[2022] UKFTT 104 (TC)

TC 08435/V

INCOME TAX, PAYE and NICs – Appellant engaged to provide services to Sky – provision of football punditry and co-commentary services – whether intermediaries legislation applies – hypothetical contract between Mr McCann and Sky – application of Ready Mixed Concrete – relationship characteristic of employment – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/05686
TC/2019/09189

BETWEEN

MCCANN MEDIA LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN
MOHAMMED FAROOQ

The hearing took place on 5 to 7 October 2021. With the consent of the parties, the form of the hearing was a video hearing which was conducted on Kinly cloud video platform. A face to face hearing was not held because of the ongoing restrictions relating to the pandemic. The documents to which we were referred are described in this decision notice.

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.

Chris Leslie, Tax Networks Ltd, for the Appellant

Ross Anderson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. McCann Media Limited ("MML") is the personal service company ("PSC") of Neil McCann. Mr McCann is a former Scottish Premiership footballer who played international football representing Scotland, and later became a qualified coach. During the relevant tax years Mr McCann provided his services through MML. MML entered into services agreements with British Sky Broadcasting Ltd ("Sky"), the terms of which are summarised below.

2. HMRC considered that the provisions in Chapter 8 of Part 2 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") – often referred to as the "IR35 rules" - and the Social Security Contributions (Intermediaries) Regulations 2000 (SI 2000/727) (the "Intermediaries Regulations") applied to the contractual arrangements in question. HMRC issued various determinations and notices to MML in respect of the tax years 2013-14 to 2017-18 in relation to PAYE and NICs. MML has appealed against those decisions.

3. On the basis of our findings of fact and for the reasons set out below, we have concluded that the intermediaries' legislation and the Intermediaries Regulations do apply, ie that Mr McCann provided services to Sky under arrangements involving MML, and the circumstances are such that, if the services were provided under a contract directly between Mr McCann and Sky, Mr McCann would be regarded as an employee of Sky. The appeal is dismissed.

BACKGROUND FACTS

4. We have set out in this section our findings of fact on some elements of the background to the appeal, a summary of key provisions of written agreements and notes of meetings which occurred. We have made additional findings of fact on the basis of the evidence before us under the heading "Sky Contracts – Performance and Payment".

5. The directors of MML are Mr McCann and his wife, Mrs Karen McCann. Mrs McCann is currently the sole shareholder of MML; prior to 1 September 2017, Mr McCann and Mrs McCann each owned 50% of the issued share capital.

6. Mr McCann is a former Scottish Premiership footballer, notably for Rangers FC, and represented Scotland. After retiring as a player, he moved into punditry. He and Mrs McCann formed MML in August 2009. He also qualified as a football coach, obtaining a UEFA PRO licence.

7. Mr McCann was the only person who provided services on behalf of MML under the Sky Contracts (or otherwise). Furthermore, there was no evidence of Mr McCann providing services to, or being engaged by, anyone other than MML during the tax years in issue.

Agreements entered into with Sky

8. The written agreements which were entered into are described in this section. There was no dispute as to whether these written agreements were entered into or into what was stated therein. MML does deny that these written agreements represent the actual contractual arrangements; that is considered separately after we make our findings of fact on the basis of the evidence before us. At this stage we confine ourselves to setting out the relevant provisions of the written agreements.

9. MML entered into the following contracts:

   (1) Services Agreement with British Sky Broadcasting Ltd ("Sky") dated 2 May 2012 (the "2012 Sky Contract"); and

   (2) Services Agreement between the Sky and the Appellant dated 18 February 2014 (the "2014 Sky Contract" and, together with the 2012 Sky Contract, the "Sky Contracts").

10. Mr McCann was also required to sign, and did sign, a Non-Disclosure Agreement (the "NDA"), which was scheduled to each of the Sky Contracts.

11. The periods covered by the Sky Contracts were:

(1) under the 2012 Sky Contract, the "Assignment" was from 1 July 2012 to 30 June 2014 "on an ad hoc as and when required basis"; and

(2) under the 2014 Sky Contract, the "Term" was 1 July 2014 to 30 June 2017.

12. Under both Sky Contracts, "Personnel" was defined as Neil McCann (and other personnel agreed by Sky pursuant to clause 1.2 of the Terms and Conditions).

13. The "Services" to be provided by MML were stated to be to provide the services of the Personnel as a commentator, presenter, interviewer, guest and/or other participant in the making of any editorial, programme and/or video whether in vision or audio and/or whether in a studio or on location, live or recorded during the Assignment/Term. The 2014 Sky Contract expressly states in this definition that these services are to be provided on an ad hoc basis as and when required (whereas such language was instead included in the definition of Assignment under the 2012 Sky Contract).

14. Key terms and conditions under the Sky Contracts were as follows:

(1) Key Personnel:

(a) Clause 1.1 required MML to use best endeavours to supply Mr McCann as the defined Personnel to provide the Services. However, MML had the right to propose other employees or sub-contractors of MML to perform the Services.

(b) Clauses 1.2 and 1.3 provided if MML 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. Sky will have no relationship with the substitute and MML is solely responsible for arranging payment to the substitute.

(c) MML was obliged to procure that any substitute execute an NDA with Sky.

(2) Restrictive Covenants

(a) Clause 2.1 provided that MML 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 radio organisation and/or media, print or betting organisations during the Assignment/Term 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 (under the 2012 Sky Contract) or the Managing Director of Sky Sports (under the 2014 Sky Contract), such consent not to be unreasonably withheld. This clause is not intended to limit the Personnel from providing their services to any other entity that is not a provider or distributor of television, radio, or (under the 2014 Sky Contract) print media and/or betting services, provided that such services do not interfere with the provision of the Services, as determined by Sky.

(b) Clause 2.9 provided that MML shall not and shall procure that the Personnel does not use any social media service to discuss Sky, any Sky staff, employee, agents or contractors 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 with the prior written consent of Sky from time to time. The 2014 Sky Contract

also restricts the use of any social media service to promote/advertise any third party products or services.

(c) Clause 8 is a non-solicitation clause applicable for 12 months.

(3) Other Duties and obligations

(a) Clause 2.6 required that ML shall procure that the Personnel shall travel to and perform the Services at any destination both inside and outside the Territory and at such time and dates (including bank holidays and weekends and anti-social hours) as may be required by Sky.

(b) Clause 2.7 provided that Sky shall have first call on MML's Personnel for the provision of the Services. MML shall procure that all Personnel shall attend at Sky's request for press, promotional events, call centre visits, recording trailers and other services reasonably required by Sky to advertise and promote Sky programmes, products and services.

(4) Fees and Payment Terms

(a) The Sky Contracts specified a Fee, which was £110,000 for 1 July 2012 to 30 June 2013, £115,000 for 1 July 2013 to 30 June 2014, to be paid monthly in arrear (under the 2012 Sky Contract), £120,000 for 1 July 2014 to 30 June 2015, £125,000 for 1 July 2015 to 30 June 2016 and £130,000 for 1 July 2016 to 30 June 2017 (under the 2014 Sky Contract).

(b) Clause 3 provided that Sky is not obliged to pay more than the Fee agreed together with any expenses reasonably incurred, provided such expenses are agreed in writing in advance. Clause 3.5 provided that MML may submit invoices to Sky on conclusion of the Assignment/Term or from time to time or if the Assignment continues for more than one month then each month. Clause 3.6 provides that Sky will pay within 30 days provided the Services have been provided in accordance with the agreement (and where not so provided reduced on a pro-rata basis). Clause 3.8 provides that the Fee is payable in equal monthly instalments if the Assignment is to continue for more than one calendar month in arrear upon submission by MML of a proper invoice to Sky.

(5) Warranties

(a) Clause 4 contained various warranties, including:

(i) The Services will be rendered to the best of MML's and the Personnel's abilities and all directions and requests given by Sky or its nominees will be complied with;

(ii) The products of the Services shall not contain anything which is defamatory, obscene, discriminatory or otherwise likely to bring Sky or any Associated Company or any of its or their directors or employees into disrepute and shall not infringe any rights of copyright, moral rights or rights of privacy of any person or legal entity;

(iii) The Personnel will ensure that they are at all relevant times entitled to work in the UK and/or any other country in which the Services will be performed;

(b) The 2014 Sky Contract contained additional warranties, including that the Personnel 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 of a commercial or advertising nature or anything that may be inconsistent with Sky's regulatory and/or legal obligations.

(6) Termination – Clause 5.1 provided that Sky may terminate the agreement at any time including if, in the reasonable opinion of Sky, MML is unable to provide the Services for a period in excess of 4 weeks (by reason of ill health, incapacity or other cause).

(7) Image rights and IP

(a) Clause 2.8 provided that MML grants Sky the exclusive right to use and exploit the image rights to advertise and promote Sky programmes and services.

(b) Clause 10 required MML to procure the Personnel to grant comprehensive rights in relation to intellectual property, and all moral rights were waived to the fullest extent permitted by law.

(8) Entire Agreement - Each contract contained an entire agreement clause, stating that the agreement constitutes the entire agreement between the parties.

(9) Assignment – MML may not assign novate, sub-contract or otherwise dispose of the Sky Contract without the prior written consent of Sky.

(10) Labels on the nature of the relationship - Clause 2.3 stated that MML agrees that there is no employment agreement or relationship between the Personnel and Sky; and both parties declare that they do not wish to create or imply a mutuality of obligations. In clause 9.1 the parties agreed that Mr McCann shall be an employee or sub-contractor of MML, not of Sky or any Associated Company (of Sky).

15. Each Sky Contract included, as a Schedule, an NDA which was executed as a deed by Mr McCann. The provisions of that NDA included:

(1) Confidential information – Mr McCann shall not, without the prior written consent of Sky or unless required by law, disclose any confidential information to any person.

(2) Any copyright and other IP rights of any kind used or created during the provision of the Services to Sky are assigned to Sky.

(3) Mr McCann warrants the same matters to Sky as are warranted by MML under the Sky Contract.

(4) Mr McCann agrees non-solicitation and non-compete obligations. The non-compete (paragraph 4.2) includes an acknowledgement that Mr McCann has a reputation in the market place as an expert and command audience share and that he will have become associated in the minds of the public with Sky Sports and he will gain knowledge of the Sky Sports' methodology and unique practice, and that should he cease to provide the Services during the Assignment/Term that will damage Sky Sports' commercial interest. He therefore agrees that should he cease to be involved in the provision of the Services, or to provide the Services (other than at Sky's request) during the Assignment/Term, he will not until the end of that period be involved directly or indirectly in the provision of any services to any other television and/or radio organisation, print, media and/or (in the NDA which was signed alongside the 2014 Sky Contract) 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 Sky, such consent not to be unreasonably withheld. This paragraph is not intended to limit him from providing his 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.

16. Mr McCann signed the Sky Contracts on behalf of MML, and he signed the NDA in his personal capacity. He understood that the Sky Contracts were legally binding.

17. There were no written variations of the terms of the Sky Contracts or the NDAs.

Dundee FC

18. In April 2017 MML was in the process of negotiating a new three-year contract with Sky. Mr McCann was approached by Dundee Football Club ("Dundee FC") (via his agent, Blair Morgan) to see if Mr McCann was willing to accept a short-term appointment as interim manager to try to save the club from relegation from the Scottish Premiership. Mr McCann was keen to take this appointment.

19. Dundee FC and MML entered into a services agreement which:

(1) required MML to provide the services of a football manager and coach, requiring MML to use best endeavours to use Mr McCann;

(2) included a substitution clause; and

(3) had a term of 18 April to 29 May 2017.

20. Mr Anderson challenged various aspects of that services agreement, including the absence of a signed copy thereof, that one party to it is stated to be Dundee FC (which is not a legal entity), and that the appointment of a manager of a football club, rather like that of a player, is a classic example of a personal appointment, ie that it was inconceivable that Dundee FC were appointing anyone other than Mr McCann himself.

21. On the basis of the evidence of Mr McCann and Mr Morgan, we are satisfied that the named parties did sign this services agreement.

22. The notices and determinations issued by HMRC do not relate to the fees paid by Dundee FC to MML. Accordingly, we make only the findings in relation to that agreement which we consider are necessary for the purposes of this appeal, and in that regard we find as facts that:

(1) Mr McCann was appointed as interim manager of Dundee FC from 18 April to 29 May 2017;

(2) Dundee FC agreed to pay MML a fixed fee for this period, and a bonus was payable if Dundee FC was not relegated from the Scottish Premier League at the end of the 2016-17 season.

23. The new contract which had been under negotiation between MML and Sky had been due to start on 1 July 2017. However, Mr McCann decided to accept an appointment as permanent manager of Dundee FC and so MML did not enter into that new contract with Sky.

Notices and determinations

24. HMRC issued the following:

(1) a Notice of Tax due dated 2 February 2018 in respect of income tax due under the Pay as you Earn ("PAYE") scheme for the year 2013-14 for £28,136.80 (the "First Determination");

(2) a Notice of Decision dated 2 February 2018 in respect of Class 1 National Insurance Contributions ("NICs") for the year 2013-14 for £17,212.28 (the "First Notice");

(3) a Notice of Tax due dated 5 December 2018 in respect of income tax due under the PAYE scheme for the year 2014-15 for £34,940 (the "Second Determination");

(4) a Notice of Decision dated 5 December 2018 in respect of NICs for the year 2014-15 for £19,958.22 (the "Second Notice");

(5) a Notice of Tax due dated 14 August 2019 (the "Third Determination") for the tax years:

(a) 2015-16 for £29,863;

(b) 2016-17 for £33554.80; and

(c) 2017-18 of £3,322.20; and

(6) a Notice of Decision dated 14 August 2019 in respect of NICs (the "Third Notice") for the tax years:

(a) 2015-16 for £18,134.96;

(b) 2016-17 for £19,734.91; and

(c) 2017-18 for £5,148.65.

25. MML requested reviews of these determinations and notices. The decisions were confirmed by HMRC upon such reviews. MML then appealed to the Tribunal by Notices of Appeal dated 20 August 2018 and 5 December 2019.

Communications with and from Sky

26. We were referred to three documents in the hearing bundle which were said to set out Sky's position on various matters. There was a letter from Sky to HMRC, apparently received by HMRC around 10 April 2018 headed "Sky Sports Talent" (the "Sky Talent Letter") and both HMRC and Mr Leslie (on behalf of MML and other PSCs) have had a (separate) meeting with representatives from Sky which addressed the arrangements which Sky entered into with various PSCs for the provision of services including commentating, punditry and presenting. Notes of those meetings (the "Sky Meeting Notes") were included in the hearing bundle.

Sky Talent Letter

27. The Sky Talent Letter is stated to be a response by Sky to various questions which had been raised by HMRC in an email of 20 October 2017 in relation to various named Sky Sports Talent. The document was redacted but one of those named was MML. There is no individual sender identified on the face of that letter.

28. The responses in that letter state that:

(1) Sky's production team decides how many and which commentators and pundits will be required for an event, and rosters for each match are created by members of the production team, such as the head of the particular sport or senior producer of that sport.

(2) In terms of the preparation by individuals, each person may bring their own research to an event and Sky Sports would not review this. Sky do not vet this research – they are trusted experts in their field. It is in the professional interests of the individual to ensure that the content they rely on is accurate, and they may also be open to challenge by the audience, who may challenge inaccuracies or disagree on social media. If repeated errors were made Sky Sports may consider reviewing the contract.

(3) "Stat packs" are prepared for the production team, and these are also sent out to commentators and pundits, although there is no obligation on them to use or refer to this information.

(4) Sky would send them specific information about the match/event, eg timing, or information on areas not immediately visible, such as tunnel information.

(5) Being asked about what would happen if the pundit/commentator had not kept themselves up to date with their sporting expertise, this is said to be not applicable. These individuals are experts in their sport and Sky would expect them to come prepared to the events. If a person were frequently, repeatedly not up to date, Sky might decide not to review the contract.

(6) Addressing the practical aspects of the broadcast and potential topics to cover, this would be discussed between the producer/directors and the individual. The producer has final say as to what topics will be covered, taking into consideration the views of talent; this is a collaborative process. In the context of a live sporting event, the commentator has a significant degree of latitude to respond to the live event as it unfolds. A pundit would respond to the flow of a conversation.

(7) Sky is said to have previously stated that for a live event, Sky's ability to control the reaction, comment and opinion is minimal. Being asked further, for replays, the replay director may control the pictures with the pundit reacting to whatever is shown on the screen; but this may also be led by the pundit with the Sky Sports production team editorially reacting to what the pundit is saying (where technically possible). The commentator/pundit provide their expert opinion in a conversational style; input from the production team as to when to speak is limited only to when a break or other cut in programming is required. The content is typically allowed to flow with minimal creative input from the production team. If the worker continued to speak during a scheduled break or beyond the end of the scheduled programme then Sky Sports would fade them out and take them off air. They may be able to continue with a particular strand of content for longer than the production team had proposed if they felt this was appropriate, but this would be limited by the programme structure and timings.

(8) Talent are responsible for their own clothing; Sky might provide a raincoat and umbrella if required.

(9) The OFCOM regulations of acceptable standards can be obtained from OFCOM. It is expected that commentators/pundits are aware of and adhere to these regulations. There is no formal training. If a commentator/pundit behaves in a manner which contradicts OFCOM regulations Sky reserves the right to charge any financial loss imposed by OFCOM. The use of inappropriate language or behaviour could result in the termination of contract.

(10) Sky Sports does not operate formal editorial guidelines in the context of commentators/pundits.

(11) No formal performance appraisals are undertaken by Sky Sports.

Sky/HMRC Meeting

29. HMRC met with Sky on 17 January 2019 (the "Sky/HMRC Meeting"). Attendees from Sky were Steve Smith (Director of Content, Productions and Operations), Gary Hughes (Head of Football), Tom Gardener (Head of Employment Tax) and Zhareen Rakkar (Senior Employment Tax Analyst). According to the meeting notes, that meeting lasted 4 hours 15 minutes. The meeting notes were heavily redacted, and had been signed on behalf of both Sky (on 16 April 2019) and HMRC, and the unredacted parts in the bundle are certified as a true copy by an officer of HMRC.

30. The meeting notes record the following:

(1) The purpose of the meeting was to discuss the production of Sky Sports programmes in relation to the working arrangements of specified individuals engaged through PSCs. Mr McCann was so specified.

(2) There was a short but redacted section on lead commentators, but then a fuller discussion under the heading of co-commentators.

(3) Sky outlined the difference between lead commentators and co-commentators. The relevant Sky producer would decide what role the relevant personnel would need to perform for particular coverage. The role of lead commentator is to be the main voice describing the match and the action. The co-commentator provides their expertise as an ex-footballer to explain what has happened.

(4) If a commentator who had agreed to provide their services was then unable on short notice, Sky would source their own replacement. They would use the pool of workers they already have and change them around/rearrange the roster to accommodate. Hypothetically onscreen talent could suggest a substitute (not a worker engaged through a PSC) but ultimately it would be at Sky's discretion whether to accept any suggested replacement and Sky would pay and engage these individuals (or their PSCs) directly.

(5) International matches will usually be done in the Sky studio; EFL and PL matches will mainly commentate at the match, although occasionally EFL games can be done from the studio. Sky will make the decision on location.

(6) Commentators are highly professional and rarely late for work. They will never arrive just five minutes before they go live because they will review team news and look at the formations, etc.

(7) If commentators continually finished commentating earlier than expected without there being any mitigating circumstances, the ultimate sanction for Sky would be to end their contracts. However, this has never happened and is entirely hypothetical. Towards the end of a football game, the commentators receive a timing notification to indicate how long after the game they have to wrap up the commentary and link back to the studio or adverts. It is the producer's responsibility to make the decisions on timings and then to communicate to the team. There have been occasions when the show should have wrapped back to the studio, but the producer has chosen to continue, eg if there was a really good atmosphere in the stadium.

(8) Sky and the production team decide on the content, structure and style of the broadcasts. The production team are responsible for all the editorial decisions.

(9) Commentators will often do their own research and have their own sources inside the club, as Sky would expect them to bring their own knowledge to the programme.

(10) Sky provides all the equipment.

(11) When Sky are broadcasting a football match live, the director is responsible for the graphics, replays and cut away shots for the commentators to comment on.

(12) Sky has an Editorial Compliance team, although they do not sit across all platforms. All producers are aware of OFCOM protocols and will ensure they are adhered to. Working in a live TV can be unpredictable, so breaches can infrequently happen. Additionally, the OFCOM rules are constantly changing and evolving so Sky will update the commentators, but this does not take the form of formal training; it is more as and when on an informal basis.

(13) The contracts between Sky and MML specifies an annual fee which is split into monthly instalments, where there is no minimum or maximum number of days/hours services to provide for the annual fee. The annual fee is worked out on the volume of work in a season Sky expect to cover. The PSCs would still be paid regardless of the number of days services provided by the workers.

(14) If there was an OFCOM fine, Sky would legally be responsible. However, if it was caused by the commentators, Sky could try to recoup the costs from the offending party. In practice the likelihood would be the PSC's contract would be terminated. To the best knowledge of those present, Sky has never received an OFCOM fine before.

(15) Sky would have to sign off on the workers providing services for other businesses, and are able to restrict the workers' other engagements at its discretion. The process would be for the worker to ring Gary Hughes and ask before accepting any other work. Examples were discussed relating to world cup coverage for ITV or being interviewed by the BBC.

(16) The meeting then discussed further categories of workers – pundits, presenters, reporters and guests. MML and Mr McCann were also listed in the pundits category.

(17) On pundits, the process concerning rosters, sourcing replacements, location, control of content, structure and style, running order, responsibility for graphics/highlights that appear on screen, editorial procedures (including OFCOM rules), fees (again referring specifically to MML), payment of OFCOM fines, equipment, right to restrict workers providing services for other businesses.

(18) There had been some redacted sections in the above. The majority of the remainder of the meeting notes are then redacted (presumably not just for reasons of confidentiality but also relevance) but the headings which remain include presenters and reporters.

(19) There is then a section on Sky's Scottish coverage, listing MML as one of the relevant PSCs. HMRC noted that Mr McCann performed multiple roles, including co-commentary and services on the website, punditry services, conducting interviews, acting as match reporter. Once these individuals have confirmed they will provide services for a particular game or associated services, it is the producer who informs them of what role Sky requires them to perform. Mr McCann contributed to articles published on the website; the football editor or a journalist will have the conversation with the talent and inform them of the content of the article, and they create the article. Once the journalist has completed the article, it goes to the sub-editor who will have the final say on the piece. The talent's PSC doesn't receive any additional payments for these services.

Sky/Appellants Meeting

31. Mr Leslie met with Sky (in a Teams meeting) on 21 January 2021. That was attended by Tom Gardner (Head of Department) and Mike Pettit (Employment Tax Manager) from Sky. Mr Leslie represents not just MML but also the PSCs of Pete Graves and Alan Parry, and that meeting covered those appeals as well as that of MML. The meeting note was prepared by Mr Leslie. That meeting note sets out:

(1) Mr Leslie indicated that he wished to test the interpretation regarding the Sky contractual Ts and Cs and whether the contract was varied in practice given the context of Sky having a talent pool to call upon.

(2) Mr Leslie referred to the terms of the Sky Contracts and the practical system (as he understood it) of Sky offering work, involving Sky preparing a spreadsheet of the work to be conducted the following month, talent each replying with their availability, Sky then allocating and scheduling the work, confirming this with updated spreadsheets (which may be sent out more than once).

(3) Mr Leslie reported that Mr Graves had told him that since going on the Sky staff contract from 2 February 2017 as an employee he can not longer decline working for Sky. Mr Pettit acknowledged that the employment contract was stricter, with other

restrictions and more types of requirements, eg restrictions regarding any use of social media.

(4) Mr Pettit said a difficulty he had is the Sky team he is speaking with now is different, but Sky acknowledged that acceptance of work was subject to exceptions, eg other business activities or other reasons relating to unavailability, and therefore the process of talent being able to have flexibility was very different from an employee at that time. As regards Mr Leslie's interpretation of the contract, Sky would wish to have sight of specific examples. Mr Leslie did refer to the existence of some specific emails/invoices.

(5) There was then a discussion which is recorded in the note under the heading of "Interpretation of the contract (Text and Context)". It is not clear from this section of the note who made all of the statements. References are made to there being a talent pool of presenters/commentators/pundits, and that they were only paid for actual work completed. It is also said that there was no flashpoint moment, ie a situation when the contractual provisions were tested in practice.

32. Mr Leslie sent the meeting notes to Sky the following day, on 22 January 2021, and asked that they provide any agreement/amendments. The letter also attached documents which he said supported the view that the contracts were capable of being varied, and that it also made business common sense to do so. Various specific points were made in relation to the three PSCs.

33. In relation to MML, Mr Leslie referred to the interim manager role at Dundee FC, the invoice issued by MML to Dundee FC and to a list of invoices issued by MML to Sky which showed that MML did not raise an invoice to Sky for services in May 2017 because Mr McCann did not carry out work for Sky that month. Mr Leslie stated that this was "presumably in relation to the pro-rata clause in the T&Cs at 3.6". Referring to this being a peak time in the season, this is said to illustrate further that talent was only paid for actual work completed, and there was no obligation on talent to accept any work offered. Sky is asked if they agree with this conclusion.

34. On 19 February 2021 Mr Pettit replied to say they agreed the meeting notes, they verified the facts as stated (eg that MML didn't get paid by Sky when doing work for Dundee FC) but that the interpretation of the facts is for the Tribunal to decide.

RELEVANT LAW

35. The relevant provisions of s49 ITEPA 2003 are as follows:

> "(1) This Chapter applies where—
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),
>
> (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and
>
> (c) the circumstances are such that—
>
> (i) if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under the client, or
>
> (ii) the worker is an office-holder who holds that office under the client and the services relate to the office.
>
> […]

(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."

36. Regulation 6 of the Intermediaries Regulations provides:

(1) This Part applies where–

(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client") who is not a public authority,

(ab) the client either qualifies as small for a tax year or does not have a UK connection for a tax year,

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

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

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

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

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

…

(2B) The condition in paragraph (1)(ab) is to be ignored if—

(a) the client concerned is an individual, and

(b) the services concerned are performed otherwise than for the purposes of the client's business.

(2C) For the purposes of paragraph (1)(ab) the client is to be treated as not qualifying as small for the tax year concerned if the client is treated as medium or large for that tax year by reason of regulation 20A(3)(a).

(3) Where this Part applies

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

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

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

ISSUE

37. There is no dispute between the parties as to the application of s49(1)(a) and (b) – MML agrees that those conditions are met. The question is whether the condition in s49(1)(c) is met

(and the corresponding provisions of regulation 6(1)(c) of the Intermediaries Regulations), ie whether the circumstances are such that if the services provided were provided under a contract directly between Sky and Mr McCann, Mr McCann would be regarded for income tax purposes as an employee of Sky.

38. The burden of proof is on MML to establish, on the balance of probabilities, that this is not the case.

39. Mr Leslie's submissions included references to the extent of the questions posed by HMRC during the enquiry process, the responses provided by and on behalf of MML and what he submits is HMRC's refusal or failure to take account of the information provided. The substance of this appeal does not concern the reasonableness of HMRC's decision-making process. We have appellate jurisdiction to determine the issue before us. We have therefore taken account of all the evidence and submissions but do not consider it necessary or appropriate to comment on the approach which has been taken by HMRC.

EVIDENCE INCLUDING WITNESSES

40. Both parties provided us with skeleton arguments, and we also received detailed written submissions based on the evidence heard which Mr Leslie and Mr Anderson addressed in their oral closing submisions. We found these submissions very helpful and have taken them into account in making our findings of fact and reaching our decision, albeit that we have not found it necessary to refer to all of the matters raised therein.

41. The hearing bundle included a significant amount of correspondence between the parties, as well as witness statements (as referred to below) and the Sky Meeting Notes (as referred to under Background Facts above).

42. There were five witnesses called by MML, each of whom provided witness statements and were cross-examined on their evidence:

(1) Mr McCann;

(2) Blair Morgan – Mr Morgan had known Mr McCann for 30 years, and had acted as his solicitor until around 2015 and as his football agent. Mr Morgan had reviewed the contracts to be entered into between Sky and MML in his capacity as solicitor to Mr McCann (and MML);

(3) Linda Leaworthy – Ms Leaworthy is a chartered tax adviser and has been MML's accountant since August 2009 and throughout the periods in issue;

(4) Alan Parry – Mr Parry was a lead commentator, who provided services to Sky through his own PSC for many years, including during tax years 2013-14 to 2018-19. He and Mr McCann had met during the tax years under appeal; and

(5) Pete Graves – Mr Graves has been a presenter on Sky Sports for many years, including during the tax years 2014-15 to 2018-19, and although he is now a direct employee of Sky he previously provided his services to Sky through his own PSC.

43. Mr McCann, Mr Morgan and Ms Leaworthy were credible witnesses; we have treated their evidence of fact as reliable. Ms Leaworth's witness statement did include an explanation of her opinion as to the non-applicability of IR35, on which we place no weight (as Ms Leaworthy was not an independent expert).

44. Mr Leslie acts for the PSCs of Mr Parry and Mr Graves as well as MML, and those PSCs have their own appeals pending before this Tribunal. Mr Leslie had met with Sky in his capacity as adviser to all three PSCs. The evidence of Mr Parry and Mr Graves addressed the terms of the contracts between Sky and their own PSCs (such evidence broadly being that those

contracts were materially identical to the Sky Contracts) and their experience of the operation of those contracts in practice. Mr Anderson submitted that the relevance of Mr Parry's and Mr Graves' evidence to this appeal is limited, and given that their PSCs have their own tax appeals pending we may wish to be cautious in making any findings in relation to their arrangements.

45. We agree with Mr Anderson that the evidence of Mr Parry and Mr Graves is not relevant when considering and making our findings of fact in relation to how MML and Mr McCann dealt with Sky or performed the services under the Sky Contracts. We do take account of their evidence in relation to the negotiation of contracts between the PSCs and Sky; which evidence, in any event, was not challenged and was consistent with the evidence of Mr McCann, Mr Morgan and Ms Leaworthy.

46. We have already referred to the fact that both HMRC and Mr Leslie met with representatives of Sky. Both parties challenged the notes of the other party's meeting. However, significantly from our perspective, neither party adduced witness evidence from anyone at Sky – whether those who had been responsible for negotiating the Sky Contracts, those in the production team with whom Mr McCann had had contact during the tax years under appeal or those who had attended the relevant meetings. In the absence of such witness evidence, which could have been tested and challenged in cross-examination, we only place weight on the statements recorded as having been made in the Sky Meeting Notes to the extent they are corroborated by some other evidence before us.

ADDITIONAL FINDINGS OF FACT: SKY CONTRACTS – PERFORMANCE AND PAYMENT

47. For former footballers who had played at the top level for English and Scottish clubs, roles at Sky were highly sought after as Sky was the premier broadcaster with rights to the live premiership games.

48. Mr McCann carried out the activities of a pundit and co-commentator when he provided services to Sky. There is a significant difference between commentators and co-commentators – commentators describe the action taking place in a game, whereas co-commentators are engaged to explain why something happened, and to comment from a technical perspective. Co-commentators are engaged for their knowledge of the game and are generally ex-footballers.

49. Mr McCann also conducted some other activities for Sky, including pre-recorded interviews of players or managers and end-of-season reviews.

Standard form contracts

50. In terms of the engagement between Sky and MML, we were referred to the two Sky Contracts which covered the periods in issue. However, there was also reference to an earlier contract having been entered into (this being referred to specifically by Mr Morgan and Ms Leaworthy) and from Mr McCann's evidence that MML had been engaged by Sky since 2009.

51. On the basis of the evidence before us, we conclude that Sky, MML and Mr McCann intended to ensure that the terms on which either MML or Mr McCann would provide services to Sky were captured in writing, and this was done by way of the agreement and execution of the Sky Contracts.

52. We also find that the terms set out in the Sky Contracts (including the NDAs) were standard form and represented the only terms on which Sky was prepared to engage MML (and, through MML, Mr McCann). We reach this conclusion based on the evidence of all five witnesses. Furthermore, it is apparent from the description of the Services as set out in the Sky Contracts that even this drafting was not bespoke to MML or Mr McCann – by way of illustration, it does not refer to football, or punditry/co-commentary.

53. Although Mr Morgan and Ms Leaworthy had proposed various changes to the written agreements on behalf of MML, which were not accepted by Sky, MML and Mr McCann were prepared to sign up to the terms of the Sky Contracts as being engaged by Sky was a sought-after opportunity, which Mr McCann was very keen to do, not only because of the rights which Sky had (in terms of the live premiership games) but also the pay was attractive.

Provision of services – scheduling, performance, work for others

54. The schedule of work was arranged by agreement between Sky and Mr McCann:

(1) Sky announced the live coverage that it would be broadcasting about two months in advance. The relevant production team at Sky was responsible for deciding which co-commentators and pundits would be offered particular games.

(2) Someone at Sky would then email or phone Mr McCann to ask if he would cover certain games for them. He would then accept or reject those games, and did on occasion reject games because of other commitments or the location being inconvenient. Mr McCann did sometimes ask to cover different matches on the list, and this would be agreed with the relevant producer.

(3) He would keep Sky updated of his movements and let them know days he might be able to work.

(4) Mr McCann generally received more than ten offers of work per month during the football season but probably covered eight to ten games per month.

(5) Mr McCann was very enthusiastic about the opportunities at Sky – he was paid well for something that he enjoyed doing and wanted to develop his professional appeal. He sought to ensure he was available as much as possible during the football season.

55. In the context of any particular game at which Mr McCann had agreed to provide his services:

(1) The allocation of roles – including pundits, co-commentators and guests - was determined by the Sky production team.

(2) Sky provided "stat packs" of statistical information about the teams and players involved to assist with preparation. Pundits and co-commentators did not need to use this information, but Mr McCann did make sure he had read this information, as well as doing his own research.

(3) The locations from which work would be carried out was determined by Sky – but in the context of covering football games this would usually be dictated by the location of the game.

(4) Any equipment was provided by Sky.

(5) Mr McCann would not take part in rehearsals, but would be involved in testing microphones and his earpiece.

56. Sky had editorial responsibility and control over broadcasts, and in practice this involved:

(1) Sky controlled the running order and identity of interviewees, and were responsible for graphics and replays on which the pundits, including Mr McCann, would comment.

(2) Sky would determine the topics to be covered, but could not dictate the substance of Mr McCann's comments, nor in how much detail he might cover the topic.

(3) Mr McCann would analyse the key points that he considered relevant and debate with others live in the studio before kick-off, at half-time and as part of the post-match

analysis. He had the ability to step in, adapt and interject during the match if there was a break for an injury, or if the match was "a boring stalemate".

(4) The timings were controlled by Sky, and they would inform the pundits and co-commentators of scheduled ad breaks and the end of the programme. Mr McCann's evidence was that this was not always rigidly adhered to – he could continue with developing his point even if he had been informed through his earpiece that they were about to break for adverts. We accept that there was some flexibility on timings.

57. Mr McCann was aware that there were OFCOM rules about defamatory, obscene and discriminatory language not being used during a broadcast, and he was aware that MML would be responsible for any OFCOM fine issued to Sky in respect of his language. No such fine was ever issued.

58. Mr McCann was appointed as interim manager of Dundee FC as described above during the term of the 2014 Sky Contract. When he accepted that position, Mr McCann did not wish to burn his bridges with Sky and told Gary Hughes, Sky's Head of Football, of his decision to take the position with Dundee FC. Although Mr McCann had initially anticipated that he would not conduct any activities for Sky during the period for which he was interim manager of Dundee FC, he did in fact appear on Sky broadcasts during this time, at the Scottish Cup Semi Finals on 22/23 April 2017 and the Scottish Cup Final on 27 May 2017.

59. We accept Mr McCann's evidence that he did not use social media during the tax years under appeal.

60. There has been no dispute between Sky and MML or Mr McCann as to the terms of the Sky Contracts or the basis on which either MML or Mr McCann provided services to Sky. Mr McCann accepted that if he was unavailable to provide any services for an extended period of four weeks, Sky would ask questions and may terminate MML's contract.

Payment of fees under the Sky Contracts

61. In 2013-14, 2014-15 and 2015-2016, MML submitted monthly invoices to Sky of equal amounts (£10,000 per month), with one exception, namely December 2013 where the invoice included an additional £600. These fees were the only source of income for MML in those tax years.

62. In 2016-17, MML submitted monthly invoices to Sky (which increased in amount part way through the tax year in line with the provisions of the Sky Contracts), and received £500 from other sources.

63. In 2017-18, MML received fees from Dundee FC and Scottish Football. MML submitted invoices to Sky in March, April and June 2017 of £10,833.33 each, which are stated to be for services in that month and were paid the following month on each occasion. MML did not submit an invoice to Sky for fees in respect of May 2017, and the fee for that month (ie the pro rata element of the annual fee) was not included in any other invoice.

64. The invoices from MML to Sky each state that they are for "consultancy services as agreed" for the specified month, and do not include any further information, eg they do not set out a list of services performed, or the number of games covered during the month.

DISCUSSION

65. Section 49(1)(c) provides that the intermediaries legislation applies where the circumstances are such that if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client. The circumstances 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.

66. The approach to be taken in determining whether the requirements of section 49(1)(c)(i) ITEPA 2003 are met was common ground between the parties. The Tribunal is required to approach matters in three steps (*Revenue & Customs Commissioners v Kickabout Productions Ltd* [2020] UKUT 216 (TCC) at [6]):

(1) Step 1: Find the terms of the actual contractual arrangements and relevant circumstances within which the individual worked.

(2) Step 2: Ascertain the terms of the hypothetical contract postulated by s49(1)(c)(i) ITEPA 2003 and the counterpart legislation as applicable for the purposes of NICs.

(3) Step 3: Consider whether the hypothetical contract would be a contract of employment.

67. The circumstances to be considered 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 (s49(4) ITEPA 2003). Although there is no equivalent to s 49(4) ITEPA 2003 in regulation 6 of the Intermediaries Regulations, the same principle applies for the purposes of NICs (see *Usetech Ltd v Young* [2004] EWHC 2248 at [9] to [10] and [36]; *HMRC v Atholl House Productions Ltd* [2021] UKUT 37 (TCC) at [9]).

68. In *Christa Ackroyd Media Ltd v HMRC* [2019] UKUT 326 (TCC) at [36] and [37] the Upper Tribunal confirmed that in constructing the hypothetical contract it was right to start with the written contract, and also agreed that s49 expressly requires the Tribunal to assess "the circumstances" as well, and that we should consider whether the hypothetical contract would have included terms not set out in the written contract.

69. Both parties referred us to the decision of the Upper Tribunal in *Atholl House*, which concerned the PSC of Ms Adams, a journalist and broadcaster, and the engagement between that PSC and BBC Radio Scotland. That decision is binding upon us. We have taken account of the entirely of that decision when reaching our conclusions, but find the initial observations set out by the Upper Tribunal on the process to be helpful. The Upper Tribunal, having set out the three stage approach from *Kickabout*, went on as follows:

> "[8] However, in order to put into context some of the later discussion, it is appropriate now to make some observations on the process by which the hypothetical contract is constructed at Stages 1 and 2, before reaching Stage 3, where the hypothetical contract is characterised:
>
> (1) It is clear that, for income tax purposes at least, this is not simply an exercise in pure 'transposition' of terms from the actual contract into the hypothetical contract. As the Upper Tribunal (Mann J and UTJ Thomas Scott) said in *Christa Ackroyd Media Ltd v Revenue and Customs Comrs* [2019] UKUT 326 (TCC), [2019] STC 2222, at [36]:
>
> 'Section 49 explicitly requires the tribunal not to restrict the exercise of constructing the hypothetical contract to the terms of the actual contract, but to assess whether "the circumstances" are such that an employment relationship would have existed if the relevant services had been provided by the individual directly and not via a service company, and s 49(4) provides that "the circumstances … include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements …" ' (emphasis added).

(2) It follows from this that it is not necessary to defer all analysis of the hypothetical contract, at Stage 2, until all terms of the actual contract have been comprehensively determined at Stage 1. It may often be appropriate – in the iterative way identified by Lord Hodge JSC in *Arnold v Britton* [2015] UKSC 36, [2016] 1 All ER 1, [2015] AC 1619, at [77] – to construe the actual contractual arrangements (using the usual canons of construction) whilst considering at the same time how these arrangements would work when determining the content of the hypothetical contract. That approach is suited to the task of synthesising a single hypothetical contract from relevant 'circumstances' that include the terms of two distinct contracts. That said, care must still be taken to ensure that ordinary principles of contractual interpretation are correctly applied at Stage 1 since, if the terms of actual contracts are wrongly construed, any error has the potential to infect the ascertainment of the terms of the hypothetical contract at Stage 2.

(3) Section 49(4) expressly directs attention to the terms of the actual agreements between the relevant parties. Plainly, the terms of such contracts will, generally speaking, be highly material; and what the contracts actually mean will have to be construed according to the ordinary principles of contractual interpretation. But the application of ordinary canons of contractual interpretation will not, of itself, determine the contents of the hypothetical contract. The fact that the hypothetical contract may be built out of more than one contract (eg, one contract between A and B and another contract between B and C) means that great care must be taken in the following (purely illustrative) regards:

(a) The relevant factual matrix may very well be different for the hypothetical contract than for either the contract between A and B and B and C.

(b) An entire agreement clause in the contract between A and B will be unlikely to operate in the case of the hypothetical contract.

(4) When ascertaining the terms of an actual contract between A and B, matters such as A's subjective views of the meaning of that contract, or ignorance of the contract's terms, will typically be irrelevant to questions of interpretation. Equally, unless giving rise to a variation or some form of waiver or estoppel, the manner in which the actual contract is performed is typically irrelevant to its construction. However, we do not consider that these matters can be regarded as necessarily irrelevant when it comes to determining the terms of the hypothetical contract in the context of the 'intermediaries legislation' and are, in our judgment, matters that can appropriately be taken into account. This should not be taken as a suggestion that the terms of the actual contract can be disregarded by the simple expedient of focusing solely on parties' beliefs, or the way they actually performed the contract. If, applying ordinary principles of contractual interpretation, the actual contracts are found to have a particular term, that will often be a strong indication that the term should be found in the hypothetical contract as well. We simply highlight the injunction in s 49(1)(c) to consider 'the circumstances', which we consider extends to circumstances beyond those relevant to the construction of an actual contract concluded between A and B.

[9] We regard the points made at para [8] above as equally applicable to the national insurance provisions which are to be found in reg 6 of the Regulations. Regulation 6(1)(c) expresses the counterpart to s 49(1)(c) slightly differently, in the following terms:

'(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for

> the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client.'
>
> While reg 6 does not contain a counterpart to s 49(4) of ITEPA 2003 that expressly directs attention at the actual contract(s) concluded between the relevant parties, we consider that the overall effect of the provision is similar to that of s 49 of ITEPA 2003, particularly when the national insurance and income tax provisions deal with similar and overlapping subject matter."

70. These observations remind us that we need to construct the terms of the hypothetical contract between Sky and Mr McCann, and also indicate that, whilst following the three stage approach set out in *Kickabout*, there may be a blurring between stages 1 and 2, as it is not necessary to defer all analysis of the hypothetical contract until all terms of the actual contract have been conclusively determined.

71. In performing step 3, ie considering whether the hypothetical contract would be a contract of employment, we apply another three-part test, namely applying the classic statement of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515, which sets out that a contract of employment exists if three conditions are fulfilled:

> (1) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
>
> (2) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
>
> (3) The other provisions of the contract are consistent with it being a contract of service.

72. We have organised our discussion of step 3 by reference to these steps, but we also bear in mind that the authorities recognise that we should be wary of treating this as a checklist exercise. Nolan LJ in the Court of Appeal in *Hall v Lorimer* [1994] 1 W.L.R. 209 [at 216] specifically approved of the comments made by Mummery J in the same case in the High Court [1992] 1 W.L.R. 939 [at 944] where he said:

> "This is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another."

ACTUAL CONTRACTUAL ARRANGEMENTS

73. We have described the written terms of the Sky Contracts above. Although two different contracts were in place at differing times during the periods under appeal, the parties did not submit that there were any relevant differences between them. We did note that only the 2014 Sky Contract included, in the definition of Services, a reference to the services being provided on an ad hoc basis as and when required by Sky. We did not consider that the absence of this language from the definition of Services in the 2012 Sky Contract was of any significance, as similar language appears in the definition of the Assignment instead in the 2012 Sky Contract and the drafting of clauses 2.6 of both contracts was identical (and required MML to procure

that Mr McCann shall travel to and perform the Services at any destination and at such time and dates as may be required by Sky).

74. Mr Leslie submitted that the Sky Contracts were just one part of the factual matrix (this being relevant to both the findings of fact about the actual terms on which the parties contracted and the determination of the terms of the hypothetical contract), and criticised HMRC's approach (apparent from their conclusions following a review and their Statement of Case) as adopting a literal interpretation of what he submitted were two boilerplate or standard form contracts. Mr Leslie noted that the Sky Contracts did not refer to Sky's talent pool and submitted that they did not reflect the way in which Mr McCann provided his services and that the terms of the restrictive covenants were inconsistent with Mr McCann's ability to act as interim manager for Dundee FC during the term of the Sky Contracts. However, Mr Leslie did not seek to rely on the inclusion of a right of substitution in the Sky Contracts.

75. Mr Anderson submitted that the Sky Contracts do represent the true agreement between Sky and MML, and that the flexibility in its day-to-day performance falls short of demonstrating that these terms would not have been reflected in a hypothetical contract between Sky and Mr McCann – fees were invoiced monthly, Sky made all editorial decisions, Sky was the only broadcaster for whom Mr McCann worked and he acknowledged that Sky would prevent a pundit from being involved in competing activities for a rival broadcaster.

76. The Sky Contracts, and the provisions of the NDAs, were legally binding agreements between Sky and MML and Sky and Mr McCann respectively. Those contracts contained an "entire agreement" clause, and there was no written agreement between the parties to vary the terms of those agreements.

77. It is well-established that, subject to certain narrow exceptions, it is not legitimate to use as an aid in the construction of a contract in writing anything which the parties said or did after it was made. The decision of the Supreme Court in *Autoclenz v Belcher* [2011] UKSC 41was considered by the Upper Tribunal in *Atholl House* at [42]. The Supreme Court acknowledged that a different approach has been taken to the principles of construction applicable to employment contracts, where the written documentation may not reflect the reality of the relationship.

78. We consider the extent to which the way in which the parties operated in the present case differed from the provisions of the Sky Contracts.

Performance of services

79. The "Services" to be provided by MML were stated to be to provide the services of the Personnel as a commentator, presenter, interviewer, guest and/or other participant in the making of any editorial, programme and/or video whether in vision or audio and/or whether in a studio or on location, live or recorded during the Assignment/Term. The 2014 Sky Contract expressly states in this definition that these are to be provided on an ad hoc basis as and when required, whereas this language appeared in the definition of the assignment in the 2012 Sky Contract. The duties and obligations of MML are then set out, and include those set out at clauses 2.6 (travel and perform the Services as may be required by Sky) and 2.7 (Sky has first call).

80. The contractual terms are thus expressed by reference to the requirements of Sky. The Sky Contracts do not specify a minimum or maximum limit on the services to be provided (whether by reference to the number of games at which Mr McCann would provide punditry/co-commentary services or the level of promotional activities).

81. We have made our findings of fact as to how Mr McCann provided services above, including as to how this was arranged, and the way this operated "on the day".

82. We accepted Mr McCann's evidence that there was some flexibility, in that the dates on which he provided services were the subject of specific agreement between Mr McCann and Sky, which accommodated Mr McCann's availability and also his preferences as to when he would work – the dates were not dictated by Sky.

83. We have already referred to the absence of witness evidence from Sky, or from those attending the meetings with Sky, and the criticisms levelled by the other party at the notes of those meetings. We have considered the Sky Talent Letter and the Sky Meeting Notes carefully in the light of the evidence at the hearing. One point which was notable was that, subject to the following caveats, the evidence of Mr McCann, Mr Parry and Mr Graves was largely consistent with the explanation which had been provided by Sky in the Sky Talent Letter. The caveats are as follows:

(1) Mr McCann's evidence was that he did not receive rosters from Sky; but he acknowledged that he did not know what the production team at Sky did behind the scenes. We infer that Sky would have produced a roster or schedule for its own use once it had agreed dates with relevant individuals from the talent pool, as the production team would need to know who had agreed to attend each game.

(2) Mr McCann's evidence was that when he was acting as a pundit at a game he could overrun even if informed of an advert break, whereas Sky have said that they would ultimately be able to fade out the person speaking but did acknowledge there was some flexibility. We accept that there was some flexibility in timings, but consider that ultimately the Sky production team, which had control over the cameras and microphones, would have been able to fade out and cut away from a speaker, albeit that no such flashpoint had occurred in relation to Mr McCann.

84. On the basis of the evidence before us, we conclude that Sky did have editorial control over the broadcasts and that the written contractual terms in relation to editorial control were followed in practice.

85. We have already referred to the fact that Mr Leslie did not seek to rely on the existence of the substitution clause in the Sky Contracts. MML had not sought to propose that anyone other than Mr McCann provide the relevant services under the Sky Contracts. If MML had done so, then Sky were not required to accept a substitute – they had discretion to assess the suitability, and would then have entered into a direct contractual relationship with that substitute.

Fees

86. The Sky Contracts specify an annual fee (increasing annually) and provide for the fee to be payable in equal monthly instalments upon submission of an invoice.

87. Mr Leslie submitted that the arrangement in practice did not involve MML being paid for Mr McCann to be available, but that it was on services delivered. However, that submission is not borne out by the evidence and the facts as we have found them.

88. We conclude that the payments from Sky to MML were in accordance with the payment terms specified in the Sky Contracts. There is only one exception to that, which concerns the absence of an invoice from MML to Sky for services in May 2017, and the resulting absence of any fee being paid by Sky for that month. However, whilst we have found that no invoice was submitted, we have also found that Mr McCann did provide services during May 2017 (his coverage of the Scottish Cup Games), MML did invoice for services in April 2017 (and was paid for such services) even though Mr McCann was unavailable for part of that month, and the monthly invoices were for regular amounts. We therefore infer that, if MML had submitted an invoice to Sky for the monthly pro rata amount for services in May 2017, such invoice would

have been payable in accordance with the terms of the Sky Contract, and Sky would have paid such invoice.

Restrictive covenant

89. There are restrictive covenants in the Sky Contracts and in the NDA.

90. Mr McCann's evidence was that Sky were not entitled to require him to refuse other engagements, and he was not required to seek Sky's permission to enter into other engagements. He stated that he had never obtained written consent to perform other services, but that, as a matter of professional courtesy, when he decided to take the role at Dundee FC he had told Mr Hughes that he was going to take the job as interim manager. This was at a crucial time in the football season and, as noted above, at the time he was not expecting that he would be able to do any work for Sky during this period. Mr Hughes had wished him well.

91. During the tax years in issue, MML did not submit any invoices to anyone other than Sky in 2013-14, 2014-15 or 2015-16. In 2016-17 there were two invoices to Level 5 PR Ltd Media Relations and Sports Management, and in 2017-18 there were invoices to Dundee FC and Scottish Football, in addition to the invoices to Sky. There was no evidence of MML, or Mr McCann, providing services to anyone else and, whilst we had no evidence as to the services provided (other than in respect of Dundee FC), we infer that those for Level 5 PR Ltd and Scottish Football were not to broadcasters, print media or betting services. Accordingly, there was no evidence that MML and/or Mr McCann had operated other than in accordance with the terms of the restrictive covenant.

92. Mr McCann's engagement with Dundee FC did affect his availability to provide services to Sky, but did not breach the terms of the Sky Contracts, and he had in any event informed Sky in advance of taking the appointment. Furthermore, Mr McCann did not use social media (the use of which was subject to restrictions in the Sky Contracts).

93. We did have evidence from Mr Parry and Mr Graves that they had provided services to other broadcasters, and that they had not sought consent from Sky to do this even though they had since been informed that the contracts between their PSCs and Sky also contained restrictive covenants on the same terms as those in the Sky Contracts:

(1) Mr Parry's evidence was that he had mainly covered Premiership matches for Sky, thus within the football season of August to May. Sky did not have rights to the major international tournaments (eg the World Cup or the European Championship), so he would cover those tournaments for other broadcasters, including ITV and Talk Sport Radio. He had never asked for Sky's agreement before taking on this work.

(2) Mr Graves had worked on radio stations; he did not ask for permission from Sky before doing this (not having been aware that there were any relevant restrictions in the contract). He pointed out that whilst he had not provided his services to anosther broadcaster providing 24-hour sports news, there is in fact only one 24-hour sports new channel in Europe, ie Sky Sports.

94. This evidence does demonstrate that those who provided services to Sky did perform other activities for other broadcasters. However, we are mindful that this evidence does not relate to the contract between MML and Sky or the work of Mr McCann, and in any event we recognise that the examples given by Mr Parry and Mr Graves were not in direct conflict with Sky's own activities. We note that the Sky Talent Letter did not address the circumstances in which individuals may take on other work, or the provisions of the Sky Contracts which required consent for such other engagements.

95. The presumed existence of freedom or flexibility does not satisfy us that Sky would not have enforced the terms of the restrictive covenant in the Sky Contracts. We consider that they would have sought to prevent Mr McCann from being involved in competing activities.

Conclusions on actual contractual arrangements

96. The first step set out in *Kickabout* is to find the terms of the actual contractual arrangements and relevant circumstances within which the individual worked. However, we note that in *Atholl House* the Upper Tribunal indicated that it is not necessary to defer all analysis of the hypothetical contract at the second step until all the terms of the actual contract have been comprehensively determined.

97. With that in mind, we set out here our overall conclusions as to the actual contractual arrangements and relevant circumstances between MML and Sky:

98. In the light of the evidence, we have concluded that the Sky Contracts, ie the written legal agreements between MML and Sky, which included the NDAs from Mr McCann, did largely reflect the agreement between the parties. As a matter of contractual interpretation, entire agreement clauses are generally effective in preventing extraneous contractual terms from arising. That should not be determinative in the present context where the legislation itself requires that we can take account of other circumstances. However, whilst Mr Leslie sought to emphasise the flexibility in the arrangements, the main area where we find this to have existed was in that the dates on which Mr McCann provided his services were reached by mutual agreement between the parties. This affects whether Sky could be said to have first call on Mr McCann's services. We do not accept that Mr McCann was only paid for work done – he regularly invoiced the agreed fee in equal instalments, irrespective of the number of games covered in any month, and this continued outside of the football season.

99. We do not consider that Mr McCann's appointment as interim manager of Dundee FC during the term of the Sky Contracts establishes that the Sky Contracts did not reflect the actual agreement between the parties – this appointment did affect his availability, but this was just for a six week period, and given that services had previously been provided by mutual agreement this was a continuation of that approach, and in any event Mr McCann did appear on Sky during this time. This appointment did not breach the terms of the restrictive covenant as drafted in the Sky Contracts. MML did submit the regular invoices to Sky for services in April and June 2017, and we consider MML would have been entitled to submit a similar invoice in respect of May 2017.

100. Furthermore, the Sky Contracts reflected standard terms drafted by or on behalf of Sky, ie they were the terms on which Sky was prepared to enter into a legal agreement with PSCs, and Sky had refused to amend those terms.

HYPOTHETICAL CONTRACT

101. The second step is for us to ascertain the terms of the hypothetical contract postulated by s49(1)(c)(i) ITEPA 2003 and the counterpart legislation as applicable for the purposes of NICs.

102. Mr Leslie submitted that at the material times a hypothetical contract between Mr McCann and Sky would have included, inter alia, the following terms:

(1) The contract was legitimately capable of being varied.

(2) Mr McCann would provide his Services, primarily as a pundit, for Sky, as part of their talent pool.

(3) Mr McCann may be offered other work by Sky, not as a pundit, but he was not obliged to agree to the work.

(4) Sky would offer Mr McCann football matches upon which he could provide services, if he was available and willing.

(5) There would be no obligation on Sky to offer Mr McCann any work, and no obligation on Mr McCann to accept any work offered.

(6) Mr McCann would only be paid for services rendered.

(7) Mr McCann's fee would be split into 12 equal payments (paid in arrears) and paid pro-rata.

(8) For convenience, but without obligation, Mr McCann would inform Sky in advance of dates he might be available to provide services.

(9) There was no need for a first call by Sky on Mr McCann's Services - there was a talent pool.

(10) Mr McCann would have full autonomy over how he created the content via providing his punditry services. Sky would be able to make suggestions, although he is not obliged to follow them.

(11) Mr McCann would exercise full autonomy over the creation of his content (punditry), relinquishing the IP to Sky after its creation. For its own broadcasting purposes, Mr McCann would not have control over subsequent editorial.

(12) Sky would not have exclusive right to Mr McCann's Services, and he would have the right to carry out other business away from Sky, by agreement without prior written consent.

(13) Mr McCann is expected to adhere to common journalistic standards and ensure that he works in a professional manner and has the knowledge and expertise to provide the Services.

(14) Any research conducted by Mr McCann in order to augment his knowledge and enable professional delivery of his Services is not chargeable to Sky.

(15) If Sky breached OFCOM guidelines as a direct result of Mr McCann's Services, then any OFCOM fine given to Sky would be passed on to Mr McCann.

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

103. Mr Leslie emphasised that the hypothetical contract needed to reflect the flexibility which existed in practice, and that if Mr McCann was unavailable Sky could rely on a pool of talent.

104. Mr Anderson submitted that, reflecting the terms of the Sky Contracts, the following terms would be incorporated into the hypothetical contract between Mr McCann and Sky:

(1) Mr McCann would be contractually obliged to provide contributions for television programmes and marketing material as required by Sky. This would include providing his personal services, as a presenter, commentator, pundit, interviewer, guest or other participant. Where services were performed there would be an obligation on Sky to pay monthly calculated on the basis of the annual fee.

(2) Sky would have first call on Mr McCann's services.

(3) If Mr McCann did not provide services for a period in excess of four weeks, Sky would be entitled to terminate the agreement.

(4) Mr McCann would not have a unilateral "right" to provide a substitute to perform his duties. Any provision in the hypothetical contract in relation to a substitute would set

out that it could be provided only with the consent of Sky who would have an unfettered discretion to decide whether the proposed substitute was acceptable.

(5) Any substitute would enter into an entirely separate contract with any suggested replacement.

(6) Sky would have the right of overall control of where, when, what and how the work was done. Mr McCann would be obliged to comply with any requests made by Sky in respect of the performance of the Services. Sky would have the right to control where Mr McCann worked (whether in the UK or overseas and whether in its studio, at a match or elsewhere); what work he did (provided it was within the broad parameters set out in the contracts); when he did the work (given that he was required to work at "such time and dates" as required by Sky).

(7) Sky would have final editorial control over any products containing Mr McCann's contributions. They would retain all intellectual property rights in those products.

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

(9) Mr McCann would be obliged to comply with guidelines laid down by OFCOM.

(10) Mr McCann would be subject to similar restrictive covenants to those in the actual contracts, including those:

(a) prohibiting him from being involved directly or indirectly in the provision of any services to any other television and/or radio organisation and/or media, print or betting organisations during the period of the contract without the prior consent in writing of Sky;

(b) preventing him from promoting or otherwise granting any rights of association to any competitor of Sky, its products, brands or services; and

(c) controlling his social media use.

105. We have considered carefully the guidance from the Upper Tribunal in *Atholl House* (at [8]) that the process by which the hypothetical contract is constructed in not an exercise in transposition; the terms of the actual agreements are highly material; whilst the manner in which the actual contract is performed is typically irrelevant to its construction, it is not necessarily irrelevant when determining the terms of the hypothetical contract in the context of the intermediaries legislation, albeit that you cannot simply disregard the terms of the actual contract.

106. We consider it is important to bear in mind that we are mandated to build a hypothetical contract between two parties, Sky and Mr McCann. In undertaking this exercise, we consider that we need to take account of the evidence before us as to Sky's position as to the contents of the legal agreements it was prepared to enter into, as well as Mr McCann's evidence in relation thereto. The evidence as to Sky's position includes that from Mr Morgan and Ms Leaworthy as to the contracts being in standard form, the contents of the Sky Talent Letter (which we have found to be broadly consistent with the evidence adduced on behalf of Mr McCann save in the respects we identified) and the Sky Meeting Notes (although, as already indicated, we only place weight on those to the extent corroborated by other evidence, including that of the witnesses and the explanations set out on behalf of Mr McCann in correspondence with HMRC).

107. On the basis of the evidence before us we have concluded that the contracts which Sky was prepared to enter into for the provision of co-commentary and punditry services were of

standard form. This was the case when they contracted with PSCs. We consider that Sky would have sought to enter into contracts with individual talent, including Mr McCann, on similarly standard terms. In addition, we note that the terms on which Sky contracted with MML already set out the terms on which they wanted to engage with Mr McCann in certain respects, namely in relation to confidential information, IP rights, non-compete and non-solicitation, ie those matters addressed by the NDA.

108. The existence of the Sky talent pool does not require specific provision in the hypothetical contract between Sky and any individual presenter, pundit or co-commentator. However, such talent pool does exist and was an important part of the way in which Sky operated – it had a pool of talented individuals, with overlapping but different skill sets and appeal, available to it, and those individuals were keen to provide services to Sky and to appear on Sky broadcasts.

109. We have broadly accepted HMRC's submissions as to the terms of the hypothetical contract, albeit that we have modified the details to take account of the existence of the Sky talent pool in the following ways:

(1) Whilst the Sky Contracts did include a substitution clause, Mr McCann had never sought to use this and, if he had, this required Sky's agreement. There was no submission that this clause was a sham. However, we consider that it is highly unrealistic to expect that Mr McCann would propose to use a substitute that would be acceptable to Sky in circumstances where such substitute was not already part of the talent pool. This is part of the actual circumstances before us, and we therefore conclude that there would not be express provisions dealing with substitutes in the hypothetical contract.

(2) We do not accept that Sky would have first call on Mr McCann's services, in the sense of expecting him to be available whenever they wanted. This is not consistent with flexibility in agreeing when to provide services (which we consider would be reflected in the hypothetical contract), or the fact that Mr McCann only covered games 8-10 times per month during the football season (this being less than the number of games offered to him). In reaching this conclusion, we are mindful of the criticisms set out by the Upper Tribunal in *Atholl House* in respect of the similar conclusion reached by the Tribunal in that appeal. Nevertheless, on the basis of the facts as we have found them, as to how the arrangement operated, rather than by reference to Mr McCann's understanding of the terms, we have concluded that this is the appropriate conclusion in this appeal. The protection for Sky would be in the restrictive covenants, the termination rights and, outside the terms of any contract, the fact that talent wanted to work for Sky and appear on Sky broadcasts.

110. Furthermore, we do not accept that the contractual terms would use the language of "control" as proposed by Mr Anderson, this seeking to pre-determine the analysis at the third step.

111. In addition, we consider that the NDAs, which are obligations undertaken directly by Mr McCann to Sky, are a clear indicator of the obligations which would be sought by Sky in a hypothetical contract. We concluded that the terms of those NDAs are entirely consistent with the way in which the Sky Contracts and the performance of services thereunder operated in practice.

112. We therefore conclude that the following terms would be incorporated into the hypothetical contract between Sky and Mr McCann:

(1) Mr McCann would be obliged to provide contributions for television programmes and marketing material as reasonably required by Sky. This would include providing his

services, as a presenter, commentator, pundit, interviewer, guest or other participant. Those services are to be rendered to the best of Mr McCann's abilities.

(2) There would be an obligation on Sky to pay monthly calculated on the basis of the annual fee.

(3) The dates on which Mr McCann provided his services would be agreed between Mr McCann and Sky.

(4) Subject to the above, Sky would have the right to determine where and when the work was done. Sky would have the right to specify where Mr McCann worked (whether in the UK or overseas and whether in its studio, at a match or elsewhere); and the role he performed on such occasions.

(5) Sky would have final editorial control over any products containing Mr McCann's contributions. They would retain all intellectual property rights in those products.

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

(7) Mr McCann would be obliged to comply with guidelines laid down by OFCOM.

(8) If Mr McCann did not provide services for a period in excess of four weeks, Sky would be entitled to terminate the agreement.

(9) Mr McCann shall not, without the prior written consent of Sky or unless required by law, disclose any confidential information to any person.

(10) Mr McCann would be subject to restrictive covenants:

(a) prohibiting him from being involved directly or indirectly in the provision of any services to any other television and/or radio organisation and/or media, print or betting organisations during the period of the contract without the prior consent in writing of Sky;

(b) preventing him from promoting or otherwise granting any rights of association to any competitor of Sky, its products, brands or services; and

(c) controlling his social media use.

WHETHER HYPOTHETICAL CONTRACT IS A CONTRACT OF EMPLOYMENT

113. We have considered the hypothetical contract in the light of the statement of the conditions required for a contract of employment as set out in *Ready Mixed Contract*, but bear in mind that we should be painting a picture of the relationship and analysing the overall effect of the whole.

Personal service and mutuality of obligations

114. In *Ready Mixed Concrete* MacKenna J set out the condition that the worker agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (This is commonly referred to as a requirement that there is a mutuality of obligations.) MacKenna J then expanded on this as follows:

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

115. Both parties recognised that there must be an irreducible minimum of mutuality of obligation for there to be a contract of employment (referring to *Carmichael v National Power plc* [1999] ICR 1226 at 1330). They differed as to the requirements of this condition and as to the application to the facts in the present appeal.

116. Mr Leslie submitted that the required level of mutuality consists of five elements – an obligation on the employer to provide ongoing work; an obligation on the employee to accept and perform the work offered; being paid if work is actually done; an obligation on the employee to make themselves available for work; and an obligation on the employer to pay the employee for making themselves available, whether work is offered or not. He submitted that all of these elements are required, and they were not met where Mr McCann was free to choose which offers of work to accept, there was no minimum level of work specified in the contract and he was only paid for work done.

117. Mr Anderson submitted that the dominant feature of the relationship within the hypothetical contract is personal service by Mr McCann, and drew attention to the monthly payment of fees by Sky, which were of regular amount and did not vary by reference to the amount of work performed or games covered. He submitted that the issue of whether the individual is required to accept work if offered, or whether the employer is obliged to offer work as available, is irrelevant to the question of whether a contract exists at all during the period when the work is actually being performed. This is even so if the contract is terminable on either side at will. The fact that an individual has the right to turn down work is not fatal to a finding that the individual is an employee or a worker and, by the same token, does not preclude a finding that the individual is employed under a worker's contract.

118. MacKenna J's own description sets out clearly that there must be a wage, and an obligation on the worker to provide their own work and skill. This has been considered further and extensively in various authorities.

119. It has been established that one feature of an employment contract is that the employer is obliged to pay the employee regardless of whether or not the services in question are performed – this can be seen from Sir Christopher Slade in *Clark v Oxfordshire Health Authority* 41 BMLR 18 at p30, *Carmichael* at p1230G, *Stevedoring & Haulage Services Ltd v Fuller* [2001] EWCA Civ 651 at [9] and [10] and *Usetech Ltd v Young* [2004] EWHC 2248 (Ch) at [64].

120. In *HMRC v Professional Game Match Officials Ltd* [2021] EWCA Civ 1370 the Court of Appeal addressed the question of mutuality of obligation in the context of the activities of football referees and the existence of an overarching contract or contracts for individual engagements. That is clearly a different issue, but nevertheless we bear in mind the conclusions drawn by the Court of Appeal at [124]:

> "124. The authorities I have summarised above show that the UT erred in law in concluding in paragraph 100 that the individual contracts could not be contracts of employment if they merely provided for a worker to be paid for the work he did, and, in paragraph 101, in concluding that the statements about the mutuality of obligation which is necessary to found an overarching contract also apply to individual engagements. The UT also erred in law in upholding the conclusion of the FTT that provisions in a contract which enabled either side to withdraw before performance negated the necessary mutuality of obligation. The UT's statement that the analysis in paragraph 13 of Stephenson was inapposite is also wrong in law. The fact that the individual contract lasted longer than the match (that is, from the Monday morning until the submission of the match report) is irrelevant, both because of the nature of

> the performance required by the contract, once made, and because the performance required included the submission of the match report."

121. The Court of Appeal thus confirmed that individual contracts can be contracts of employment if they merely provide for a worker to be paid for the work he did, and provisions which enable either side to withdraw before performance do not of themselves negate mutuality of obligations.

122. We do not consider that the authorities provide support for Mr Leslie's submission that there are five required components for a mutuality of obligations, and in particular reject the propositions so far as they focus on obligations to accept all work offered and remain available for work (impliedly at all times).

123. We agree with HMRC that the first of MacKenna J's conditions is satisfied in relation to the hypothetical contract between Sky and Mr McCann:

(1) Sky is required to pay Mr McCann monthly on the basis of an agreed annual fee.

(2) That amount is payable irrespective of the level of services requested by Sky or actually performed by Mr McCann, save in circumstances where Mr McCann did not perform any services for more than four weeks (in which case Sky would have the right to terminate the contract).

(3) Performance of the services is a personal obligation of Mr McCann, with no opportunity to delegate or substitute others.

(4) Mr McCann is obliged to provide services as reasonably required by Sky. The fact that the dates applicable, or games to be covered, are to be agreed between them does not negate the existence of the obligation to act as pundit, co-commentator or guest on such occasions.

124. In short, we do not consider that the lack of an absolute right for Sky to dictate the dates on which Mr McCann is to attend and act as a pundit negates the existence of the required level of mutuality of obligations.

Control

125. MacKenna J's second condition for the existence of a contract of employment is that the individual 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. He went on to explain:

> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant."

126. This is typically referred to as control over the "what", the "how", the "when" and the "where". What is relevant is the right to control, not whether it is exercised in practice, and the absence of a practical ability to control how a skilled person performs his or her duties is not conclusive of the absence of an employment relationship (*Atholl House* at [92]).

127. Mr Leslie submitted that Sky did not have a sufficient level of control over Mr McCann for this purpose:

(1) Mr McCann was in full control of his own diary, and free to accept or decline offers of work.

(2) As a professional Mr McCann cannot be controlled during a live event. A pundit could respond to the flow of a conversation and will react to whatever was shown on screen – the content is the pundit's own input and expert opinion. There is minimal creative input from the Sky production team, as acknowledged by Sky in the Sky Talent Letter.

(3) There were no Sky editorial guidelines; instead, everyone (whether they were employed directly or provided services through a PSC) had to comply with OFCOM's regulations.

(4) The fact that Sky had editorial control over the content created by Mr McCann, including the decision as to whether to broadcast it, is not relevant to the question of whether there was control over his activities.

(5) Sky's control over when and where services are to be performed merely reflects, in this context, the practicalities of the industry and the location of games, and is of little assistance.

128. We consider that, taking account of the entirety of the arrangements, Sky did have a sufficient degree of control to satisfy this condition:

(1) The Sky production team decided which guests and pundits/co-commentators to use for particular games. They then offered the games to the relevant individuals, although Mr McCann was able to decline to cover a particular game.

(2) Once a presenting team was assembled, Sky determined the roles to be performed by everyone involved, and Mr McCann was required to work within the agreed format of the programme, as determined by Sky's producer. The structure and timing of what was broadcast was determined by Sky.

(3) Mr McCann provided his own expertise and perspective, and the content was his own, with this being subject to the restrictions set out by OFCOM. As Mr Leslie acknowledged, this factor is neutral in the context of professionals engaged to provide their expertise during live broadcasts.

(4) The range of (non-Sky) activities that could be undertaken by Mr McCann was restricted – he was not permitted to provide services to competing broadcasters, and his use of social media was subject to restrictions (albeit that he did not use social media himself in any event). These restrictions applied throughout the term of the hypothetical contract with Sky.

(5) As noted above, Mr McCann could decline to cover a game that was offered to him. However, once accepted, the "when" and "where" were largely functions of the location and timing of the game.

Other provisions

129. MacKenna's J's third condition is that the other provisions of the contract are consistent with its being a contract of service. He went on to describe this as a negative condition, but also for his purpose the most important one, and gave five examples before putting forward this helpful explanation:

> "I can put the point which I am making in other words. 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."

130. In *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, Cooke J suggested, at page 184G (cited in *Hall v Lorimer* at [215] per Nolan LJ), that the question of whether a worker is an employee could be answered by determining whether the individual who performs the services is performing them as a person in business on his own account. He identified five relevant factors:

> "…factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

131. There is also authority for the proposition that where an individual is economically dependent on a broadcaster and where the broadcaster has the right to restrict the individual from participating in other activities, including presenting for rival broadcasters, the presenter cannot be considered to be in business on his or his or her own account (*Christa Ackroyd Media Ltd v HMRC* [2018] UKFTT 69 at [176]-[177], affirmed [2019] UKUT 326 (TCC)).

132. We see no reason to find that any particular factor on its own should be regarded as determinative, and some factors may be of no or minimal relevance to particular fact-patterns. Two of the factors listed by Cooke J are of no assistance in the present context, namely whether Mr McCann used his own helpers and his degree of responsibility for investment and management.

133. Considering the hypothetical contract between Mr McCann and Sky we note the following:

(1) Equipment – Sky provided all of the equipment for the broadcast, although Mr McCann used his own computer equipment when preparing ahead of any game. Given that Sky is a broadcaster and needed to ensure that the equipment used by everyone involved was compatible and of the requisite quality, we regard Mr McCann's use of Sky's equipment as neutral.

(2) Financial risk – Mr Leslie submitted it was highly material that Mr McCann was only paid following performance of the services, and that if there was no work there was no pay. However, we consider that this does not reflect the terms of the Sky Contracts, the way in which they were operated or the terms of the hypothetical contract. Mr McCann was paid an annual fee by Sky, in monthly instalments, in an amount which did not vary accordingly the number of games covered in a particular month, or the level of other promotional activities performed. Mr McCann did bear some elements of financial risk, including:

(a) any OFCOM fine resulting from his behaviour would be passed on to him, but there was insufficient evidence before us to enable us to conclude, on the balance of probabilities, that this would not also be the case for individuals who were actually directly employed by Sky; and

(b) Sky could terminate the contract if no services were performed, and when he was appointed as interim manager of Dundee FC he was exposed to the possibility that another pundit would essentially take his seat and he would not be offered a renewed contract. These are risks shared by workers who move between jobs. We regard this as neutral in this context.

(3) Opportunity to profit from sound management – Cooke J listed this separately from financial risk, but the two factors could be said to be related. If financial risk includes a consideration of whether an individual is exposed to costs or losses, this factor draws attention to the issue of whether, by his business practices, an individual can minimise costs and increase profits. Mr McCann could not increase the fees payable to him by taking on more activities for Sky during the period. He could not profit from sound management of his activities for Sky – although he could seek new sources of income, as considered separately below. We do place some weight on this factor, considering that this is consistent with a contract of employment.

(4) Economic dependence and right to restrict other activities – Mr Anderson submitted that we should find that Mr McCann was economically dependent upon Sky during the periods in issue. The accounts of MML show that MML had no other sources of income in the first three tax years, and (with the exception of the payments from Dundee FC) minimal other income in 2016-17. We had no evidence as to the financial circumstances of Mr McCann, albeit we acknowledge that the burden of proof is on MML. We do not make any finding as to whether Mr McCann was economically dependent on Sky, but do make the findings above in relation to MML. We do, however, consider it relevant to assess the extent to which Mr McCann was able to exploit other opportunities. MML was able to increase its revenues, and did in fact do so, when Mr McCann was appointed as interim manager of Dundee FC. He would have been able to do so under the terms of the hypothetical contract. Mr McCann did have the ability to increase his earnings by accepting other appointments; but this is akin to any situation in which a worker provides services to one organisation on a basis which only covers some of their time. They can use their (otherwise free) time to seek other opportunities. Mr McCann could not, however, provide services to other broadcasters, and was to that extent restricted in his ability to do other work.

(5) Stated intentions and understanding of the parties - The Sky Contracts stated that MML and Sky agreed that there exists no employment agreement or relationship between Mr McCann and Sky and that the parties do not wish to create or imply any mutuality of obligations. The hypothetical contract we constructed contains no such provision. We place no weight on those statements. Mr Anderson referred us to a news article in which Mr McCann had, in May 2017, referred to those at Sky at his bosses. The use of this terminology could be equally appropriate for both self-employed and employed workers, connoting here the fact that Sky did have control over games offered to Mr McCann. We do not place any weight on this language in this context.

134. Assessing all of the above, we consider that Mr McCann cannot be considered to be in business on his own account under the terms of the hypothetical contract. We place particular weight on his entitlement to an annual fee from Sky, which did not vary according to the number of services provided (considering this outweighs the other matters identified in the context of financial risk) and he did not provide services to any other broadcaster and could not do so (by reason of the restrictive covenant). Whilst we recognise that Mr McCann was able to take other roles and exploit other opportunities (in areas not covered by the restrictive covenant), notably in his role at Dundee FC, this is not inconsistent with the relationship between Mr McCann and Sky being one of employment as it can occur when there is flexibility in the performance of services which are not expected to be provided full-time.

135. We have concluded that the provisions of the hypothetical contract are consistent with a contract of employment. This, coupled with our conclusions in relation to the first two conditions and taking account of the whole picture which is painted by the facts as we have found them, means that we consider that the hypothetical contract would be a contract of

employment. Accordingly, s49(1) ITEPA 2003 and regulation 6 of the Intermediaries Regulations apply.

QUANTUM

136. HMRC issued three determinations and three notices, as set out in the Background Facts above. Section 50(6) Taxes Management Act 1970 provides that if, on an appeal notified to the Tribunal, the Tribunal decides that the appellant is overcharged, the assessment or amounts shall be reduced accordingly, but otherwise the assessment shall stand good. The burden of proof is thus on MML to establish, on the balance of probabilities, that it has been overcharged by the amounts assessed.

137. In his skeleton argument Mr Leslie set out that MML "does not entirely understand the quantum" assessed by HMRC, and referred to alternative tax computations which had been supplied by MML's accountant and were included in the hearing bundle. However, we were not taken to these alternative tax computations in the hearing, no evidence was led in relation to them which could assist with establishing that these (lower) computations were to be preferred, and we could not ourselves identify anything on the face of the three determinations or the three notices issued by HMRC to support a conclusion that they had been prepared on an incorrect basis. We have not been persuaded that the assessments raised by HMRC in these determinations or notices are excessive, and accordingly they stand good.

DISPENSATION

138. The appeals against the First, Second and Third Determinations and the First, Second and Third Notices are dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

139. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

Release date: 10 MARCH 2022