NCN: [2021] UKFTT 369 (TC)

TC 08300

INCOME TAX and NATIONAL INSURANCE – sections 48-61 ITEPA 2003 – intermediaries legislation – IR35 – television presenter – personal service company – hypothetical contract – whether presenter would have been regarded as an employee if engaged under a contract directly with the television company – mutuality of obligation – control to a sufficient degree – whether unfettered right of substitution – appeal dismissed in principle

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/05772
& TC/2019/01807

BETWEEN

LITTLE PIECE OF PARADISE LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE HEIDI POON
SIMON BIRD

The hearing took place on 22 and 23 October 2020

With the consent of the parties, the form of the hearing was V (video) on the remote platform hosted by the Video Hearings Service of HMCTS. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Anthony Paine, of Chamber HB Ltd, for the Appellant

Ms Sadiya Choudhury, Counsel, instructed by HM Revenue and Customs' Solicitor's Office and Legal Services for the Respondents

DECISION

INTRODUCTION

1. The conjoined appeals are by Little Piece of Paradise Limited ('LPPL' or 'the appellant') against the following decisions by the respondents ('HMRC'):

   (a) Determinations under Regulation 80 of the Income Tax (PAYE) Regulations 2003 in respect of income tax deductible via Pay As You Earn (the 'PAYE determinations'); and

   (b) Notices under section 8(1)(c) of the Social Security Contributions (Transfer of Functions) Act 1999 in relation to the associated National Insurance Contributions payable on earnings subject to PAYE (the 'NIC notices').

2. The determinations and notices relate to arrangements entered into between LPPL and Sky TV Limited ('Sky') for the provision of the services of Mr Dave Clark as a presenter. The principal issue in this appeal is whether on the facts the intermediaries legislation applies to the relationship between Mr Clark, LPPL and Sky. If the legislation (commonly known as 'IR35') applies, then tax liabilities to income tax and national insurance contributions arise for LPPL.

3. The overall quantum under appeal is £281,084.48 (not including interest), and relates to five tax years with the amounts of PAYE and NICs being assessed as follows:

	Tax year	Date of notice	PAYE	Class 1 NIC	Class 1A NIC
1	2013-14	21 March 2018	£31,609	£16,579.83	
2	2014-15	26 February 2019	£40,847	From 6 April 2014 to	From 6 April 2014
3	2015-16	26 February 2019	£39,880	5 April 2018	To 5 April 2016
4	2016-17	26 February 2019	£37,450	Aggregate 4 years	Aggregate 2 years
5	2017-18	26 February 2019	£35,914	Total of £77,067.51	Total of £1,737.14
		Category Total	£185,700	£93,647.34	£1,737.14

4. The determinations and notices under appeal were based on the appellant's turnover for the relevant years. Following the lodgement of the Statement of Case, the appellant's agent provided the figures for the actual amounts paid by LPPL to Mr Clark, which would give rise to higher amounts of PAYE and NICs due for each year, subject to deductions of pension contributions made by LPPL to Mr Clark's personal pension scheme. Notwithstanding the sums of the determinations and notices under appeal being noted above, parties are agreed that these figures are subject to amendments and have invited the Tribunal to deal with the appeals in principle. The question of quantum may be referred back to the tribunal if necessary.

LEGAL FRAMEWORK

5. The intermediaries legislation in relation to income tax is by reference to section 49 Income Tax (Earnings and Pensions) Act 2003 ('ITEPA'), which provides 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 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 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.

6. The equivalent provision for national insurance purposes is under regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000 (the '2000 Regulations'). The statutory wording of s49 and reg 6 is similar, but not identical. Neither party seeks to draw on the differences[1] in the wording between s49 and reg 6; both parties have proceeded on the basis that if s49 ITEPA applies in this instant case, then reg 6 of the 2000 Regulations also applies.

WITNESS EVIDENCE

7. For the appellant, Mr Clark was called as a witness and was cross-examined. We find Mr Clark a credible witness; he gave his answers to questions put to him in a direct and straightforward manner, and we accept his evidence as to matters of fact.

THE FACTS

Background

8. Mr Clark is a well-known sports presenter and commentor, and he first started working for British Sky Broadcasting Limited ('BskyB') in July 1988, which changed its name to Sky TV Limited ('Sky') on 5 February 2015. Prior to the incorporation of LPPL, Mr Clark had undertaken work with Sky on a self-employed basis by rendering invoices.

9. At the request of Sky, LPPL was incorporated on 9 June 2003 to be a personal service company ('PSC') for Mr Clark to provide his broadcasting services. The two directors and shareholders of LPPL are Mr David John Clark and Dr Carolyn Edwards. Mr Clark is the majority shareholder owning 70% of the appellant. From 2003 onwards, Mr Clark has been providing his services to Sky through the appellant.

The Framework Agreements

10. The contractual arrangements for the provision of Mr Clark's services to Sky were governed by the relevant 'Services Agreement' in force at a particular time. There were three agreements in place to cover a six-years period, (spanning over the five tax years in question).

(1) The agreement for the period 1 August 2012 to 31 July 2014 (the 'First Contract');

(2) The agreement from 1 August 2014 to 31 July 2016 (the 'Second Contract');

(3) The agreement from 1 August 2016 to 31 July 2018 (the 'Third Contract').

11. The three agreements adopted the same format with three constituent parts: (a) the Key Terms to define the parties to the contract, the period covered, and the fee payable, etc., and the dates and signatures of the contracting parties; (b) the Terms and Conditions; and (c) the Schedule, being a Non-Disclosure Agreement ('NDA') between Sky and Mr Clark.

[1] We note the observation by Henderson J in *Dragonfly Consultancy Limited v Revenue and Customs Commissioners* [2008] EWHC 2113 (Ch) that depending on the specific circumstances, the differences in the wording between s49 and reg 6 may give rise to different conclusions as to the applicability of the IR35 legislation.

The Key Terms

12. The Key Terms of the First Contract identify the contracting parties as Sky and LPPL ('The Company') with the 'Personnel' as 'Dave Clark'. Other key terms relevant to the consideration of the Contract are:

(1) *Assignment* – 'The Assignment will be from 1st August 2012 to 31st July 2014 on an ad hoc and when required basis. For the purposes of this Agreement, "Year" means each consecutive 12 month period commencing 1st August each year.'

(2) *Services* – 'The Company shall provide the services of the Personnel as a commentator, presenter, interviewer, guest, or other participant in the making of any editorial, programme or video whether in vision or audio and whether in a studio or on location, live or recorded during the Assignment.'

(3) *Fee* – 'Year 1 – 1st August 2012 to 31st July 2013 £155,000

Year 2 – 1st August 2013 to 31st July 2014 £160,000

to be paid monthly in arrears during the Term by transfer to the designated bank account notified by the Company to Sky.'

13. In the Second Contract, the Fee under Key Terms was stated to be £150,000 for each of the two years; namely: August 2014 to July 2016. In the Third Contract, the Fee for Year 1 (to July 2017) remained at £150,000, and for Year 2 (to July 2018) was increased to £155,000.

Terms and Conditions

14. Clause 1 in the First Contract[2] set out the terms of engagement as follows:

> '1.1 The Company shall use best endeavours to use the Personnel specified in the Key Terms to provide the Services. However, the Company has the right to propose other employees or sub-contractors … to perform the Services.
>
> 1.2 If the Company makes a proposal under clause 1.1, Sky will have the right to assess the suitability of the substitute prior to the substitution. If Sky find the substitute to be suitable, they will confirm this in writing. …
>
> 1.3 The Company agrees that all Personnel performing the Services shall be engaged by the Company, provided however, the Company may sub-contract performance of the Services to an independent third party if Sky's prior written consent has been obtained.
>
> 1.4 In the event that the Company sub-contracts the performance of the Services … , the Company shall procure that the sub-contractor shall ensure that any Personnel supplied by such sub-contractor shall, prior to entering into any such sub-contracting agreement … , sign a Non-Disclosure Agreement in the form attached as Schedule hereto …
>
> 1.5 Without prejudice to the provisions of Clauses 7 and 9 below, the Company shall procure that all Personnel shall, prior to performing the Services, sign the Non-Disclosure Agreement in the form attached as a Schedule thereto.
>
> 1.6 The Company agrees to protect, defend, indemnify and hold Sky harmless from and against all claims, liabilities, demands, causes of action, losses and/or damages and all costs and expenses … arising from any failure of the Company to comply with this Agreement including Clauses 1.4 and 1.5 or any

[2] The First Contract was entered into in June 2012 prior to Sky's change of name, and the designation of 'BSkyB' was used to refer to the broadcasting company in the contract. For convenience and consistency, BSkyB in the contract is here substituted by the designation of 'Sky' in the citation.

breach of a Non-Disclosure Agreement.' (underlining original in the Third Contract)

15. Clause 2 stipulated the 'Company's Duties and Obligations', and the list under clause 2.1 was extended beyond television and radio to include 'print media and/or betting services' in the Second and Third Contracts.

> '2.1 The Company shall procure that the Personnel shall provide the Services to Sky during the Assignment for *exclusive exploitation* within the UK, the Republic of Ireland, the Channel Islands and Isle of Man ("Territory") and for non-exclusive exploitation outside of the Territory. The Company shall procure that neither the Personnel nor any former Personnel shall be involved directly or indirectly in the provision of any services to any other television and/or all radio organisation and/or all media organisations during the Assignments for exploitation inside or outside the territory where such services are the same as or similar to the Services, without the prior written consent of the Head of Sky Sports, such consent not to be unreasonably withheld. *This Clause 2.1 is not intended to limit the personnel from providing their services to any other entity that is not a provider or distributor of television and all radio services, provided that such services do not interfere with the provision of the Services, as determined by Sky*.
>
> 2.2 The Company agrees that Sky would be entitled to *injunctive relief* to enforce the terms of clause 2.1 and acknowledges that damages would not be an adequate remedy. During the period of any such restrictions *Sky will continue to pay the Daily Rate or Fee*, as appropriate.
>
> 2.3 The Company agrees that there exists no employment agreement or relationship between the Personnel and Sky or any Associated Company …
>
> 2.4 The Company shall correct defective work in its own time and at its own expense. Sky reserves the right to offset losses sustained as a result of the Company's actions, breach or unsatisfactory performance from the Fee or Daily Rate without prejudice to any other remedies which Sky may have for such breach or unsatisfactory performance.
>
> [2.5] …
>
> 2.6 The Company shall procure that the Personnel shall travel to and perform the Services at any destination both inside and outside the Territory and as such time in dates (including bank holidays and weekends and anti-social hours) as may be required by Sky.
>
> 2.7 Notwithstanding any other provision of this Agreement, Sky *shall have first call* on the Company's personnel for the provision of the services. …
>
> 2.8 The company grants to Sky the *exclusive right* in the Territory during the Term (and thereafter in perpetuity for archive, library and programming purposes) to use an exploit and authorise others to use an exploit the image rights to advertise and promote Sky programmes and services generally for the purposes of this Clause 2.8. "Image Rights" means the exclusive right to use and exploit the voice, nickname, name, image (including any footage of performances), appearance, autograph, biography, biographical material, photograph, likeness or other representation or relevant details of the personnel in each case in whatever format or media, in whatever capacity, on *an unlimited basis*.
>
> 2.9 The Company shall not and shall procure that the Personnel does not use any social media service to discuss Sky, [and their associates] and/or any sports rights holder and/or any related matter other than in accordance with

> any direction or guidelines of Sky from time to time and/or without the prior written consent of Sky. *This is a material term of this Agreement*.' (all italics and underlining added)

Fees and payment terms

16. Clause 3 provided for the payment of the Fee as specified in the Key Terms, that being '*a Fee [that] has been agreed in writing for the whole Term*', together with 'any expenses incurred in connection with the provision of the Services' which were to be agreed in writing in advance with Sky. The Fee, exclusive of VAT, was payable 'in equal monthly instalments if the Term is to continue for more than one calendar month in arrears following the submission' of an invoice by LPPL to Sky. By clause 3.3, LPPL was obliged to ensure that all legal requirements as set out in the Working Time Regulations 1998 for any personnel providing services to Sky would be met.

17. Clause 3.6 is relied upon by the appellant as providing Sky with the right to reduce the fee payable pro-rata if no service was provided to Sky. Clause 3.6 states as follows:

> '3.6 [Sky] shall pay the Daily Rate or Fee and all other payments due to the Company … within thirty (30) days after the receipt by Sky of a proper invoice … provided that the Services have been provided in accordance with this Agreement (and where not so provided reduced on a pro-rata basis) and such invoice is undisputed by Sky….' [the 30 days in the First Contract was changed to 45 days in the Second and Third Contracts]

18. As to expenses, the First and Second Contracts stated simply under clause 3.1 that the fee would be paid 'together with any expenses reasonably incurred in connection with the provision of the Services, provided any such expenses are agreed in writing in advance with Sky'. The Third Contract contained more specific terms under clause 3.1 to state:

> 'In addition, Sky shall reimburse the Company for expenses reasonably incurred in providing the Services provided that:
>
> 'a) unless otherwise agreed in writing by Sky, all bookings in respect of travel and accommodation must be made directly by Sky on behalf of the Personnel and shall be made in accordance with the Sky travel and expenses policy from time to time; and
>
> b) all other expenses must be pre-agreed in writing with Sky, be in accordance with Sky's expenses policy and shall be subject to the supply of receipts.'

Warranties

19. Clause 4 of each Contract set out the terms of the warranties to be provided by LPPL:

> '4.1 the Services will be rendered to the best of the Company's and the Personnel's abilities and all directions and requests given by Sky or its nominees will be complied with;
>
> 4.2 neither the Company nor the Personnel … will enter into any arrangement or take any action which might inhibit or restrict the exercise by Sky of its rights or the performance by the Company of its obligations pursuant to this Agreement;
>
> 4.3 the products of the Services shall not contain anything which is defamatory, obscene, discriminatory … shall not infringe any rights of copyright, moral rights or rights of privacy of any person or legal entity;
>
> […]

> 4.5 … neither the Company, nor the Personnel, … shall enter into any arrangements or take any action which may restrict Sky's rights hereunder or its exploitation of the products of the Services whatsoever;
>
> 4.6 … the Company and the Personnel will keep Sky informed of its or their addresses, telephone numbers and other contact details to enable Sky to contact all parties including at short notice if required; …'

20. In the Second and Third Contracts, additional warranties were included under clause 4.1 whereby the 'Personnel'–

> '4.1(i) … will comply with all of Sky's reasonable directions during the provision of the Services including only wearing clothing supplied or approved by Sky and not wearing anything capable of being perceived as an advertisement … or inconsistent with Sky's regulatory and/or legal obligations; and
>
> 4.1 (j) … whilst on any of the locations and premises where the Services are required, observe all rules and regulations … and observe all directions as may from time to time reasonably be given by or on behalf of Sky or its nominee.'

Termination

21. Clause 5 set out the circumstances for termination of the contract, which included:

> '(a) the Company is unable to provide the Services for a period in excess of 4 weeks by reason of ill health, mental or physical incapacity of the Personnel or other cause or by reason of the facial or physical appearance or voice of the Personnel becoming altered in any way so as, in Sky's reasonable opinion, to affect his performance of the services under this Agreement and the Company is unable to provide a substitute to Sky;
>
> (b) the Company becomes … insolvent …
>
> (c) the Company materially breaches this Agreement; [and fails to remedy such breach within 7 days];
>
> (d) production and/or transmission of any of the sports programmes broadcast by Sky in respect of which the Services are to be provided are prevented, interrupted or delayed for a period in excess of one month by any cause outside Sky's control and/or Sky ceases to hold the broadcasting rights in respect of such sports; and
>
> (e) the Personnel is guilty or is alleged in any public media to be guilty of any serious or persistent misconduct, …or is convicted of a criminal offence or brings himself, [or Sky] into disrepute.'

22. Clause 6 provided for 'the obligations upon termination', whereby LPPL shall deliver up to Sky all papers and property belonging to Sky or received from any third party, and a specified list of data and information.

Confidential information and Non-solicitation

23. Clause 7 provided for the protocol governing the handling of confidential information that the Company may come into possession during the term of the contract.

24. Clause 8 in the First Contract stipulated as follows:

> 'The Company agrees it will not, and undertakes to procure that the Personnel and any former Personnel will not, during the continuance of this Agreement and for the period of twelve (12) calendar months thereafter, solicit for employment or otherwise any employees, consultants, directors or officers of Sky or any Associated Company who are of a senior level or with whom the

> Company or any of the Personnel or former Personnel (as appropriate) had material contact in the course of providing the Services or who are aware of Confidential Information.'

25. The clause for non-solicitation within the framework agreement was expanded significantly under the Schedule of NDA whereby Mr Clark would agree to the terms for 'non-solicitation and non-compete' as related below.

Status and tax liabilities

26. Clause 9.1 of each Contract contained express provisions to set out parties' intentions as the effect to be given by the agreement, whereby: 'the parties declare that, during the continuance of the Agreement, [Mr Clark] shall be an employee or sub-contractor of the Company', and that LPPL 'shall be solely responsible for all matters relating to [Mr Clark's] employment/engagement'.

Intellectual property

27. Clause 10 stated that 'the Company agrees and will procure that the Personnel agrees to':

> (a) assign to Sky 'with the full title guarantee by way of a present assignment of future copyright, the entire copyright, related rights and all other intellectual property rights';
>
> (b) irrevocably and unconditionally waive all moral rights throughout the world in, and to, the products of the Services;
>
> (c) grant to Sky consent under the Copyright Designs and Patents Act 1988 to enable Sky to make the fullest use of the Services provided under the Agreement;
>
> (d) warrant not to infringe on copyright and other intellectual property rights in the course of the provision of Services;
>
> (e) grant to Sky 'the right to use and reproduce photographs, reproductions of the Personnel's physical likeness and recordings of their voice(s) and name, signature and biography exclusively for and in connection with the advertising, merchandising, exhibition and commercial exploitation' of Sky programmes and/or services in such manner and media for such purposes as Sky may require throughout the world'.

Schedule of Non-Disclosure Agreement

28. The Schedule of Non-Disclosure Agreement formed part of the framework agreement between Sky and LPPL and is common to the three Contracts. The parties to the NDA were Sky and Mr Clark, and the NDA replicates the relevant key provisions under the framework agreement such as the non-disclosure of confidential information, the consent, assignation, and grant of rights (copyright and intellectual property) to Sky for 'the commercial exploitation of the services in such manner and media and for such purposes as Sky may require throughout the world'.

29. The 'non-solicitation' clause 8 in the Contracts was significantly expanded to encompass 'non-compete' provisions under paragraph 4.2 of the NDA. The wording for the non-compete provisions in the NDA was the same to all three contracts, except that in the NDA Schedule to the First Contract the words 'and/or betting' (as underlined below) were absent.

> 'I acknowledge and agree that I have a reputation in the market place as an expert and command audience share. I further acknowledge that during the Term *I will have become associated in the minds of the public with Sky Sports* and will gain knowledge of the Sky Sports methodology and unique practice and that should I cease to provide the Services during the Term that will

> damage Sky Sports' commercial interest, I therefore agree that should I cease to provide the Services (other than at Sky's request) during the Term I will not until the end of the Term to be involved *directly or indirectly in the provision of any services to any other television and/or radio organisation, print, media and/or betting organisations for exploitation inside or outside the Territory where such services are the same as or similar to the Services*, *without the prior written consent of the Managing Director of Sky Sports*, such consent not to be unreasonably withheld. This paragraph 4.2 is not intended to limit me from providing my services to any other entity that is not a provider or distributor of television and/or radio services, *provided that such services do not interfere with the provision of the Services as determined by Sky*. I agree that Sky would be entitled to injunctive relief to enforce the terms of paragraph 4.2 and acknowledge that damages would not be an adequate remedy.' (italics and underlining added)

Responses from Sky

30. By attachment to a letter dated 18 October 2017, Sky responded to the questionnaire from HMRC in relation to the enquiry opened into the Mr Clark's returns. In respect of the contractual arrangements, Sky stated that 'changes to Mr Clark's contract were due to the fact that he no longer was to present boxing'; that 'the contract was on a fixed fee basis'; 'there are no provisions within the contract to reduce fees on the basis of a no-show by Mr Clark'; that Mr Clark was not required to work a minimum or maximum of days under the contract; that his services would be on an ad-hoc basis and dependent on the events in the darts calendar.

31. Other substantive responses by Sky are incorporated into the relevant parts of the factual matrix, and some salient responses in Sky's own words included the following:

(1) *Substitute* – 'Sky would only accept a substitute if entirely comfortable that any proposed alternative was fully competent to carry out the engagement'; and that 'Sky would always pay the presenter directly'.

(2) *Editorial guidelines* – no formal process is followed to make presenters aware of Sky's Standards and Working Practices.

(3) *Research carried out* – no prescribed research requirements as part of the role, but presenters are expected to have a broad knowledge of sports, and any related subject matter, and that their research will be 'self-led' and carried out in their own time; 'deep specialist knowledge of the particular sports' is a requirement of the role.

(4) *Correction of defective work* – the standard clause is inserted for all on-air talent contracts whether or not the services are provided live or pre-recorded. 'This is intended to protect Sky's position in the event that the talent did make an error or overrun on time in a context where it would be possible for them to correct that error prior to broadcast.'

(5) *On replacement* – the production team will draw up a schedule of sports events at the start of, and on an ongoing basis, during the season; the team would schedule coverage from 'a roaster of presenters in advance'. Where a particular presenter was unavailable to attend a particular event, Sky would redirect the request to an alternative presenter to ensure that all scheduled events were covered.

(6) *On production* – the process is a collaboration between the presenter and the production team; the presenter's ideas will be considered and discussed in proposing a running order for the programme. Due to the format of the live sports coverage, the presenter may have some ability to change the actual running order, but 'this is typically in collaboration with the Sky production team'.

(7) *Scripts used on the programme* – Dave Clark's role involved him presenting in his own words; he may make his own notes and scripts for certain sections and reference to them while on-air, but large sections of the programme would be ad-lib.

Work Arrangements in Practice

Determination of where and when

32. In relation to the Contracts with Sky, while each contract provided for a fee each year for performing the Services, in practice this had resulted in LPPL providing Mr Clark to Sky as a presenter for Darts and initially also Boxing coverage. (The last Boxing show covered by Mr Clark was in 2014.) For the duration of the contracts in question, Mr Clark had been the lead presenter of the Professional Darts Corporation's ('PDC') events covered by Sky.

33. The PDC events were a major feature for Sky Sports. The PDC events were organised by the corporation, and the governing body released the PDC calendar, which would provide details of the location, the date and time of the events in advance for any broadcasting coverage to be scheduled. During the contractual periods in question, Sky would determine which PDC competition events it would cover from the PDC calendar. There was no reference in the Contracts as to how many sessions Mr Clark would present in a year.

34. In practice, Sky only covered 64 days a year of 'the big events', and Mr Clark agreed that the 64 days represented 'the largest proportion of [his] working time'. The 64 days per annum would normally be the total working days resulting from the relevant contracts. The dates and the locations of the events were pre-determined according to PDC calendar. While many locations were in the UK: London, Exeter, Cardiff, Liverpool, Manchester, Birmingham, Glasgow, Aberdeen, Belfast, and so on, some big events were on the continent: Rotterdam (Premier League), Frankfurt (World Cup). Mr Clark said it was the PDC calendar that told him where to go; that he would 'always turn up' and 'proud to be there at the right time'.

35. An event on the PDC calendar was always broadcast live from the location as a 'live feed'. If an event overran, Mr Clark said it was what it took, and he remembered an event continuing to one o'clock in the morning, and that there was no additional fee payable.

How the work was carried out

36. To prepare for his presentations, Mr Clark said on average every event would require one day of preparation; that part of his research involved studying data produced by Alston Eliot as the provider of the scorings for PDC; it was 'very meticulous homework' which he carried out in his work studio at home, where he would also make phone calls to the darts players in advance of covering an event; that all homework was done by him personally at his home studio, which required computers, internet connection, a filing system where he keeps all his notes, and equipment for recording with editing facilities.

37. The input from Sky in term of production included:

(1) The producer usually decides which guests to interview, and Mr Clark decides what questions to ask the guests. Sky described the interview as often based on a 'collaborative approach' between the presenter and the guest.

(2) The set department (designers and producers) organise all aspects of the studio and layout.

(3) Advertising breaks are agreed with the PDC in advance. The producer would decide what advertising announcements to be made by the presenter, and communicate this by email. While Mr Clark could refuse to make the announcements, in practice Sky had no experience of this happening in the past.

(4) The broadcasts are on locations rather than in a studio. Little control over changes regarding lighting and cameras, but it would be unlikely for anyone to overrule an instruction to do with a technical aspect of a broadcast.

38. Sky expects a presenter to be aware of the legal framework in which all broadcasters have to operate for live TV. Sky Sports coverage is intended to have a live conversational style and presenters are expected to 'project their own individual styles whilst ensuring journalistic standards and regulatory requirements are met'.

39. The Ofcom Guidelines were referred to by Mr Clark as the 'code', the 'rules of broadcasting' and that he was aware of, and would abide by, and that he was 'self-educated' of the requirements under the code, but that there was no regular update from Sky in relation to the Ofcom Guidelines.

Payment of fees

40. As to the payment arrangement, a general pattern emerged whereby LPPL rendered invoices monthly to Sky. In other words, there would be 12 payments for the 64 days of presenting services in any one year. Every invoice bears the same description as for 'Presenting services of Dave Clark', though the timing of invoices showed slight variations, for example:

(1) Invoice number 188 was dated 1 April 2014 (in advance) for 'Presenting services of Dave Clark for period 1 to 30 April 2014 for £13,334 and VAT of £2,666.80;

(2) Invoice number 190 was dated 22 May 2014 (in mid-month) for period 1 to 31 May 2014' for £13,334 and VAT of £2,666.80;

(3) Invoice number 191 was dated 3 June 2014 (in advance) for period 1 to 30 June 2014' for £13,334 and VAT of £2,666.80.

41. The monthly rate changed from £13,334 to £12,500 from around August 2014, and there were periods when two months were invoiced together.

(1) Invoice number 193 was dated 25 September 2014 for August and September 2014, each month at £12,500 plus £2,500 VAT, making the grand total for this invoice £30,000.

(2) Invoice number 194 was dated 14 October 2014 for October for £12,500 plus VAT;

(3) Invoice number 195 was dated 4 December 2014 for the months of November and December 2014 for £30,000 in total.

42. The listed events on PDC calendar were not all covered by Sky Sports. For example, in February 2017 Sky Sports covered only 4 out of the 14 PDC events. In cross-examination, it was highlighted that in August and September 2017, there were no fewer than 16 PDC events but none of which were covered by Sky. The question was put to Mr Clark that the Contract gave no basis for reading that fee payments were contingent upon the rendering of services; that monthly invoices would have been rendered for August and September 2017, just like other months, even though no PDC events were covered in those months. Mr Clark disagreed, and said that he thought it was a case of 'no show, no pay', though he did not dispute that there were 12 payments for the 64 days of presenting services.

'Substitution'

43. When asked about the provision of substitute of Mr Clark to cover an event, the example on the occasion of 'double sessions' in a world championship in 2015 was given, where Mr Clark was the presenter from 7pm to midnight, and LPPL 'recommended a substitute' (Rod Studd) to provide cover from 1pm-5pm. Mr Clark stated that Mr Studd was 'initially a commentator' for Sky Sports and his name was suggested to be a substitute.

44. Sky's response in relation to Rod Studd presenting part of the darts events was to say:

> 'Cover was provided for specific afternoon darts broadcasts which Dave Clark was not able to present. This was *ad hoc* and on some occasions other presenters were also used.
>
> Rod Studd was already known to Sky and working on a freelance basis. For the presenting shifts which he agreed to work in place of Dave Clark a separate fee was negotiated between Sky and Rod Studd. Sky paid Rod Studd for these additional services.'

45. Mr Clark said there were 'only 10 days a year' when a 'substitute' was called on, such as in tournament events, and that the 'substitutes' would render their invoices direct to Sky. This part of his evidence was challenged by Ms Choudhury, as she put it, that Mr Studd was brought in 'to bolster the Darts team in Sky' and was 'another member of the team' rather than a substitute. In response, the appellant relied on the statement provided by Mr Studd dated 16 June 2017, wherein Mr Studd stated as follows:

> 'Dave Clark approached me in 2015 as due to health issues he was unable to continue to present double sessions on certain darts competitions. He asked me if I would be willing to cover for these and it was agreed that I would. The arrangement was settled and followed through.
>
> It was also agreed that there would be a reciprocal arrangement that we would cover each other for sickness or family crisis etc.
>
> While the former was long term and arrangements made such that BskyB would make payment the latter was on the understanding that payment would be between the parties on a per diem basis.'

46. Mr Clark maintained that Rod Studd was 'known to Sky but not in the context of Darts presentation'; that Studd was 'presented to Sky' by Mr Clark as a substitute due to the 'progressive effect of Parkinson's' on Mr Clark; that once the substitution was agreed with Studd, Sky 'chose to fill the afternoon session' with Studd; that it 'became a pattern', with the programme between 'split between two personnel'.

Other relevant factors

47. Mr Clark did not possess any pass for entry into Sky premises. If a meeting is arranged by Sky for Mr Clark to attend, he would receive an email with details for access. To gain access, Mr Clark would need to either present the email at the reception, or scan the QR code, or enter the booking reference at the 'check-in stands'.

48. Mr Clark is not required to attend rehearsals, as darts is an 'outside' broadcast and any rehearsals would be for technical issues such as equipment and system checks. Mr Clark's attendance at any press conference was on a voluntary basis. As to media events, Sky replied to say that Sky Sports might ask Mr Clark to attend a media event such as the World Championship, but 'attendance would be at [Mr Clark's] discretion'. To Sky's knowledge, Mr Clark has not attended any promotional events.

49. Mr Clark is not required by Sky to provide any equipment. Ear-pieces and microphones are supplied to presenters by Sky on the basis that the equipment needs to be compatible with the other studio facilities. Special adjustments were made to the ear-pieces and microphones to assist Mr Clark with his condition. Mr Clark said his microphone did not have Sky's logo.

50. There was no clothing allowance; Mr Clark normally paid for his own clothes, though 'performance clothing' had been invoiced. When appearing on Sky Sports, Mr Clark wears a Sky uniform (specifically a coat) and uses microphones with Sky logos on. During cross-examination, video footage was played which showed that the 'performance clothing' worn by Mr Clark, which Mr Clark referred to as his 'wardrobe on air' and the shirts would only be

used on air to keep them looking nice. Ms Choudhury, however, challenged the fact that the wardrobe on air was not specialist clothing, and 'no reasons not to wear them elsewhere'.

51. Wikipedia refers to Mr Clark as 'a Sky Sports News presenter', and 'the anchorman for boxing and darts coverage'. Certain media articles in the public domain are also lodged as evidence to show the public perception of 'Dave Clark' as 'Sky Sports darts frontman', and 'the face of Sky's Darts coverage'. In an article in February 2018 by the Sports Writer, Mike Walters on social media who interviewed Mr Clark in relation to the five years since his diagnosis of Parkinson's, Mr Clark was reported to have said:

> 'Employers who look for the exit door when an employee is diagnosed with Parkinson's are out of order. Mine was enlightened enough to offer me a new contract.'

52. Two digital articles from the Guardian were included. The one dated 12 September 2012 was about Sky being 'dropped' for the contract to broadcast Premiership rugby from 2013 in favour of BT, and the one dated 1 August 2017 reported Amazon Prime streaming service outbidding Sky 'to win exclusive ATP tour tennis rights' to show all elite men's tennis events except the four grand slams, (ATP stands for The Association of Tennis Professionals). Mr Clark was asked in cross-examination whether he knew whether the presenters covering the rugby and tennis events in Sky Sports had been retained, or whether they also lost their contracts. Mr Clark was unable to confirm either way, but indicated that it was likely that some of the presenters would have moved on to continue the coverage with the winning channels.

Change to Contract

53. In November 2018, an announcement letter was issued by Sky to 'Sky Sports Talent' to notify all 'on-air talent' (including Mr Clark) of the change to be implemented by April 2020. The change followed from the requirement by HMRC for the Public Sector Broadcasters (the BBC and Channel Four) to assess whether all their workers on PSC contracts should be treated as employees being extended to the private sector broadcasters like Sky. The announcement stated that:

> 'The assessment … is restrictive and means in practice, that nearly all on-air talent currently engaged via PSCs will no longer qualify as self-employed. Therefore, we have taken the decision that going forward we will no longer be able to engage on-air talent through PSCs or Sole Traders. […]
>
> The change will take effect from the end of your current PSC arrangement.'

Other Assignments Undertaken

54. In January 2011, Mr Clark was diagnosed with Parkinson's disease. He said due to health issues, the undertaking with other assignments outwith Sky has been on a 'much more selective basis'. His only other assignments have been with bookmakers, Paddy Power and William Hill. There is also a book being written on a commercial basis with an agent based on Mr Clark's 'life-time experience in broadcasting'.

55. Mr Clark said that the range of sports he has covered included football, Olympic Games (Barcelona), snooker, golf (for Sunday Times) and rugby (1995). During the period of the Contracts, apart from the coverage for Sky Sports, he also provided previews with score prediction on Darts competitions for bookmaker, William Hill. He had also worked for radio shows not too long ago, but that was curtailed for health reasons as he wanted to spend more time with his family.

56. For the betting market, Mr Clark provided score prediction, what he called 'tipping service' via Paddy Power. This was not in the form of a preview, (for that 'I need to get permission' he said). The tipping service of darts events was provided by Mr Clark's pre-

recording of 4 to 5 minutes duration giving his score prediction, which would then be played at the bookmakers', and that he would provide the pre-recording the day before the live event.

57. Mr Clark stressed that he did not, and never sought 'permission' from Sky for undertaking the additional assignments with William Hill and Paddy Power, as the basis of those engagements was prior to the relevant contracts being entered into by LPPL.

58. Mr Clark said that he started doing some 'PR' work for William Hill around 2014-15, for which he was paid, and that he is still doing it.

59. Mr Clark described the 'only' type of assignment he 'would not feel comfortable' to take on would be 'in a similar anchor man role for another media company in non-Sky time'. Mr Clark referred to ITV as an example, which had procured the right to broadcast darts events for 10 to 15 days a year. This meant in practice, he would not offer his service as a presenter to ITV for those 10 to 15 days.

THE APPELLANT'S CASE

60. For the appellant, Mr Paine emphasises that: (a) Mr Clark had undertaken 'the same work on a self-employed basis to several customers of whom one was Sky' before the formation of LPPL; (b) the work arrangements following the transition of the work to LPPL did not change; (c) there was no adjustment in the relationship to bind Mr Clark into the organisation in a manner similar to the employed workers, (d) there was no intention to create an employment relationship between Sky and the service provider per clause 9.1 of the Contract; and (e) there were no comparable employment related benefits and protection such as: sick and holiday pay, paternity or similar leave entitlements, pension or redundancy entitlement, protection against unfair dismissal or third party liability, no access to Sky offices, or training, and no requirement to operate within the Staff Handbook.

61. The appellant's case is based on a hypothetical contract with the following terms:

(a) There were terms which rendered no mutuality of obligation. If services or work were not provided there is no obligation under the contract to make payment.

(b) Dave Clark ('DC') would be practically and realistically and without undue fettering be able to provide a substitute.

(c) By the terms of the contract that substitute to be paid by DC.

(d) Would not restrict DC as to times or arrival and departure in respect of each event.

(e) Would not give Sky control over where the presentation was to occur.

(f) Would not materially control how and what the presentation contained.

(g) As a live broadcast Sky would have no mechanism for editorial control over DCs presentation and any suggestions made by Sky could be rejected.

(h) DC would be obliged to follow guidelines laid down by Ofcom and would be responsible for fines if these were breached.

(i) The place of work would always be at location at a venue chosen by the PDC.

(j) Mr Clark would be restricted in relation to other engagements only to the extent that these were PDC darts presentations.

(k) Mr Clark does not have to comply with all directions and requests in the performance of the services.

(l) Mr Clark's contract could be terminated with immediate effect on account of illness which prevented him from performing the Services.

(m) Mr Clark's contract could also be terminated by reason or facial or physical appearance or voice of the personnel becoming altered in any way as to affect the performances of the services - unless he was able to provide a suitable substitute.

(n) Would require DC to prepare for presentations at his own accommodation with sufficient infrastructure to facilitate this.

(o) Would require DC at his own expense to maintain training and competence sufficient for his role.

(p) Would require DC to maintain insurance.

62. As to *Mutuality of Obligation* under the actual contractual terms, it is submitted that:

(1) Clause 5.1 set out the termination conditions, under which Sky could terminate the contract if Mr Clark became ill, mentally or physically incapacitated, and that in Sky's reasonable opinion, LPPL is unable to provide a substitute. These conditions were clearly part of the intended arrangements both in contract and in practice, but 'could not be consistent with a contract of employment'.

(2) In addition, at 5.1a, if Mr Clark's facial or physical appearance or voice become altered so as to affect his performance, Sky may terminate the agreement with immediate effect. Given Mr Clark's medical condition which does display some physical conditions this 'de facto gives Sky the option to terminate the contract at will', which has been a concern of Mr Clark for many years.

(3) Sky does not have the obligation to pay whether there is work available or not, since Clause 5.1 (d) of the Contract is not a sham clause, and termination or disruption of the underlying Sports contract between Sky and PDC was a real possibility, as evidenced by Sky Tennis and Rugby teams, which have been terminated in recent years.

(4) No part of the Contract is any minimum requirement set for work, and no obligation on LPPL to accept any work offered. If no services are provided in accordance with the agreement, then no fees are payable by Sky as per Clause 3.6, and as such no mutuality of obligation.

(5) No element of the Contract requires LPPL to accept any work offered, and although the Contract may be terminated under Clause 5.1(a) for non-performance, this underlines the lack of mutuality of obligation.

63. In relation to the issue of *Control*, it is submitted that:

(1) Control as to *where* – Mr Clark de facto presents at PDC darts events televised by Sky; the venues and dates are determined by PDC and vary from season to season; Sky televises the leading competitions. It is contended therefore that the control as to *where* was exercised by PDC rather than Sky.

(2) Occasionally, Sky would ask if Mr Clark was available to participate in the draw or interviews, 'once annually would be the benchmark'. These are requests (not demands) of Sky and could be turned down and have been, as in relation to the 'Draw for the World Match Play'. These requests would be undertaken wherever the activity was occurring.

(3) Control as to *when* – services must be performed as and when determined in the first instance by the PDC calendar. On days when a televised PDC event was scheduled, Mr Clark would arrive when he arrived; there was no pre-set time by Sky, although as a

professional he would normally arrive in good time to ensure a quality presentation. There was no requirement to stay after show for debriefing etc. which would be expected for an employee.

(4) Control as to *how* and *what* – As per Sky's response, Mr Clark's role involved him presenting in his own words so any scripts, if required, were written by Mr Clark without any need to clear this before broadcast. Auto-cue was not used to guide Mr Clark; there was no mechanism for Sky to impose any level of close control over Mr Clark output during a live broadcast. The running order was set by live events, the length of matches, the winner of matches and other incidents happening at the time.

(5) Mr Clark would take instructions as to who to interview, but that interview would be in his hands, in the same way as a window cleaner may be directed to clean a particular window, but not how to clean it. Nor was Mr Clark subject to governance checks, appraisal. He was not advised of, nor in the Sky system of code of conduct, or in Sky training in any way; or issued with 'Sky's ways of Working'; and has no Sky email address to take instructions from Sky. Mr Clark was 'not integrated into Sky in any significant way'.

(6) In respect of Mr Clark's activities as a presenter, he is 'his own man – not part of the production process'. As to Mr Clark being the 'face of Sky's Darts coverage' to the public, that is a 'subjective perception' and a 'conjecture'.

(7) In relation to professional conduct as a presenter, Mr Clark is bound by the Ofcom guidelines and regulations. To that end, the control comes from the regulatory body, not from Sky on Mr Clark in providing his services to Sky.

64. For the appellant, it is submitted that the following are relevant factors for consideration.

(1) *Exclusivity* – factually when not attending to a PDC Sky televised event, Mr Clark is free to work elsewhere, and does and has done since contracting with Sky, as shown by income for services outwith Sky totalling £6,000 in the year to 31 March 2017. The reason why other income is lower is a matter of choice due to health reasons rather than any constraints applied by Sky. It is contended that Sky was just one of LPPL's clients, and the business was not restricted by the Sky Contract which took up 'relatively small proportion of days per year – 64 Days'.

(2) *Limited restrictions* – The Contract at 2.1 makes limited restrictions on LPPL's additional work but this is minimal in practice, affecting just 15 days (being UK darts broadcast on other channels) out of 301 days LPPL is not providing services to Sky.

(3) *Defective work* – the Contract provides for any defective work must be put right at the cost of LPPL; an example might be making good damage caused by a defamatory remark while broadcasting.

(4) *In business on his own account* – LPPL operates from dedicated premises (a fully operational studio) and incurs costs and financial risk associated with the running of this facility. Whilst not an express part of the Contract, it is an implied part as evidenced by the lack of provision of premises, training, information database, necessary equipment for suitable presentation (save equipment necessary to be compatible with Sky systems). It is a 'business necessity', not a matter of personal choice as contended by the respondents, since no other premises has been made available by Sky. Other business necessities include iPad or similar, wardrobe not suitable for day-to-day wear procured only for presenting purposes; and the 'intangible asset of knowledge and presenting skill' of Mr Clark is provided by LPPL without support or input from Sky.

(5) *Public liability* – LPPL is required by the Contract to have adequate public liability and libel and slander insurances. This confirms the risk lies with Mr Clark should these boundaries be transgressed whilst broadcasting unscripted, which represents a significant part of any broadcast.

(6) *Financial risk* – given the termination possibilities, the business is at a constant risk of loss of contract as well as the contract not being renewed. Invoices have to be rendered and be approved by Sky before payment would be processed. Any delayed invoices would be paid only after receipt and due process by Sky, which is not 'on a par with employee receiving pay on or before the end of the month of employment'.

(7) *Arrears risk* – should Sky enter administration, any outstanding fees owed to LPPL, being an unsecured creditors, would have fewer safeguards than those applicable to employees as a preferred creditor with access to make good unpaid earnings and redundancy pay, which would not be available to a contractor. The size of the contractor does not significantly mitigate this risk, as seen in the case of Lehman Brothers, Carillion, and in the sector: Setanta UK and ITV Digital.

HMRC'S CASE

65. HMRC submit that a hypothetical contact between Mr Clark and Sky would have included the following terms:

(a) Mr Clark would be contractually obliged to provide his personal service as a presenter, commentator, interviewer, guest and/or other participant in the making of any editorial, programme and/or video as and when required by Sky. Sky would be obliged to pay him for those services, even on days when Sky did not require those services.

(b) Mr Clark would not practically be able to provide a substitute to perform his duties.

(c) If the Tribunal were to find that the hypothetical contract included a provision to suggest substitute personnel, any such right would be highly fettered by the requirement to obtain Sky's prior written approval.

(d) If a proposed replacement suggested by Mr Clark were accepted by Sky, Sky would pay the suggested replacement directly, which would constitute an entirely separate contract from that between Sky and Mr Clark.

(e) Sky would have the overall right of control as to what, where, when and how Mr Clark's work was done.

(f) Sky would have final editorial control over the programmes on which Mr Clark worked.

(g) Mr Clark would be obliged to comply with the television programme guidelines laid down by Ofcom.

(h) The place of work would normally be at the event which Sky decided to broadcast live from or in Sky's studio, but would always be determined by Sky.

(i) Mr Clark would be restricted in the work and some non-work activities that he did, or might do, outside Sky during the period of the Contracts. For example, he would be prohibited from being involved directly or indirectly in the provision of any services to any other television, radio, and/or media organisations without the prior consent of Sky. That consent could not be unreasonably withheld.

(j) Mr Clark would be obliged to comply with all directions and requests given by Sky or its nominees in respect of the performance of the services.

(k) Sky would retain all intellectual property rights used and/or created during the provision of Mr Clark's service.

(l) Mr Clark would have no contractual right (over and above those rights granted by statute) to be paid for absence caused by sickness, holiday or paternity.

(m) Mr Clark's contract could be terminated with immediate effect on account of illness which prevented him from performing the service or for material breach.

(n) Mr Clark would be prevented from endorsing, promoting or otherwise granting any rights of association to any competitor of Sky, its products, brands or services.

66. HMRC's case is that the hypothetical contract between Mr Clark and Sky is such as to be regarded as a contract of employment. HMRC rely on the following facts in particular.

(1) *Mutuality of Obligation*: There would have been sufficient mutuality of obligation between Mr Clark and Sky during the currency of each of the Contracts. Mr Clark was required to personally perform the services as and when required by Sky. In practice, Sky required him to present its coverage of PDC events. Even though it appears Sky had no obligation to provide continuous work, there was a contractual requirement on Sky to provide payment of £150,000 per year in return for the services of Mr Clark, akin to payment of a retainer. If Mr Clark had refused or failed to perform the services personally when required to do so, he would have been in breach of contract.

(2) *Personal Service*: The obligation within the hypothetical contract would have been for the provision of personal service. Sky required Mr Clark's services to present their coverage of PDC events. The hypothetical contract would not have contained a right for Mr Clark to provide a substitute. If Mr Clark could not provide such services, Sky would be responsible for finding another presenter who met with its approval for the role in question.

(3) *Control*: Sky would have the ultimate contractual right to require Mr Clark to fulfil his duties as a presenter (and other services as so contractually defined) and it could therefore contractually control what was done, when it was done, how it was done and where it was done. Mr Clark would be required to work within the format of the programme as determined by the executive producer, and be bound by the Ofcom guidelines. The ultimate method that Sky had for exerting its control over how Mr Clark performed his duties was the right of Sky to terminate the contract for breach.

(4) *Provision of equipment*: In a hypothetical contract there would be no requirement for Mr Clark to provide personal equipment or premises. Sky provides all the necessary equipment to enable him to provide his services. To the extent that he makes use of his own equipment in preparing for and presenting the programme, this is entirely a matter of personal choice.

(5) *In business on his own account*: The hypothetical contract would have required Mr Clark to provide his services to Sky on an exclusive and first call basis (although in practice consent may have been given by Sky for Mr Clark to work for third parties) throughout the relevant term. The hypothetical contract would also have contained a provision requiring Mr Clark to notify Sky where he provided services to other television and/or radio organisations and/or media organisations during the term of that contract, where such services were the same as, or similar to the services provided to Sky. The

income received from Mr Clark's services for Sky was over 98% of the appellant's total income. The other income in any one year was a maximum of £6,000 and is not a sustainable income to live on. Mr Clark was therefore economically dependent on Sky.

67. Other relevant factors pointing towards a relationship of employment included:

(1) *The duration of the engagement*: Mr Clark has worked for Sky continuously since 1998 in numerous roles. Whilst this is not determinative of employment status, the length of the relationship between Mr Clark and Sky is more consistent with employment than self-employment: *Kickabout* at [87].

(2) *Public perception*: Media press releases have often described Mr Clark as an employee of Sky. The public see Mr Clark as part of the Sky family, as opposed to being independent of it.

(3) *No right to payment for absences*: The lack of any contractual right to payment for absences caused by holiday, sickness or paternity is a neutral factor given that Mr Clark would in any event have been entitled under the hypothetical contract to statutory benefits in respect of holiday leave and pay, sick pay and paternity leave and pay. The same applies to the fact that the contract could have been terminated on account of illness when such a clause may not have compiled with the requirements of the Equality Act 2010.

DISCUSSION

The issue and the burden

68. The purpose of the intermediaries legislation is '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': *R (Professional Contractors Group & Others) v IRC* [2001] EWCA Civ 1945 at [51].

69. The appeals have been brought under the provision of s50(6) of the Taxes Management Act 1970 ('TMA'), and the burden is therefore on the appellant to demonstrate that it has been overcharged by the assessments, otherwise the assessments 'shall stand good'.

70. For the purposes of s49(1) ITEPA, there is no dispute between the parties that sub-paras (a) and (b) of s49(1) are satisfied on the facts. Mr Clark is 'the worker', and Sky is 'the client', and LPPL is 'the intermediary'. The dispute between the parties is whether the services provided by Mr Clark to Sky via LPPL were under a contract for services (i.e. self-employment as maintained by the appellant) or a contract of service (i.e. employment as HMRC contend). The issue between the parties is therefore whether s49(1)(c) is satisfied.

71. In *Usetech Limited v Young* [2004] EWHC 2248 (Ch), Park J identified at [9] what is required in relation to s49(1) ITEPA:

> '… The conditions of sub-paras (a) and (b) involve an analysis of the actual facts and legal relationships, but when that analysis shows that those two sub-paras are satisfied sub-para (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. …'

72. To determine whether the condition under s49(1)(c) is satisfied, the Tribunal is required to construct a hypothetical contract, and in the context of the hypothetical contract, to assess:

> If the services provided by Mr Clark were provided under a contract directly between Sky and Mr Clark, would Mr Clark be regarded for income tax purposes as an employee of Sky?

The hypothetical contract

73. The parties have submitted the terms of what they considered would have been contained in the hypothetical contract. We have considered the proposed hypothetical contracts as part of the parties' submissions in support of their respective positions. We have not sought to adopt either version by evaluating each in turn, or to pick and mix from the basket of the proposed terms in the parties' hypothetical contracts. We consider it right and proper to start afresh in our construction of the hypothetical contract as an essential part of our findings of fact.

74. The terms of the hypothetical contract which would have existed between Mr Clark and Sky for the performance of his services for s49(1)(c) purposes must be derived from all the circumstances in which the services were provided, taking as a starting point the terms of the actual contracts: *Canal Street Productions Limited v HMRC* [2019] UKFTT 647 (TC) at [119].

75. Taking the actual Contracts as the starting point, we observe that there are no material differences from one contract to another, apart from those clauses which have been highlighted as being slight amendments to, or in addition to their predecessor provisions. Any additional clauses in later versions are extensions of their predecessor provisions in greater detail, and we read the additional provisions as refinements of the contractual terms that had been in existence. Parties have not sought to distinguish one contractual period from another in their submissions, and there are no significant differences between the Contracts to warrant the construction of three separate hypothetical contracts to cover each of the two-year periods. We have therefore approached the exercise of constructing the hypothetical contract as one contract that would have applied sequentially to cover the six-year period, and by focussing on the essential contractual arrangements that would have existed between Mr Clark and Sky.

76. In our view, the material terms of the hypothetical contract would be as follows:

(1) The contract was for a fixed term of 2 years, and ran from August to July for each year, which would appear to coincide with the annual cycle of Sky Sports. The contract could be subject to renewal on expiry.

(2) Mr Clark was contractually obliged to *personally* perform the 'Services' as defined under the Key Terms to be a commentator, presenter, interviewer in sports events being broadcast by Sky Sports.

(3) Sky 'shall have first call' on Mr Clark's Services pursuant to clause 2.7, which would be on the 64 days per annum to cover major events organised by the Professional Darts Corporation (PDC).

(4) The 64 days per annum Mr Clark was to perform the Services would be determined by Sky. As the broadcaster, Sky would decide which events on the PDC calendar it would cover in any one year. The date and the location of each PDC event in which Mr Clark would perform the Services would be in accordance with the PDC calendar.

(5) The annual fee for performing the Services for those 64 days would be fixed in advance of the commencement of each contractual period, to be payable by monthly instalments upon invoices being rendered.

(6) The contract would be terminable pursuant to clause 5, which would give Sky the right to terminate the contract 'with immediate effect at any time' if in Sky's 'reasonable opinion' any of the stipulated conditions had obtained.

(7) Mr Clark would be subject to restrictions in relation to the handling of confidential information (clause 6) and non-solicitation (clause 7) and restrictions as to the provision of his Services outwith Sky as set out under the 'non-compete' undertakings at paragraph 4.2 of the NDA Schedule.

(8) Mr Clark would carry out his research, write his own script, and adhere to the Ofcom Guidelines in relation to the Services he would perform in presenting a Sky programme. In other aspects of the delivery of his Services, Mr Clark was expected to work under the direction of Sky's production manager in charge of the programme. Sky would have full editorial control over any programme and Mr Clark would have to follow the reasonable requests of the executive producer, such as who to interview.

(9) Sky would provide all necessary studio equipment during the live streaming of a sports event in which Mr Clark provided his Services, including microphone and earpieces. Sky would organise the necessary travel and accommodation bookings for Mr Clark to enable location performance of the Services to take place. Sky would reimburse any reasonable expenses claimed by Mr Clark, upon submission of receipts and if approved by Sky, e.g. 'on-stage' clothing, travel/accommodation not booked by Sky.

(10) Mr Clark would agree to assign to Sky all rights (intellectual property, copyright, etc) to enable Sky to have the exclusive rights in the commercial exploitation of his output emanating from presenting for Sky Sports.

(11) Mr Clark would have to seek permission from Sky before engaging in any new commercial activities. He would agree not to exploit his image rights in any manner, or to undertake any assignments from other broadcasters, or media outlets, that would cause a breach of the 'non-compete' restrictions pursuant to the Non-Disclosure Agreement.

(12) Pursuant to clause 3.4, the Fixed Fee per annum would be agreed on the basis as to include a sum to satisfy Mr Clark 'paid holiday entitlement' under the Working time Regulations 1998. Mr Clark would have no contractual rights (over and above those rights granted by statute), to be paid for absences caused by sickness.

The tripartite test

77. There is no statutory definition for employee or employment within the legislative context. The parties are agreed on the relevant test to be applied, and have made their submissions by adopting the general approach set out by McKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at p515:

> '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 services.'

78. McKenna J's explication of each of the three conditions can be summarised as follows.

(1) The first condition pertains to *mutuality of obligation*, whereby there 'must be consideration' (a wage or other remuneration), and the servant 'must be obliged to provide his own work and skill'.

(2) The second condition relates to the *exercise of control* by one party on the other to create the master-servant relationship.

(3) The third condition is to assess *other relevant factors* as a 'negative condition'; that is to say, if the first two conditions are satisfied, a contract is a contract of employment unless there are other relevant factors to the contrary.

First: Mutuality of Obligation

Whether a question of law or of fact

79. Whether mutuality of obligation exists is a question of law or a question of fact has been addressed in several decisions in the body of case law in this area. The distinction is of special importance in cases of appeal from first-instance tribunals, such as in *Quashie* from the Employment Tribunal to the Employment Appeal Tribunal (EAT), or in *HMRC v Kickabout Productions Limited* [2020] UKUT 216 (TCC) on appeal of the first-instance decision in *Kickabout Productions Limited* v *HMRC* [2019] UKFTT 415 (TC). In *Usetech*, Park J cited with approval at [32] Hart J's observation in *Synaptek Ltd v Young* [2003] EWHC 645 (Ch), [2003] STC 543 at p553:

> 'Deciding in 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.'

80. In *Carmichael v National Power Plc* [1999] UKHL 47, [1999] 1 WLR 2042, the House of Lords restored the decision of the industrial tribunal which found that the applicants' cause failed at the first hurdle, and their case 'founders on the rock of absence of mutuality', by reversing the majority decision of the Court of Appeal, which had approached the issue as a matter of law. Lord Hoffmann in his speech addressed 'the troublesome distinction between questions of fact and questions of law' in the following terms (sub-paragraphs added):

> '… 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.'

81. As a matter of fact, we find that the parties did not intend the Contracts to be the exclusive record of the terms of their agreement, with 'exclusive' being the operative word here. While each Contract served as the framework agreement for the relevant period between the parties, there were terms governing the parties' contractual relationship that were not expressly stated in the Contracts, because there existed tacit understanding between the parties as to the practical aspects of the outworking of the contractual terms. For instance, the Contracts did not provide for the basis of the 64 days when Mr Clark's services would be required, or that Mr Clark would be working under the direction of the executive producer, or would adhere to regulatory and editorial guidelines even in the absence of any formal process being followed.

82. Following Lord Hoffmann's guidance, the terms of the Contracts in the present case are therefore a question of fact, based on our finding that the terms of agreement between the parties are to be gathered partly from documents, and partly from their conduct.

Whether irreducible minimum

83. McKenna J's explication on mutuality of obligation is that there must be the irreducible minimum of the obligation to pay a wage or remuneration by one party for the obligation to work or perform services by the other party. In *Stringfellow Restaurants Ltd v Quashie* [2012]

EWCA Civ 1735 ('*Quashie*'), Elias LJ expands at [10] on determining whether the mutual obligations exist in a work-wage relationship for the condition to obtain in a bilateral contract:

> '… Every bilateral contract requires mutual obligations; they constitute the consideration from each party necessary to create the contract. Typically an employment contract will be for a fixed or indefinite duration, and one of the obligations will be to keep the relationship in place until it is lawfully severed, usually by termination on notice. But there are some circumstances where a worker works intermittently for the employer, perhaps as and when work is available. There is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration. …'

84. Elias LJ continued at [12] of *Quashie* by stating that 'an irreducible minimum of obligation' is the sine qua non for a contract to remain in force:

> 'In order for a contract to remain in force, it is necessary to show that there is at least what has been termed "an irreducible minimum of obligation", either express or implied, which continue during the breaks in work engagements …Where this occurs, these contracts are often referred to as "global" or "umbrella" contracts because they are overarching contracts punctuated by periods of work. …'

85. In relation to the interpretion of the contractual terms in this case, each Contract was for a fixed term of two years. During each contractual period, for the Contract to remain in force, Sky was obliged to pay the monthly instalments of the fixed annual fee upon the rendering of invoices by Mr Clark. The monthly instalments of the annual fee represented the consideration from Sky. In return, there was the obligation for Mr Clark to perform the Services personally. It is material in the present case that the obligation placed on Mr Clark (via the appellant) was to ensure that Sky '*shall have first call*' on Mr Clark's Services. We find that the irreducible minimum of obligation did obtain between Sky and Mr Clark, and specifically Mr Clark was obliged 'to provide his *own* work and skill'.

86. Turning to the definition of 'Assignment' under the Key Terms as being '*on an ad hoc and when required basis*', we consider its significance in relation to mutuality of obligation. In our view, while the performance of the Services by Mr Clark was intermittent, with breaks in work engagements being punctuated by periods of work, the irreducible minimum remained in force under the relevant Contract which served as an umbrella contract between the parties. That the irreducible minimum remained in force during breaks in work engagements was fortified by the fact that invoices were being rendered by Mr Clark for instalments of the annual fee, regardless of whether there had been PDC events being covered in the relevant months. In other words, Sky's contractual obligation to pay the monthly instalments was not contingent upon Services having been performed in the said months, but was consequent upon the existence of an obligation to pay the annual fixed fee by instalments.

Appellant's contentions regarding mutuality of obligation

Payment of fee contingent upon services performed

87. It is the appellant's case that there was no mutuality of obligation between Sky and Mr Clark under the contract, on the premise that 'if services or work were not provided there is no obligation under the contract to make payment' (first clause of the appellant's hypothetical contract). In this regard, the appellant has relied on clause 3.6 of the Contract, which provided for fee payable to be pro-rated where Services were not so performed.

88. As a matter of law, clause 3 of the framework agreement is to be construed as setting out the 'Fee and Payment Terms' for an umbrella contract, which is capable of covering two

separate categories of the fee and payment terms: (i) the Daily Rate category; and (ii) the Fee category. All provisions under clause 3 are to be read in conjunction with the definition provision as contained in clause 3.1, which states as follows:

> 'Sky shall not be obliged to pay the Company more than the individual daily rate negotiated by the parties for providing the Services from time to time during the Term ("**Daily Rate**") or where a Fee has been agreed in writing for the whole Term, the Fee agreed for the Term ("**Fee**") as specified in the Key Terms. In addition, Sky shall reimburse the Company for expenses reasonably incurred in providing the Services …' (Bold type original)

89. The first category of payees is under 'Daily Rate' and the second category of payees is under 'Fee'. This distinction is reinforced at clause 3.2, which states: 'The Daily Rate *or* Fee shall be exclusive of Value Added Tax' (italics added); and at clause 3.4, which states:

> 'The Company agrees that the **Fee or Daily Rate** payable to the Company in respect of the Services includes a sum which satisfies any obligations Sky may have under the Working Time Regulations 1998 to pay the Personnel paid holiday entitlement …' (emphasis added)

90. At clause 3.5, the two separate categories continue to be observed: 'the Fee or Daily Rate for the Services provided shall be payable either':

> 'a) in equal monthly instalments if the Term is to continue for more than one calendar month in arrears upon submission by the Company of a proper invoice (providing for VAT if appropriate), to Sky at the conclusion of each month; or
>
> b) where the Fee is payable on a Daily Rate basis upon the conclusion of the Term or the month following the provision of the Services upon submission by the Company of a proper invoice (providing for VAT if appropriate).'

91. It is plain from the evidence that the terms under clause 3.5(a) applied to the Services performed by Mr Clark for Sky, and not the 'Daily Rate' scenario under clause 3.5(b). Notwithstanding the inclusion of clause 3.6, the parties to the Contract conducted their business on the basis that Sky's obligation to Mr Clark was to pay the fixed annual fee over 12 months.

92. As a matter of fact, the assertion by the appellant that fee was payable on a pro-rata basis is unsupported by any obtainable evidence. There was no evidence that the monthly invoices were rendered on a pro-rata basis according to the number of performances in any given month. On the contrary, the quantum of each monthly invoice was one-twelfth of the annual fixed fee, even for those months when Sky did not cover any PDC events.

93. To the extent that there was any calibration in fixing the annual fee, as stated by Sky, that the reduction in the annual fee was due to the fact that Mr Clark was no longer to present boxing. The reason given by Sky for the reduction in the fixed fee was not contended by the appellant. The calibration of the fixed fee in accordance with the sports to be presented by Mr Clark was indicative of the mutuality that existed between consideration and the obligation for performance of services.

94. The fee payable by Sky was neither reduced for no-show, nor increased when Mr Clark had to work 'over-time', as he did when a live event went on to one o'clock in the morning, or when he joined any press or promotional events. The parties to the Contract agreed to have the annual Fee fixed in advance. Sky's understanding of the contractual obligation is that '*there are no provision within the contract to reduce fees on the basis of a no-show by Mr Clark*'. The appellant's assertion that there was no mutuality of obligation on the premise that 'if no work, then no pay' conflicts with Sky's understanding of its obligation, and is not supported

by the conduct of the parties in practice. Furthermore, pursuant to clause 2.2, Sky's obligation to pay the Fee '*will continue*' despite any injunctive relief it might take against LPPL.

Termination clause indicative of no mutuality

95. The appellant also contends that the termination clause 'de facto gives Sky the option to terminate the contract at will'. The assertion that the Sky could have terminated the contract at will is not borne out upon a proper reading of the terms for termination. The Contract was terminable by Sky immediately for cause, but would not otherwise be terminable by either party. The very fact that the termination clause was included in every Contract is indicative of the contrary: that there must be some mutual obligations binding the parties to the contract that would need to be severed as and when a stipulated condition obtains. If there was no mutuality of obligation created by the Contract as the appellant contends, then arguably it would not have been necessary for the inclusion of a termination clause in the Contract.

No employment relationship agreed

96. The appellant has also placed reliance on the fact that Mr Clark had been treated as a 'self-employed' ever since he started with Sky in 1988; that incorporation of LPPL as a PSC was at the insistence by Sky; that the parties to the Contract had agreed that 'there exists no employment agreement or relationship between the Personnel and Sky' (clause 2.3); and that they intended the contractual relationship to be governed by clause 9, whereby Mr Clark as the Personnel 'shall be an employee' of LLP as the provider of Mr Clark's Services.

97. We accept as a matter of fact that those were the intentions of LPPL, Sky and Mr Clark as parties to the Contract, and those clauses in the agreement were intended to make express those intentions. However, as Elias LJ said in *Quashie* at [52]:

> '… It is trite law that the parties cannot by agreement fix the status of their relationship: that is an objective matter to be determined by an assessment of all the relevant facts….'

98. In *Autoclenz Ltd v Belcher and Ors* [2011] UKSC 41, Lord Clarke at [32] endorsed the statement of law by Aikens LJ at [91] of the Court of Appeal decision:

> 'There is a danger that a court or tribunal might concentrate too much on what were the private intentions or expectations of the parties. What the parties privately intended or expected (either before or after the contract was agreed) *may* be evidence of what, objectively discerned, was actually agreed between the parties … But ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed.'

99. While it is legitimate for a court or tribunal to have regard to the way in which parties to a contract have chosen to characterise the relationship, here is not a case where we can accord such regard to the express terms in the Contract to inform the proper characterisation of the contractual relationship between Mr Clark and Sky for IR35 purposes. Nor can we give any weight to the fact that Mr Clark was treated as a self-employed in the contractual arrangements with Sky prior to the incorporation of LPPL. For one thing, just because the prior arrangement had not been challenged by HMRC does not equate to that being the correct arrangement to characterise the contractual relationship prior to LPPL's incorporation. Secondly, the issue in front of us is strictly delineated by the three Contracts in place that spanned the six-year period. We have no basis, either evidentially or in terms of legal analysis, to draw on the contractual arrangements prior to inform the contractual relationship during the relevant period. Thirdly, Sky's announcement in November 2018 to change the contractual arrangements with its on-air

talent, on one interpretation, could be taken as Sky conceding that its contractual relationship with Mr Clark in the relevant period should have been characterised as under a contract of service rather than for services. However, HMRC are not entitled to assert that they are home and dry by virtue of Sky's subsequent announcement of the change, just as the appellant could not rely on the prior arrangement as having proved its case.

100. We find therefore that mutuality of obligation existed between Sky and Mr Clark for each contractual period. Since each contract was renewed on its expiry to provide a continuum for the six years in question, the state of affairs as regards mutuality of obligation obtained for the entire duration of the relevant period. We are not satisfied that the appellant has advanced any valid submissions, either on the law or on the facts, to displace our conclusion.

Second: Control to a Sufficient Degree

101. McKenna J's explication on the second criterion is at p515 of *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. 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 the servant. The right need not be unrestricted.
>
> > "What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters." *Zuijs v Wirth Brothers Proprietary Ltd* [(1955) 93 CLR 561, at 571]'

Control over What

102. While the framework agreements made no express provisions as to *what* programmes Mr Clark would be required to perform his services, there was clear understanding between the contracting parties that it would be sports events, initially boxing and darts, and latterly only darts. Of the darts events, only those organised by PDC were of interest to Sky Sports.

103. It was not disputed that not all PDC events were covered. The decision power lay with Sky Sports to choose which PDC calendar events it would broadcast. There is no dispute that in practice, it was 64 days of PDC events per annum Mr Clark would be required to provide the Services to Sky. To that end, it was Sky which had the ultimate control over *what* programmes Mr Clark would be required to perform his services.

Control over When and Where

104. Sky had 'first call' on Mr Clark's time by express provisions of the Contracts. Given the agreement to allow Sky to have the right of first call, Mr Clark had to reserve the 64 days in his diary to ensure that Sky could exercise its right. In our view, the contractual right of first call signified a very high degree of control over the time Mr Clark was to perform the Services.

105. Furthermore, since all the PDC events were live streamed, Mr Clark had to perform the services as and when and where the live events took place. Mr Clark did not have the option to choose the dates he would perform his services because the main services he was to perform could not have been pre-recorded. To the extent that Mr Clark was to perform the Services in real time for live events, the time and location of the performance of those services were completely controlled by Sky. In accordance with the terms of the hypothetical contract, Sky had control over the dates and locations for the performance of Mr Clark's services.

106. We accept that the organising corporation determined the dates and locations of the PDC events each year in advance, and announced the details on its events calendar. However, the ultimate control of dates and locations was with Sky, and not PDC as the appellant contends. Sky was not bound by the PDC calendar; it could choose to cover some events and disregard

others, as evidenced by the fact that Sky had chosen not to cover any PDC events in August and September 2017. As to the contention that Mr Clark could arrive on the event location as and when he chose on the day, and that there was 'no pre-set time by Sky' for Mr Clark's arrival, this factor is of little to no significance in the light of the overarching exercise of control by Sky over *which* particular day in Mr Clark's diary that he must reserve for Sky to perform the Services.

Control over How

107. We accept Mr Clark's evidence that every event would require one day of preparation, which would be carried out in his own time and in his own studio, and that he would write his own script and control his delivery. To that extent, he had a high degree of control over *how* he would perform the Services.

108. It is not doubted that Mr Clark has the expertise and knowledge in performing the services to a high degree of autonomy. However, that delineated area of autonomy was contextualised within the compass of wider controls, such as: the Ofcome guidelines, the Sky's Editorial guidelines, the directions of the executing producer for the Sky Sports programmes.

109. We find as a fact that Sky did retain control in the production process and collateral matters. As McKenna J stated by citing *Zuijus*: 'What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters.' In any event, as Lord Phillips observed in *Various Claimants v Catholic Child Welfare Society & Ors* [2012] UKSC 56 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 suspectable 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.'

110. In the hierarchy of controls therefore, the control over *what* is of greater weight than control over *how per se*. After all, it was Mr Clark's expertise and knowledge in certain sports that Sky was paying a fee for obtaining, and for that matter, the substance of Mr Clark's presenting services was the preserve of Mr Clark. However, in relation to *what* Mr Clark was to render his presenting services, it was a matter over which Sky had complete control.

Control by rights and covenants

111. The Contracts, when viewed as a whole, have significant coverage on assigning a host of rights to Sky to ensure that Sky would retain the absolute control over the exploitation of the output from Mr Clark's presenting services. The extensive terms in warranties and non-solicitation provisions within the Contracts (between Sky and LPPL) were fortified by similar and further terms in the accompanying Schedule of Non-Disclosure Agreement (between Sky and Mr Clark). The assignment of rights to Sky was an important aspect of control that was being exercised in the contractual relationship.

112. The non-solicitation clause in the Contracts and the additional non-compete undertakings in the NDA gave Sky the control over areas of Mr Clark's activities beyond the confines of the programmes in which the Services were performed. The terms under non-solicitation and non-compete clauses function as restrictive covenants to limit what Mr Clark could undertake to do

outside the programme hours to ensure that there would be no conflict with Sky's interest. These restrictive covenants are significant measures in assessing the extent of control Sky could exercise over Mr Clark consequent upon the performance of the Services, and contribute to characterising the contractual relationship between Sky and Mr Clark as one of service, and not for services.

Third: Other Relevant Factors

113. In our view, the first two conditions as concerns mutuality of obligation and control to a sufficient degree were both satisfied for there to be a contract of service. At the third stage of the test, we assess whether there were other relevant factors that would be inconsistent with our conclusion that it was a contract of service that existed between Mr Clark and Sky.

114. The third stage involves what McKenna J described as a 'negative condition' at p515 of *Ready Mixed Concrete*, which he explained at p516-7 in the following terms:

> 'An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control.'

115. As to how the third condition may negate a conclusion reached of a contract of service upon the first two conditions being satisfied, McKenna J gave examples at p516, such as when:

> (1) A building contractor providing at his own expense the necessary plant and materials and 'to accept a high degree of control' is not under 'a contract to serve another for a wage, but a contract to produce a thing (or a result)'.
>
> (2) A carrier of another's goods providing at his own expense everything needed for performance is not under a contract of service, though the carrier accepts the other's control over his performance.

116. In *Weight Watchers (UK) Ltd and Ors v Revenue and Customs Commissioners* [2011] UKUT 433 (TCC), Briggs J expanded on the application of the third condition at [42]:

> 'Putting it more broadly, where it is shown in relation to a particular contract that there exists both the requisite mutuality of work-related 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 which places it in some different category. The judge does not, after finding that the first two conditions are satisfied, approach the remaining condition from an evenly balanced starting point, looking to weigh the provisions of the contract to find which predominate, but rather for a review of the whole of the terms for the purpose of ensuring that there is nothing which points away from the prima facie affirmative conclusion reached as the result of satisfaction of the first two conditions.'

117. Having concluded that the first two conditions are satisfied, we do not approach the third condition from 'an evenly balanced starting point'. It is expedient for us to approach the third stage of the test by addressing the appellant's contentions in turn.

Exclusivity

118. The appellant contends that the 64 days Mr Clark had to work for Sky was a relatively small proportion of days per year, and Mr Clark was 'free' to work elsewhere when not attending PDC Sky televised events. We reject this submission for two reasons. First, as a

matter of fact, Mr Clark would have to devote an additional 64 days to prepare for the televised events, on his own evidence that he needed at least one day to prepare for every event. There would also be additional days he had to allow for travel and get to the locations in good time, some of these locations were not in the UK. We are of the view that more than 50% of Mr Clark's available working days in a year would be taken up by Sky's business.

119. Secondly, the fact that Sky had first call on Mr Clark was a prevailing factor. Suppose that it was really the case that Mr Clark were 'free' to work elsewhere on days other than those 64 days of PDC events, the prevailing factor of first call meant that it still would not be inconsistent with the conclusion that while he was working on Sky's programme on those 64 days, he was working under a contract of service.

Limited restrictions

120. We do not agree that Mr Clark was in fact 'free' to work elsewhere on days when he was not engaged in Sky's business. The restrictive covenants in the Contracts were not 'limited' to the 15 days for UK darts broadcast on other channels as the appellant asserts. We accept the evidence that the public perceived Mr Clark as an anchor man in Sky Sports. Indeed, by signing the NDA, Mr Clark agreed to 'acknowledge' that he '*will have become associated in the minds of the public with Sky Sports*'. For this reason, the restrictive covenants placed by Sky were extensive, which meant Mr Clark was not free to take up any similar presenting role for any other broadcaster. To use Lord Denning's word in *Bank voor Handel en Scheepvaart N.V. v Slatford* [1953] 1 QB 248 at p295: 'The test of being a servant … depends on whether the person is part and parcel of the organisation', by public perception and Mr Clark's own acknowledgment by signing the NDA, Mr Clark was part and parcel of Sky Sports.

121. In other areas of engagements that might not be a direct breach of the restrictive covenants, there would be the protocol to obtain prior clearance with Sky. Mr Clark said that he did not need to obtain Sky's consent in relation to the tipping service and score prediction he provided to the bookmakers because he started those assignments before the Contracts came into place. We note, however, that Mr Clark's engagements with William Hill and Paddy Power could have been subject to such a protocol by amendments to the terms of the warranties after the First Contract to include betting agencies. We have heard no evidence as to whether Sky and Mr Clark had discussed his engagements with the bookmakers. In any event, those engagements were marginal to Mr Clark's overall economic activities.

122. In conclusion, we are of the view that Mr Clark's scope to offer his expertise as a sports commentator elsewhere was severely curtailed by the restrictive covenants. Nor could he have engaged in business activities without prior clearance with Sky in case any new engagements might infringe Sky's extensive intellectual property, image rights related to Mr Clark's output.

In business on his own account

123. The appellant's submissions on defective work, public liability, financial risk, arrears risk can be considered under the encompassing heading of whether Mr Clark was in business on his own account. In *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, Cooke J suggested that whether a worker was an employee could be determined by weighing factors as to whether the individual was performing the services as a person in business on his own account:

> '… the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services preforming them as a person in business on his own account?" … 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; …' (at 184)
>
> '… 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 degrees 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.' (at 185A-B)

124. However, Nolan LJ in the Court of Appeal expressed his 'reserve' in applying the test or indicia set out by Cooke J to the facts of *Hall (HMIT) v Lorimer* [1994] 1WLR 209, on appeal from Mummery J's decision in the High Court [1992] 1 WLR 939. Instead, the Court of Appeal agreed with the views expressed by Mummery J 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 … 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. …'

125. *Hall v Lorimer* concerned services performed by a professional: 'a vision mixer' skilled in editing programmes for television. Nolan LJ observed at 218 the extent of relevance of Cooke J's indicia in the context of a professional rendering his services:

> '… whether the individual is in business on his own account, though often helpful, may be of little assistance in the case of one carrying on a profession or vocation. 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. *… The extent to which the individual is dependent upon or independent of a particular paymaster for the financial exploitation of his talents may well be significant*….' (emphasis added)

126. We do not consider Mr Clark to be in business on his own account just because he used his own equipment and studio to carry out his research, and to certain extent, correct any defective work. We accept that LPPL was obliged to take out public liability insurance against any potential defamatory, libel and slander charges against Mr Clark while performing the Services, which would be consistent with the fact that Mr Clark was largely in charge of what he was going to say while on air, from his prepared scripts to any impromptu remarks. The financial risk, or arrears risk as to invoices being subject to approval and delay in payment, and the risk of Sky going into administration, were not of a nature that made Mr Clark's risk exposure on a par with one who was in business on his own account. The material factor is that without Sky as the broadcaster, Mr Clark's presenting services would have no outlet for any financial reward. To that end, the crucial and most important factor is, as Nolan LJ indicated in *Hall v Lorimer*: Mr Clark was dependent upon Sky as the paymaster for the financial exploitation of his talents.

Holiday and sick pay

127. We note earlier that the Fee fixed for a year was inclusive of Mr Clark's paid holiday entitlement as agreed between LPPL and Sky, in accordance with the terms of Working Time Regulations 1998 under clause 3.4. As to sick pay, Mr Clark would have his statutory entitlement, and the Contracts did not provide for Sky to have the right to reduce the fixed fee

payable for 'no show', which would have included no show due to sickness. In any event, this factor is of no relevance to the test, as observed by Cooke J in *Market Investigations* at 181F:

> 'The lack of provision for holiday, time off and sick pay in these contracts does not indicate contract for services as by the very nature of the contracts such provisions are not applicable in the circumstances even if the contracts are contracts of service.'

Substitution

128. Extensive evidence was led as to the 'substitution' provided by Rod Studd. The significance of substitution for the third stage of the test is explained by Briggs J in *Weightwatchers* at [32] to [34]:

> '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. …
>
> 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.'

129. In *Pimlico Plumbers Ltd & Anr v Smith* [2018] UKSC 29, Lord Wilson considered what is the most important test in characterising a contract of service at [32] and said: 'The sole test is, of course, the obligation of personal performance; any other so-called sole test would be an inappropriate usurpation of the sole test.' For this reason, we address this factor in more detail. In assessing the differing accounts between Mr Clark's / Studd's statements and Sky's response as to how Rod Studd came to be engaged in presenting some parts of the PDC events, we accord more weight to Sky's written replies on the matter of 'substitution'. We find that Rod Studd was already a commentator for Sky Sports, and he was brought in to cover the afternoon session on those days when the PDC events consisted of 'double sessions'. As a finding of fact, and to the extent that any substitution was to be made, it was Sky's decision that the substitute was suitable, and the substitution was permitted to go ahead. This finding is consistent with the interpretation of the terms of the Contract, such as clause 1.3: *if Sky's 'prior written consent has been obtained*'. Clause 1.3 refers to 'sub-contracting', which is at variance with the conduct of the parties. There followed a separate engagement contract between Sky in relation to Rod Studd, and LPPL was in no way contractually involved in Rod Studd's engagement for the 'substitution' to be construed as coming within the umbrella Contracts between LPPL and Sky. There was no unfettered right to substitute at will to negate the obligation of personal performance by Mr Clark as the named Personnel in the Contracts.

130. Besides our finding of fact, we also have regard to what Park J in *Usetech* observed at [34], after citing the Special Commissioner's finding that 'the "right" of substitution was largely illusory'. Park J observed that 'there is a logically prior question which ought to be considered'. Bearing in mind that there was not in fact a direct contract between the worker

and the client as such, but that the hypothetical contract is one that the IR35 provisions require it to be assumed as if it did exist, Park J then reasoned at [39]:

> 'Suppose again that Usetech [*the equivalent of LPPL*] contracted directly with ABB [*the equivalent of Sky*] 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 [*the equivalent of Mr Clark*]. Would ABB [*Sky*] 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*.' (italics added)

131. Park J referred to his assertion that there would have been *no* substitution provision in the notional contract as being in accordance with the Special Commissioner's findings (at [40] of *Usetech*); that the end client (ABB) was not contracting indirectly with Usetech as the intermediary company for the supply of a person competent in Pro-Engineer, but that ABB 'required Mr Hood' specifically. Similarly, we find that Sky was not contracting indirectly with LPPL for the supply of any presenter; Sky required specifically Mr Clark as the named 'Personnel' in the Contracts.

132. Park J's reasoning in *Usetech* applies equally to the present case. The logical prior question the Tribunal is required to consider is whether there would have been any right of substitution at all in the hypothetical contract between Mr Clark and Sky, which the IR35 provisions require to be assumed. For the same reason as Park J set out at [39], the hypothetical contract between Mr Clark and Sky would have been one without a substitution provision, and no substitution provision is included in our construction of the notional contract.

133. We have considered other relevant factors to ensure that there is nothing which points away from the prima facie affirmative conclusion reached as the result of satisfaction of the first two conditions. We are satisfied that no factors existed which were inconsistent with the affirmative conclusion that the contractual arrangements between Sky and Mr Clark would have been a contract of service for the duration of the entire relevant period from 1 August 2012 to 31 July 2018 for the purposes of the IR35 legislation.

DISPOSITION

134. For the reasons given, the appeal is dismissed in principle, subject to any reference to the Tribunal in relation to the quantum of the determinations and decisions concerning the intermediaries legislation.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

135. 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.

DR HEIDI POON
TRIBUNAL JUDGE

Release date: 18 October 2021