass (see, to that effect, *Commission* v *France*, paragraph 23). Paragraph 40 of the judgment in *Kügler* shows that medical services effected for prophylactic purposes may benefit from the exemption under Article 13A(1)(c). Even in cases where it is clear that the persons who are the subject of examinations or other medical interventions of a prophylactic nature are not suffering from any disease or health disorder, the inclusion of those services within the meaning of provision of medical care is consistent with the objective of reducing the cost of health care, which is common to both the exemption under Article 13A(1)(b) and that under (c) of that paragraph (see *Commission* v *France*, paragraph 23, and *Kügler*, paragraph 29)."

14. In Kugler, the CJEU held that exemption was not dependent on the legal form of the taxable person supplying medical services. Exemption applied where medical care was provided by a company as well as by an individual. It stated at [30]:

> "30. The principle of fiscal neutrality precludes, *inter alia*, economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned. It follows that that principle would be disregarded if the possibility of relying on the exemption which is envisaged for the provision of medical care referred to in Article 13(A)(1)(c) were dependent on the legal form in which the taxable person carries on his activity"

15. In the same context we were also referred to the judgment of the CJEU in *Canterbury Hockey Club Case C-253/07* and the decision of the Upper Tribunal in *Abbotsley Ltd v HM Revenue & Customs* [2018] UKUT 191 (TCC). Canterbury concerned exemption for supplies of services closely linked to sport to persons taking part in sport. The CJEU held that the exemption did not require the services to be supplied directly to natural persons taking part in sport. The CJEU stated its conclusion firstly by reference to the purpose of the exemption and secondly by reference to the principle of fiscal neutrality:

> "29. ⋯ if the words 'services ... supplied ... to persons taking part in sport' in Article 13A(1)(m) of the Sixth Directive were interpreted as meaning that they require that the services in question be directly supplied to natural persons taking part in sport within an organisational structure put in place by a sports club, the exemption provided for by that provision would depend on the existence of a legal relationship between the service supplier and the persons taking part in sport within such a structure. Such an interpretation would mean that a large number of supplies of services essential to sport would be automatically and inevitably excluded from the benefit of that exemption, irrespective of the question whether those services were directly linked to persons taking part in sport and who was the true beneficiary of those services. Such a result would, as the Commission correctly maintains, run counter to the purpose of the exemption provided for by that provision which is to extend the benefit of that exemption to services supplied to individuals taking part in sport.
>
> 30. It follows, besides, from that interpretation that the exemption for transactions effected by undertakings or organisations mentioned in Article 13A(1)(m) of the Sixth Directive would not benefit certain persons who participate in sport solely because they participate in it within a structure managed by a club. That interpretation would not be consistent with the principle of fiscal neutrality, inherent in the common system of VAT, in compliance with which the exemptions provided for in Article 13 of the Sixth Directive must be applied (see, to that effect, Case C-283/95 *Fischer* [1998] ECR I-3369, paragraph 27). In fact, that principle precludes, in particular, economic operators who effect the same transactions being treated differently in respect of the levying of VAT (see, to that effect, Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 20). It follows that that principle would be disregarded if the possibility of invoking the benefit of the exemption under Article 13A(1)(m) of the Sixth Directive depended on the organisational structure particular to the sporting activity practised."

16. A similar issue to that in the present appeal arose in the case of *Sally Moher t/a Premier Dental Agency v The Commissioners for Her Majesty's Revenue & Customs* [2012] UKUT 260 (TCC). In that case the appellant supplied temporary dental staff to dentists, mainly nurses. As in

the present appeal the issue was whether that was a supply of staff or a supply of medical care. The Upper Tribunal held that the FTT had been entitled to find that the appellant's supply was a standard rated supply of staff to the dentist and that it was the dentist who was supplying medical care to the patients. The Upper Tribunal stated as follows

> "13. For the respondents, Miss Jessica Simor of counsel argued that the tribunal's conclusion that the appellant's supplies were of staff and not of medical services was a finding of fact, unassailable in this tribunal unless it could be shown to be irrational, a task which the appellant had not even attempted. The tribunal had, she said, examined all the relevant evidence, particularly about the contractual relationship between the appellant and the dentists, had considered the appellant's concession that once assigned to a dentist the nurses and auxiliaries were under the dentist's control and merely did as they were directed, and had correctly concluded from all those factors that the appellant supplied staff to the dentists, and it was the dentists who supplied the medical care to their patients.
>
> 14. In our judgment those arguments are unanswerable; indeed, it is difficult to see how one could rationally conclude that the appellant was making supplies of medical care, once it is accepted that the nurses and auxiliaries were under the control of the dentist to whom they were assigned. This is so even if (assuming, in the appellant's favour) that the nurses were to be regarded as employees of the appellant. The appellant did not control—or even know— whether, and if so, the extent to which, the dentist directed a nurse or auxiliary to carry out other duties which themselves were not exempt supplies, such as acting as receptionist or assisting with cosmetic dentistry. Even in relation to dental services which were exempt, the appellant did not dictate the treatment offered to the patients, or play any part at all in determining what treatment was offered or how it was provided, nor did she supervise the nurses and auxiliaries. She had no relationship, contractual or otherwise, with the patients to whom the medical care was provided. It is in our view beyond argument that her supply was of staff to dentists, who (as the tribunal found) assumed all the responsibility for directing the nurses as to what they should do, and for determining the treatment to be offered to the patients and the manner of its delivery. That the staff (and, indeed, the appellant herself) had a medical qualification cannot affect the nature of the supply. The tribunal correctly concluded that the appellant could not benefit from the exemption, and that the respondents were right to refuse the repayment."

17. It was clearly determinative in Sally Moher that the contractual framework put the nurses and auxiliaries under the control of the dentist. The appellant had conceded that they were under the control of the dentist. The fact that a dentist may have required the nurses or auxiliaries to carry out duties which were not exempt was simply a facet of the control which the dentists were given. Similarly, it appears that the fact the appellant had no involvement in the treatment of patients by nurses or auxiliaries and did not supervise the nurses or auxiliaries, which was a matter for the dentists, reflected the fact that this was a supply of staff to dentists. It was the dentists who directed and supervised the staff who were supplied by the appellant.

18. In *Adecco v HM Revenue & Customs* [2018] EWCA Civ 1794 the Court of Appeal was concerned with the nature of services being provided by Adecco to its clients. Adecco maintained that its services amounted to the introduction of temporary staff ("temps") to its clients. The temps were not employees of Adecco and it argued that the consideration for the supply of those services on which VAT was chargeable was the retained commission element of the fee it charged clients. The balance of the monies it collected from clients represented the employment costs of the temps, namely salary, PAYE and national insurance contributions which it merely disbursed. Temps worked under the direct supervision and control of the clients. They agreed with Adecco to perform assignments and Adecco agreed to pay them at an agreed rate. Upon analysis of the contractual position, the Court of Appeal found that Adecco was supplying workers and the value of that supply was the total amount paid by clients to Adecco. It was held that the FTT's decision in *Reed Employment Ltd v HM Revenue &*

Customs [2011] UKFTT 200 was wrong. In Reed Employment, the FTT had decided on similar facts that there was a supply of introductory services rather than a supply of staff.

19. It was submitted by Mr Firth, and Ms Newstead Taylor did not take issue with the submission, that in Adecco the Court of Appeal held there was a supply of staff rather than introductory services because Adecco assigned control of the worker to the client. In this context we were referred to what the Court of Appeal said at [50] and [51]:

> "50. …the FTT [in Reed Employment] said this in paragraph 88:
>
> > 'In our view, in ascertaining the nature of a supply it is relevant to have regard to what it is that the supplier is capable, as a matter of contract, of providing, and on that basis to consider what in economic reality has been supplied. In the case of Reed, at no time did Reed exercise control over its temp workers, such that control could be ceded by Reed to its clients. The obligations owed by a temp worker to Reed did not amount to an ability of Reed to exercise control over the temp worker, and in any event those obligations commenced only after the temp worker had accepted the assignment, and accordingly had come under the control of the client. The making of a supply of staff must in our view, at the least, connote a passing of control of staff from the supplier to the person receiving the supply. There is no such passing of control in this case. Absent that factor, Reed was capable only of making a more limited supply, which can, in our view, be characterised only as a supply of introductory services, along with the ancillary services to which we have referred.'
>
> 51. I am not persuaded by these points. In the first place, Reed, like Adecco, paid temps in discharge of obligations of its own, not as agent for any client. It cannot therefore be said in any meaningful way that Reed paid a temp "on behalf of" the client, that Reed was "reimbursed" by a client or that such a payment was "not a cost component of Reed's own supply". Secondly, Reed, like Adecco, could perfectly well, in my view, supply more than the "introductory and ancillary services" found by the FTT without having had any pre-existing control over the temps. Thirdly, the "control of the client" to which the FTT referred in paragraph 88 of its decision must have been derived from the arrangements between the client and Reed. Temps did not agree with clients that they would be subject to their control. It seems to me that Reed, like Adecco, will have been able to confer control on its clients by virtue of its own contracts with the temps."

20. We were also referred to decisions of the FTT in *Rapid Sequence Ltd v HM Revenue & Customs* [2013] UKFTT 432 (TC) and *City Fresh Services Limited v HM Revenue & Customs* [2015] UKFTT 0364 (TC). It seems to us that the issue in the present appeal is particularly fact sensitive and that reference to other decisions of the FTT on different evidence and different facts does not assist.

21. The contractual framework in this appeal is common ground, to the extent that Mainpay contracts to supply A&E, and A&E contracts to supply NHS Trusts. The dispute focusses on the terms of the contracts, the effect of those terms and the nature of the supplies made pursuant to the contracts. We were referred to what was said by Laws J (as he then was) in *Customs & Excise Commissioners v Reed Personnel Services Ltd* [1995] STC 588

> " … First, as I have already said, the concept of 'supply' for the purposes of VAT is not identical with that of contractual obligation. Secondly, in consequence, it is perfectly possible that although the parties in any given situation may conclude their contractual arrangements in writing so as to define all their mutual rights and obligations arising in private law, their agreement may nevertheless leave open the question, what is the nature of the supplies made by A to B for the purposes of A's assessment of VAT. In many situations, of course, the contract will on the facts conclude any VAT issue, as where there is a simple agreement for the supply of goods or services with no third parties involved. In cases of that kind there is no space between the issue of supply for VAT purposes and the nature of the private law contractual obligation. But that is a circumstance, not a rule. There may be cases, generally (perhaps always) where three or more

parties are concerned, in which the contract's definition (however exhaustive) of the parties' private law obligations nevertheless neither caters for nor concludes the statutory question, what supplies are made by whom to whom. Nor should this be a matter for surprise: in principle, the incidence of VAT is obviously not by definition regulated by private agreement. Whether and to what extent the tax falls to be exacted depends, as with every tax, on the application of the taxing statute to the particular facts. Within those facts, the terms of contracts entered into by the taxpayer may or may not determine the right tax result. They do not necessarily do so. They will not do so where the contract, though it tells all the parties everything that they must or must not do, does not categorise any individual party's obligations in a way which inevitably leads to the conclusion that he makes certain defined supplies to another. In principle, the nature of a VAT supply is to be ascertained from the whole facts of the case. It may be a consequence, but it is not a function, of the contracts entered into by the relevant parties."

22. We were not referred to more recent authorities which require regard to be had not just to the contractual terms but to economic reality. For example, *Esporta Ltd v HM Revenue & Customs* [2014] EWCA Civ 155 where the Court of Appeal said as follows:

> "14. It is common ground that, in determining the nature of a supply, regard must be had to the economic realities and to all the circumstances in which the transaction takes place (see *Revenue and Customs Commissioners v. Loyalty Management UK Ltd* (Case C-53/09 and C-55/09) [2010] STC 2651 at paragraph 39, and *Revenue and Customs Commissioners v. Loyalty Management UK Ltd* [2013] STC 784 per Lord Reed at paragraph 38)."

23. We shall consider all the circumstances in which the supplies took place. The parties were agreed that the key issue in light of all the circumstances is whether the consultants came under the control, direction and supervision of the NHS Trusts. If so, that would be a supply of staff by Mainpay. If not, then it would be a supply of medical care by Mainpay. We will consider that test taking into account the objective of the exemption and the EU law principle of fiscal neutrality.

FINDINGS OF FACT

24. This appeal is concerned with doctors employed, or at least treated as employed by Mainpay. Mainpay operates in various sectors where temporary workers are contracted to work at end clients. In relation to hospital workers, Mr Harker told us that Mainpay supplied locum doctors at all levels of experience. There was evidence before us that in order of experience postgraduate doctors working in hospitals are designated in order of seniority as follows: Foundation Year 1, Foundation Year 2, Core Trainee and Specialist Trainee. NHS Hospitals have a supervisory structure in which consultants oversee the work of these doctors.

25. Mr Harker estimated that 80% of doctors which it placed in hospitals through A&E were consultants. He thought that the remaining 20% would be "GP Specialists". We shall deal with the position of supplies involving consultants first, and then consider the position of supplies involving GP Specialists.

26. Mr Harker's witness statement is notable for its brevity. It is 5 paragraphs long and simply maintains that Mainpay, as the employer of the consultants, has control over the consultants. In particular, it is said that Mainpay:

(1) Dictates which consultant provides medical care.

(2) Can dismiss a consultant for breach of contract.

(3) Can replace a consultant assigned to provide medical care with a suitably qualified alternative consultant.

(4) Determines the consultant's rate of pay.

(5) Determines where the service will be provided and what hours the consultant works.

(6) Does not hand over control or direction over consultants to the NHS Trusts.

27. The evidence before us was also notable for its generality. No consultants who had been employed or contracted to Mainpay in the Relevant Period gave evidence. Dr Bily, who did give evidence, was not employed in the Relevant Period and no contractual documentation from his employment was adduced in evidence. Dr Berry was never employed by Mainpay and his evidence was principally directed to the way in which consultants in the NHS make clinical decisions. This is surprising given that the starting point in any analysis as to the nature of a supply for VAT purposes is the contractual arrangements, and where the analysis must include consideration of all the circumstances in which supplies are made. We did not have evidence from specific individuals who contracted with Mainpay in the Relevant Period setting out the circumstances in which they contracted with Mainpay and how they provided their services.

28. Mr Harker has an accountancy background and was the sole director of Mainpay in the Relevant Period. He is resident in Sark in the Channel Islands and was responsible for the day to day running of Mainpay. Various matters were outsourced to UK based companies. The operation of Mainpay's payroll, including the processing of workers' time sheets, together with its invoicing and bookkeeping were outsourced to a company called Accuco Ltd, which prepared payment information from which Mainpay made payments to workers. Payments were authorised by Mr Harker. Accuco also provided a sales support function, dealing with day to day employee matters such as maternity pay, maternity leave and pension payments. A second UK company, Awakino Ltd was responsible for "sales generation", which involved signing workers up to Mainpay's services. Consultants were generally introduced to Mainpay either by a recruitment agency such as A&E, in response to direct marketing or by word of mouth.

29. Mr Harker said that the benefit to a consultant in using Mainpay is to be found in the obligations Mainpay assumes, such as obligations in relation to pensions, sick pay and insurance. These obligations, including an employer's pension contribution are funded by Mainpay out of its charges to A&E. It earns a 4% gross margin, being the difference between what it charges A&E and the total costs of employing a consultant including employer's National Insurance contributions. Consultants were employed on fixed term assignments which could be renewed. If the relationship between Mainpay and a consultant was that of an overarching contract of employment covering periods between temporary assignments during the Relevant Period then the consultant might also obtain a beneficial tax treatment for travel and subsistence costs. We understand that it was intended each assignment would be treated as a temporary place of work and that relief would be available for travel and subsistence costs incurred by the consultant.

30. A&E's gross margin will be the difference between what they are paid by the NHS Trust and what they have to pay Mainpay. Mr Harker's evidence by way of example was that the NHS Trust may pay A&E £100 per hour and A&E may pay Mainpay £95 per hour. Mainpay would then pay the consultant £x per hour, ie something less than £95 per hour which would be a market rate for the consultant's services taking into account pension contributions and travel and subsistence expenses and which would give Mainpay its margin.

31. Typically, an agency such as A&E would identify an assignment which they would introduce to a consultant registered with them. Rates of pay are generally quite standard. If the consultant was agreeable to the assignment A&E would inform Mainpay about it and provide an Assignment Schedule. Once an assignment was accepted by the consultant, Mainpay would communicate with the consultant in relation to payroll matters.

32. Mr Harker thought that Mainpay started dealing with A&E in about January 2010, which is some 10 months before the start of the Relevant Period. The earliest agreement between Mainpay and A&E in evidence before us was an agreement dated 13 March 2012 ("the A&E Agreement"). The A&E Agreement recited as follows:

> "(A) The Supplier [Mainpay] is an Umbrella Company which employs and assigns the services of its employees to work on projects for third parties.
>
> (B) The Supplier shall ensure that assigned employees shall provide the Services for the Client in accordance with the terms of this Agreement which is a contract for services."

33. For these purposes "the Client" would be an NHS Trust. An "Umbrella Company" is defined as a company which engages consultants under an "overarching contract of employment", treats all income generated by the consultants as employment earnings and accounts to HMRC for full PAYE and National Insurance contributions on all employment income earned by employed consultants. The "Services" were defined as the services described in the Assignment Schedule to the A&E Agreement. It was common ground that "the Services" for the purposes of the A&E Agreement might be described for example as "the services of a consultant anaesthetist", in other words a description of the consultant's specialism.

34. No contract with A&E prior to 13 March 2012 was provided. There was no explanation as to why that was the case. Further, it was not clear whether the A&E Agreement was in force until the end of the Relevant Period.

35. At this stage it is worth noting that there is a separate appeal by Mainpay to the tribunal where the issue is whether Mainpay does in fact engage consultants under an overarching contract of employment. In opening the appeal, both parties were keen to emphasise that issue is not relevant for present purposes and we are not being asked to determine that issue. Nothing we say in this decision should be taken as expressing any view on that issue.

36. Pursuant to clause 2.1 of the A&E Agreement, Mainpay was obliged amongst other things to do the following:

> "(a) throughout the term of the Assignment supply the Services in accordance with Good Industry Practice at all times taking responsibility for the way in which the Services are performed;
>
> …
>
> (c) comply with all health and safety, site and security regulations applicable at the Locations(s) to the extent that they apply to the type of work required for the provision of the Services.
>
> (d) comply with all the Client's reasonable requirements, regulations, policies and protocols…
>
> (e) comply with the Client's IT security policies…
>
> …
>
> (h) be covered by appropriate professional indemnity insurance in connection with the Services …
>
> (i) supply to [A&E] copies of any relevant qualifications or authorisations that the Supplier and/or the Consultant is required by the Client or by law or any professional body to have in order to provide the Services to the Client.
>
> (j) where necessary, provide at its own cost all such equipment and training for the Consultant as is reasonable for the adequate performance of the Services…"

37. It was common ground that the only way Mainpay could comply with these obligations was to require the Consultants to comply with them. "Good Industry Practice" in clause 2.1(a) was defined as "the skill, diligence, prudence, foresight and judgment which would be expected from a suitably skilled and experienced person engaged in the same type of services".

38. Clause 2.1(b) made provision for Mainpay to deliver weekly timesheets to the client for approval and to return those timesheets to A&E. Subject to that approval, clause 3 required Mainpay to issue invoices for the Services in accordance with the Assignment Schedule. The Assignment Schedule defined a "payment rate" which took into account Mainpay's employment costs. The clause records that payment rates are set at a level which enables Mainpay to pay the consultant at a market rate.

39. Clause 4 included an acknowledgment from A&E and Mainpay that neither Mainpay nor the consultant is an employee or worker of A&E or the client. Mainpay also warranted that the consultant has the experience, training and qualifications which the client considers necessary or which are required by law or by any professional body for the consultant to possess in order to perform the Services.

40. Clause 11 recorded that A&E operated as an employment business in relation to Mainpay. It went on to state that the essence of the services which A&E provided were primarily the introduction by A&E of a candidate to provide medical services to a client, and the facilitation of prompt payments to the consultant.

41. The A&E Agreement included an "Assignment Schedule". The Assignment Schedule in evidence was not completed. We understand that it would be completed in relation to each assignment undertaken by each consultant. There was provision for the following details to be entered:

(1) Details of each assignment including start and end dates, normal working hours, payment rate and a description of the services to be provided by the consultant.

(2) Details of the client, including name, address, contact details and the location at which the services were to be performed.

(3) Details of the consultant, including name, address, contact details and the experience, training and qualifications "required". It seems to us that the reference "required" was to requirements of the client in so far as they might be specified.

42. We were provided with various versions of contracts between Mainpay and consultants. Certain IT issues experienced by Mainpay, which we do not need to explore in this decision, meant that the content of those contracts at the time they were agreed would have been different in some respects to the copies adduced in evidence. Based on the evidence before us we are satisfied that Mainpay had the following contracts:

(1) A contract with KK dated 19 March 2010 ("the 2010 Contract")

(2) A new contract with KK dated 9 April 2013 ("the 2013 Contract")

(3) A new contract with KK dated 6 April 2014 ("the 2014 Contract")

43. We are satisfied that these contracts were standard form contracts used by Mainpay in the Relevant Period. We have anonymised the name of the consultant involved. The hearing bundles contained contracts for other individuals but we were not taken to those documents and we have not taken them into consideration in this decision.

44. The 2010 Contract was described as a "contract for services" between Mainpay and KK. It expressly states for the avoidance of doubt that it "shall not give rise to a contract of employment between [Mainpay] and [KK]". There was no obligation on Mainpay to offer any assignment and no obligation on KK to accept any assignment. Clause 8 provided as follows:

"8. …[KK] will:

1. Co-operate with the Client's reasonable instructions and accept the direction, supervision and control of any responsible person in the Client's organisation;

2. Observe any relevant rules and regulations of the Client's establishment …

3. … comply with the Health and Safety policies and procedures of the Client."

45. We note that the definition of "Client" in the 2010 Contract was the person "which has contracted with Mainpay for the services of [KK]". On the present facts, the only person to contract with Mainpay for services was A&E rather than the NHS Trusts. The extent to which A&E might retain the right to direct, supervise and control KK would depend on its contractual arrangement with the NHS Trusts. Similarly, the extent to which A&E gave such rights to the NHS Trusts would depend on that contractual arrangement. We had no evidence of the contractual arrangements between A&E and the NHS Trusts.

46. Mr Harker maintained that despite the terms of the 2010 Contract, the substance of the relationship was that the consultants were Mainpay's employees and that they were never looked at in any other way. We note that clause 4.1 of the 2010 Contract made provision for a "minimum hourly rate" of £65ph, with payment being subject to deductions in respect of PAYE and Class 1 National Insurance contributions. However, we are aware that in the case of certain non-employed temporary workers there is a requirement to operate deductions for PAYE and National Insurance contributions.

47. Clause 9 of the 2010 Contract refers to termination. It provides that Mainpay or A&E may terminate an assignment at any time without prior notice or liability.

48. We are satisfied that the 2013 Contract was introduced with effect from April 2013 to replace the 2010 Contract. It contained significant amendments. In particular, it was said to constitute a contract of service and to give rise to a contract of employment which would operate and be effective between assignments. This latter point is relevant to the overarching contract of employment issue in Mainpay's other appeal.

49. Clause 8 of the 2013 Contract provided as follows:

"8.1 [KK] agrees as follows:

…

8.1.3. to take all reasonable steps during an Assignment to safeguard his or her own health and safety and that of any other person who may be present … and to comply with the Client's or any other applicable health and safety laws, regulations and statutory requirements relating to the type and location of work required for any assignment;

8.1.4. to abide by the reasonable and relevant rules and regulations of the Client's establishment (including but not limited to normal hours of work, security or operational matters, dress code, information technology practices …) …

8.1.5. to co-operate with the Clients requests to the extent reasonably required to enable the Client to progress its work requirement, but not to the extent that the Client is acting as his/her employer or that [KK] considers that he/she will have a direct contractual obligation with the Client …"

50. The definition of the Client in the 2013 Contract was the same as that in the 2010 Contract, and refers to A&E. Mainpay was obliged to obtain suitable assignments for KK for at least 336 hours per year. KK was obliged "to consider" any suitable assignments.

51. We were not referred in any detail to the 2014 Contract which was outside the Relevant Period and we do not consider it further.

52. There was no reference in these contracts specifying where KK would work or how many hours he would work. Such details were to be provided by Mainpay to KK in relation to each assignment. Mainpay would know KK's normal working hours and the NHS Trust he was working for from the Assignment Schedule to the A&E Agreement. Mainpay would not know

his specific working patterns, either in terms of where in a hospital he was working or what hours he was actually working on any specific day.

53. Consultants employed by Mainpay receive a Mainpay Employee Handbook and a Mainpay Guide, although these documents were not specific to consultants or medical practitioners. We were provided with copies of these documents from 2015, 2016 and 2017. There was no explanation as to why we did not have copies from the Relevant Period. Where we refer to these documents it is to the October 2015 versions which are closest to the Relevant Period.

54. The Employee Handbook includes a description of the relationships between the worker, Mainpay, the recruitment agency and the end client. The worker is employed by Mainpay. Mainpay provides suitably qualified personnel to the recruitment agency under a contract for services. The recruitment agency places candidates with the end client. In terms of payments, the end client pays the recruitment agency, the recruitment agency pays Mainpay, and Mainpay operates a payroll to pay the consultant.

55. Paragraph 1.1 of the Mainpay Guide, states as follows:

> "Mainpay specialises in providing temporary workers (contractors) to recruitment agencies and end clients…and every year we employ thousands of temporary workers throughout the UK.
>
> We maximise your income, save you time and effort, and provide you with full employment rights."

56. Mr Harker maintained that Mainpay could direct a consultant in its position as the employer of that consultant to do an assignment. He said it was unlikely to do so if the consultant was unhappy with the assignment because it would be "bad for business". In fact, the written contracts do not support that evidence. The 2010 Contract provides that a consultant is not obliged to accept an assignment offered by Mainpay. The 2013 Contract provides only that a consultant is obliged "to consider any suitable assignments obtained by [Mainpay]".

57. Mr Harker maintained that Mainpay would also communicate with consultants who had accepted an assignment in relation to any issues arising in connection with the assignment. For example, if the consultant was unable to work for any reason, or if disciplinary issues or complaints were made against the consultant and escalated to the General Medical Council ("GMC"). He said that if for any reason a replacement consultant was needed, Mainpay would find a replacement in partnership with the recruitment agency.

58. In fact, there was no evidence of any contact between consultants and Mainpay save in relation to payroll matters. There was no evidence of Mainpay ever being involved in complaints against a consultant. In practical terms, if a replacement consultant were needed that is something that would be agreed between A&E and the NHS Trust. There was no evidence that Mainpay ever had contact with the NHS Trusts.

59. Mr Harker said that what Mainpay provided to consultants was a lot more than a payroll function. They undertook a lot of additional obligations as an employer, including sick pay, maternity pay, pension contributions and travel and subsistence allowances. We accept that was the case in October 2015, when such obligations were referred to in the Employee Handbook. We are not satisfied it was the case in the Relevant Period. The extent of Mainpay's obligations in the 2010 and 2013 Contracts appears to be the statutory minimum applicable to workers in relation to leave and statutory sick pay.

60. Whilst no consultants contracted to Mainpay in the Relevant Period gave evidence, we did have the results of interviews conducted by HMRC with a number of individuals who were employed by Mainpay in the Relevant Period. There were redacted notes of two of those interviews in evidence. Both interviewees regarded Mainpay as simply providing a payment or

payroll function. Mr Harker questioned the statistical significance of two interviews but it was the only direct evidence available to us in relation to employees working in the Relevant Period. Also, Mainpay was invited to conduct its own interviews if it considered HMRC's interviews unrepresentative and it did not do so.

61. We are satisfied that in the Relevant Period the perception of consultants would have been that Mainpay was simply providing a tax efficient payroll function in relation to assignments negotiated between the consultants, A&E and the NHS Trusts.

62. We now turn to the specific evidence of Dr Bily and Dr Berry.

63. Since 2006, Dr Bily has worked in various hospitals in the NHS as a locum consultant haematologist. He specialises in haemato-oncology treating patients with various cancers such as leukaemia and lymphoma. Each assignment would last up to 6 months. For much of the time since 2006 he has worked in Northern Ireland.

64. Dr Bily has worked with Mainpay since 2015. Mainpay were recommended to him by A&E, with whom he has worked since 2010. He had no involvement with Mainpay in the Relevant Period. He had no recollection of what forms he was required to sign when he first started working with Mainpay or what documents he provided to Mainpay. We had no copies of any contracts specific to Dr Bily. Dr Bily would login to the Mainpay website to view timesheets and other financial information. He had no recollection of seeing the Mainpay Employee Handbook or being given the Mainpay Guide.

65. Mr Harker's evidence was that consultants would have to register with Mainpay. As part of the registration process, Accuco would call the consultant to confirm the consultant's details. At that stage the consultant would be sent an email with login details for Mainpay's website. The website included links to the contract which they were required to sign up to online. The consultant could also click on a link to financial information which would show payslip details as well as expense claims. Accuco would check that the consultant was registered with the GMC but there was no evidence that they would check any other specialist qualifications a consultant might have or whether a consultant's experience, training and qualifications matched the requirements of the NHS Trust. Mr Harker maintained that the GMC register would identify whether the consultant was a specialist but we were not shown any evidence to this effect. Indeed, Mr Harker accepted that it would be A&E who checked the consultants' qualifications and carried out CRB checks.

66. Dr Bily explained what was involved when he was taken on by a hospital. In the first instance, A&E would offer him a position at a specific hospital. He would not have a face to face interview with anyone at the hospital. Sometimes, he might have a phone call from the hospital asking for his details, such as his qualifications and experience. A&E would provide him with details as to where he would be working, the hours and the rate of pay. That information would be provided to A&E by the hospital. If Dr Bily wanted different terms he would tell A&E.

67. Once the position was agreed between A&E and the hospital on the one hand, and A&E and Dr Bily on the other hand, A&E would provide details about the post to Mainpay in the form of the Assignment Schedule. At this stage, Mr Harker confirmed that Mainpay did not have a contractual agreement with the consultant. It was put to Mr Harker that Mainpay did not control which consultant would be provided to which hospital, and that that was a matter for the consultant, A&E and the hospital. Mr Harker suggested that contractually he could argue otherwise. He pointed to clause 7.2 of the A&E Agreement which provided for a right of substitution.

68. Clause 7.2 of the A&E Agreement provides as follows:

> "7.2 [Mainpay] may from time to time and shall as soon as possible after being required by [A&E] so to do, without prejudice to the other provisions of this Agreement, offer a suitable replacement consultant provided that:
>
> (a) [A&E] shall be under no obligation to accept such replacement consultant if in its or the Client's reasonable opinion such replacement is not wholly suitable …; and
>
> (b) if a replacement consultant is accepted, [Mainpay] shall use all due diligence to ensure that handover arrangements are made … and shall use its reasonable endeavours to procure that a suitable replacement consultant is available to perform the Services as soon as possible. If no such replacement is available within 5 Business Days … then A&E may terminate this Agreement by written notice with immediate effect."

69. There was no evidence that Mainpay had ever chosen to utilise clause 7.2 or that it had been required to provide a replacement consultant by A&E. That is not surprising because in practice it was A&E and the NHS Trust which would choose the consultant to work in the relevant hospital. If for any reason a consultant was no longer available to complete an assignment then we have no doubt that A&E and the NHS Trust would together find a replacement consultant.

70. Dr Bily's understanding was that Mainpay was his employer. A&E provided Dr Bily with timesheets which he would fill in to give details of dates and hours worked, split between standard hours and "on call" hours. He would give the timesheets to Mainpay and they paid him his salary.

71. The contact between consultants and Mainpay through the website was purely in relation to contractual and financial matters. It did not involve any contact relating to what might be described as medical or professional matters. Consultants had a telephone contact number for Mainpay which was an office hours number. Outside normal office hours there was an answerphone which would be picked up when the office was next open.

72. Dr Berry has worked as a consultant anaesthetist in the NHS for the majority of his career. For a period, he was the clinical director of a critical care department in a large teaching hospital and for a few months he was the medical director of an NHS Trust which was a non-clinical role on the Trust Board. He has also worked as a locum anaesthetist within the NHS and other organisations. He has been employed as a locum through an agency at least once in his career. On one occasion he recalled being employed directly by Orkney hospital as a locum without the involvement of an agency. He has had no involvement with either Mainpay or A&E. He is a long-standing friend of the owner of Mainpay. There was no suggestion that friendship in any way affected the reliability of his evidence.

73. The evidence of Dr Bily and Dr Berry was principally directed towards how consultants work on a day to day basis. They were speaking from their own experience of working in NHS hospitals and we accept their evidence.

74. NHS Trusts have induction procedures which Dr Bily would follow when he first started work at a hospital. For example, in relation to health and safety matters and IT systems, where he would be given a username and password. The hospital would provide him with a name badge and/or photo ID for security purposes. Dr Bily was not required to wear any particular clothing in carrying out his duties, although the NHS Trust would provide aprons where necessary. Consultants in other specialisms might be required to wear clothing such as "scrubs" provided by the hospital. As a consultant Dr Bily would work "day sessions" with some "on calls". The required working pattern would be notified to Dr Bily in advance by the hospital "rotamaster" software. Dr Bily might swap day sessions with a colleague or he might agree to cover another consultant who was sick. In that case he would inform rotamaster and the lead

consultant for haematology, who would usually be a consultant employed directly by the hospital.

75. Patient clinics would be arranged administratively by the hospital. Dr Bily would be informed by the hospital where and when he was required to attend a clinic.

76. Mainpay had no involvement in these procedures or in any other aspect of Dr Bily's day to day work at the hospital. In relation to health and safety, if Dr Bily had a concern he would raise it with someone at the hospital, rather than Mainpay. The Mainpay Employee Handbook states as follows in relation to health and safety:

> "Although Mainpay is your employer, we do not supervise employees on site. It is therefore up to you, the employee, to become familiar with the health and safety requirements for each site that you are required to work at.
>
> …
>
> Any action which endangers the health and safety of another person whilst at work, will lead to disciplinary action being taken which could result in dismissal."

77. Dr Bily gave evidence in which he set out the framework in which he performed his services as a consultant haematologist. He provides treatment as part of what was described as a complex program involving doctors, nurses, carers, social workers and other support services. Patients will be referred to Dr Bily either with an established diagnosis of a haematological cancer or with suspicion of such a condition. Dr Bily will organise all investigations necessary to confirm the diagnosis and to establish the extent and stage of any cancer. Thereafter there will be a multidisciplinary team responsible for the patient. Multidisciplinary meetings will involve doctors and others with various specialities such as haematologists, radiotherapists, radiologists and microbiologists, nurses and other support workers. The lead consultant would usually attend these meetings. The outcome is a team recommendation for treatment of that patient. There is usually a consensus as to recommended treatment and rarely any disagreement. If there were to be disagreement it would be resolved by further discussion.

78. Whilst there would be a team approach, Dr Bily regarded himself as having "final responsibility" for treatment recommendations, discussing those recommendations with the patient and agreeing with the patient a course of treatment. The hospital might have local policies as to how a particular condition was to be treated. He viewed these as recommendations rather than directions. Treatments and drugs are governed by NICE guidelines. If he wanted to prescribe a specific drug which was not within the NICE guidelines, which he described as "an extraordinary drug" then that would be a matter for agreement at a multidisciplinary meeting. He would then put a case to the hospital trust for funding. Whilst Dr Bily considered that he had final responsibility for treatments recommended to his patients, he accepted in cross-examination that he was under the direction, supervision and control of the hospital in relation to treatment and drugs offered to patients. It seems to us that this was a reference to prescription of extraordinary drugs.

79. Dr Berry's witness statement described the clinical decision-making process in the context of anaesthesia as a "shared process between the clinician and patient". It might involve investigation or advice from other specialists, for example a cardiologist. Discussions between surgical and nursing colleagues would be led by the anaesthetist. An individual treatment plan may be governed by a hospital's local policies but overall decision making would be led by the anaesthetist. His evidence was that he would not regard himself as under the control of another person in his decision making as a clinician.

80. Dr Berry distinguished national NHS guidelines, and Trust guidelines. An example of the former would include how to manage a cardiac arrest. An example of the latter might

concern measures to reduce the use of antibiotics. However, such guidelines would not usually dictate the treatment to be delivered. There may be times when a consultant needed to step outside the guidelines. If an extraordinary drug was being considered, a case would be presented to senior clinical management, involving a group of senior consultants and a senior pharmacist.

81. Dr Berry agreed that consultants exercise their own judgment in a hospital environment provided by the NHS Trust. He agreed that they did so within the remit and local policies of the NHS Trust. However, he considered that a consultant would be entitled to take a different approach if necessary and the personal clinical decision of a consultant would not be questioned.

82. It is necessary for consultants such as Dr Bily to have regular appraisals. In recent years these have been carried out by specialist organisations. A&E gives Dr Bily contact details for a relevant organisation. He would receive a copy of the appraisal and his understanding was that the organisation also gives a copy to A&E. He did not provide a copy to Mainpay. Dr Berry's evidence was that such appraisals would not be sent to the NHS Trust.

83. Dr Bily was not aware of any complaints made as to his professional conduct, but he understood that if there were any complaints then they would be dealt with by a department at the relevant hospital. Somewhat surprisingly, he was not aware what professional indemnity arrangements were in place via the hospital, A&E or Mainpay.

84. HMRC relied on an NHS document headed "NHS Terms and Conditions of Contract" dated 22 November 2007 ("the NHS Terms and Conditions"). This was expressed to apply to the supply of all medical locums, excluding GP locums, and to all NHS bodies. "Agency Workers" were defined as "any registered medical practitioner … supplied by the supplier as a temporary worker whether employed or engaged by the supplier". The document extends to 100 pages but our attention was drawn only to the following terms:

> "**24 Health and Safety**
>
> 24.5 All Agency Workers are deemed to be under the exclusive direction, supervision and control of the Authority throughout the engagement. The Authority undertakes to the Supplier that it will assume responsibility for the health and safety and supervision of each Agency Worker from the start of any engagement."
>
> "**Schedule 2**
>
> **5 Agency Worker Obligations**
>
> 5.1 The Supplier shall use all reasonable endeavours to ensure that all Agency Workers to be deployed in the provision of the Services are aware that at all times whilst on the Authorities premises they:
>
> 5.1.1 must work as directed by the Authority and follow all reasonable requests, instructions, policies, procedures and rules of the Authority."

85. We note that Schedule 2 is introduced into the NHS Terms and Conditions by Clause 2.1 which provides that the supplier, which appears to be A&E on the present facts, is required to provide services to the NHS Trust and those services "shall be supplied in compliance with the provisions of Schedule 2 (Staff and Agency Workers)".

86. We have already noted the absence of any evidence as to the agreement between A&E and the NHS Trusts. That agreement may incorporate or at least be consistent with the NHS Terms and Conditions, we simply do not know. If the NHS Terms and Conditions do reflect the basis on which consultants contracted by Mainpay are working within NHS Trusts then it points to control, direction and supervision being with the NHS Trusts.

87. We note clause 6.2 of the A&E Agreement which deals with termination of the agreement:

> "This Agreement may be terminated prior to the End Date:
>
> (a) by [A&E] by notice with immediate effect if …:
>
> …
>
> (vii) for any reason the [NHS Trust]:
>
> (A) terminates its corresponding agreement with [A&E]; or
>
> (B) cancels its requirement for the Services prior to the Start Date,
>
> in relation to the provision of the Services by [Mainpay] or requests that the consultant be removed or replaced as consultant, and, for the avoidance of doubt, [A&E] shall incur no liability for Losses in connection with any such termination;"

88. The "End Date" was defined in the Assignment Schedule and was effectively the agreed period of the assignment. We were not taken specifically to clause 6.2 of the A&E Agreement, but to our minds it illustrates connections between the relationship of Mainpay and A&E on the one hand and A&E and the NHS Trust on the other hand. If an NHS Trust can terminate its agreement with A&E in relation to a specific consultant for any reason then A&E can terminate its agreement with Mainpay in relation to that consultant without liability for loss. We do not know the terms on which the NHS Trusts might be able to terminate their agreements with A&E.

89. The sums invoiced by Mainpay to A&E effectively recover the cost of employing the consultant, including PAYE, National Insurance contributions and pension contributions. In addition, there is a margin of 4%. The margin is restricted to a maximum of £23 per week. This is explained to consultants as follows in the Mainpay Guide:

> "**1.4 What does it cost?**
>
> Mainpay accounts for 4% of all work invoiced as its gross margin which goes towards the cost of administration. Furthermore, Mainpay's margin will never exceed £23 per calendar week you work.
>
> There are no other additional or hidden costs; no sign-up, leaving or minimum charges nor any minimum commitment term."

90. There was also reference in an FAQ sheet provided by Mainpay for it to deduct £2 per week from payments made to workers to cover the cost of employer's and public liability insurance. Mr Harker maintained that Mainpay provided professional indemnity insurance for consultants. The Employee Handbook states as follows:

> "Mainpay has obtained insurance … providing the following cover:
>
> - Employers Liability Insurance …
> - Public Liability insurance …
> - Professional Indemnity Insurance protects you against compensation sought by a client if you have made mistakes or are found to have been negligent in your work activities … This insurance is needed by a very small proportion of our employees, however Mainpay have obtained £5 million cover."

91. The position described in the Mainpay Guide and the Employee Handbook was the position in 2015, after the Relevant Period. It refers to protecting against compensation sought by "a client" and not a patient. We do not know what the position was in the Relevant Period. Dr Bily was not aware of his position in relation to professional indemnity insurance for his

own work. We had no evidence as to the arrangements generally for "agency doctors" or as to the involvement of the NHS in providing professional indemnity cover for hospital doctors. There is no reason for us to think consultants did not have professional indemnity cover in place, but we are not satisfied that in the Relevant Period it was Mainpay that arranged such cover.

92. Turning back to the points made by Mr Harker in his witness statement, we are not satisfied that in reality Mainpay does dictate which consultant provides medical care. That is a matter decided by A&E and the NHS Trust, prior to the involvement of Mainpay in the assignment. Further, if the NHS Trust was able to terminate its agreement with A&E for any reason, A&E can terminate its contract with Mainpay for the provision of that consultant without liability for any loss.

93. Where Mainpay is the employer of a consultant, we accept that Mainpay can dismiss the consultant for breach of contract, subject to compliance with relevant employment laws. We note that the 2010 Contract was in any event terminable by Mainpay at any time, without notice.

94. Strictly, Mainpay can insist upon providing a suitable replacement consultant to A&E for an assignment. However, for the reasons given above we are not satisfied that this was a practical option for Mainpay. If the NHS Trust terminated its agreement with A&E, then A&E could if it wished terminate its agreement with Mainpay for the provision of that consultant.

95. Mainpay does not determine the consultant's rate of pay. That is negotiated between A&E and the NHS Trust. The consultant will only accept an assignment if he is content with the rate of pay. In any event, rates of pay are fairly standard, which Mr Harker accepted. Mr Harker maintained that the NHS Trust and A&E had no idea what the consultant was getting paid. We do not accept that evidence. We prefer Dr Bily's evidence that A&E would provide the consultant with details of his rate of pay. The consultant will not know what the NHS Trust pays to A&E.

96. Mr Harker accepted that the NHS Trusts may have some "operational control" over consultants, for example in relation to health and safety on site, use of IT, and which ward or operating theatres were to be used at any one time. However, he maintained that Mainpay had contractual control over where the consultant provided his services. That may be true to an extent, in that they require the consultant to perform his services at the NHS Trust that has agreed with A&E for the provision of the consultant's services. However, in terms of which part of the hospital the consultant is required to perform his services that is a matter for the NHS Trust. In terms of the hours to be worked, Mainpay's agreement with the consultant is clearly intended to mirror the Assignment Schedule and, we presume A&E's agreement with the NHS Trust.

97. In the period between March 2010 and April 2013, the 2010 Contract provided that the consultant must accept the direction supervision and control of A&E. There was no evidence as to A&E's contract with the NHS Trust. It may or may not have provided that direction supervision and control should remain with A&E or pass to the NHS Trust. On the evidence we have seen it is more likely to have passed to the NHS Trust given the description of A&E's services in clause 11 of the A&E Agreement, which were the introduction by A&E of candidates to the NHS Trust.

98. In the period between April 2013 and January 2014, the 2013 Contract provided that the consultant was an employee of Mainpay. However, the consultant was required to abide by reasonable and relevant rules and regulations of A&E's and to cooperate with A&E's requests "to the extent reasonably required to enable [A&E] to progress its work requirement". In practice, those would be the requests of the NHS Trust.

99. The above findings of fact relate to consultants. In relation to GP Specialists, we have not heard any evidence as to how they carry out their role. Mr Firth submitted that we did not need such evidence. We disagree. It is common ground that control is a key feature in distinguishing a supply of medical care from a supply of staff. We had no evidence as to the contracts entered into by GP Specialists and no evidence as to how they carry out their work, or how their work might be directed or supervised. Mr Firth submitted that they were equivalent to consultants but there was no evidence to that effect. We cannot make any findings of fact relevant to the question of whether GP Specialists were under the control, direction and supervision of the NHS Trusts.

DISCUSSION

100. Mr Firth in his submissions distinguished what he described as the "ordinary interpretation" of the exemption from the "purposive interpretation". The distinction between the two is that the latter interpretation requires us to take into account the objectives pursued by the exemption and the principle of fiscal neutrality. We are not sure whether this distinction is based on any authority and it seems to us that a proper construction of the PVD requires us to take into account in any event the objectives pursued by the exemption and the principle of fiscal neutrality. However, Ms Newstead Taylor did not invite us to adopt any different approach. It seems to us that the ultimate answer will be the same whatever approach is adopted.

101. Mainpay's case put forward by Mr Firth can be summarised as follows:

(1) Mainpay contracts with A&E in the A&E Agreement to provide services in the form of medical care directly to the NHS Trusts.

(2) Pursuant to the A&E Agreement, Mainpay retains responsibility for those services.

(3) Consultants are not under the control of NHS Trusts as regards the medical care they provide to patients and the clinical decisions they take in relation to patients. No-one other than the individual consultant has control over such care and decisions.

(4) Mainpay has control over the assignments carried out by consultants, including where and when those assignments are carried out. If an assignment calls for a consultant to attend at a specific hospital for set hours on set days then Mainpay has the contractual right to require the consultant to do so to provide medical care.

102. Mr Firth relied on Sally Moher and Adecco as authority for the proposition that in a supply of staff, control of the individual must be given to the client. He submitted that because the consultants do not come under the control of the NHS Trusts, the supply by Mainpay cannot be a supply of staff. Moreover, the Appellant retains contractual responsibility for the way in which the services are performed, which is consistent with a supply of medical care and not with a supply of staff. He submitted that what was relevant was not whether Mainpay exercised control over medical care provided by the consultants, but whether it assigned, through A&E, the right of control to the NHS Trust. A&E could only give to the NHS Trust what it had been given contractually by Mainpay. Mainpay did not assign the right of control to A&E so that it could not in turn assign a right of control to the NHS Trust.

103. We have noted that what Mainpay supplied to A&E according to the A&E Agreement was the services described in the Assignment Schedule. Those services might be described for example as "the services of a consultant anaesthetist". We do not consider that is consistent only with a supply of medical care. An agreement to supply the services of a consultant anaesthetist is equally consistent in our view with a supply of staff, in the form of a consultant anaesthetist.

104. Mr Firth relied heavily on the fact that Mainpay had responsibility for the way in which the consultants provided their services. That was the reason it maintained professional indemnity insurance on behalf of consultants. If a consultant was negligent, Mainpay would be sued for medical negligence. In our view this submission falls away in the light of our findings of fact about professional indemnity insurance. We are not satisfied that Mainpay did arrange professional indemnity insurance for consultants. Further, there was no evidence that Mainpay itself obtained indemnity insurance in relation to supplies of medical care which it might be said to make. We acknowledge that clause 2(1)(a) of the A&E Agreement states that Mainpay takes responsibility for the way in which the Services are performed. However, what it is taking responsibility for will depend on what services it contracted to provide, either medical services or staff. The absence of any evidence that Mainpay itself was insured against liability for professional negligence suggests that it was supplying staff, and not medical care.

105. The key issue in this appeal is whether NHS Trusts have a power of control, direction and supervision over the consultants. Mr Firth submitted that when a consultant is providing medical care it is the consultant who is in control of the clinical decision. Mainpay does not assign control of the consultant to the end-client, in contrast to the position in Sally Moher and Adecco. He accepted that Mainpay had no control over clinical decisions, but submitted that neither did the NHS Trust.

106. The fact that Mainpay did not have control over clinical decisions is significant. It illustrates how consultants at the top of their profession operate in practice. Their role is to take clinical decisions and they will do that whether Mainpay supplied medical care or staff. In our view it is the framework within which the consultants operate which is more relevant.

107. Mr Firth drew an analogy with an emergency plumber engaged by a hospital though an agency to fix a leaking pipe. Despite Mr Firth's detailed and imaginative description, we do not consider that the analogy really throws any light on the issues we must resolve. More helpful were five propositions which Mr Firth invited us to draw from the analogy. Ms Newstead Taylor did not accept these propositions. We find as follows in relation to the five propositions:

(1) Control over the environment in which a service takes place does not amount to control over the service and does not affect the characterisation of the service. Hence, control over health and safety is not relevant to the characterisation of the service. What is relevant is control over the way in which a service is supplied.

We do not accept that control over the environment is necessarily irrelevant. Rules in place at a site where a consultant is working may not affect in any relevant way what is actually being provided, whether it is medical care or staff. However, to the extent that any rules in place directly affect the way in which a service is provided, that may be relevant in characterising the nature of the service provided, in our context whether it is medical care or staff. The evidence before us as to the requirement to comply with hospital health and safety rules was very general and it seems to us that it is consistent with both a supply of medical care and a supply of staff.

(2) The nature of a service is not characterised by the fact that the end-user can dictate when and where the service is provided.

A hospital will make arrangements for patients to be seen at clinics in various wards at various times. The role of the consultant is to treat those patients, and Mr Firth submitted that the service is supplied regardless of when and where the role is performed. We do not accept that such control is necessarily irrelevant. On the present facts, control as to when and where a consultant must work does tend to suggest a supply of staff, but it is not in our view a very strong indicator.

(3) Any limitation as to the range of solutions the user will accept from a service provider does not affect the characterisation of the supply.

Mr Firth submitted that local policies which the service provider must adhere to because of financial limits or by reference to an approved supplier list does not turn a supply of services into a supply of staff. We have some difficulty with this proposition on the facts of this case. Consultants may be subject to much less control in their day to day work than other workers, and indeed other medical practitioners. In practical terms, the occasions on which an NHS Trust might have to exercise such control are probably rare. Indeed, neither Dr Bily or Dr Berry could give an example of where it had happened. However, both accepted that their clinical decisions might be subject to local policies of the NHS Trust, for example in relation to prescribing extraordinary drugs. In our view it is significant that both Dr Bily and Dr Berry accepted that they were required to take clinical decisions within what Dr Berry described as the remit of the NHS Trust policies. They were required to at least take those policies into account.

(4) The fact a service provider uses the skills of other people in carrying out the service does not affect the character of the service supplied.

We broadly accept this proposition. Mr Firth acknowledged that treatment decisions might be a matter of consensus, engaging the skills of other medical professionals. However, he submitted that ultimate responsibility for a clinical decision lies with the consultant and that indicated a lack of control on the part of the NHS Trusts. We have already considered the significance of responsibility for clinical decisions. It is the framework within which such decisions are taken that is relevant.

(5) The organisational structure through which a service is delivered does not affect the characterisation of the service.

Mr Firth submitted that a consultant could be an employee of Mainpay or an independent contractor engaged by Mainpay. The end-user gets precisely the same service whatever the organisational structure. The extent to which the consultant reports back to Mainpay is irrelevant. We agree that whether the consultant is an employee or an independent contractor does not in itself affect the nature of the supply made by Mainpay. What is more important are the terms on which the supply is made. The 2010 contract was described as a contract for services which did not give rise to a contract of employment. KK agreed with Mainpay that he would accept the direction, supervision and control of A&E. The 2013 Contract was described as a contract of service giving rise to a contract of employment. KK agreed that he would abide by the reasonable and relevant rules and regulations of the NHS Trust's establishment, and that he would co-operate with requests made by the NHS Trust to the extent reasonably required to enable it to progress its work requirement.

108. In relation to the last proposition, the respondents contend that the 2010 Contract had the effect that Mainpay was engaging the services of independent contractors, not employees. Their case in relation to the 2013 Contract is that for the purposes of and in the context of this appeal only, the respondents are content for us to assume that locum consultants were employees of Mainpay. In any event, Ms Newstead Taylor acknowledged that the difference was not determinative of the issue as to the nature of the supply in this case.

109. Mr Firth referred us to a decision of the VAT & Duties Tribunal from 2004 in *Gambro Hospital Ltd v Commissioners of Customs & Excise* (4 May 2004). In that case the appellant company contracted to supply kidney dialysis and related services to an NHS Trust. It built and equipped a facility in Lewisham to provide those services. The appellant argued that the supplies were standard rated on the basis that what was being supplied was not medical care but the operation of healthcare facilities. HMCE argued that the supplies were exempt as supplies of medical care. The tribunal held that they were exempt supplies of medical care. The

essence of what was supplied was the treatment of patients, not the operation of a healthcare facility. It seems to us that this was a case of the NHS Trust outsourcing care services to the trader, and on the facts the trader was supplying medical care. It is far removed from the present facts.

110. Mr Firth submitted that it was "the essence of the supply" which must be identified, and responsibility for health and safety matters and the like was irrelevant to that question. He submitted that in this appeal, the essence of the supply was that the NHS Trust needed someone to diagnose and treat patients. In this regard, Mainpay was fulfilling precisely the same need.

111. We accept that the NHS Trust was looking for someone to diagnose and treat patients. However, it could obtain what it was looking for either through the supply of a consultant or the supply of medical care.

112. Ms Newstead Taylor submitted that Mainpay's business structure, being resident in Sark with no physical presence in the UK, meant that it could not exercise the necessary level of control over consultants consistent with a supply of medical care. Nor could Accuco or Awakino. It does not seem to us that is necessarily the case. Control, direction and supervision could in theory be exercised remotely.

113. Ms Newstead Taylor submitted that Mainpay's business was clearly based on a supply of consultants, not medical care. She relied in particular on the Mainpay Guide in which Mainpay described itself as "providing temporary workers (contractors) to recruitment agencies and end clients", and as "operating a high quality and tax-efficient payroll structure". In the Employee Handbook it described itself as providing "suitably qualified personnel to Recruitment Agency" which the agency then "places" with end clients. This was consistent with the anonymous employee interviews. We accept that this evidence points towards a supply of staff rather than medical care.

114. We also accept Ms Newstead Taylor's submission that it is not realistic to suggest that Mainpay would supply medical care without ensuring for itself that the consultant was suitably qualified to provide the medical care it says it was contracting to provide. The only documents Mainpay required consultants to provide when registering were documents relating to proof of identity, address and right to work in the UK. It did not check professional qualifications. At most, Accuco would check whether the consultant was on the GMC register. Further, is was not involved in appraisals, unlike A&E it was not provided with a copy of a consultants appraisal, and we are not satisfied that it had professional indemnity insurance for the provision of medical care.

115. Based on the evidence as a whole, including the contractual arrangements and the circumstances in which consultants worked, we are satisfied that throughout the Relevant Period consultants were under the control, direction and supervision of the NHS Trusts and operated within the framework of the NHS Trusts. They effectively became part and parcel of the organisations of the NHS Trusts which were themselves providing medical care to patients.

116. Mr Firth submitted that a conclusion that Mainpay was providing medical care and being paid to do so was consistent with Article 10 of the PVD which provides that employees shall not be regarded as carrying on an economic activity for the purposes of VAT. It states as follows:

> "The condition in Article 9(1) that the economic activity be conducted 'independently' shall exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability."

117. We accept that the effect of Article 10 is that the economic activity of a consultant employed by Mainpay is treated as part of Mainpay's economic activity for VAT purposes. Hence, the employee is not carrying on an independent economic activity for VAT purposes. We do not see how that can add anything to Mainpay's argument. The issue remains, whether Mainpay was supplying medical care or staff.

118. Mr Firth's overall submission was that for a supply of staff, the recipient must obtain a right of control and direction over the individual and the activities performed by the individual. The NHS Trusts had no such right of control and direction in this case. The consultants do not simply do as they are directed. They have the final responsibility for the medical care that is provided. No-one can overrule their clinical judgment or direct them to provide a specific treatment. Those clinical decisions might be taken in the context of national and local policies, but the consultant is entitled to take a different approach. Further, there was nothing in the A&E Agreement which gave A&E the right to control and direct the consultants. It was only if Mainpay granted such rights that control could pass to A&E and then on to the NHS Trust.

119. We do not accept this submission for reasons we have already given. In our view the question is not whether there is a transfer of control over clinical decision making, but over the way in which the consultant works. In cases such as this, operational control is more important than it might be in other cases. In particular, control over when, where and what work the consultant carries out. In our view the consultants engaged by Mainpay carried out their work within the framework of the NHS Trust, in the sense that they operated within the remit of local policies laid down by the NHS Trust. Mainpay's consultants were incorporated into the organisation of the NHS Trust in the same way as a consultant who might have been employed directly by the NHS Trust. Mr Firth described the question in terms of "what is the essence of the supply". Based on the evidence as a whole we regard the essence of the supply as being that of staff, rather than medical services.

120. We turn now to consider what Mr Firth called the purposive interpretation of the exemption, which involves applying an interpretation which is consistent with the objectives of the exemption and the principle of fiscal neutrality.

121. It was common ground that:

(1) the objective of the exemption is to reduce the cost of medical care, and

(2) the principle of fiscal neutrality requires supplies of similar goods or services to be treated the same for VAT purposes.

122. Mr Firth submitted that Mainpay's interpretation of the exemption so as to provide exemption for its supplies in this case furthered the purpose of the exemption, namely reducing the costs of medical care.

123. In our view it is not inconsistent with the purpose of the exemption for the supplies in the present case to fall outside the exemption. Mr Firth did not submit that it was not possible for Mainpay to supply consultants as staff, or indeed for the NHS to require a supply of staff rather than medical care. Clearly a supply of staff would come with an additional VAT cost but that is effectively a choice for the parties involved which will depend on the nature of the agreements entered into by the parties. We do not know whether A&E charged VAT on its supplies to the NHS Trusts. Whether it was payable would depend on an analysis of the contractual arrangements between A&E and the NHS Trusts.

124. In relation to fiscal neutrality we were referred to the following paragraphs from the judgment of the CJEU in *Pro Med Logistik GmbH* Case C-454/12 as a summary of the principle:

"52 According to well-established case-law, the principle of fiscal neutrality precludes, in particular, treating similar goods or supplies of services, which are thus in competition with each other, differently for VAT purposes (see Joined Cases C-259/10 and C-260/10 *The Rank Group* [2011] ECR I-10947, paragraph 32 and the case-law cited).

53 In order to determine whether two supplies of services are similar within the meaning of that case-law, account must primarily be taken of the point of view of a typical consumer, avoiding artificial distinctions based on insignificant differences (see *The Rank Group*, paragraph 43 and the case-law cited).

54 Two supplies of services are therefore similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other (see *The Rank Group*, paragraph 44 and the case-law cited).

55 In addition, it must be observed that the assessment of the comparability of the services supplied hinges not only on the comparison of individual services, but also on the context in which those services are supplied (see Case C-357/07 *TNT Post UK* [2009] ECR I-3025, paragraph 38)."

125. The principle of fiscal neutrality was recently applied by the FTT in *Done Bros (Cash Betting) Limited v HM Revenue & Customs [2018] UKFTT 406 (TC)*, to which we were referred. The FTT held that versions of gambling games played on fixed odds betting terminals and online were to be treated in the same way for VAT purposes.

126. Mr Firth compared the present supply to the supply of a self-employed locum in the NHS. He submitted that a self-employed locum would be making exempt supplies of medical care, as would a locum supplied through a personal services company. He said that these were accepted as supplies of medical care by the VAT Tribunal in Gambro in relation to doctors at [28] where it said in the context of who was the recipient of the supply: "… a self employed consultant may well supply his services to a hospital for VAT purposes rather than to an individual but those services will still consist of the care of natural persons". He submitted the position should be no different where a locum was providing services through Mainpay and the placement was found via an agency such as A&E. Fiscal neutrality required Mainpay to be treated in the same way.

127. Ms Newstead Taylor submitted that there was no evidence that self-employed consultant locums do supply their services to the NHS and in any event HMRC do not accept that supplies by self-employed consultant locums or through personal service companies are exempt. On that basis she submitted that the principle of fiscal neutrality was not engaged.

128. Dr Berry did give evidence that on one occasion he had provided his services to the NHS as a self-employed locum. We had no details as to the circumstances in which he did so or as to the VAT treatment of those supplies. In any event, we do not consider that Mainpay's reliance on fiscal neutrality assists it in this appeal. Fiscal neutrality requires the two supplies being compared to have similar characteristics, from the point of view of a typical consumer.

129. It is not agreed in this case that supplies by self-employed consultant locums direct to NHS Trusts or through personal service companies are exempt from VAT. In those circumstances it is not clear to us that we can make a finding as to the VAT treatment of those supplies in order to rely on fiscal neutrality. We have not heard any evidence as to the circumstances in which such supplies might be made. In Done Brothers (Cash Betting) Ltd and in *Revenue & Customs Commissioners v Rank* C-259/10 and C-260/10 to which Mr Firth

referred, the VAT treatment of the comparator was common ground and the question was whether the supplies were similar to the comparator. That is not the position here.

130. Further, we had no submissions as to whether the typical consumer of the supplies was the NHS Trust or the patient. Nor do we have sufficient evidence as to the circumstances in which self-employed consultant locums might supply their services to the NHS to say that the two services are similar. In any event, if there is a supply of staff, with the NHS Trust having the power of control, direction and supervision over the consultant, we struggle to see that is similar to a supply of medical care where the NHS Trust has no such power of control, direction and supervision. As Ms Newstead Taylor suggested, a patient might be concerned to think that it was Mainpay who was responsible for the medical care being received and who had a power of control, direction and supervision over the consultant, rather than the NHS Trust. Mainpay had no relevant qualifications or experience to exercise such a power.

131. Finally, we turn to the position of GP Specialists engaged by Mainpay. In the absence of any evidence in relation to GP Specialists, Mainpay has not satisfied us that in relation to their work it makes a supply of medical care as opposed to staff.

CONCLUSION

132. For the reasons given above we consider that in relation to consultants' services Mainpay supplied staff and not medical care in the Relevant Period. That supply was standard rated for VAT purposes. We are not satisfied that the position is any different in relation to GP Specialists. In the circumstances we dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

133. 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: 29 April 2020