Neutral Citation: [2024] UKFTT 00038 (TC)

Case Number: TC09029

FIRST-TIER TRIBUNAL
TAX CHAMBER

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Appeal reference: TC/2019/01583

Income Tax and National Insurance – Income Tax (Earnings and Pensions) Act 2003, sections 48-61 – Social Security Contributions (Intermediaries) Regulations 2000, regulation 6 – intermediaries legislation – personal service company – football pundit for Sky – terms of the actual contract – terms of the hypothetical contract – whether the hypothetical contract would be an employment contract – yes – appeal dismissed

Heard on: 27 and 28 March 2023
Further written submissions on: 11 April 2023
and 25 April 2023
Judgment date: 11 December 2023

Before

TRIBUNAL JUDGE RICHARD CHAPMAN KC
MR MOHAMMED FAROOQ

Between

PD & MJ LIMITED
(In Members' Voluntary Liquidation)

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Michael Firth of counsel.

For the Respondents: Miss Georgina Hirsch of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs.

DECISION

INTRODUCTION

1. This appeal relates to the business relationship between Mr Phil Thompson and Sky UK Limited ("Sky"). Mr Thompson is (and has been at all relevant times) the sole director of the Appellant, PD & MJ Limited ("the Company"). Although the relevant contractual relationship was between the Company and Sky, the relevant services within this appeal were supplied by Mr Thompson as a pundit on Sky's weekly television programme variously known as Soccer Saturday, Gillette Soccer Saturday, and Gillette Labs Soccer Saturday (referred to herein as "Soccer Saturday"). The essence of the appeal is as to whether sections 48 to 61 of the Income Tax (Earnings and Pensions) Act 2003 and the Social Security Contributions (Intermediaries) Regulations 2000 ("ITEPA 2003" and "the 2000 Regulations" respectively and together "the Intermediaries Legislation", also commonly known as IR35) apply. HMRC maintain that they do apply, which is reflected in their decisions to assess the Company for PAYE and NIC for the years 2013/14 to 2017/18 in the total sum of £294,306.68. The Company appeals these decisions and argues that the Intermediaries Legislation does not apply.

2. The quantum of the decisions is not in dispute and so the parties only seek a determination in principle as to the applicability of the Intermediaries Legislation. The parties also agree that the key dispute is as to (if Mr Thompson had provided his services directly with Sky) whether he would have been regarded for income tax and national insurance purposes as an employee of Sky.

FINDINGS OF FACT

3. There was no real dispute as to the factual background. We make the following findings of fact having heard oral evidence from Mr Thompson and Mr Ian Condron (Mr Condron being the producer of the Soccer Saturday programme at the relevant times), each of whom also provided written statements. Both witnesses gave their evidence in a clear, helpful, and honest way and we have no reservations at all about their credibility. We have also considered the documents within the hearing bundle. We make these findings on the balance of probability and bear in mind that the burden of proof is upon the Company.

4. Mr Thompson is a former footballer. He has an impressive record in playing for Liverpool Football Club ("Liverpool") and for England. He is also a former manager of Liverpool.

5. Between 1994 and 1998, Mr Thompson appeared on Soccer Saturday. The programme featured a panel of high profile former professional footballers, who would watch live football matches and provide live analysis and punditry. Mr Thompson would be on this panel and would be paid for each show that he appeared on. Mr Thompson left the programme when he became an assistant manager, and then caretaker manager, at Liverpool. Mr Thompson returned to Soccer Saturday in 2004.

6. The Company was incorporated on 15 January 2013, with the intention that Mr Thompson's services for Sky be provided through the Company. This resulted in a contract between the Company and Sky (then named British Sky Broadcasting Limited) entitled "Services Agreement" and dated 11 June 2013 ("the 2013 Contract"). The 2013 Contract comprised a document entitled "Key Terms", a document entitled "Terms and Conditions" and a document entitled "Schedule" which included what was described as a non-disclosure agreement, but which also included other terms. The Schedule was signed by Mr Thompson in his individual capacity.

7. The main terms of the 2013 Contract of relevance to these proceedings were as follows:

(1) By the Key Terms, the assignment was from 1 August 2013 to 31 July 2015. This was stated to be, "on an ad hoc as and when required basis."

(2) By the Key Terms, the Company was required to provide the services of Mr Thompson. These services were listed as being, "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."

(3) By the Key Terms, the fee payable to the Company was modestly different for each year and was paid monthly in arrears.

(4) Paragraph 1 of the Terms and Conditions made provisions in respect of the Company's "Key Personnel". In particular:

> (a) Paragraph 1.1 provided that the Company was to use best endeavours to perform the services using Mr Thompson but had the right to propose other employees or sub-contractors.
>
> (b) Paragraph 1.2 provided that, "If the Company makes a proposal under Clause 1.1, BSkyB will have the right to assess the suitability of the substitute prior to the substitution. If BSkyB find the substitute to be suitable, they will confirm this in writing. Any person involved in the provision of the Services from time to time shall be the "Personnel" for the purposes of this Agreement."

(5) By paragraph 2 of the Terms and Conditions, the Company's duties and obligations included the following:

> (a) To provide exclusive use of Mr Thompson's services within the defined area (including the United Kingdom and the Republic of Ireland), to provide non-exclusive rights to exploitation outside the Territory, and not to provide similar services to other television, radio or media organisations. Paragraph 2.1 reads as follows, "The Company shall procure that the Personnel shall provide the Services to BSkyB during the Assignment for exclusive exploitation within the UK, the Republic of Ireland, the Channel Islands and Isle of Man ("Territory") and for non-exclusive exploitation outside of the Territory. The Company shall procure that neither the Personnel nor any former Personnel shall be involved directly or indirectly in the provision of any services to any other television and/or radio organisation and/or media, print or betting organisations during the Assignment for exploitation inside or outside the Territory where such services are the same as or similar to the Services, without the prior written consent of the Head of Sky Sports, such consent not to be unreasonably withheld. This Clause 2.1 is not intended to limit the Personnel from providing their services to any other entity that is not a provider or distributor of television, radio, print media and/or betting services, provided that such services do not interfere with the provision of the Services, as determined by BSkyB."
>
> (b) To correct any defective work at the Company's own cost.
>
> (c) To perform the Services when and where Sky requires. Paragraph 2.6 reads as follows, "The Company 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 BSkyB."

(d) To give Sky "first call" on Mr Thompson's services. Paragraph 2.7 reads as follows, "Notwithstanding any other provision of this Agreement, BSkyB shall have first call on the Company's Personnel for the Provision of the Services. Further, at no additional cost to BSkyB the Company shall procure that all Personnel shall attend at BSkyB's request for the purposes of press and/or promotional events, call centre visits, recording trailers and/or other promotional material for use in all forms of media and/or other services reasonably required by BskyB in each case to advertise and promote BSkyB programmes and/or BskyB's products and services generally. Neither the Company nor any Personnel shall endorse or promote or otherwise grant any rights of association or provide marketing or promotional services to any competitor of Sky, its products, brands or services."

(e) To grant Sky the exclusive right in the Territory to use Mr Thompson's image rights to advertise and promote Sky's programmes and services.

(f) To limit Mr Thompson's ability to discuss Sky on social media. Paragraph 2.9 reads as follows, "The Company shall not and shall procure that the Personnel does not use any social media service to discuss BSkyB, any BSkyB staff, employee, agents or contractors and/or any sports rights holder and/or any related matter other than in accordance with any direction and/or with the prior written consent of BSkyB from time to time. This is a material term of this Agreement."

(6) By paragraph 2.3 of the Terms and Conditions, the Company and Sky agreed that there was no employment agreement or relationship between Mr Thompson and BSkyB or any associated company.

(7) Paragraph 3 of the Terms and Conditions dealt with the fee and payment terms. These were payable in equal monthly instalments.

(8) By paragraph 4 of the Terms and Conditions, the Company gave (and agreed to procure that Mr Thompson would give) various warranties. These included the following:

(a) By paragraph 4.1, "the Services will be rendered to the best of the Company's and the Personnel's abilities and all directions and requests given by BSkyB or its nominees will be complied with."

(b) Not to enter into any agreement which restricts the exercise of Sky's rights.

(c) That the services would not contain anything defamatory, obscene, discriminatory, or otherwise likely to bring Sky into disrepute.

(9) Paragraph 5 of the Terms and Conditions dealt with the circumstances in which Sky may terminate the 2013 Contract. There was no corresponding provision for termination by the Company.

(10) Paragraph 6 of the Terms and Conditions dealt with the Company's obligations to Sky after termination.

(11) By paragraph 7 of the Terms and Conditions, the Company agreed not to disclose (and to procure Mr Thompson's agreement not to disclose) any confidential information obtained through the provision of the services.

(12) By paragraph 8 of the Terms and Conditions, the Company agreed to (and to procure Mr Thompson's agreement to) a non-solicitation clause.

(13) By paragraph 9 of the Terms and Conditions, the Company and Sky agreed that Mr Thompson was not an employee, worker, agent, partner or joint venturer of Sky or any associated company.

(14) By paragraph 10 of the Terms and Conditions, the Company agreed to (and to procure Mr Thompson's agreement to) the assignment to Sky of intellectual property rights used for the services.

(15) Paragraph 11 of the Terms and Conditions provided for an exclusion of liability by Sky in respect of any personal injury, ailment or death save for in the event of negligence by Sky.

(16) Paragraph 12 of the Terms and Conditions required the Company to obtain and maintain insurance.

(17) Paragraph 13 of the Terms and Conditions dealt with the Company's data protection obligations.

(18) Paragraph 14 of the Terms and Conditions dealt with the provision of notices.

(19) Paragraph 15 of the Terms and Conditions included an entire agreement clause.

(20) The Schedule was signed by Mr Thompson and included his agreement to various of the duties and obligations referred to in the Terms and Conditions.

(21) Paragraph 3.1 of the Schedule provided that, "I will render my services to the best of my ability and comply with the terms of the Main Agreement and all directions and requests given by or on behalf of BSkyB or its nominees."

(22) Paragraph 4.2 of the Schedule included a non-compete clause in the following terms, "I acknowledge and agree that I have a reputation in the market place as an expert and command audience share. I further acknowledge that during the Assignment I will have become associated in the minds of the public with Sky Sports and will gain knowledge of the Sky Sports methodology and unique practice and that should I cease to provide the Services during the Assignment that will damage Sky Sports' commercial interest. I therefore agree that should I cease to be involved in the provision of the Services (other than at BSkyB's request) during the Assignment, I will not until the end of the Assignment be involved directly or indirectly in the provision of any services to any other television and/or radio organisation, print, media and/or betting organisations during the period of the Assignment for the exploitation inside or outside the Territory where such services are the same as or similar to the Services, without the prior written consent of the Head of Sky Sports, such consent not to be unreasonably withheld. This paragraph 4.2 is not intended to limit me from providing my services to any other entity that is not a provider or distributor of television and/or radio services, provided that such services do not interfere with the provision of the Services as determined by BSkyB. I agree that BSkyB would be entitled to injunctive relief to enforce the terms of paragraph 4.2 and acknowledge that damages would not be an adequate remedy."

(23) Paragraph 8.2 of the Schedule expressly incorporated the definition of "Services" in the Key Terms.

8. A further agreement was entered into between the Company and Sky on 9 June 2015, which replaced the 2013 Contract ("the 2015 Contract"). The main differences between the 2013 Contract and the 2015 Contract were as follows:

(1) The assignment years were of course different, as the 2013 Contract related to the period from 1 August 2013 to 31 July 2015, whereas the 2015 Contract related to the period from 1 August 2015 to 31 July 2017.

(2) The 2013 Contract provided for different fees for 2013/14 and 2014/15. The 2015 Contract had the same fee for each year (which was, in fact, the same as for 2014/15).

(3) The 2015 Contract removed the words, "presenter" and "interviewer" from the list of services.

(4) Whereas the 2013 Contract provided a warranty at paragraph 4.1 that "all directions and requests by BSkyB or its nominees will be complied with," the 2015 Contract provided additional detail as to what this included (for example, not wearing anything capable of being perceived as an advertisement or of a commercial or advertising nature or inconsistent with Sky's obligations and observing occupational health and safety and fire regulations).

9. It follows that the main terms of the 2013 Contract and the 2015 Contract were, in substance, the same. The matters referred to at paragraphs 8(1) and (2) above are merely functions of the different periods and fees involved. Further, the matters referred to at paragraphs 8(3) and (4) are not in fact substantive differences at all when considering the rights and obligations of the parties; the words "other participant" in the services for the 2015 Contract are wide enough to includer presenter and interviewer in appropriate circumstances and the additional detail of the directions to be complied with in the 2015 Contract with are capable of being subsumed within the "all directions and requests" provision within the 2013 Contract if such a direction or request were to be made. Indeed, neither party suggested that there was a different approach, analysis or conclusion to be taken in respect of each of the contracts. Save as expressly set out, therefore, we treat the 2013 Contract and the 2015 Contract as substantially the same and refer to them together as "the Contract").

10. The arrangements for the programme were relatively informal. In practice, the understanding was that Mr Thompson's main role would be to appear on Soccer Saturday, with about ten to fifteen appearances per year on mid-week shows. Although Mr Thompson stated in his witness statement that he was of the view that he did not need permission from Sky to miss a programme, in practice he would always give Sky notice when he was unavailable in order to ensure that Sky could obtain a replacement. If a replacement was required, it would be Sky rather than the Company or Mr Thompson who would decide who would be on instead and who would make the necessary arrangements. Indeed, Mr Thompson said that he would not dare tell Sky who should be on instead as it was not his role to do so. In any event, Mr Thompson would rarely miss a programme. Mr Thompson said during his oral evidence that the assumption was that he would be asked to be on the programme most of the time unless there was a particular reason such as attending a wedding. If Mr Thompson was not able to attend for any particular week, Mr Thompson would tell Mr Condron in advance out of respect, who would agree. This did not happen often as Mr Thompson would holiday out of season and enjoyed being on the programme so much that he did not want to miss it. Mr Thompson would be told early on in a week whether he would be on the programme that Saturday. He would also be told in advance if he was going to be on a Wednesday programme. Mr Thompson would be asked to be on (and would then appear on) the programme most weeks. Mr Thompson said that the viewing public would expect him to be on their screens on a Saturday.

11. Mr Thompson's preparation for the programme largely involved him watching football matches during the week. He would be sent a bundle of documents and statistics on a

Thursday. However, this was for information purposes rather than Mr Thompson being told to say anything in particular on the programme.

12. The format of Soccer Saturday during the relevant periods remained as before, in that Mr Thompson was a member of a panel of pundits. The programme ran for six hours and was hosted by Mr Jeff Stelling. The first three hours would be a general discussion between the host and the panellists. The next three hours would involve the panellists putting on headphones to listen to the commentary for the match being analysed, which would be watched on a live feed on a studio monitor. The panellists would discuss features of the match as they arose. These were the panellists' own opinions rather than commentating. Mr Stelling was in charge of the running order, and he would ask questions of the panellists or lead the discussion. Mr Thompson did not wear an earpiece to receive instructions and would not be given any direction other than the floor manager signalling to him to wrap up. Sky would have final editorial control, but Mr Thompson was effectively left to give his own opinions. Mr Thompson (and the other panellists) knew that the microphones were on even when it was a commercial break and so were careful with their language and topics of conversation. Mr Thompson would usually go home straight after the programme.

13. Mr Thompson would usually be filmed at Sky's studios in London. On occasion, Sky would ask Mr Thompson to go to Anfield to cover a big story relating to Liverpool. If Mr Thompson was available, then he would agree to do this.

14. On average, about 80% of the Company's income came from the Contract (although the range over the relevant periods was from 71% to 88%). The Company's other activities during the relevant periods included work for Skybet (which was associated with Sky), speaking engagements, tours of Liverpool's stadium at Anfield, and television interviews with Liverpool's television channel. Mr Thompson would seek Sky's permission if he was going to do anything for another broadcaster. Whether Sky would agree depended upon what it was for. He said that if he had asked Mr Condron if, for example, he could appear on the BBC, Mr Condron would have said no. Similarly, he said that Mr Condron would have said no if anybody had asked him to do any shows relating to the Premier League. However, if, for instance, Liverpool's television channel was to do a show looking back at Mr Thompson's career, that would be fine.

15. Mr Thompson became a formal employee of Sky in 2020. Mr Thompson said during his oral evidence that he performed his work in the same way after he became an employee. However, the major difference was that he was now given Sky television for free, which had been denied to him previously as this was a benefit which was reserved for Sky employees. He said that he did not have an office at any time.

16. Mr Condron said that the wording of the Contract was not known or relevant to him. He said that there was no stipulation that the panellists had to do any particular show or number of shows. Mr Condron also said that Mr Thompson had more authority than a reporter as he was a former footballer. He would expect Mr Thompson to give his opinion and to say what he thought. Mr Condron also gave evidence as to the way in which the Contract worked in practice which was consistent with Mr Thompson's evidence as set out above.

THE LEGAL FRAMEWORK

17. There was common ground as to the following legal framework and the legal principles to be applied.

18. The relevant parts of section 49 of ITEPA 2003 provide as follows:

> "49. Engagements to which this Chapter applies
>
> (1) This Chapter applies where

(a) an individual ('the worker') personally performs, or is under an obligation personally to perform, services for another person ('the client').

...

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

(c) the circumstances are such that

(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."

19. The relevant parts of regulation 6 of the 2000 Regulations provide as follows:

"6. Provision of services through intermediary

(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.

...

(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.

..."

20. As set out above, the relevant provisions of ITEPA 2003 and the 2000 Regulations are substantially similar. The parties both (rightly) approached the appeal upon the basis that the case in respect of PAYE and the case in respect of NIC would stand or fall together.

21. A three-stage test is to be applied: first, to identify the actual contractual arrangements; secondly, to ascertain the terms of the hypothetical contract; and, thirdly, to consider whether the hypothetical contract would be a contract of employment. The Court of Appeal stated as follows in *HMRC v Atholl House Productions Ltd* [2022] EWCA Civ 501, [2022] STC 837 ("*Atholl House*") *per* Sir David Richards at [7] (see also *HMRC v Kickabout Productions Ltd* [2022] EWCA Civ 502, [2022] STC 876 *per* Sir David Richards at [7]):

> "[7] As regards the application of the condition in s49(1)(c), it has been common ground between the parties that the following three-stage process provides a helpful structure:
>
> (1) *Stage 1*. Find the terms of the actual contractual arrangements (between Atholl House and the BBC on the one hand and between Ms Adams and Atholl House on the other) and relevant circumstances within which Ms Adams worked.
>
> (2) *Stage 2*. Ascertain the terms of the 'hypothetical contract' (between Ms Adams and the BBC) postulated by s49(1)(c)(i) and the counterpart legislation as applicable for the purposes of NICs.
>
> (3) *Stage 3*. Consider whether the hypothetical contract would be a contract of employment.

22. Finding the terms of the actual contract includes ascertaining their proper construction in the event of ambiguity. The approach to be taken is to ascertain the objective meaning of the language used in the express terms, considering the contract as a whole, and taking into account the factual background available to the parties at the time of the contract. In *Wood v Capita Insurance Services Ltd* [2017] AC 1173, Lord Hodge JSC stated as follows at [10] to [14] (see also *Rainy Sku SA v Kookmin Bank* [2011] 1 WLR 2900 and *Arnold v Britton* [2015] AC 1619).

> "[10] The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381, 1383H—1385D and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989, 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912—913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extrajudicial writing, "A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision" (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.
>
> [11] Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky* case [2011] 1 WLR 2900, para 21f. In the *Arnold* case [2015]AC 1619 all of the judgments confirmed the approach in the *Rainy Sky* case: Lord Neuberger of Abbotsbury PSC, paras 13—14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of

drafting of the clause (the *Rainy Sky* case, para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the Arnold case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

[12] This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

[13] Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions.

[14] On the approach to contractual interpretation, the *Rainy Sky* and *Arnold* cases were saying the same thing."

23. The actual contract will also include any implied terms. For this purpose, a term may be implied in order to give business efficacy to the contract or alternatively because it is so obvious as to go without saying, although a term may not be implied if it is inconsistent with an express term of the contract (see *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72, [2016] AC 742, at [16]).

24. The hypothetical contract will sometimes be based upon the terms of the agreement between the intermediary and the client. However, it must be noted that this depends upon the circumstances. In *Usetech Ltd v Young* [2004] STC 1671, Park J stated as follows at [36]:

"[36] The factor which complicates the issue in this case is that in the chain of contracts NES is interposed between Usetech and ABB. The structure

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

25. A further three-stage test is to be applied when considering whether a contract or arrangement is a contract of employment. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 ("*Ready Mixed Concrete*"), MacKenna J stated as follows at 515:

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

26. For the purposes of the first of these tests, mutuality of obligation can be established where work is carried out and paid for (see *HMRC v Professional Game Match Officials Limited* [2021] EWCA Civ 1370 *per* Elisabeth Laing LJ at [118] to [125]).

27. Whether there is sufficient control depends on whether an employer has ultimate authority over the performance of the work. In *HMRC v Professional Game Match Officials Limited*, *supra*, Elisabeth Laing LJ stated at [69]:

> "[69] A further legal issue is what degree of control is necessary. At this stage, all I need to say is that I agree with the UT that the FTT directed itself correctly in para [16] on the criterion of control. The FTT referred to a statement in para [19] of *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318, [2001] IRLR 269, [2001] ICR 819 that there must be a 'sufficient framework of control' ... in the sense of 'ultimate authority' ... rather than there necessarily being day-to-day control in practice'. ..."

28. A distinction is to be made between a right of control and how that right is exercised. It is the right of control which is important. In *HMRC v Kickabout Productions Ltd, supra*, Sir David Richards stated as follows at [84] to [89]:

> "[84] At [78], the UT held, on the FTT's findings of fact, that Talksport could control 'where' and 'when' Mr Hawksbee performed his duties and that it had material rights of control over 'what' tasks Mr Hawksbee performed because it had the ultimate right to decide on the form and content of a particular programme. The fact that, in practice, Talksport was content to give him a high degree of autonomy did not alter that conclusion as the control test focuses on the right of control and not how, or if, that right is exercised: see Langstaff J in *Wright v Aegis Defence Services (BVI) Ltd* (2018) UKEAT/0173/17/DM. The fact that Talksport had little control over how Mr Hawksbee presented the programmes put him in the same category as other highly skilled people, such as a surgeon or a footballer, but did not prevent the existence of a sufficient framework of control for these purposes.

> The UT concluded that such framework of control would exist in the case of Talksport and Mr Hawksbee.
>
> [85] This conclusion represented an evaluative judgment on the part of the UT, and KPL must show that it made some error of principle or had regard to irrelevant factors or disregarded relevant factors, or that it was perverse, before this court will interfere with it.
>
> [86] KPL submitted that the UT failed to appreciate that control over 'where and when' was given little weight by the FTT, and should have been given little weight by the UT, because Mr Hawksbee could only provide his services if he was in the studio, and at the time, specified by Talksport. It may be noted that under the contracts Talksport was entitled to change the times and dates of the programmes but, in any event, I can detect no sign in the UT's decision that it was unaware of the FTT's approach or that the UT itself gave undue weight to control over the 'where and when'.
>
> [87] KPL further submitted that the UT misinterpreted the importance of 'the ultimate right to decide' in RMC. Talksport had control over the content of a programme but not control over Mr Hawksbee in the performance of his services. The UT accepted that Talksport had little practical control over 'how' Mr Hawksbee performed his services, by which must be meant how he presented programmes but, as the UT remarked, this is no different from other highly skilled people performing services. The right to control the content of the programmes is highly material to the question of control. Indeed, as it seems to me, it may be said that the right to control the content of the programmes gave Talksport appreciably more control over the provision of Mr Hawksbee's services than, for example, a hospital trust has over the provision of the services of its surgeons.
>
> [88] KPL also submitted that, as regards control over 'what' services were performed by Mr Hawksbee, the UT did not take account, or even went against the FTT's unchallenged finding, that it was 'relatively narrow' in comparison to the BBC's control over what services were provided by a different presenter in *Christa Ackroyd Media Ltd v Revenue and Customs Comrs* [2019] UKUT 326 (TCC), [2019] STC 2222. The UT did not ignore the narrow range of Talksport's control in this respect, but it is clearly not decisive against an employment relationship, and it was for the UT to decide the weight to be given to it.
>
> [89] It must be borne in mind that control is a necessary, but not necessarily a sufficient, condition for the existence of an employment relationship. There may well be a framework of control which, by a greater or lesser margin, is sufficient for these purposes but will not, when all other relevant factors are assessed, be sufficient to establish employment."

29. In the context of the media, editorial control is a relevant factor. Further, control over what is to be done is important, but control over how, where and when services are to be performed is also relevant. In *Red White and Green Limited v HMRC* [2023] UKUT 00083 (TCC) ("*RWG*"), the Upper Tribunal stated as follows at [49], [52] and [53] (see also [42] to [59]):

> "[49] We respectfully agree with the approach of the Upper Tribunal in *Atholl House*. This aspect of its decision was not before the Court of Appeal. In short, control over what is to be done is an important factor but control over how, where and when services are to be performed remains relevant.
>
> ...

> [52] Again, we respectfully agree with that conclusion. Further, in the present case, whilst there was no right of deployment as such, as the FTT noted there were rights to require Mr Holmes to carry out promotional work as and when reasonably required and without further payment. There was also a contractual right for ITV to require Mr Holmes to present This Morning on such dates and locations that it notified to Mr Holmes at its sole discretion. Those were relevant rights of control.
>
> [53] In the context of radio and television presenters, the authorities establish that editorial control is a relevant factor. Indeed, in *Kickabout* the Court of Appeal described it as being "highly relevant". Further, it was acknowledged by the Upper Tribunal in that case that Talksport only had relatively narrow rights of control over what tasks the broadcaster performed. The Court of Appeal did not consider that the Upper Tribunal had given undue weight to control over the 'where and when'."

30. In *Hall v Lorimer* [1994] 1 WLR 209, the Court of Appeal approved Mummery J's judgment at first instance that there is no complete exhaustive list of relevant elements when deciding whether or not a contract is a contract of employment.

31. In *Atholl House*, Sir David Richards made it clear that there was no dichotomy between *Hall v Lorimer, supra,* and the third stage of the *Ready Mixed Concrete* test. When considering the third part of the *Ready Mixed Concrete* test, a wider range of factors can be taken into account than just the express and implied terms of the contract. The relevant factors are those which existed at the time that the contract was made, and which were known or reasonably available to both parties. Sir David Richards made the following points in respect of the relevant test and the factors to be taken into account:

> "[61] I will below review some of the authorities and the way they have developed. From this review, I have reached a number of conclusions relevant to this appeal. First, there is not a dichotomy between the *RMC* test on the one hand and the approach in Hall v Lorimer and the line of authorities of which it is part on the other. They do not represent significantly different tests for determining employment. Second, the question posed in *Hall v Lorimer* and other authorities as to whether a person is in business on their own account is, for the most part, simply another way of asking whether they are an independent contractor. If the evidence establishes that they do in fact conduct a business on their own account, quite apart from the engagement in dispute, that may be a relevant factor in the determination of the issue – a point to which I will return. But, as used in the authorities, that is not the situation to which this phrase is generally applied. See in this respect the observation of Dillon LJ in *Nethermere (St Neots) Ltd v Gardiner* [1984] IRLR 240, [1984] ICR 612, which I set out below when referring to that case. Third, the factors to which a court or tribunal can have regard when assessing whether a contract is a contract of employment or a contract for services are not confined only to the terms of the contract and the effects of those terms.
>
> ...
>
> [122] In my judgment, this review of the authorities bears out the propositions which I earlier stated. It is wrong to treat *RMC* and the line of cases including *Hall v Lorimer* as representing two separate tests, with the possibility that the result in any particular case could depend on which test is applied. Both approaches recognise mutuality of obligation and the right of control as necessary pre-conditions to a finding that a contract is one of employment. Once those necessary, but not necessarily sufficient, conditions are satisfied, both approaches require the identification and overall

assessment of all the relevant factors present in the particular case. In other words, they are both multi-factorial in their approach. A strict reading of the third condition in the *RMC* test might exclude consideration of any factor beyond the express and implied terms of the contract, and this is certainly the way that it has been interpreted in some of the authorities. There are, however, many other authorities in which a wider range of factors was taken into consideration and indeed, as recently as 2012, HMRC were successfully inviting the Upper Tribunal to do just that: *Matthews v Revenue and Customs Comrs*.

[123] The more difficult question, in my view, is not whether other factors can be taken into consideration but what limit there is on the choice of such factors. For this, there must be a return to first principles. The relationship of employment is created by the employer and employee through the contract made by them. The question for the court or tribunal is whether, judged objectively, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made. To be relevant to that issue any circumstance must be one which is known, or could reasonably be supposed to be known, to both parties. Those circumstances are the same as those comprising the factual matrix admissible for the interpretation of contracts: the 'facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties' (*Arnold v Britton* [2015] UKSC 36, [2016] 1 All ER 1, [2015] AC 1619 (at [21])).

[124] If the person providing the services is known to carry on a business, profession or vocation on their own account as a self-employed person, it would in my judgment be myopic to ignore it, when considering whether or not the parties intended to create a relationship of employment. In many of the cases, it has been taken into account for that purpose. The weight to be attached to it is a matter for the decision-making court or tribunal. If the contract provides, as did Ms Adams' contracts with the BBC, that she was a freelance contributor, the relevance of this fact arises directly from the contract's express terms."

32. The written contract might not always be the exclusive record of the terms of the agreement of the parties. In *S&L Barnes Limited v HMRC* [2023] UKFTT 00042 (TC) ("*Barnes*") (Judge Poon), the First-tier Tribunal stated as follows at [115] and [116]:

"[115] While each Contract served as the framework agreement for the relevant period between the parties, I find that the parties did not intend the Contracts to be the exclusive record of the terms of their agreement. There was tacit understanding between the parties as to the practical aspects of the outworking of the contractual terms. For instance, the Contracts did not provide for the basis of the 228 days when Mr Barnes' services would be required, nor for the protocol whereby Mr Barnes would be allowed to give priority to high-profile tournaments such as the World Cup and the Six Nations over Sky's right to call on his services.

[116] 116. In *Carmichael v National Power Plc* [1999] UKHL 47, [1999] 1 WLR 2042, Lord Hoffmann's guidance is that 'when the intention of the parties, objectively ascertained, has to be gathered partly from documents but also from oral exchanges and conduct', then the terms of the contract are a question of fact. In line with this guidance, the terms of the Contracts in the present case are a question of fact, based on my finding that the terms of agreement between the parties are to be gathered partly from documents, and partly from their conduct."

THE PARTIES' SUBMISSIONS

The Company

33. By way of summary, Mr Firth submitted as follows:

(1) As regards the actual contract:

(a) The use of the term "ad hoc" means that there was no agreement as to the amount of services to be provided or when and that "as and when required" was too vague. He said that these terms could not mean that Sky had the right to demand Mr Thompson's whenever they wanted and to whatever degree they wanted.

(b) The proper construction of "ad hoc" and "as and when required" is therefore that Mr Thompson would carry out work as and when the parties agreed that he would do so. In the alternative, this is to be implied in order to give business efficacy to the contract or alternatively because it was so obvious as to go without saying (see *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72). In the further alternative, insofar as the term is so vague it fails, this is how the parties went about the agreement in practice and represents the dealings of the parties.

(c) Sky's right to require Mr Thompson to comply with all directions and requests given by Sky does not mean that Mr Thompson could be required to express opinions that he did not hold. Instead, he was required to give his own opinions.

(2) As regards the hypothetical contract, Mr Firth listed the following terms:

(a) The assignment would be for a fixed term of two years for the 2013 Contract and a further two years for the 2015 Contract.

(b) The services under the Contract would be personally performed by Mr Thompson.

(c) The services would be provided when requested by Sky, subject to Mr Thompson's right to refuse any request.

(d) The scope of the services to be provided by Mr Thomson comprised punditry on Soccer Saturday and mid-week football matches, being an interview on breaking news, promotional events, and such preparatory work and research as Mr Thompson considered appropriate.

(e) Mr Thompson would not be permitted to provide services that were the same or similar to the services to another broadcaster or radio or media organisation without the prior written consent of the Head of Sky Sports, such consent not to be unreasonably withheld.

(f) Punditry services would be provided in the Sky studio and the location of interviews and promotional events would be subject to agreement between the parties.

(g) Preparatory work would be carried out at places and times and for durations of Mr Thompson's choosing.

(h) The contract would be terminable pursuant to the conditions in clause 5 of the Contract.

(i) Sky would pay the fees set out in the Contracts in equal monthly instalments in arrears upon receipt by Sky of an invoice. The fees were fixed in advance and not dependent upon air time.

(j) Mr Thompson would be expected to fit his punditry into the running order of the programme determined by Sky and to follow reasonable directions and instructions as to the subject matters on which he gave his opinion, but the content would be determined solely by Mr Thompson.

(k) Mr Thompson would be subject to restrictions in relation to the handling of confidential information and non-solicitation and restrictions as to the provision of materially similar services under the non-compete undertakings in the Schedule.

(l) Mr Thompson would agree to assign all intellectual property rights relating to the programmes to enable Sky to have the exclusive rights in the commercial exploitation of Mr Thompson's output but Mr Thompson was free to use his own opinions as he saw fit.

(3) As regards whether the hypothetical contract was a contract of employment:

(a) Mr Firth accepted that there was mutuality of obligation.

(b) Mr Firth submitted that there was not a sufficient framework of control. In particular, he relied upon Mr Thompson's ability to decline a request to appear on any particular programme, the fact that Mr Thompson was able to provide his own analysis and personal opinions rather than being told what to say by Sky, and that he is to be treated like a guest on a current events programme.

(c) Mr Firth further submitted that when considering all the relevant circumstances, the parties did not intend an employment relationship. In particular:

(i) Mr Thompson was not subject to control. This lack of control included the fact that he was asked to give his opinions and so was not restricted in what he said.

(ii) At the very least, the conduct between the parties in determining whether or not Mr Thompson would provide services to Sky was approached on the basis of gentlemanly conduct. As Mr Firth put it, this took place by, "Sky being reasonable in its requests and PT acting professionally to normally accommodate those requests."

(iii) The general operation of the arrangement was that Mr Thompson appeared on one show a week for six hours on a Saturday, with no shows in between the seasons, together with about ten to fifteen mid-week shows.

(iv) Mr Thompson would leave the studio as soon as possible after the show.

(v) As such, Mr Thompson's work for Sky took up a small amount of his time.

(vi) The fee was not a salary as it was not adjusted to reflect the work done. It was a block fee to ensure exclusivity of Mr Thompson's services.

(vii) Although Sky held the intellectual property to the shows and outputs, the opinions and analysis remained Mr Thompson's.

(viii) Mr Thompson undertook other engagements for the Company. These (as with the engagements for Sky) exploited Mr Thompson's status as a highly decorated former professional footballer. These therefore exploited Mr Thompson's own status and character. Sky was just one aspect of Mr Thompson's exploitation of that status and character.

(ix) Mr Thompson had the potential to increase the profits of his business through the efficient use of his time.

(x) Mr Thompson took on a risk to his reputation and profile whenever he appeared.

34. As set out above, Mr Firth's submission in respect of the actual contract is effectively that Mr Thompson was only required to work (or, more correctly, the Company was only required to supply Mr Thompson) when mutually agreed between Mr Thompson and Sky. Mr Firth's formulation for the purposes of the hypothetical contract was slightly different in that he said that Mr Thompson had a right to refuse a request to carry out an engagement (although, given that what appears to be suggested for the actual contract is an unfettered right to refuse to an engagement, this effectively amounts to the same thing). Mr Firth noted that this is how the relationship had worked since 2005.

35. Mr Firth also drew close parallels between the present case and *Barnes*. In *Barnes*, the First-tier Tribunal was considering the relationship between Sky and Mr Stuart Barnes, who was (Mr Firth submitted) effectively a pundit for rugby in the same way that Mr Thompson was for football. The contracts in *Barnes* were substantially the same as the contracts in the present case. The First-tier Tribunal analysed the actual contracts and concluded that the hypothetical contract was broadly the same as the actual contracts. As regards the *Ready Mixed Concrete* three-stage test, the First-tier Tribunal held that there was mutuality of obligation and that there was a sufficient framework of control to satisfy the second stage of the test. As regards the third stage of the test, the First-tier Tribunal held that that the hypothetical contract would not have given rise to a contract of employment. This was, in particular, for the following reasons as set out at [134] to [137] (which we set out in full given the extent of Mr Firth's reliance upon the case).

> "[134] With these precepts in mind, the factors in the present case relevant to my consideration at the third stage of the RMC test are as follows.
>
> (1) There is a distinction between a presenter and a commentator in the broadcast of a live match. Mr Barnes started as a presenter with Sky, but moved to become a commentator. During the relevant period, the principal services provided by Mr Barnes to Sky as a co-commentator in live matches were punditry in nature, which I find to be qualitatively different from those provided by Miles Harrison as a presenter.
>
> (2) Mr Harrison was the 'first voice' and provided the running commentary of a match, while Mr Barnes was the 'second voice' giving the analytical insights on the good and bad moments of a game, from team strategy to the execution of moves by individual players. Mr Harrison would be on air most of the time, while Mr Barnes' commentary would come in at the appropriate moments and would often be accompanied by coordinated replays.
>
> (3) Without Mr Barnes' analytical input, the live commentary of a match with only the first voice would be all the duller, and unlikely to attract as many viewers as a live match with punditry input. In fixing the annual fee payable to Mr Barnes, Sky did not stipulate the minimum days of services, only the maximum. In real terms, the number of days Mr Barnes would appear on air for Sky varied from 90 to 120 days. Taking 120 days as the

benchmark, it means Mr Barnes could be working 25% less than the benchmark maximum without any issue being raised by Sky. I do not consider the annual fee resemble a 'salary' in nature as submitted for the respondents. I find the annual fee to be a block fee, for the exclusive right to have first call of Mr Barnes' services for a period of time. To ensure that Mr Barnes' services would not be made available to another UK broadcaster, Sky was content to pay a premium for the assurance of exclusive right, in full knowledge that Mr Barnes' availability on air could vary up to 25%, as reduced by the duration of 6-8 weeks the World Cup tournament.

(4) The provisions for intellectual property rights under clause 10 would place no embargo on Mr Barnes' right to reproduce his opinions elsewhere that had been given during a live broadcast for Sky. The work pattern for the match on Saturday 10 November 2018 (at §§51-56) illustrates the intensity of preparation in the run-up to cover for a live match, and immediately after the match, Mr Barnes would be putting pen to paper to produce his Sunday Times column. In his journalistic output, Mr Barnes would most likely be reproducing aspects of his commentary given in the Sky broadcast on the same match. The phrasing and the emphasis might differ for the column, but it would be the same match from which Mr Barnes had gleaned insights as a live commentator while broadcasting for Sky, and he was not debarred by Sky in reusing any material so gleaned in other domains or avenues. One such avenue would be when Mr Barnes participated as an expert representative to select the 'Player of the Season' for the European Cup. The material that Mr Barnes had used to provide his services for Sky remained his intellectual property, essentially because he is the master and the creator of his opinions as a pundit.

(5) Sky would not consider it to be a conflict of interest when Mr Barnes reproduced in newspapers material which had been gleaned in the course of providing his services to Sky. On the contrary, Sky would be attuned to the publicity benefits conferred on its broadcast when Mr Barnes' column on the match broadcast by Sky would cover the back page of the Sunday Times the next day. Mr Barnes' Times/Sunday Times columns would take some of Sky's games to the newspaper readers, and Sky in turn benefitted from the reputation of Mr Barnes as a renowned columnist on its roster of commentators.

(6) Mr Barnes had much latitude in stating his availability to cover live matches for Sky. The conduct between the parties in drawing up booking schedules of Mr Barnes' time would appear to be by gentlemanly consensus, with Sky being reasonable in its requests, and Mr Barnes exercising his leeway of refusal pursuant to the express term under Key Terms (c1.1) on 'variations' agreed between the parties from time to time. There was the long-standing understanding between the parties that Mr Barnes would be unavailable to Sky during the Six Nations season, and the World Cup tournament, although he could be requested for interviews by Sky Sports News. What Sky lost in terms of Mr Barnes' availability was gained in return through the publicity of having one of its regular commentators as a columnist of these high-profile games, which in turn reflected well on Sky as the broadcaster with the exclusive right to Mr Barnes' services.

(7) Depending on his availability, Mr Barnes would agree to be interviewed for Sky Sports News during pre-match on request, especially for matches not broadcast by Sky such as the Six Nations and the World Cup. The news interviewer of Mr Barnes might have been an employee for Sky, but it would be most unusual for an employer to interview its employee regularly on

request (if Mr Barnes were Sky's employee). The context in which Mr Barnes became a regular candidate to be interviewed by Sky Sports News was his reputation as a rugby union expert, well-known and well-regarded outside Sky TV. It was Mr Barnes' personal reputation in this respect that Sky contracted with SLB to ensure it could have regular access and first call. The fact that Sky Sports News sought to interview Mr Barnes is a strong indicator that the contractual relationship in real terms was not that of a master-servant relationship in a contract of employment.

(8) Outside his Sky commitments, Mr Barnes was in business on his own account. The 31 articles published during the 2015 World Cup illustrate the competitiveness of the field to maintain parity as a sought-after sport pundit. Other expert voices were called on to give coverage of the tournament, each jostling for a unique angle to sum up a match, for insightful comments on a player or a team that would prove to be prophetic.

(9) To maintain his profile as a pundit, Mr Barnes' experience as a professional ex-player has stood him in good stead. It is in part his experience as a former player that he can profit from dedicating hours and days to watching replays of matches dimming out the sound, in order to find that unique angle for his commentary, to gain fresh insights so that his opinions do not become stale. There was no demarcation in the research, the thinking, the scripting he did for Sky broadcast and the newspaper columns, or indeed in any other ancillary engagements he undertook, (such as being an expert witness to the court on Farrell; or as representative to select the 'Player of the Season' for the European Cup). It was the one and the same enterprise of being 'Stuart Barnes, the voice of rugby'.

(10) The profit Mr Barnes can make from the sound management of his business is through the efficient use of his time, and he did so with his engagements with Sky writing the Sky online column on a Monday, doing the Rugby Club mid-week, fitting his broadcasting engagements round his newspaper commitments.

(11) In *Basic Broadcasting Ltd v HMRC* [2022] UKFTT 00048 (TC)('*BBL*') in relation to the services provided by Adrian Chiles to ITV and the BBC, it is found that '[e]very time [Mr Chiles] presented a programme his reputation was at risk'. In common with this finding in BBL, there was a reputational risk for Mr Barnes every time he appeared on air for Sky, whether it was for a live commentary or for an interview by Sky Sports News. As stated in the questionnaire response, which I accept, 'any editorial issues that emanate from [Mr Barnes'] mouth are his own responsibility' (§47 (6)). The reputational risk is real, and requires vigilance to mitigate, and is part and parcel for being in business on his own account which is staked largely on Mr Barnes' profile as a world expert on rugby.

(12) Mr Barnes was not financially dependent on Sky during the relevant period, notwithstanding the fact that the income from Sky accounted for some 60% of his overall turnover. In absolute terms, his income from the Times/Sunday Times was by no means modest. His refusal to enter into a new contract with Sky after 2019 to cover second division matches was another indicator that Mr Barnes was not financially dependent on Sky. There was no lack of contacts asking for Mr Barnes' services and he had no need for an agent. If Sky had not procured exclusive right for Mr Barnes' services as a broadcaster during the relevant period, through sound management of his time, Mr Barnes would most probably have found another outlet for his talent, owing to his personal reputation as a world-

renowned expert on rugby. The reputation is personal to Mr Barnes, which was not, and is not, dependent on Sky.

[135] Having regard to the cumulative totality of the provisions in the hypothetical contract in the context of the parties' conduct and intention, I conclude that the relevant Contracts would not have been contracts of employment for the duration of the relevant period. In reaching my conclusion I have not given any weight to the express provision in the Contracts in relation to the parties' intention that Mr Barnes as the Personnel shall not be an employee of Sky.

[136] Separately, my conclusion is reached with the factor that Mr Barnes being in business on his own account as one of the many factors to be considered in the round. I also have regard to the fact that contractually Mr Barnes has been an employee of SLB since its incorporation in 2005, and technically would not have been in business on his own account. However, for present purposes, I have considered whether work done by Mr Barnes through SLB would, if it had been done by Mr Barnes on his own account, give rise to the conclusion that he was in business on his account during the relevant period. In so finding, I have regard to Sir David Richards' observation in *Atholl House* at [124]:

> 'If the person providing the services is known to carry on a business, profession or vocation on their own account as a self-employed person, it would in my judgment be myopic to ignore it, when considering whether or not the parties intended to create a relationship of employment. … The weight to be attached to it is a matter for the decision-making court or tribunal. ..'"

36. Further, Mr Firth submitted that this Tribunal ought to follow *Barnes* in reliance upon the principle of comity. In essence, Mr Firth's submission was that whilst a First-tier Tribunal decision was not binding upon another First-tier Tribunal, the later tribunal should seek to achieve consistency with previous tribunals unless convinced the earlier decision was wrong. In *HMRC v Procter & Gamble UK* [2009] EWCA Civ 507, the Court of Appeal stated as follows *per* Jacob LJ at [43]:

> "[43] Finally I should say a word about a decision of a differently constituted Tribunal concerning a product called Pringles Dippers (2003) VAT Decision 18381. It was decided that this was zero-rated. Part of the decision was devoted to the question of whether a Pringle Dipper was "made from the potato." It was held not, although the amount of potato was broadly the same as for a Regular Pringle. The present Tribunal took the view that the earlier Tribunal had erred in law this respect, though there were other reasons (having no parallel with the present case) why the ultimate decision was justifiable. The present Tribunal were entitled to take that view – there is no rule of *stare decisis* between Tribunals of co-ordinate jurisdiction. Rightly it did so only when convinced the earlier decision was wrong – for broadly Tribunals should strive to achieve consistency amongst themselves. But once so convinced it was its duty to apply the law as it considered it to be. As far as we are concerned it was the present Tribunal which approached the question "made from the potato" correctly in law."

HMRC

37. By way of summary, Miss Hirsch submitted as follows:

(1) As regards the actual contract:

(a) Miss Hirsch relied upon the express terms of the Contract.

(b) Miss Hirsch noted that there was no written contract between the Company and Mr Thompson. She submitted that a contract of employment is necessarily to be implied between the Company and Mr Thompson in order for Mr Thompson's services to be provided by the Company to Sky.

(2) As regards the hypothetical contract, Miss Hirsch listed the following terms:

(a) Mr Thompson would provide his services as a commentator, guest or participant on Sky's programmes, including related promotional and press events.

(b) Sky would pay a guaranteed fee to Mr Thompson.

(c) Mr Thompson would be personally obliged to perform the services. If a replacement was suggested by Mr Thompson, this would have to be approved by Sky.

(d) Sky would have the right to control where Mr Thompson worked, what work he did, when, and how.

(e) Sky would have final editorial control over the programme on which Mr Thompson worked.

(f) Mr Thompson was required to comply with the Ofcom Broadcasting Code.

(g) Mr Thompson would have the right to be reimbursed reasonable expenses.

(h) Mr Thompson would be restricted in his ability to share confidential information or use social media insofar as it concerned Sky, or promote any third party products or services.

(i) Mr Thompson would need Sky's prior permission to provide any other television, radio or media services which were the same or similar to those he provided to Sky.

(j) Sky would retain all intellectual property rights.

(k) Statutory benefits would depend upon whether or not Mr Thompson was a worker under the hypothetical contracts.

(3) In the course of oral submissions, Miss Hirsch agreed with all of Mr Firth's proposed hypothetical terms save for two points. First, she submitted that there was no basis for an unfettered right for Mr Thompson to refuse a request that work be carried out and so submitted that there would be an implied term of reasonableness (although Mr Firth noted that this had not been put to any witness and he also submitted that this was contrary to the evidence). Secondly, she submitted that Sky had a discretion as to where Mr Thompson was required to carry out his work.

(4) As regards whether the hypothetical contract was a contract of employment:

(a) There was no dispute as to mutuality of obligation as this had been accepted by Mr Firth on behalf of the Company.

(b) Miss Hirsch submitted that there was a sufficient framework of control. In particular, she relied upon Sky's contractual right to control what work Mr Thompson did, when, where and how he did it. Although Mr Thompson had latitude over what he said and the provision of his opinions, Sky still had editorial control. Similarly, restrictions over Mr Thompson's activities such as in respect

of confidential information, non-solicitation of employees, and non-competition added to this control.

(c) Miss Hirsch further submitted that when considering all the relevant circumstances, the parties did intend an employment relationship. In particular:

(i) Sky's right to a "first call" on Mr Thompson's services and the requirement for consent for Mr Thompson to provide similar services elsewhere were consistent with an employment contract.

(ii) Mr Thompson could not therefore exploit his skills as a television pundit elsewhere.

(iii) Mr Thompson was in relative terms financially dependent on Sky as 71% to 88% of the Company's income was from the Contracts.

(iv) Mr Thompson was not under any financial risk of loss.

(v) The payment of the fee in monthly instalments was akin to a salary.

(vi) The hypothetical contracts were for two year periods rather than short term projects.

(vii) Mr Thompson was well known for his connection to Sky.

38. Miss Hirsch drew close parallels with the First-tier Tribunal decision in *Alan Parry Productions Ltd v HMRC* [2022] UKFTT 194 (TC) ("*Parry*") (Judge Beare), noting that the contracts in question were substantially similar to the present case and that the First-tier Tribunal held that the Intermediaries Legislation applied.

39. Miss Hirsch agreed that the principle of comity means that, whilst a judge of first instance is not bound by a decision of another judge of first instance, the approach of the earlier decision should be followed unless it is wrong. Amongst other decisions, Miss Hirsch referred to the First-tier Tribunal decision of *Greencyc Ltd v HMRC* [2021] UKFTT 0480 (TC) (Judge Aleksander) at [44]:

> "[44] Second, there is a certain irony in Mr Baig's submission that I am not bound by Judge Mosedale's decision in *First Class Communications* (as to which he is correct), yet he refers me to various other decisions of the First-tier Tribunal (such as *Dreams* and *JSM Construction*) in support of his submissions both in relation to recategorization and the extension of time for the service of the costs regime opt-out notice. Although not cited to me, I would note the comments made by Judge Brooks in *Ardmore Construction Limited v HMRC* [2014] SFTD 1077 at [19] that decisions of the First-tier Tribunal:
>
> […] constitute persuasive authorities which would be expected to be followed by the FTT. For example in HMRC v Abdul Noor [2013] UKUT 71 (TCC) the Tax and Chancery Chamber of the UT, in relation to the decision of one High Court Judge on another (but equally applicable in the case of any persuasive authority), said, at [82]:
>
> "[…] although the decisions were not binding on him in the way that a decision of the Court of Appeal would be binding, the decision of a High Court Judge ought to be followed by another [High Court] judge unless that judge thinks that the earlier decision was clearly wrong"

As Lord Goddard CJ put it in *Huddersfield Police Authority v Watson* [1947] KB 842, at 848:

> "I can only say for myself that I think the modern practice, and the modern view of the subject, is that a judge of first instance, though he would always follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity."

40. In any event, Miss Hirsch submits that *Barnes* is wrong and, in any event, turns upon different facts to the present case. Indeed, Miss Hirsch submits that the approach taken in *Parry* is to be preferred and followed.

Further submissions:

41. The submissions set out above in respect of the principle of comity were the subject of written submissions, for which permission was given at the end of the oral hearing. In the event, Miss Hirsch also provided further written submissions (which she also sought permission to rely upon) on the effect of *RWG* (being the Upper Tribunal decision referred to above) as well as further written submissions on the substance of the case. Mr Firth objects to the reliance upon written submissions beyond those on the principle of comity. However, we grant permission because these are matters which are relevant to the decision the Tribunal has to make, the Upper Tribunal decision in *RWG* was released after the end of the oral hearing in the present case, the further submissions are in essence only limited extensions to previous submissions, and (crucially) Mr Firth has helpfully responded to them in full in his own written submissions.

42. Miss Hirsch's additional submissions can be summarised as follows:

(1) In *RWG*, the Upper Tribunal found that the appellant's freedom to choose when and where he prepared for programmes and his ability to decide what research he carried out did not preclude control.

(2) Further, the Upper Tribunal held that reliance upon one particular paymaster can be relevant. Similarly, it is possible to be employed by one party and self-employed for the purposes of engagements with other parties.

(3) There were other similarities between the present case and *RWG* (which found that the Intermediaries Legislation did apply) such as the inability to increase profit and the lack of economic risk.

(4) The hypothetical contract in the present case included an expectation that Mr Thompson would work, or at least be available for work, on all broadcasts of Soccer Saturday unless he was ill or had previously agreed.

43. Mr Firth's submissions in response can be summarised as follows:

(1) Mr Thompson's unchallenged evidence was that it was up to Mr Thompson whether or not he did a show, and he would let Mr Condron known when he was not doing a show out of respect. This had been the case since 2005.

(2) In *Parry*, the appellant's role was a commentator not a pundit. The factual circumstances were therefore different.

(3) *RWG* adds nothing as it restates existing principles and applies them to the specific facts of that case, which are different to the present case.

DISCUSSION

The Actual Contract

44. In accordance with *Atholl House*, we begin by making our findings as to the terms of the actual contractual arrangements between the Company and Sky on the one hand and the Company and Mr Thompson on the other.

45. We have already set out the express terms of the Contract between the Company and Sky at paragraphs 7 to 9 above and we adopt these for this purpose. We note that (save as set out below) the parties' summaries of those terms are broadly the same as our findings. Nevertheless, we treat the actual Contract as in accordance with our findings rather than adopting any other summary as these more accurately (and for the most relevant terms, directly) reflect the express terms of the Contract.

46. A point of construction arises as to the meaning of "on an ad hoc as and when required basis" within the definition of Services in the Key Terms. We do not accept that this is to be construed as meaning that Mr Thompson or the Company had a right to refuse any request by Sky or that appearances would be by mutual agreement. We find that the proper construction is that the Services were to be provided whenever Sky required them. This is for the following reasons. First, "ad hoc" simply means that there was no contractually defined or fixed occasion for the provision of the Services. Secondly, "required" is as required by Sky as it is referring to when Mr Thompson's services are to be provided to Sky. Thirdly, the Contract as a whole envisages Sky being able to decide when the Services are to be provided. In particular, paragraph 2.1 of the Terms and Conditions requires the Company to procure that Mr Thompson provide the Services, paragraph 2.7 provides Sky with "first call" on his Services, and paragraph 4 provides for the Company and Mr Thompson to comply with Sky's directions and requests. Fourthly, neither the definition of Services nor any other relevant term of the Contract states that the Company or Mr Thompson's agreement is necessary. Fifthly, if the term included a requirement of mutual agreement or a right to refuse, Mr Thompson could in principle refuse to agree to any engagements at all, which would not make business sense and again would be contrary to Sky's ability to require performance.

47. We do not accept that there was an implied term to the effect that Mr Thompson or the Company had a right to refuse any request by Sky or that appearances would be by mutual agreement. For the reasons set out above, this would be inconsistent with our construction of the express terms of the Contract. Further, this is not necessary in order to give business efficacy to the Contract or so obvious that it goes without saying. The Contract has a clear meaning that Sky has an entitlement to require Mr Thompson's services whenever they require. We accept that on its own this could be treated as entitling Sky to require Mr Thompson's services every hour of every day, or for such other unreasonable frequency or duration. This could (and, we find, would) be resolved by an implied term of reasonableness, such that the Assignment would be on an ad hoc as and when *reasonably* required basis. This would remain consistent with the remainder of the Contract and places the emphasis upon Sky's requirements rather than importing a right of refusal or mutual agreement which is unnecessary. In any event, even if we did not imply such a term of reasonableness, the clause remains unambiguous and would be inconsistent with Mr Firth's implied terms as to a right of refusal or a requirement of mutual agreement.

48. For completeness, we note that HMRC submitted that, if there was a term that Mr Thompson was entitled to refuse to attend any particular engagement, it would be an implied term that he could not do so unreasonably. Given that we have found that Mr Thompson does not have a contractual right to refuse the engagement providing Sky's request is a reasonable one, HMRC's proposed implied term does not arise.

49. It follows that, for the same reasons as set out above in respect of the construction and implied term arguments, we do not accept Mr Firth's submission that the Contract is too vague. Indeed, it is clear and unambiguous; the Contract provides for Sky to be entitled to have the Services delivered as and when Sky requires.

50. Paragraph 4.1 of the Terms and Conditions for the 2013 Contract (substantially replicated as paragraph 4.1(a) of the Terms and Conditions for the 2015 Contract) which provides that, "the Services will be rendered to the best of the Company's and the Personnel's abilities and all directions and requests given by BSkyB or its nominees will be complied with." We do not accept Mr Firth's submission that this is to be construed as meaning that Sky is unable to require Mr Thompson to express opinions which he did not believe or otherwise to control what he says or to restrict his opinions. This paragraph is unambiguous and does not make any reference to Mr Thompson's opinions. As such, there is no room for Mr Firth's construction.

51. However, we do agree that it cannot be that the parties intended there to be no fetter at all upon the directions and requests. We find that in such circumstances there is an implied term of reasonableness, such that the Services will be rendered to the best of the Company's and the Personnel's abilities and all *reasonable* directions and requests given by BSkyB or its nominees will be complied with. This is necessary in order to give business efficacy to the Contract as otherwise Mr Thompson could be required to comply with inappropriate directions and requests or directions and requests. Similarly, given the emphasis on reasonableness elsewhere in the Contract and as part of the factual matrix as a whole, we find that it is so obvious to go without saying that the parties did not intend that Sky be entitled to make or give unreasonable directions and requests. It might well be, therefore, that in practice Mr Thompson would not be obliged to express opinions which he did not believe or otherwise to control what he says or to restrict his opinions. However, this is a feature of such a direction or request being unreasonable and in breach of the implied term rather than being the proper construction of paragraph 4.1 (or paragraph 4.1(a)) itself. We are fortified in this view by the fact that Mr Firth submitted that the hypothetical contract would include requiring compliance with reasonable directions and requests, to which (in oral submissions) Miss Hirsch agreed.

52. We note that neither Mr Firth nor Miss Hirsch raised any issues as to construction or implied terms in respect of paragraph 2.6 of the Terms and Conditions of the Contract, which provides that, "The Company 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 BSkyB." We therefore assume that the parties accept that paragraph 2.6 does not provide for any right to object to the location of the required provision of the services. In any event, we find that the proper construction is that there is no such right as the term is unambiguous in giving Sky control over the location. However, for the same reasons as set out in respect of the directions and requests, we find that this is subject to an implied term of reasonableness.

53. There is no evidence as to any agreement between Mr Thompson and the Company. The only written contract signed by Mr Thompson himself is the Schedule, which effectively bound Mr Thompson into various of the terms of the Contract. Indeed, this goes slightly further than the Contract, in that it includes a non-compete clause. Although not signed by the Company or Sky, it is signed as a deed, and is addressed to Sky.

The Hypothetical Contract

54. We now move to ascertain the terms of the hypothetical contract between Mr Thompson and Sky.

55. Save for the following modifications, we find that the hypothetical contract would contain the same the express terms of the Contract set out in paragraphs 6 to 9 above and in accordance with our construction as set out in paragraphs 44 to 53 above.

56. The first modification is that services would be provided by Mr Thompson rather than by the Company. This modification is because the relevant provider of the service would be Mr Thompson in his own right rather than the Company procuring the provision of Mr Thompson's services.

57. The second modification is that the services themselves would be narrower and more closely defined than in the Contract, being only Soccer Saturday, mid-week games, associated marketing and publicity events, and relevant interviews (such as news items relevant to Liverpool). Further, when acting as a panellist, Mr Thompson was entitled (and required) to give unfettered opinions and analysis providing these were within the confines of Ofcom broadcasting standards and requirements. We reach this view because we assume that a direct contract between Sky and Mr Thompson would be likely to address Mr Thompson's own role. In such circumstances, it would be likely to reflect what, at the time of the Contract being entered into, was an already well-defined arrangement as to what programmes Mr Thompson would appear on.

58. The third modification is that the implied terms set out above would be express terms insofar as they would have been specifically addressed in a direct contract between Mr Thompson and Sky. This is because as regards the actual Contract it was so obvious as to go without saying and so, if hypothetically raised for the purposes of the hypothetical contract, it would be expressly included in that hypothetical contract. As such, the Assignment would be on an ad hoc as and when *reasonably* required basis. Further, there would be a requirement of compliance with all *reasonable* directions and requests given by Sky or its nominees. Even if they were not express terms, they would still be terms of the hypothetical contract as they would be implied for the same reasons as in respect of the actual Contract.

59. We reject Mr Firth's submission that the hypothetical contract would have included a term that Mr Thompson would have the right to refuse any request by Sky to provide the services. For the reasons set out above in respect of the express and implied terms of the actual Contract, this is not what was agreed between the Company and Sky and there is no basis for establishing that a different agreement would be reached in the event of a hypothetical contract between Mr Thompson and Sky. Indeed, Mr Thompson signed the Schedule in which he gave undertakings to Sky through which he agreed to carry out the Services (as defined in the Contract and so including the provisions as to "as and when required" and "first call") in accordance with the Contract between the Company and Sky (as set out in paragraphs 3.1 and 8.2 of the Schedule). As such, there is no reason to believe that a direct negotiation between Mr Thompson and Sky would have resulted in substantially different terms, still less terms diametrically opposed to those in the Contract as regards Sky's ability to require performance.

60. We do not accept that the evidence of the informal arrangements for Mr Thompson's appearances on Sky affect the position. In practice, Mr Condron agreed to accommodate Mr Thompson's rare non-attendances. Both Mr Thompson and Mr Condron treated this as Mr Thompson notifying Mr Condron in advance out of respect rather than requiring agreement. Nevertheless, as set out above, the contractual rights and obligations in the actual contracts did not give Mr Thompson the right of refusal and did not require mutual agreement. The pragmatic and consensual approach taken to non-attendance does not detract from those contractual rights and there is no suggestion that there was any agreement that those contractual rights did not apply or were varied. Indeed, Mr Condron's evidence was that he

did not consider the terms of the Contract. Given that Sky did not provide for a right of refusal for Mr Thompson or mutual agreement in the 2013 Contract and the 2015 Contract and given that Mr Thompson himself agreed to the terms of the 2013 Contract and the 2015 Contract by virtue of the Schedule, it is reasonable to assume (and we find) that no such terms would be provided for in a hypothetical contract between Mr Thompson and Sky.

61. We also reject Mr Firth's submission that the hypothetical contract would have included a term that the location of interviews and promotional events would be subject to agreement between the parties. Again, this would be inconsistent with the express terms of the actual Contract, which provide for Sky to be able to decide the location of the services. The fact that as a matter of practice the services were delivered in the Sky studios in London or alternatively in Liverpool does not mean that Sky was not entitled under the actual Contract to require attendance at different locations. Again, given that Sky did not provide for mutual agreement as to locations in the 2013 Contract and the 2015 Contract and given that Mr Thompson himself agreed to the terms of the 2013 Contract and the 2015 Contract by virtue of the Schedule, it is reasonable to assume (and we find) that no such term would be provided for in a hypothetical contract between Mr Thompson and Sky.

62. We find that the remainder of the terms in the Contract would apply to the hypothetical agreement. Again, this is because they represented the terms agreed between the Company and Sky and were the subject of the Schedule signed by Mr Thompson. As such, both Sky and Mr Thompson were in fact agreeable to those terms and so there is no reason why they would not be agreeable to them in the event of a direct agreement between them by way of the hypothetical contract. Given that the Contract included the Schedule, the hypothetical contract would for the same reasons include the non-compete clause at paragraph 4.2 of the Schedule.

63. We note that Mr Firth included within his submissions some terms of the hypothetical contract which went beyond summaries of the terms in the Contract. We have already dealt with those relating to when and where the services were to be provided above.

64. The other terms which on the face of it went beyond the actual Contract were that preparatory work could be carried out at places and times and for durations of Mr Thompson's choosing and that Mr Thompson would be expected to fit his punditry into the running order of the programme determined by Sky and to follow reasonable directions and instructions as to the subject matters on which he gave his opinion, but the content would be determined solely by Mr Thompson. These terms are entirely consistent with the terms of the actual Contract in that the Contract does not restrict when and for how long Mr Thompson prepares and does not restrict the content of Mr Thompson's opinions (providing it is appropriate for the purposes of Ofcom and broadcasting requirements, which would be catered for by the ability for Sky to give reasonable directions and instructions). Given that a direct contract between Mr Thompson and Sky may well have provided more detail as to his role (as we have found above) we agree that this greater detail would also have been in the hypothetical contract. We note that Miss Hirsch did not dispute that these would be terms of the hypothetical agreement (although we are of course not bound by that lack of dispute).

Whether the Hypothetical Contract Would be a Contract of Employment

65. We now turn to whether the hypothetical contract would be a contract of employment. In doing so, we consider the three-stage test in *Ready Mixed Concrete* as set out above.

Mutuality of Obligation

66. We agree with both parties that there is mutuality of obligation. Mr Thompson's obligation under the hypothetical contract would be to provide the services in accordance with the terms of the contract, and Sky's obligation would be to pay the agreed fee.

Control

67. We find that there is a sufficient framework of control for the purposes of stage two of the *Ready Mixed Concrete* test. This is for the following reasons.

(1) Sky would have the contractual right to decide when the services were to be provided and this would be on a first call basis. Even if this includes an obligation to exercise this contractual right reasonably, Mr Thompson would not have a right of refusal or a right to require mutual agreement.

(2) Sky would have the contractual right to decide where the services were to be provided. Again, even if this includes an obligation to exercise this contractual right reasonably, this would not be subject to mutual agreement.

(3) Sky would have the right to prevent Mr Thompson from working for competitors by virtue of the non-competition clause and the right to prevent him from working for other broadcasters. The fact that Sky's consent is not to be unreasonably withheld does place limits on this right, but it still involves Sky retaining control of Mr Thompson's activities in appropriate circumstances in order to preserve their exclusive exploitation of his services in programmes such as Soccer Saturday.

(4) Sky retained control over confidential information and intellectual property arising out of the services. The fact that the opinions remained those of Mr Thompson does not detract from this; the control arises from Sky's ability to control the output of the programmes and other services.

(5) The fact that Mr Thompson had control over his own opinions and his preparation for the show does not detract from the contractual rights of the parties and was instead merely a feature of the nature of the services which he provided.

Contract of Employment

68. We find that the hypothetical contract would have been a contract of employment. This is for the following reasons.

(1) The control set out above was considerable. In particular, Sky's contractual right to require Mr Thompson's performance of the services at a location of their choosing is consistent with an employment relationship. The fact that the way in which the contract was performed meant that this was in fact on regular occasions, at regular locations, and that there was always consensus as to when attendance was required or not required does not detract from the level of Sky's contractual right of control in this regard.

(2) Mr Thompson's role as a pundit and a guest giving his own opinion does not tend against the hypothetical contract being an employment contract. If the role of an employee is to give his or her own advice and opinion, then doing so is consistent with (rather than inconsistent with) the employment relationship.

(3) The manner in which Mr Thompson prepared for and provided these services is not inconsistent with an employment relationship. The same is true of the fact that Mr Thompson would leave as soon as he had finished the programme. An employee can be given latitude as to the way in which services are performed and still be an employee.

(4) The fact that Mr Thompson's opinions and analysis remained his does not affect the employment relationship. Crucially, the hypothetical contract restricted Mr Thompson's ability to exploit those opinions and analysis (and intellectual property more generally) other than in accordance with its terms.

(5) The hypothetical contract provided for termination by Sky but not by Mr Thompson.

(6) Whilst Mr Thompson had his own status and character as a result of his expertise and professional background, he had become associated with Soccer Saturday. This was recognised in the wording of the non-compete clause at paragraph 4.2 of the Schedule. Mr Thompson also acknowledged this in his evidence as he noted that the viewing public would expect him to be on their screens on a Saturday.

(7) The fact that the payment was paid as a block fee regardless of air time is neutral. Whether this is a salary or a fee depends upon whether the arrangement was an employment contract or not rather than being dependent upon the actual Contract's or hypothetical contract's choice of label.

(8) It is right that Mr Thompson's work for Sky took up a relatively small amount of his time and that this was one method of capitalising on Mr Thompson's own status and character. However, this must be balanced against the fact that his work was the substantial majority (an average of 80% during the relevant periods) of the Company's earnings. This was the main element of Mr Thompson's professional income. As such, his services for Sky did not take place against a background of the majority of Mr Thompson's professional income coming from a range of self-employed engagements.

(9) The fact that Mr Thompson had the potential to increase his income through the efficient use of his time is neutral. This is saying no more than the fact that Mr Thompson could earn money from engagements other than Sky if he used his time wisely. As it is possible to be employed by one principal and self-employed for engagements with other principals, the ability to increase the amount of self-employed work does not cause the employed engagement to change its nature.

(10) Mr Thompson's risk to his reputation and profile during appearances is neutral. This is a feature of the role he undertook rather than the nature of the hypothetical contract. In any event, Mr Thompson was not taking on any financial risk during his appearances for Sky.

(11) The absence of perks offered by Sky to employees (primarily free Sky television) does tend against Mr Thompson and Sky treating Mr Thompson as an employee. However, this is outweighed by all the other factors set out above.

69. Standing back, these factors combine together to make the hypothetical contract a contract of employment. No term of the hypothetical contract is inconsistent with an employment contract. To the contrary, the terms of the hypothetical contract and the circumstances in which the professional relationship was performed were consistent with an employment contract.

70. We note that we have not taken into account the fact that Mr Thompson later became an employee or any similarity or difference after he became an employee when compared with before. This is because, by its very nature, this post-dates the relevant period.

71. We also note that we have reached a contrary conclusion to the result in *Barnes*. We find that this is in accordance with the principle of comity because the facts of *Barnes* are different to the present case, with the effect that the multi-factorial assessment has resulted in a different outcome. In particular, Mr Barnes appears to have been in business on his own account to a greater degree than in the present case as Sky accounted for 60% of the appellant's turnover. Importantly, a feature of *Barnes* was that Mr Barnes was entitled to (and appears to have been encouraged) to reproduce his opinions elsewhere in other media. In the present case, Mr Thompson was more constrained. Further, all Mr Barnes' engagements

contributed to what Judge Poon referred to at [134] (10) as being, "one and the same enterprise of being 'Stuart Barnes, the voice of rugby'." By contrast, as set out above, Mr Thompson was more closely associated with Sky than any other professional activities that he was carrying out at that time.

72. Similarly, we do not treat ourselves as being bound by the outcome in *Parry* and are not constrained to follow *Parry* by the principle of comity as, whilst the underlying contracts were similar, the factual differences as to how those contracts operated when compared to the present case require their own analysis. As such, although we have reached the same outcome as in *Parry*, this is the result of our own multi-factorial assessment in the present case as set out above.

DISPOSITION

73. It follows that, for the reasons set out above, we dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

74. 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.

RICHARD CHAPMAN KC
TRIBUNAL JUDGE

Release date: 11th DECEMBER 2023