FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House

Appeal reference: TC/2018/02263

INCOME TAX AND NATIONAL INSURANCE - intermediaries legislation - IR35 - personal service company - if the contracts in question had been directly between the end user and the individual, would they have been contracts of employment - remitted hearing following an earlier decision and appeals to the Upper Tribunal and the Court of Appeal - scope of the remitted hearing considered - case law in relation to the contrast between contracts for services and contracts of employment considered - conclusion that, in this case, if the contracts in question had been directly between the end user and the individual, they would have been contracts for services and not contracts of employment - appeal allowed

Heard on: 10, 11 AND 12 OCTOBER 2023
Judgment date: 29 November 2023

Before

TRIBUNAL JUDGE TONY BEARE
MR DUNCAN MCBRIDE

Between

ATHOLL HOUSE PRODUCTIONS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Keith Gordon and Ms Ximena Montes Manzano, of counsel, instructed by Sharpe Pritchard LLP

For the Respondents: Mr Adam Tolley KC, Mr Christopher Stone and Ms Marianne Tutin, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This decision relates to an appeal which we first considered in March 2019 – see *Atholl House Productions Limited v. The Commissioners for Her Majesty's Revenue and Customs* [2019] UKFTT 242 (TC). In that decision, we found in favour of the Appellant.

2. Our decision in relation to the appeal was upheld on different grounds by the Upper Tribunal (Marcus Smith J and Judge Jonathan Richards) in *The Commissioners for Her Majesty's Revenue and Customs v. Atholl House Productions Limited* [2021] UKUT 37 (TCC) ("*Atholl House UT*"). In its decision, the Upper Tribunal set aside our original decision on the basis that it contained errors of law but went on to re-make the decision on the basis of the facts which we had found and reached the same conclusion in favour of the Appellant as we had done in our original decision.

3. On appeal by the Respondents, the Court of Appeal (Peter Jackson LJ, Arnold LJ and Sir David Richards) in *The Commissioners for Her Majesty's Revenue and Customs v. Atholl House Productions Limited* [2022] EWCA Civ 501 ("*Atholl House CA*") set aside both our original decision and the decision of the Upper Tribunal in *Atholl House UT* on the basis that the Upper Tribunal had made errors of law. The Court of Appeal considered that it was unable to re-make the decision on the basis of the facts found in our original decision. Accordingly, on 26 April 2022, it remitted the appeal to the Upper Tribunal for the decision to be remade (the "CA Order"). The precise basis on which the Court of Appeal remitted the appeal has been the subject of some dispute between the parties, as described in further detail below.

4. On 24 June 2022, following the making of the CA Order, the Appellant made an application to the Upper Tribunal to rely on further evidence in the remitted proceedings.

5. On 24 October 2022, the Upper Tribunal concluded that the First-tier Tribunal was the appropriate forum for the ongoing dispute and accordingly remitted the proceedings to the First-tier Tribunal to be heard by the same panel as the original hearing, if practicable, and left

it for the First-tier Tribunal to determine whether to make any further findings of fact and whether to allow further evidence to be admitted (the "UT Order").

6. On 2 November 2022, following the making of the UT Order, the Appellant renewed its application to rely on further evidence in the remitted proceedings and, on 19 December 2022, Judge Beare upheld that application.

7. The hearing of the remitted appeal took place on the dates set out above. At that hearing, we were provided with the additional evidence which the Appellant had been permitted to produce, the submissions of both parties in relation to the scope of the remitted hearing and the submissions of the parties in relation to the issue which is the subject of the appeal, in the light of the law as set out by the Court of Appeal in *Atholl House CA* and the evidence as a whole.

THE ISSUE

8. The issue which is the subject of the appeal and the background facts are set out in some detail in paragraphs [1] to [7] of our original decision.

9. In short, the matter in issue is whether the "intermediaries legislation" in Sections 48 to 61 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003"), and the related provisions of the Social Security Contributions (Intermediaries) Regulations 2000 (the "2000 Regulations"), commonly known for short as "IR35", applied to the arrangements entered into between the Appellant and the British Broadcasting Corporation (the "BBC") in relation to the provision by the Appellant to the BBC of the services of Ms Kaye Adams. If IR35 applied to those arrangements, then the Appellant was liable to pay income tax under the PAYE system and national insurance contributions in respect of the earnings under those contracts as if Ms Adams had been employed by the BBC.

10. The appeal originally related to the four tax years ending 5 April 2014 to 5 April 2017 (both inclusive). Following the making of the appeal, the Respondents did not oppose the appeal as regards the first two of those tax years but they have consistently maintained their opposition to the appeal as regards the tax years ending 5 April 2016 and 5 April 2017. The aggregate amounts involved for those tax years are income tax of £81,150.60 and national insurance contributions of £43,290.98.

THE LEGISLATION

11. The relevant legislation is set out in paragraphs [8] to [15] of our original decision.

12. As regards income tax, it applies where:

(1) an individual (the "worker") personally performs, or is under an obligation personally to perform, services for another person (the "client");

(2) 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

(3) the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under the client. In this context, the legislation provides that the circumstances referred to 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.

13. As regards national insurance, the legislation is, to all intents and purposes, the same. In order for the legislation to apply, the circumstances must be such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded as employed in employed earner's employment by the client.

THE QUESTION TO BE ADDRESSED

14. In this case, there is no dispute that Ms Adams personally performed services for the BBC not under a contract directly between the BBC and Ms Adams but instead under arrangements involving the Appellant. Thus, the focus of the appeal in relation to both income tax and national insurance is solely the third limb of the statutory test in each case – namely, whether the circumstances in which Ms Adams carried out her services were such that, if the services had been provided as a result of contracts between the BBC and Ms Adams, she would have been regarded for income tax purposes as an employee of the BBC and would have been regarded for national insurance purposes as employed in employed earner's employment by the BBC.

THE THREE STAGES

15. It is common ground that, in applying the third limb of the statutory test, the following three-stage process should be followed:

(1) Stage 1 - find the terms of the actual contracts (between the Appellant and the BBC on the one hand and between Ms Adams and the Appellant on the other) and the 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 the third limb of the statutory test by reference to the terms of the actual contracts and the relevant circumstances; and

(3) Stage 3 - consider whether the hypothetical contract would be a contract of employment.

16. In this decision, we will describe the above stages as "Stage 1", "Stage 2" and "Stage 3" respectively. In addition, in order to avoid confusion, we will also refer to:

(1) the written contracts which were executed by the BBC and the Appellant as the "written agreements";

(2) the contracts determined at Stage 1 by reference to the written agreements as the "actual contracts"; and

(3) the hypothetical contracts determined at Stage 2 by reference to the actual contracts and the relevant circumstances as the "hypothetical contracts".

For completeness, we should say at this stage that no evidence or submissions have been provided to us at either the original hearing or the remitted hearing as to the terms of the actual contracts between the Appellant and Ms Adams over the relevant period but it is common ground that the actual contracts whose terms are relevant to the determination of the terms of the hypothetical contracts are solely the actual contracts between the BBC and the Appellant. For that reason, we do not refer in the rest of this decision to the terms of the actual contracts between the Appellant and Ms Adams.

STAGE 1

17. As regards Stage 1, in its decision in *Atholl House CA*, the Court of Appeal held that ordinary principles of contractual construction should apply. Sir David Richards said that the wider approach to contractual construction adopted by the Supreme Court in *Autoclenz Ltd v. Belcher* [2011] UKSC 41, [2011] ICR 1157 ("*Autoclenz*") and *Uber BV v. Aslam* [2021] UKSC 5 ("*Uber*") had no relevance in circumstances such as these where the question in issue is not one of statutory interpretation – see *Atholl House CA* at paragraph [156].

18. It follows from this that, in a case involving the IR35 legislation, the terms of the actual contracts need to be determined by reference to well-established rules on the interpretation of

contracts in general and without regard to the fact that the contractual arrangements relate to the context of employment. This is a mixed question of fact and law because, even if, as in this case, there are written agreements between the client and the intermediary and a statement in those written agreements to the effect that they set out all the terms of the agreement between the parties, it is a question of fact as to whether or not the parties intended those written agreements to be the exclusive record of the terms of their agreement – see Lord Hoffmann in *Carmichael v. National Power plc* [1999] 4 All ER 897 at 903; [1999] ICR 1226 ("*Carmichael*") at 1233 and the Upper Tribunal in *The Commissioners for Her Majesty's Revenue and Customs v. Kickabout Productions Limited* [2020] UKUT 216 (TCC) ("*Kickabout UT*") at paragraph [25].

19. Some guidance on the rules for interpreting contracts may be found in the Supreme Court decision in *Wood v. Capita Insurance Services Limited* [2017] UKSC 24 ("*Wood*"). Lord Hodge, with whom the other Justices agreed, noted, at paragraphs [10] and [11], that:

> (1) "[the] court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement";
>
> (2) this is not a literalist exercise focused solely on a parsing of the wording of the particular clause. Instead, the court needs to consider the contract as a whole and, depending on the nature, formality and quality of the drafting in the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning;
>
> (3) where there are rival meanings, the court can give weight to the implications of the alternative constructions "by reaching a view as to which as to which construction is more consistent with business common sense";
>
> (4) 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 the drafting of the clause; and
>
> (5) the court must be alive to the possibility that:
>
> > (a) one party may have agreed to something which, with hindsight, does not serve his interest;
> >
> > (b) a provision may be a negotiated compromise; and
> >
> > (c) the parties may have been unable to agree more precise terms in the course of the negotiations.

STAGE 2

20. The Court of Appeal in *Atholl House CA* had very little to say about Stage 2. That is because, in the Court of Appeal:

> (1) the grounds of appeal by the Respondents related solely to the manner in which the Upper Tribunal in that case had approached Stage 3; and
>
> (2) the "Respondent's notice" served by the taxpayer related solely to:
>
> > (a) the application of the decision in *Autoclenz* at Stage 1; and
> >
> > (b) if the taxpayer succeeded on that ground, the manner in which the Upper Tribunal in that case had approached Stage 3.

21. Thus, the way in which Stage 2 was to be approached - and, in particular, the interaction between Stage 2 and Stage 1 - was very much left at large by the Court of Appeal decision. However, those matters were addressed in some detail by the Upper Tribunal in *Atholl House*

UT. At paragraphs [8], [9], [43] and [54] to [56] in *Atholl House UT*, the Upper Tribunal held as follows:

> (1) in determining the terms of the hypothetical contract, Sections 49(1)(c) and 49(4) of the ITEPA 2003 refer to the "circumstances" in which the services are provided and stipulate that those "circumstances" "include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided";
>
> (2) it follows that the terms of the actual contracts forming part of the arrangements will generally be highly material in determining the terms of the hypothetical contract but will not be determinative of them;
>
> (3) whereas the terms of the actual contracts should be determined by reference to the ordinary canons of contractual interpretation, those ordinary canons will not, of themselves, determine the contents of the hypothetical contract;
>
> (4) in addition, it is not necessary to defer all analysis of the hypothetical contract at Stage 2 until all of the terms of the actual contracts have been comprehensively determined at Stage 1. It might often be appropriate, in the iterative way identified by Lord Hodge JSC in *Arnold v. Britten* [2015] UKSC ("*Arnold*") at paragraph [77], to construe the terms of the actual contracts whilst considering at the same time how the actual contracts would work in determining the content of the hypothetical contract;
>
> (5) when determining the terms of an actual contract, the parties' subjective beliefs as to the meaning of the contract or ignorance of the contract's terms will typically be irrelevant. Similarly, unless giving rise to a variation or some form of waiver or estoppel, the manner in which the actual contract is performed is typically irrelevant to its construction. However, those matters should not be regarded as being necessarily irrelevant in determining the terms of the hypothetical contract and are, in the view of the Upper Tribunal, matters that can appropriately be taken into account. This is because they are part of the "circumstances" which are required to be taken into account in determining the terms of the hypothetical contract. The Upper Tribunal observed that:
>
> "The process of synthesising the hypothetical contract out of the actual contracts in fact agreed involves additional considerations, and not merely the usual processes of interpretation."
>
> As such, the parties' subjective beliefs and conduct are relevant circumstances which need to be considered in determining the terms of the hypothetical contract at Stage 2, even if they do not affect the identification of the terms of the actual contracts at Stage 1;
>
> (6) it is not correct to construct the hypothetical contract simply by reference to the understanding by one of the parties of the terms of the actual contracts. That would be to place too much weight on matters not necessarily relevant to the construction of the hypothetical contract. Instead, the appropriate way to approach the task of constructing the terms of the hypothetical contract is to conduct a "counterfactual" exercise - in other words, to consider what the terms of the contract would have been if the client had contracted directly with the worker. In doing so, where the intermediary is under the control of the worker, the terms of the actual contract between the intermediary and the client is a safe starting point because that is what the client agreed with the intermediary and what the intermediary (which is controlled by the worker) agreed with the client;
>
> (7) in many cases, the worker and the client will have enjoyed a harmonious working relationship in which the precise terms of the actual contracts do not feature prominently as there will be no need for either party to insist on enforcing the strict terms of the actual

contracts between the parties. It is therefore helpful in constructing the terms of the hypothetical contract to consider what might have happened in the event of certain hypothetical potential "flashpoints" - which is to say, postulating circumstances where one of the parties might have wished to stand on its rights as set out in the actual contracts against the wishes of the other party and then to consider what might then have occurred; and

(8) these principles are as applicable in the case of the relevant national insurance legislation as they are in the case of the income tax legislation notwithstanding the fact that Regulation 6 in the 2000 Regulations does not contain an equivalent to Section 49(4) of the ITEPA 2003 - which expressly directs attention to the terms of the actual contracts - because the provisions deal with similar and overlapping subject matter.

STAGE 3

22. As regards Stage 3, it is common ground that another three-stage process - the one described by MacKenna J in *Ready Mixed Contract (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497 ("*RMC*") at 515 - should be adopted. That is to say that:

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

23. MacKenna J went on as follows in *RMC*:

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

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

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

"What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters." – *Zuijs v. Wirth Brothers Proprietary, Ltd*.

To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication.

The third and negative condition is for my purpose the important one, and I shall try with the help of five examples to explain what I mean by provisions inconsistent with the nature of a contract of service.

(i) A contract obliges one party to build for the other, providing at his own expense the necessary plant and materials. This is not a contract of service, even though the builder may be obliged to use his own

labour only and to accept a high degree of control: it is a building contract. It is not a contract to serve another for a wage, but a contract to produce a thing (or a result) for a price.

(ii) A contract obliges one party to carry another's goods, providing at his own expense everything needed for performance. This is not a contract of service, even though the carrier may be obliged to drive the vehicle himself and to accept the other's control over his performance: it is a contract of carriage.

(iii) A contract obliges a labourer to work for a builder, providing some simple tools, and to accept the builder's control. Notwithstanding the obligation to provide the tools, the contract is one of service. That obligation is not inconsistent with the nature of a contract of service. It is not a sufficiently important matter to affect the substance of the contract.

(iv) A contract obliges one party to work for the other, accepting his control, and to provide his own transport. This is still a contract of service. The obligation to provide his own transport does not affect the substance. Transport in this example is incidental to the main purpose of the contract. Transport in the second example was the essential part of the performance.

(v) The same instrument provides that one party shall work for the other subject to the other's control, and also that he shall sell him his land. The first part of the instrument is no less a contract of service because the second part imposes obligations of a different kind: *Amalgamated Engineering Union v. Minister of Pensions and National Insurance*.

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

24. The above expression of the position in law shows that, in order for there to be a relationship of employer and employee:

(1) there must be mutuality of obligations;

(2) the putative employer must enjoy a degree of control over the putative employee; and

(3) the other terms of the contract must be consistent with its being an employment contract.

25. In this decision, we will describe the test described in paragraph 24(1) above as "Stage 3A", the test described in paragraph 24(2) above as "Stage 3B" and the test described in paragraph 24(3) above as "Stage 3C".

26. For reasons which will shortly become apparent, we do not propose to say very much in this decision about either of Stage 3A or Stage 3B. They have together been described as a necessary but not sufficient condition of a contract of service - see *Fall v. Hitchin* [1973] 1 WLR 286 ("*Fall*") - and as the "irreducible minimum" which need to be satisfied before considering the relevant factors at Stage 3C - see *Montgomery v. Johnson Underwood Limited* [2001] ICR 819 ("*Montgomery*").

27. Instead, our primary focus in this decision is on Stage 3C, which needs to be addressed only if both of Stage 3A and Stage 3B have been satisfied.

THE SCOPE OF THE PROCEEDINGS

28. As we have outlined in paragraph 3 above, following its determination that the Upper Tribunal had made errors of law and that it did not have sufficient evidence to re-make the decision itself, the Court of Appeal remitted the appeal to the Upper Tribunal. It did so on the terms of the following paragraphs in the judgment of Sir David Richards:

"162. For the reasons given above, I would allow HMRC's appeal and set aside the UT's decision.

163. The findings that the hypothetical contracts would satisfy the irreducible minimum of mutuality of obligation and the right of control remain. What is now required is an assessment of whether overall there would under the hypothetical contracts have existed an employment relationship between Ms Adams and the BBC. For this purpose, there need to be taken into account the terms of the hypothetical contracts and their effects, and the circumstances in which such contracts would have been made insofar as they would have been known to both parties or were reasonably available to both parties.

164. This is an assessment which has yet to be made in this case on a correct basis. The FTT wrongly proceeded on a basis that left clauses 8.1 and 8.2 out of account. As explained above, the UT largely failed to take account of the many features of the contractual terms and their effects, some of which may be seen as pointing to an employment relationship while others may be seen as consistent with Ms Adams being an independent contractor. It largely focused on Ms Adams' freelance career and engagements without considering their relevance to her hypothetical contract with the BBC in the two years in question or the extent to which such information was known or reasonably available to the BBC.

165. This court has previously made clear that its own power to re-make a decision should be used sparingly and only if the court feels no real doubt about how the FTT or the UT, properly directed, would have decided the case: see *Newey (t/a Ocean Finance) v HMRC* [2018] EWCA Civ 791; [2018] STC 1054 at [111]-[112]. Like Henderson LJ in that case, I do not feel confident enough about the correct conclusion for this court to make the decision.

166. It is therefore, unfortunately, necessary for the case to be remitted. My provisional view is that the case should be remitted to the UT for the decision to be remade on the basis of the FTT's findings of fact, as corrected by the UT's decision on the Autoclenz point. I would, however, give the parties the opportunity to argue, if either wishes to do so, that further facts should be found and, if so, whether the parties should be confined to the existing evidence or (and, if so, on what basis) either party should be permitted to adduce further evidence. If any further fact-finding or evidence were permitted, it would then be necessary to decide whether the case should be remitted to the UT or the FTT."

29. Both Arnold LJ and Peter Jackson LJ agreed with this outcome - see *Atholl House CA* at paragraphs [167] and [172].

30. The Court of Appeal then remitted the appeal under the terms of the CA Order, the crucial part of which was as follows:

"2. The matter is remitted to the Upper Tribunal for the decision to be remade on the basis of the First-tier Tribunal's findings of fact, as corrected by the Upper Tribunal's decision, and any further findings of fact that the Upper Tribunal considers appropriate to make and upon such further evidence (if any) as the Upper Tribunal may permit on the application of either party."

31. Unfortunately, the terms of the decision in *Atholl House CA* and the CA Order set out above have given rise to considerable uncertainty and debate.

32. In order to explain the reasons for that, we should start by repeating that the general position in a case of this kind would require us to:

(1) determine the terms of the actual contracts between the BBC and the Appellant - Stage 1;

(2) determine the terms of the hypothetical contracts between the BBC and Ms Adams in view of the terms of the actual contracts described in paragraph 32(1) above and the circumstances in which those contracts came to exist - Stage 2; and

(3) apply the three limbs of the test laid down by MacKenna J in *RMC* - Stage 3A, Stage 3B and Stage 3C.

33. The problem in scope which has arisen in this case arises as a result of the fact that, in the passages from *Atholl House CA* set out above, Sir David Richards:

(1) began by saying that Stage 3A and Stage 3B had been finally determined by the Upper Tribunal but that Stage 3C remained to be determined - see paragraph [163];

(2) then said that Stage 3C had yet to be considered on a correct basis - see paragraph [164];

(3) then said that the Court of Appeal did not feel confident enough about reaching the right conclusion on the facts to re-make the decision - see paragraph [165]; and

(4) finally, said that, as a result, the case needed to be remitted and that it should be remitted on the basis that the decision should be re-made on the basis of our findings of fact in the original decision, as corrected by the Upper Tribunal in *Atholl House UT*, but that he would, however, give the parties the opportunity to argue that further facts should be found and, if so, to apply to produce new evidence - see paragraph [166].

34. The terms of the CA Order made no distinction between the various stages or the various parts of Stage 3. It simply repeated the terms of paragraph [166] in *Atholl House CA* and remitted the case to the Upper Tribunal. The UT Order, in turn, did not distinguish between the various stages or the various parts of Stage 3 when remitting the case to us. (In any event, as a matter of law, nothing set out in the UT Order could have widened the scope of the remission from the one which had been determined by the Court of Appeal.)

35. Mr Tolley KC, on behalf of the Respondents, submitted that the paragraphs of the decision set out above clearly limited the scope of our role in the present proceedings to just part of Stage 3C - namely, "the circumstances in which such contracts would have been made insofar as they would have been known to both parties or were reasonably available to both parties." He said that this followed from the fact that, in paragraph [163], Sir David Richards had made it clear that Stage 3A and Stage 3B had been finally determined and that this therefore meant that, by definition, neither those stages nor Stage 1 and Stage 2 - which logically preceded those stages - could be re-opened. He submitted that, by definition, therefore, the new arguments and new evidence to which reference was made in paragraph [166] must necessarily be confined to the part of Stage 3C which related to the circumstances in which the hypothetical contracts would have been made.

36. Mr Gordon, on behalf of the Appellant, said that that was an unjustifiably restrictive reading of the terms of those paragraphs. He said that, although Sir David Richards had started by saying that each of Stage 3A and Stage 3B had been finally determined, the words which followed in paragraph [166] demonstrated that the whole decision needed to be re-made and that further arguments and facts could be adduced for that purpose. He added that that interpretation was supported by the terms of the CA Order itself, which simply referred to the case being remitted in order for "the decision to be remade on the basis of the First-tier Tribunal's findings of fact, as corrected by the Upper Tribunal's decision, and any further findings of fact that the Upper Tribunal considers appropriate to make and upon such further evidence (if any) as the Upper Tribunal may permit on the application of either party".

37. In our view, neither party is entirely right about the scope of the remitted hearing.

38. We agree with Mr Tolley KC that we are not at this stage permitted to re-open either of Stage 3A or Stage 3B. Our remit is simply to address Stage 3C. However, we agree with Mr Gordon that, in addressing Stage 3C, we are not simply confined to considering the arguments and hearing new evidence which relate to the circumstances in which the hypothetical contracts in this case would have been made. Instead, we are also permitted to consider arguments and new evidence which pertain to the terms of the hypothetical contracts insofar as those terms relate to Stage 3C. It is not the case that, in determining Stage 3C, we are bound by the findings made by the Upper Tribunal in *Atholl House UT* in relation to the terms of the hypothetical contracts if and to the extent that we conclude that the new evidence leads to a different conclusion.

39. We have reached the conclusions set out in paragraph 38 above for the reasons which follow.

40. In our view, the structure of the paragraphs in Sir David Richards's judgment set out above - with the introduction in paragraph [163] and then the ensuing paragraphs leading to the direction in paragraph [166] - makes it clear that the Court of Appeal does not wish us to address either of Stage 3A or Stage 3B in this decision. Instead, we are confined to addressing Stage 3C. It seems clear to us that, having concluded in the opening part of paragraph [163] that Stage 3A and Stage 3B had been determined, everything said by Sir David Richards thereafter was directed at Stage 3C. Mr Gordon's position would require us to treat the opening part of paragraph [163] as standing apart from the words which follow and therefore as being superseded in its entirety by paragraph [166] whereas we consider that the three paragraphs need to be read as an integrated whole.

41. However, we consider that paragraph [166] makes it clear that, in addressing Stage 3C, we are not confined to relying on the terms of the hypothetical contracts which were determined by the Upper Tribunal in *Atholl House UT* to the extent that there is anything in the new evidence or additional findings of fact based on that new evidence or the original evidence which leads to a different conclusion. That follows from the fact that, after saying that the decision would need to be re-made on the basis of the findings of fact in our original decision, as corrected by the Upper Tribunal on the *Autoclenz* point, Sir David Richards went on to add that he would, however, give the parties permission to argue that further facts should be found and that further evidence should be allowed to be adduced for that purpose. Since the terms of the hypothetical contracts at Stage 2 are in part a question of fact, it must follow that we are free to find different terms from those found by the Upper Tribunal in *Atholl House UT* if the new evidence or the additional findings of fact based on that new evidence or the original evidence lead to that conclusion.

42. It is true that, before the Court of Appeal, the Respondents did not challenge the findings of the Upper Tribunal as regards the terms of the hypothetical contracts. Instead, the Respondents' focus in that appeal was on the manner in which the Upper Tribunal had interpreted and applied Stage 3C in the light of its conclusions at Stage 2 as regard the terms of the hypothetical contracts - see *Atholl House CA* at paragraph [50].

43. It is also true that, in the final paragraphs of his judgment, Sir David Richards's focus was on the failure by the Upper Tribunal, in reaching its conclusion, "to take account of the many features of the contractual terms and their effects". It was not on any defect in the conclusions reached by the Upper Tribunal as regards the terms of the hypothetical contracts at Stage 2 - see *Atholl House CA* at paragraph [164]. That was why, in setting out in *Atholl House CA* at paragraph [166] the ambit for the remitted case to be heard, Sir David Richards said that the

decision was to be remade "on the basis of the FTT's findings of fact, as corrected by the UT's decision on the *Autoclenz* point".

44. However, the language in paragraph [166] which immediately follows that direction does not say that the power of the First-tier Tribunal to make further findings of fact for the purposes of determining Stage 3C is confined to findings which relate merely to the circumstances in which the hypothetical contracts found by the Upper Tribunal arose. Instead, those further findings of fact might well disturb the findings made by the Upper Tribunal as to those terms. We therefore consider that, so far as concerns Stage 3C - albeit not, to be clear, either of Stage 3A or Stage 3B - if, upon considering the entirety of the evidence in the light of the new evidence at the remitted hearing, we were to determine that the terms of the hypothetical contracts were different from those determined by the Upper Tribunal in *Atholl House UT*, then we would be free to reach that conclusion.

45. We do not think that the fact that the CA Order failed to make apparent the distinctions which we have drawn above changes the position. The CA Order should in our view be read in the light of the terms of the judgment of Sir David Richards in *Atholl House CA* and not in isolation as if it existed in a vacuum.

46. The above conclusion means that, in our view, we do not need to make any further findings of fact in this decision which pertain solely to Stage 3A or Stage 3B or to address in our discussion on the legal analysis whether the conclusions which have been reached in relation to those stages by the Upper Tribunal are capable of change. That is not to say that any further findings of fact which we may make and which have a bearing on the issues of mutuality of obligations or control are of no moment. Although we are not permitted at this stage to call into question the fact that the hypothetical contracts in this case would have satisfied Stage 3A and Stage 3B, the extent of the mutuality of obligations and the extent of the control which would have been exercised by the BBC over Ms Adams under the hypothetical contracts might well be pertinent factors in our evaluation of the various relevant factors for the purposes of Stage 3C - as we will explain in due course below.

47. Notwithstanding the conclusions set out in paragraphs 37 to 46 above, in approaching the remitted hearing, we were conscious of the fact that that hearing was the fourth hearing in relation to this appeal and that the appeal had been ongoing for a protracted period of time. We were keen to ensure that, so far as possible, should the conclusions that we have set out above be held to be incorrect as a matter of law by a superior court, that court should be able to re-make the decision without having to remit the appeal back to us for yet another hearing to find additional facts. Accordingly, we instructed the parties to make their submissions at the remitted hearing in the light of the new evidence which we heard on the basis that the scope of the hearing was as outlined by Mr Gordon and that we would make our findings of fact on the assumption that each of the three stages of Stage 3 remained open.

THE EVIDENCE AT THE ORIGINAL HEARING

Introduction

48. We were provided with a considerable amount of written and oral evidence at the original hearing. Some of that evidence was summarised in our original decision and we have decided to set it out once again in this decision for ease of reference.

49. Other evidence which was provided to us at the original hearing was not summarised in our original decision on the basis that we did not consider it to be relevant to our decision at that time. However, as it was either mentioned in the course of the submissions made at the remitted hearing or we now consider it to be relevant to our decision in this case, we will set it out in this decision.

50. For the purposes of the original hearing, we were provided in advance of the hearing with two witness statements from Ms Adams and one witness statement from each of Mr Colin Paterson - an employee of the BBC who was editor in charge of the Kaye Adams Programme between April 2015 and December 2016 - Mr Stephen Hollywood - an employee of the BBC who was a senior content producer on morning radio programmes - and Mr Adonis Zanettos - Ms Adams's accountant - and we heard oral evidence at the original hearing from each of Ms Adams, Mr Paterson and Mr Zanettos.

51. We were also provided with:

(1) copies of two written agreements between the BBC and the Appellant – one relating to the period from 16 March 2015 to 31 March 2016 and the other relating to the period from 4 April 2016 to 31 March 2017. Each written agreement related to the presentation of 160 programmes during the period specified by the written agreement and the parties informed us at the original hearing that both written agreements were on the same terms. Accordingly, for the purposes of this decision, we make no distinction between the terms of the two written agreements;

(2) copies of correspondence between the Respondents and Mr Zanettos dated 29 July 2015 and 26 October 2015 in which a number of questions were raised by the Respondents in relation to the relationship of the BBC and Ms Adams and answers were provided by Mr Zanettos (the "Correspondence"); and

(3) two notes - one by the Respondents and the other by the BBC - of a meeting held between the Respondents and three representatives of the BBC, including Mr Paterson, on 27 September 2016.

The evidence recorded in our original decision

The terms of the written agreements

52. It is the terms of the written agreements to which we first turn.

53. Each written agreement contained the following terms which are germane to the issue that is the subject of the appeal:

(1) it specified that the Appellant was to provide the services of Ms Adams as presenter of the Kaye Adams Programme for a minimum commitment of 160 programmes (the "Minimum Commitment") during the term of the agreement (Part A and clauses 3 and 6.1 of Part B);

(2) it specified that, in return for the Minimum Commitment, subject to the compliance by the Appellant and Ms Adams with its and her obligations pursuant to the agreement, the BBC would pay the Appellant a minimum fee of £155,000 (the "Minimum Fee") and that, if the BBC required Ms Adams to exceed the Minimum Commitment, then the Appellant would be entitled to invoice and be paid for the additional programmes at the rate of £968.75 per programme (clause 6.1 of Part B);

(3) it required the execution by Ms Adams, as the contributor, of a "Contributor Guarantee" (in the form set out in Schedule 2 to Part B), pursuant to which Ms Adams confirmed that:

(a) the Appellant had entered into the agreement on her behalf and that she would perform the services required by, and comply with the terms of, the agreement and, in particular, that she would read and fully comply with the BBC's Editorial Guidelines and Guidance (together, the "Guidelines") and the BBC's reputation for impartiality, integrity, independence and decency (the "Standards");

(b) she would make herself available to complete such editorial training as the BBC might from time to time require;

(c) she would at the reasonable request of the BBC undergo a full medical examination and allow the BBC access to the results of that examination, subject to keeping such results confidential;

(d) she would grant the Appellant such consents (including a waiver of her moral rights) and grants of rights as were required in order for the Appellant to fulfil its obligations under the agreement to grant rights to the BBC; and

(e) she was not an employee of the BBC and acknowledged that the BBC had no liability to her in respect of any insurance cover (including health and medical insurance) or loss of income (or the suffering of any expense) due to illness, injury or damage sustained in the course of her provision of services to the Appellant unless caused by the negligence or default of the BBC,

(Part A and clause 11.19 of Part B);

(4) it specified that the services of Ms Adams to the BBC were not exclusive (clause 1) but that, during the term of the agreement, "the BBC will have first call on the freelance services of [Ms Adams] (subject only to any prior professional commitments of [Ms Adams] which have been confirmed to the [BBC] in writing prior to the signature hereof)" (clause 8.1 of Part B). It also provided that:

(a) during the term of the agreement, Ms Adams would "not without the prior written consent of the [BBC], such consent not to be unreasonably withheld, appear in any other third party audio and/or visual content primarily intended for audiences in the United Kingdom and the Republic of Ireland" and specified that it would be reasonable for the BBC to withhold its consent if the services in question could reasonably be considered to be in direct competition with the services or in conflict with the Standards; and

(b) neither the Appellant nor Ms Adams would allow any written material to be published for a party other than the BBC

(i) which featured substantially similar content to the services either before or for a period of seven days after the transmission of the BBC programme containing such content;

(ii) which included BBC-owned content without prior written licence from the BBC;

(iii) which included content about the BBC "or is for a regular writing commitment (without the prior written consent of the [BBC])";

(iv) which contained content that could reasonably be considered to be controversial or to compromise the Standards or to breach confidentiality; or

(v) "if the [services] provided hereunder are either primarily for News output or otherwise primarily journalistic in nature without first obtaining copy approval from the [BBC] (which will not be unreasonably withheld)"

(clause 8.3 of Part B);

(5) it required the Appellant to provide the freelance services of Ms Adams to the BBC as required in order to present the programme including preparation, appearing in and out of vision, creative input for content production (and revising such content as required at the Appellant's own cost and in Ms Adams's own time), travel as deemed necessary

by the BBC, promotion of the programme and "such other services as are usually provided by a professional first class presenter" (clause 3.1 of Part B);

(6) it required the Appellant to procure that Ms Adams would be contactable and available to provide her services throughout any "call day", if required, attend at such times and places as the BBC deemed reasonably necessary, execute and complete the services conscientiously and "fully and willingly comply with such requests as may be made by the BBC in connection with the [services]" (clause 3.2 of Part B);

(7) it contained an assignment by the Appellant to the BBC of all intellectual property rights associated with the services provided by Ms Adams (clause 4 of Part B) and a confirmation that Ms Adams had waived any moral rights to her contributions (clause 5 of Part B);

(8) it specified that all fees were VAT-exclusive and would be paid monthly on completion of the relevant work (clauses 6.2 and 6.3 of Part B);

(9) it specified that, if the Appellant failed for any reason to procure the delivery of the services by Ms Adams, the BBC would be entitled to reduce the Minimum Fee by a proportionate amount (clause 6.5 of Part B);

(10) it specified that the Minimum Fee was inclusive of all expenses unless specific expenses were agreed with the BBC in advance of being incurred to be exceptional, that the Appellant would provide the appropriate clothing for Ms Adams to carry out the services and that the Appellant would be responsible for the care, control, security, insurance and maintenance of any equipment and materials which it or Ms Adams provided to perform the services (clause 7 of Part B);

(11) it specified that:

> (a) the services provided by Ms Adams and the activities and conduct of Ms Adams "must not compromise or call into question, or be perceived to compromise or call into question, any of the [Standards]";
>
> (b) the Appellant and Ms Adams had given, or would give, the BBC written notice of all commercial, financial or personal interests or activities which related to editorial decisions or content with which Ms Adams was likely to be involved or which could otherwise be perceived to give rise to a conflict of interest on the part of the Appellant or Ms Adams or to influence or affect the contributions of Ms Adams, the editorial decisions or the Standards; and
>
> (c) neither the Appellant nor Ms Adams would be involved in any product placement or promotion of Ms Adams's goods, services or personal interests via any BBC content or make use of or refer to their association with the BBC or any BBC content in any commercial, political or campaigning context,

(clauses 9.1 to 9.3 of Part B);

(12) it specified that Ms Adams would:

> (a) read, and fully comply with, the Guidelines and would fully comply with "the BBC's Values" (by which we believe was meant the Standards), "any other editorial policies and other BBC guidelines and policies as may be advised to the [Appellant] and/or [Ms Adams] by the BBC from time to time" and any applicable codes from the Office of Communications or any replacement regulatory body ("Ofcom");
>
> (b) complete such editorial training as the BBC might from time to time require;

(c) not include in her contributions "remarks or interjections that the BBC has asked or may ask [Ms Adams] to avoid";

(d) not behave in a manner which could bring the Appellant, Ms Adams, the BBC or any BBC content into disrepute or which was likely to make the Appellant, Ms Adams or the BBC subject to sanction from Ofcom;

(e) not engage in any conduct which could compromise or call into question the impartiality or integrity of Ms Adams, the BBC or any BBC content and, in particular, without the prior written consent of the BBC, not to have an interest in any person which had a trading relationship with the BBC or was tendering for work from the BBC, not to provide media training, not to be publicly associated with any government initiative or any campaigning organisation "(including charities or political parties)", not to publicly express personal opinions or advocate any particular position on matters of public policy or controversial issues (other than professional opinions which had always to be given with due accuracy), not to publish statements about the BBC and not to promote goods or services; and

(f) not act in a way which could be regarded as bullying or harassment,

(clause 9.4 of Part B);

(13) it contained warranties from the Appellant that (inter alia):

(a) none of the contributions would infringe any person's intellectual property rights or bring the BBC into disrepute;

(b) neither the Appellant nor Ms Adams would do anything which might expose the BBC to civil or criminal proceedings;

(c) the Appellant and Ms Adams would execute all such documents as might be required to vest in the BBC the intellectual property rights associated with the Appellant's contributions;

(d) Ms Adams would "use reasonable endeavours to attain and maintain such a state of good health as will enable the provision of the [services] and will not without the BBC's written consent voluntarily engage in any hazardous pursuits which could jeopardise [Ms Adams's] ability to fulfil the [services]";

(e) the Appellant would, at the reasonable request of the BBC, procure that Ms Adams underwent a full medical and co-operate with the BBC in any application which the BBC might make for its own production insurance;

(f) Ms Adams would be employed as a director of, and would be a shareholder of, the Appellant throughout the term and would not be an employee of the BBC;

(g) the Appellant would procure such insurance cover for itself and Ms Adams as it and she deemed necessary for their own personal needs and that the BBC had no liability to either of them as an employer or otherwise in respect of such insurance cover (including health and medical insurance) or loss of income (or the suffering of any expense) due to illness, injury or damage sustained in the course of the provision of the services unless caused by the negligence or default of the BBC; and

(h) the Appellant and Ms Adams would be responsible for the payment of all taxes (including national insurance contributions) as might become due in connection with the payments made under the agreement,

and that the Appellant would indemnify the BBC for any loss which the BBC might suffer as a result of any breach of warranty or any other breach of the terms of the agreement (clauses 11 and 12 of Part B);

(14) it provided for the BBC to have the right to terminate the agreement if the Appellant or Ms Adams committed a material or irremediable breach of the agreement or failed to remedy a remediable breach of the agreement within 14 days of receiving notice of the breach from the BBC and it specified that (inter alia) it would be a material or irremediable breach if Ms Adams "is unable personally to provide the [services] hereunder due to ongoing ill-health, injury, mental or physical disability or other substantive cause or reason" (clause 13.1 of Part B);

(15) it specified that, if the Appellant or Ms Adams failed to provide the services in accordance with the terms of the agreement or acted in breach of clause 8.1 of Part B (as summarised in paragraph 53(4) above), then the BBC would have the discretion to give Ms Adams the option of continuing to provide the services for the balance of the term but that, if Ms Adams refused, then the BBC would not be obliged to provide any future work to her and could exclude her from the premises and, if the BBC chose to make payment to her for a certain part of the term, could prevent her from working for any other party during the payment period without the BBC's prior written consent (clause 13.2 of Part B);

(16) it specified that the BBC could suspend the agreement:

> (a) for up to three months if Ms Adams "has behaved in a manner which could bring the BBC into disrepute, and/or could otherwise compromise or call into question the [Standards] or could otherwise constitute a material breach of [the written agreement]", in which case the BBC would be entitled to reduce the Minimum Fee by a proportionate amount during the suspension period; or
>
> (b) if Ms Adams stood for election to any regional or national assembly or was appointed to any non-elected body with political functions,

(clause 13.3 of Part B);

(17) it contained an acknowledgment from both parties to the agreement that "the BBC's editorial control of its content is final" and a statement that:

"The BBC will not be obliged to call on the [services] of [Ms Adams] or to use any of the [contributions], and will not be liable to the [Appellant] or to [Ms Adams] for any loss or damage or any failure to obtain publicity or any opportunity to enhance the reputation of [Ms Adams], as a result provided that the BBC will still be obliged to pay the [Minimum Fee] (subject to any other provisions in the [agreement] to the contrary)",

(clause 14 of Part B);

(18) it provided expressly that the failure of either party to the agreement to exercise or enforce any right conferred on it by the agreement "will not be deemed to be a waiver of any such right or operate so as to bar the exercise or enforcement of such right at any time thereafter" and that no omission or delay on the part of any party to the agreement in exercising any right or discretion under the agreement would "operate as a waiver by it of any such right or stop the exercise or enforcement of any such right at any time thereafter" (clauses 16.1 and 16.2 of Part B);

(19) it precluded the Appellant from assigning or sub-contracting its rights under the agreement but stated that the Appellant "will be entitled to nominate and provide an alternative Contributor in exceptional circumstances where [Ms Adams] is not available

for reasons beyond [her] reasonable control (not including suspension hereunder) subject to reasonable prior notice being given to the [BBC] and such alternative provider being deemed suitable and being approved by the [BBC] for this purpose. The terms of this [agreement] will remain in effect in relation to the substitute for the approved duration of their services" (clause 16.7 of Part B); and

(20) it specified that no amendment to the terms of the agreement "will be valid or binding unless made by prior written [contract] between the parties and signed by them or their authorised representatives" (clause 16.7 of Part B) and that the agreement would "prevail at all times over all other terms and conditions which may purport to apply in connection with the [services], unless amended by the prior written agreement of the parties…" (clause 16.10 of Part B).

54. Now that we have summarised the material terms of the written agreements, we turn to the summary in our original decision of the evidence which was provided by the witnesses at the original hearing.

55. At the time of our original decision:

(1) we concluded that it was not necessary to summarise the contents of either the Correspondence or the notes of the meeting held between the Respondents and the BBC on 27 September 2016 because the ground covered by the Correspondence and those notes was largely repeated in the witness evidence; and

(2) we said that, where a specific extract from that material was pertinent to the evidence given by a witness, we would refer to it in our summary of the relevant witness's evidence.

The evidence of Ms Adams

56. The summary in our decision of the material parts of Ms Adams's evidence was as follows:

(1) Ms Adams has been a freelance journalist for more than 20 years. Over that period, she has provided her services to a wide variety of media organisations, including the BBC, and she has never over that period received, from any of the organisations to whom she has provided her services, any employment-related benefits such as holiday and sick pay, maternity leave or a pension entitlement;

(2) she was first approached by Mr Jeff Zycinski, the head of radio at BBC Scotland, in 2010 to host a morning radio phone-in and she has worked for BBC Scotland since that date although the number of weekly programmes and the duration of those programmes have fluctuated over that period and she has provided her services under a series of agreements, each of which has a term of around one year;

(3) if she was unable to fulfil the Minimum Commitment because of her own unavailability, then the Minimum Fee would be reduced by a pro rata amount. She had not really contemplated what the position would be if her failure to fulfil the Minimum Commitment was attributable to a failure by the BBC to call on her services despite the fact that she was available. (In that regard, her answer to question 43 in the Correspondence suggested that she would have expected a similar reduction to the Minimum Fee in that instance whereas both the Respondents' and the BBC's notes of the meeting of 27 September 2016 between the Respondents and the BBC recorded a response to the contrary from Ms Alison Denvir of the BBC's legal and business team, at least in relation to an earlier agreement than the ones which are at issue in the appeal;)

(4) for each programme, she would receive a briefing note by email on the evening before the programme and would spend between 20 minutes and 2 hours during the evening working on the content and writing the script. She would then send that to the producer later in the evening so that the producer was able to put it onto the BBC's system. This was essential to the whole team's having access to the script whilst she was on air. In the morning, the rest of the team would be in before her arrival at around 7.15 to 7.30 and would have worked on the material during that time. There would then be a team discussion before the final content of the programme was agreed, shortly before 9.00;

(5) whilst on air, she would have ultimate control over which callers to take, what questions to ask and what direction the show should follow although other members of the team would make suggestions in that regard;

(6) at the end of each programme, she would spend a short time with the team debriefing on how the programme had gone and then having preliminary discussions with the team for the following day's programme in relation to the content of that programme, before leaving the BBC at around 12.30;

(7) as a result of her parents' ill-health and her responsibilities to her children over the tax years in question, she had not managed to fulfil the Minimum Commitment under at least one of the two written agreements and had not been paid a proportionate part of the Minimum Fee under that agreement as a result;

(8) neither of the written agreements had been reviewed by her agent because she saw no need to pay an agency commission in respect of them, given that her earlier agreements with the BBC had been negotiated by her agent;

(9) during the term of one of those earlier agreements (in 2011), she had put out a tweet from her own personal twitter account in relation to the then London Mayor, Boris Johnson. The BBC considered that the tweet was in breach of the Standards and she was suspended for three weeks as a result. The BBC did not pay her for the programmes which she had missed during the period of her suspension;

(10) she was very conscious of the need to maintain a high personal profile in order to maximise her income. Accordingly, she had spent a lot of time developing her own brand through her work for other media outlets, her hosting of events and awards and her social media output. She currently had around 133,000 followers. Her work on Loose Women was particularly significant in that regard because it meant that her face was recognised more widely. Accordingly, she had tended to cut back on her work for the BBC whenever she had been given an opportunity to expand her work on Loose Women. Whenever she was introduced on stage at her other engagements, she was more likely to be referred to as "Loose Women's Kaye Adams" than as "the BBC's Kaye Adams";

(11) the significance to her of her own brand development could be seen when she was criticised by certain women's organisations for her handling of a debate on the case of Ched Evans, a footballer who had been accused of rape and was ultimately acquitted. Although the BBC did not consider that her handling of the debate amounted to a breach of the Appellant's agreement with them, she felt that the criticism was unfair and would have a detrimental impact on her reputation if left unchallenged. Accordingly, she had, of her own initiative and at her own expense, sought to challenge the criticism by submitting a complaint to the Press Commission;

(12) the BBC never sought to place any restrictions on her work for others and it was at all times understood by the BBC that she would continue to carry on with her other

engagements without seeking the BBC's permission. In fact, the BBC would often go out of its way to help her to fulfil her other engagements by allowing her to present her programme from an alternative location. This suited the BBC as well because the higher her national profile, the better it was for the BBC too. Having said that, in the course of her regular and ongoing discussions with other members of the team, she would often tell them what she was planning to do - not by way of seeking permission for her other work but merely to solicit their thoughts on her other engagements and to bounce ideas back and forth. She would not have felt constrained from accepting another engagement merely because she had not mentioned it to the BBC team in one of those discussions;

(13) she did not have access to the BBC operating system when she was working from home and would therefore use her own mobile phone, computer and personal email address to communicate with the BBC during those times. In addition, on those occasions when the programme was broadcast from outside the studio and the technology provided at the relevant location was insufficient, she would use her own equipment - an iPad and a mobile phone - to present the programme;

(14) she had been given a copy of the Guidelines when she first started to work for the BBC but she couldn't say that she had ever read them or referred to them on any occasion. On reading them recently as a result of the present dispute, they appeared to encapsulate what she would have regarded as good practice which she would have chosen to follow in any event. She could not recall the BBC's personnel's ever raising with her in relation to one of her programmes the BBC's duties under the Guidelines although, had they done so, she would have taken the matter seriously as it was not in her interests to breach the Guidelines, both in terms of her ongoing relationship with the BBC and in relation to her other engagements and her profile and brand in general;

(15) she observed that, had she wanted to breach the Guidelines whilst on air, the BBC would have been unable to stop her as she had control of the microphone but she conceded that the BBC would then have been able to discipline her, either by suspending her (as it had done in relation to the Boris Johnson tweet) or by terminating the written agreement;

(16) apart from the Boris Johnson-related suspension, the BBC had never sought to control the content of her social media output or her articles for newspapers. In addition, she had been an ambassador for breast cancer and children's charities and the BBC had never sought to intervene in that;

(17) her work for the BBC during the two tax years in question had been no different in terms of content or approach from her work for the BBC in the earlier tax years the appeal in relation to which the Respondents had now agreed not to oppose. In fact, she had at one stage in the earlier tax years been presenting her programme on the BBC for five days each week and not four. The only difference was that, in the two tax years which remained the subject of the appeal, she had done a greater percentage of her overall work for the BBC than for others. The reason for this was that, because of her father's illness, she was keen to spend as much of her working time as possible in the Glasgow area and to reduce her travelling so that she could spend time with him in her afternoons;

(18) she would frequently record promotions for the programme - these would generally be recorded just after she arrived at the studio in the morning and would appear on BBC Scotland TV. This was in her interests, as well as the BBC's, and so there was no need for the BBC to compel her to do it;

(19) she had not read the written agreements as she knew what she had agreed in her discussions with Mr Zycinski and she had worked for the BBC for a number of years already;

(20) she accepted that the only one of the services outlined in clause 3.1 of the written agreements which could realistically be performed by a substitute might be the preparation for a programme (see clause 3.1.1). This was consistent with her response to question 54 in the Correspondence - which asked whether Ms Adams was entitled to send a replacement to carry out her work under the written agreement - to which Ms Adams had replied "Of course not"; and

(21) notwithstanding the terms of each written agreement, she had not been asked by the BBC to complete any editorial training or to undergo a medical.

The evidence of Mr Paterson

57. The summary in our decision of the material parts of Mr Paterson's evidence was as follows:

(1) he confirmed that he was the editor in charge of the Kaye Adams Programme in the period from April 2015 until December 2016 and his description of the manner in which each day's programme was put together was consistent with the description of that process by Ms Adams;

(2) he reiterated the collaborative approach which was adopted by the whole team associated with the programme and said that, given that that was the case, there was no need for the editorial team ever to insist on editorial control over the programme's content. Instead, the team, together with Ms Adams, would discuss the content of each programme and decide together on the format. Ms Adams, as an experienced journalist, was at the forefront of such discussions. Reference was made to the BBC's note of the meeting of 27 September 2016 in which Mr Paterson had likened Ms Adams to the conductor of "her Orchestra". That note also recorded Mr Paterson as having said at the meeting that Ms Adams was "very much a broadcaster in her own right, given that she works for others, she isn't "BBC's Kaye Adams", she is a journalist who happens to work for us";

(3) however, when pushed to explain what would happen in the hypothetical situation where no consensus on the way forward could be reached in a particular case, he accepted that the BBC had ultimate responsibility for the content of the programme (and hence ultimate control over the editorial process);

(4) he explained that the way in which an agreement between the BBC and a presenter like Ms Adams would arise is that there would be initial conversations between the editor of the programme - in this case, Mr Zycinski - and the presenter - in this case, Ms Adams - in which the number and content of the programmes would be agreed. In those discussions, the amount payable under the agreement would also be tentatively discussed in the light of the available budget. The agreement would then be handed over to the BBC's legal and business affairs team to be finalised;

(5) he confirmed that Ms Adams did not ask anyone at the BBC for permission to take on any of her other engagements but that the nature of some of those engagements would be known by him as a result of his regular conversations with Ms Adams. By way of elaborating on this, Mr Paterson said that he wouldn't necessarily be aware about the awards ceremonies and corporate events which Ms Adams presented because information on those would not always emerge during the relevant discussions but that information about Ms Adams's newspaper columns and TV work would generally

become known to him as a result of those discussions. However, those were relaxed exchanges in which Ms Adams happened to let him know what she was doing for organisations other than the BBC - they were not requests for permission to do the relevant work. In addition, he would have been aware if Ms Adams had been required to apply to someone else in the organisation for permission to do other work;

(6) he also confirmed that Ms Adams did carry out promotional activities for the programme but pointed out that it was in her interests to do so. It was not a case of her being instructed by anyone in the BBC to do so;

(7) he confirmed that, if the BBC did not schedule programmes to the extent of the Minimum Commitment for its own reasons - as opposed to Ms Adams's other commitments - then Ms Adams would still be entitled to receive the Minimum Fee. (As noted in paragraph 56(3) above, this was consistent with the answer given by Ms Denvir to the same question at the meeting of 27 September 2016 between the Respondents and the BBC;)

(8) he explained that the Guidelines did not prescribe what to do in specified individual scenarios. Instead, they set out general principles and areas which required care. Accordingly, the Guidelines left both the relevant editorial team and the relevant presenter with considerable discretion as to how the Guidelines should be applied in any particular scenario. The same was true of the Ofcom code;

(9) he confirmed that, while she was presenting the programme, Ms Adams would wear BBC headphones and while she was in the studio, Ms Adams would have a BBC computer available to her and would also have access to the BBC's messenger service so that she could communicate with the team during the show. However, Ms Adams also had access to her own laptop and iPad which she would use both inside and outside the studio; and

(10) he explained that there were differences in the way in which the BBC dealt with Ms Adams from the way in which it dealt with its employees. For example, if the BBC wanted to change an employee's job, it would have to go through a formal and clearly laid-down process whereas any change to the relationship with Ms Adams could be achieved through informal discussions with her. Similarly, there was a process within the BBC under which employees could apply for other jobs internally once their fixed term contracts came to an end and he was not sure that that process would extend to Ms Adams. In addition, an employee was required to undertake compulsory training and was entitled to holiday and sick pay and maternity leave, which was not the case with Ms Adams.

The evidence of Mr Hollywood

58. Mr Hollywood's witness statement did not contain very much additional relevant information to that which had already been provided by Ms Adams and/or Mr Paterson. Mr Hollywood was the senior content producer of the Kaye Adams Programme during the tax years in question and his witness statement described how the programme was structured and operated on a day-to-day basis. That description matched the description of the process which had been provided by Ms Adams and Mr Paterson. In that context, Mr Hollywood confirmed that:

(1) his job was to ensure that the Guidelines were observed by the programme where applicable and that the editorial remit for the programme set by Mr Zycinski - a focus on topical issues (such as the Scottish referendum) and issues pertaining to family life - was met;

(2) Ms Adams did not have the ability to send a replacement to do the programme instead of her. If Ms Adams was unable to do a particular programme, then the choice of a replacement presenter would be made by the BBC and that replacement presenter would be paid separately and outside the terms of the written agreement between the BBC and the Appellant; and

(3) Ms Adams did not have an annual review, unlike BBC employees who had regular formal appraisals.

The evidence of Mr Zanettos

59. The evidence of Mr Zanettos was of limited relevance in terms of the issue which is central to the appeal. This is because it was common ground that, in practice, Ms Adams was paid for each programme she did and was not paid for programmes that she did not do because of her own unavailability. Since there were no circumstances in which Ms Adams failed to reach the Minimum Commitment as a result of the BBC's asking her not to do a programme in circumstances where she was available, Mr Zanettos's evidence could shed no additional light on the issue of whether Ms Adams would have been entitled to the Minimum Fee in that event.

The evidence from the original hearing which was not recorded in our original decision

60. In addition to the above, we consider that we should set out the following evidence which was presented to us at the original hearing but which was not recorded in our original decision:

(1) Ms Adams testified that, in 2014, immediately prior to the tax years in question, she had fallen out of favour with ITV and her role on Loose Women had therefore been reduced. There was subsequently a change of editor and she began to be offered more work on Loose Women;

(2) in its responses to questions which were raised with it during the course of the meeting on 27 September 2016, the BBC indicated that:

(a) the programme presented by Ms Adams generally ran from 9.00 to 12 noon;

(b) Ms Adams would generally arrive at around 7.00 to prepare;

(c) there would be a post-programme debrief but Ms Adams would generally have left by 1.00; and

(d) Ms Adams would generally write the script for the next programme that evening;

(3) Ms Adams estimated that, during the two tax years in question, on average, approximately 40% to 50% of her working time was spent on her engagement with the BBC;

(4) Ms Adams estimated that, during the two tax years in question, on average, approximately 50% to 70% of her gross income derived from her engagement by the BBC;

(5) the amount of gross income received by the Appellant from the BBC in the tax years ending 5 April 2014 to 5 April 2017, both inclusive, was as follows:

(a) £54,000.00 in the tax year ending 5 April 2014;

(b) £30,600.00 in the tax year ending 5 April 2015;

(c) £157,906.25 in the tax year ending 5 April 2016; and

(d) £143,375.00 in the tax year ending 5 April 2017;

(6) the turnover of the Appellant in the financial years ending 30 June 2013 to 30 June 2016, both inclusive, was as follows:

(a) £180,486.00 in the financial year ending 30 June 2013;

(b) £176,475.00 in the financial year ending 30 June 2014;

(c) £165,732.00 in the financial year ending 30 June 2015;

(d) £216,968.00 in the financial year ending 30 June 2016; and

(e) £234,156.00 in the financial year ending 30 June 2017;

(7) Ms Adams testified that the BBC had never required her to do any work for the BBC other than the programmes for which she had contracted; and

(8) Ms Adams testified that, despite the rights of first call which it held, the BBC had always gone out of its way to accommodate her other commitments and had allowed her occasionally to prioritise those other commitments over her commitments to the BBC.

THE EVIDENCE AT THE REMITTED HEARING

Introduction

61. We now turn to summarise the additional evidence which the Appellant was permitted to adduce for the purpose of the remitted hearing. This was as follows:

(1) the Radio Industry Guidelines published by the Respondents in 2008 (the "Radio Guidelines");

(2) a report by the National Audit Office into the BBC's engagement with personal service companies (the "NAO Report") dated 15 November 2018;

(3) a witness statement from Mr Zycinski dated 14 June 2022; and

(4) a witness statement from Ms Denvir dated 16 June 2022.

The Radio Guidelines

62. The Radio Guidelines set out the principles to be applied in determining the employment status of radio presenters and disc jockeys. They specified that a contract for services was more likely to exist "where all or most of the following conditions apply:-

1.1 The contract is for a specific programme at a specific interval for a fixed term (eg where a presenter presents a programme once a week on a fixed term contract)

1.2 The method of remuneration is by way of a fee per programme. In this situation there is more risk of not being paid compared to an employee who is paid a regular wage or salary.

1.3 There is no roll-over situation (eg the engager gives no guarantee to negotiate the next contract).

1.4 The Radio Presenter/DJ is free to pursue other engagements that do not conflict with the radio presentation (i.e. the contract is non-exclusive.)

1.5 There is no requirement to provide cover for staff shortages. This would suggest that the right of control by the engager over the Radio Presenter/DJ is low.

1.6 There is no right on the part of the radio station to move the Radio Presenter/DJ from task to task (e.g. presenting to scripting, editing, producing, voicing etc...) without the agreement

of the Radio Presenter/DJ.

1.7 The presenter has creative input into the programme.

1.8 The engager does not have the right to control the manner in which the Radio Presenter/DJ carries out the work outside of observing the regulatory requirements of the industry (i.e. Ofcom Code, BBC Trust etc.)"

63. By way of caveat, the Radio Guidelines went on to note that it was important that:

(1) the contract accurately reflected the true terms and conditions and it was not simply a case of wording the contract to satisfy the above conditions; and

(2) in practice, the actual services required of the presenter did not extend over and beyond what he or she was contractually required to do.

64. The Radio Guidelines also set out a list of certain categories of roles where self-employment was accepted by the Respondents but that list expressly excluded reporters and commentators who presented their finished work on air as their status was said to fall to be determined by the principles described in paragraph 62 above.

The NAO Report

65. The NAO Report related to an investigation into the BBC's engagement with personal service companies. This followed reforms in April 2017 under which public bodies such as the BBC were made responsible for determining the employment status of all those whom it engaged through personal service companies. The following relevant points were made in the NAO Report:

(1) the hiring of "freelancers" - who were defined in the NAO Report as individuals who were not members of the BBC's staff but might be either self-employed for tax purposes or employed for those purposes - was common practice within the media industry and gave broadcasters the flexibility to make changes quickly that reflected programming and audience needs;

(2) prior to 2013, the BBC based its decisions as to whether a person providing services to it was employed or self-employed on its understanding of the Respondents' guidance "and, for on-air presenters, of industry practice". The guidance on which it relied was the Respondents' general guidance on employment status "and media-specific guidance covering most on-air and off-air roles";

(3) whilst the latter set out certain specified roles which the Respondents considered to be self-employed for tax purposes, "there was a lack of clear media-specific [Respondents'] guidance for on-air television, and for radio presenters on long-term engagements". However, the BBC considered these roles "to be self-employed for tax purposes in line with its understanding of case law and industry practice at the time";

(4) in the early 2000s, when the BBC was certain that presenters were self-employed, it had no preference as to whether it engaged presenters directly as sole traders or through personal service companies but, once some uncertainties about that arose following investigations conducted by the Respondents in 2004 and then 2007, it introduced policies requiring presenters engaged in longer-term or higher value roles - which is to say longer than 6 months or more than £10,000 per annum - to contract through personal service companies unless they produced a written determination from the Respondents stipulating that they were self-employed for tax purposes or met some other specific

criteria, because that reduced the risk to the BBC of a finding that the presenters had employment status; and

(5) from November 2013, the BBC began to use a new test - developed with Deloitte in liaison with the Respondents - for assessing the employment status of its television and radio news presenters while continuing to use the Radio Guidelines for non-news radio presenters. It also adopted the policy of offering those television and radio news presenters whom it considered, following the application of the above test, to be employed the option of one of two on-air talent employment contracts.

The evidence of Mr Zycinski

66. Mr Zycinski testified that:

(1) he was head of radio at BBC Scotland at the time of Ms Adams's engagement and, in that capacity, was responsible for the strategy of the station and had direct control over non-news and non-sport programmes. Talent recruitment and management was an important part of his role but he was not particularly familiar with the contractual issues involved because, once he had reached agreement orally with an individual, he would hand things on to the contracts department to deal with the relevant paperwork;

(2) the move towards having more presenters on a self-employed basis started with the introduction of a regime in 1993 to enable producers to select their own talent and resources. This encouraged producers to look outside the BBC for talent and, by 2005, when he had become head of radio at BBC Scotland, the culture shift was already well-ingrained;

(3) whilst he did not have the necessary expertise to distinguish between individuals who were self-employed for tax purposes and individuals who were employees for those purposes, he did maintain a distinction in his own mind between people whom he called "freelancers" - individuals who worked for other organisations as well as the BBC - and people whom he called "staff" - individuals who worked exclusively for the BBC. Whilst he accepted that the BBC had part-time employees on the staff, he wouldn't describe such people as "freelancers" because they tended not to do work for other organisations in addition to the BBC but were instead part-time because of their other commitments, such as family or caring responsibilities;

(4) in keeping with the practice at commercial radio stations, the BBC tended to enter into employment contracts with its news presenters and to enter into contracts for services with its non-news presenters. The presenters who had employment contracts had the usual employee rights, which meant that they were more difficult to remove than self-employed presenters in a case of poor performance. Even in the case of a longer-term contract such as the contracts in the present case, the key point was that the contract was for a fixed term and therefore it was easier for the BBC to make a change in the event that a programme wasn't as successful as had been hoped. There was no need to find alternative work for the relevant individual to do as it was in the case of staff. A staff member had to be paid indefinitely even if there was no work to do;

(5) however, he accepted that the statement made above needed to be qualified by what was outlined in the NAO Report. In that regard:

(a) he had no recollection of the BBC policy mentioned in the NAO Report as having developed in 2004 and 2008 of requiring freelance presenters who had contracts which exceeded a specified threshold duration or a specified threshold amount to contract through personal service companies in order to remove from the BBC the risk that they might be deemed to be employees for tax purposes.

However, that wasn't entirely surprising as he tended to be involved when the headline issues were being agreed with a presenter and then handed the matter over to the contracts department to deal with the details. He had no reason to doubt the veracity of what had been said in the NAO Report on that. He added that, in any event, in his experience, it was often the presenter himself or herself who suggested contracting with the BBC through a personal service company; and

(b) he was more aware of the change in BBC policy in 2013 when some individuals - primarily news presenters - were employed by the BBC under the terms of contracts which were known as "On-Air Talent - Statutory" contracts ("OATS contracts"). He did not know much about the terms of those contracts for the same reason as that outlined in paragraph 66(5)(a) above but he knew that the level of rights and benefits which were available to individuals who contracted on that basis were different from the levels of rights and benefits which were available to individuals who were thought of as "staff";

(6) allowing self-employed presenters to maintain other interests benefited the BBC because it lessened the blow when changes to the schedule had to be made. For that reason, it was always more desirable to engage non-news presenters on a self-employed basis;

(7) those other interests were also beneficial to the BBC as it enabled the relevant presenter to increase his or her profile and that was helpful in expanding the BBC's audience. In the present case, ensuring that the programme on which Ms Adams was engaged carried her name was designed to associate Ms Adams with the BBC in the minds of the listeners;

(8) in the case of a new programme, the aim would be to try to ensure that the relevant presenter was available frequently in the initial months in order to establish a regular pattern. After that initial period, it was easier to be more flexible about the presenter's absences;

(9) after he took over as head of radio at BBC Scotland, he was keen to increase the audience by opening up the schedule to new ideas and formats and conducting audience research and what became clear was that very few of the existing presenters were known to non-listeners. As part of the audience research, people were asked for the names of well-known personalities whom they would like to hear on BBC Scotland and Ms Adams was one of the names put forward. Ms Adams was an attractive proposition because, in addition to addressing the gender imbalance of presenters on the station, she had a high profile with listeners in Scotland through her work on Scottish Women for STV and Loose Women for ITV;

(10) a staff presenter was required to work normal eight-hour day shifts and this time constraint would have precluded the presenter from doing other work outside the BBC. He accepted that the amount of work required by Ms Adams under the relevant contracts was material. Taking into account the programme itself, the preparation for the programme and the debriefing following the programme, it might well involve around six hours on each day that the programme went out. In this case, the programme went out on four days a week, Monday to Thursday, so that the overall time commitment was substantial. However, he did not think that this would prevent Ms Adams from taking on another substantial presenting role over the same period. Presenters realised that they had a short shelf-life and tried to fit in as much work as they could;

(11) his budget constraints meant that, in any event, he would not have been able to offer Ms Adams a contract with a larger Minimum Commitment. As for the Minimum

Commitment that was agreed, he did not expect that Ms Adams would be available for as many as 160 programmes per annum but he was not too concerned about that as, if she did not get to that level, he would have been able to save some money. The main point was to ensure that she would be available as much as possible for the first three months in order to make the audience aware that this was her new format. After that, gaps in her availability would not be too troublesome;

(12) he had no reason to doubt Ms Adams's evidence at the original hearing to the effect that she had spent 40% to 50% of her working time over the two tax years in question in working for the BBC;

(13) the written agreement which commenced in March 2015 interrupted the term of another agreement which had commenced in September 2014 and involved a number of changes. Under the earlier agreement, the programme ran for just one hour, the name of the programme was "Morning Call", the minimum commitment was 46 programmes, the minimum contract fee was £27,600 and the fee per programme for each additional programme was around £600. In contrast, under the written agreement commencing in March 2015 which replaced it, the programme ran for three hours, the name of the programme was the "Kaye Adams Programme", the Minimum Commitment was 160 programmes, the Minimum Fee was £155,000 and the fee per programme for each additional programme was £968.75. The format of the programme changed from a phone-in - where Ms Adams could essentially just respond to callers - to something which required much more preparation time and challenges - for example, in dealing with guests. The purpose underlying the change in format was to take advantage of the post-independence referendum up-tick in interest in more serious matters such as politics, health, education and current affairs. The programme retained its name even on the days when Ms Adams did not present it;

(14) even at his very first meeting with Ms Adams many years previously, he was aware that her availability would be an issue for the BBC as she had many other irons in the fire. At the time of the contract in March 2015, he was aware that Ms Adams was back in favour with ITV and of her commitment to Loose Women which he understood would be a greater priority for Ms Adams because of its higher profile. Although Loose Women was the only commitment of which he was definitely aware in March 2015, he was also aware at that point that, in addition to that commitment, Ms Adams had opportunities to write newspaper columns and was talking about writing a book. However, he viewed the other commitments in positive terms because it was important that Ms Adams should maintain a profile outside BBC Scotland if BBC Scotland was to attract new listeners. Her profile with the wider audience was a key reason for recruiting her and it was not simply her skills as a journalist and presenter. Therefore, he knew that he would have to be flexible in allowing Ms Adams time away to take advantage of other media opportunities;

(15) he did not have any knowledge about the precise terms of Ms Adams's other engagements or even whether that work was carried out as an employee or as an independent contractor. Such terms tended to be commercially sensitive. All he knew was that she had a portfolio of work other than her work for the BBC and he assumed that she carried out that work as an independent contractor;

(16) although he could not recall the precise timing, he was aware at or around the time of the March 2015 contract that Ms Adams was looking to spend more time in Glasgow because of her parents' ill-health and that this might affect her availability to do other work;

(17) by the time of both the March 2015 contract and the March 2016 contract, Ms Adams had been presenting on BBC Scotland for some time and was well known for BBC radio presenting. There was a picture of her in the foyer of BBC Scotland alongside other well-known BBC presenters;

(18) he would not have wanted Ms Adams to become a member of staff for the reasons outlined above in relation to flexibility on both sides. Had she become a staff presenter, she would have been unable to carry on the other work which gave her the profile that he wanted to attract the wider audience to BBC Scotland;

(19) he did not regard Ms Adams as being part of the BBC except during the periods when she was on-air. He considered that, in the minds of the public, she was much more associated with Loose Women than with the BBC. Whilst he wanted her to be associated with the BBC in the minds of the public, the internal perception of her within the BBC was that she was an external presenter;

(20) in addition, had the intention been to make her a member of staff, human resources procedures within the BBC would have required the presenter role to have been advertised both internally and externally. He doubted that Ms Adams would have been prepared to go through the interview process and there was always the chance that the interview panel might have preferred another candidate;

(21) from the very beginning, he was keen to give Ms Adams as much creative control and input as possible. Programmes were shaped around her ideas and the relationship was co-operative and not confrontational. If there was ever an issue to resolve, he or Mr Paterson would meet Ms Adams for coffee and resolve the issue; and

(22) Ms Adams's work schedule with Radio Scotland evolved over time as a result of the needs of the schedule and Ms Adams's availability.

The evidence of Ms Denvir

67. Ms Denvir testified that:

(1) at the time when the written agreements were executed, she was a senior legal and business affairs manager at the BBC and part of her responsibilities included processing the contracts between the BBC and its contributors (including presenters);

(2) in the course of those responsibilities, she had been involved in the process leading up to the execution of the written agreements. Her role was twofold. First, she provided background advice to Mr Zycinski when he did his headline negotiations with Ms Adams as to the main contract terms - for example, the nature of the programme, the length of the programme, the Minimum Commitment and the Minimum Fee - and then, once they had shaken hands on the deal, she had been responsible for documenting it;

(3) contracts for contributors were in a standard form and the detailed terms and conditions were generally not reviewed. There were different contract types and it was largely a case of selecting the correct type for execution. Even when, in a particular case, changes needed to be made to the standard form for that type, it was generally not a matter of making the change using bespoke new drafting. Instead, a term from another contract type would be inserted into the contract;

(4) there was not generally any negotiation on the general terms of the contract. Any negotiations tended to focus on the primary commercial terms such as the ones mentioned in paragraph 67(2) above;

(5) at the time when the written agreements were executed, custom and practice across the industry, and the widely-held view within the BBC, which she shared, was that radio

presenters other than those responsible for delivering the news were self-employed. The BBC, in common with the rest of the industry at the relevant time, followed the Radio Guidelines. This indicated that presenters were self-employed as long as certain conditions were met, including where the relevant presenter was engaged on a non-exclusive basis, was paid a fee per programme (rather than a salary) and was engaged for a specific programme (with no requirement to move from task to task);

(6) notwithstanding the BBC's view set out above, the fact that the Radio Guidelines left some room for interpretation meant that the BBC policy was to arrange for presenters with longer-term or higher-value engagements to contract through an intermediate personal service company. A few exceptions were made to that policy but that was the policy. The contractual terms for those presenters who were engaged through personal service companies were essentially the same as the contractual terms for those presenters who were engaged directly, with the obvious differences that, in the latter case, there was no intermediate service company and, hence, no need for a letter of guarantee from the relevant presenter;

(7) the reason for the policy described in paragraph 67(6) above was to ensure that the risk of the relevant presenter's being treated as an employee for tax purposes would fall on the presenter's personal service company and not on the BBC. She was not senior enough at the time to be involved in the internal processes which led to that decision, and she did not know why the uncertainty arose, but she surmised that, despite the terms of the Radio Guidelines, the terms of those contracts were perceived to involve a greater commitment on the part of the relevant presenter to the BBC and therefore to give rise to a risk that the relevant presenter might fall to be treated for tax purposes as an employee and the BBC, as a publicly-funded organisation, would not have been prepared to take that risk;

(8) she accepted that, by requiring the relevant presenter to contract through a personal service company, the BBC did not need to decide for itself whether, for tax purposes, the relevant presenter was employed or self-employed. Nevertheless, she confirmed that, in her view at the time, the engagement of Ms Adams satisfied most or all of the conditions for self-employment which were set out in the Radio Guidelines and therefore she believed that it was appropriate for Ms Adams to be treated as self-employed;

(9) whilst she did not have the necessary expertise to distinguish between individuals who were self-employed for tax purposes and individuals who were employees for those purposes, she did maintain a distinction in her own mind between people whom she called "freelancers" and people whom she called "staff". She agreed with the distinction drawn by Mr Zycinski between "freelancers" - individuals who worked for organisations other than the BBC in addition to their work for the BBC - and "staff" who, whether they were full-time or part-time, worked exclusively for the BBC. "Freelancers" were treated very differently from "staff". They would not be moved from task to task but would instead be engaged for a specific purpose and they would not have fixed hours but would have more flexible working arrangements;

(10) she added that, so far as presenters were concerned, she saw "freelancers" as being people who were considered by the BBC to be self-employed in accordance with the Radio Guidelines. She accepted that, within the BBC as a whole, there might well be "freelancers" who were employees and not self-employed, such as camera operators and other people who operated behind the scenes;

(11) a distinguishing feature of staff members was that they tended to have fixed and predictable working hours and it would be rare for those to change. In addition:

(a) the hiring process for staff was different from the hiring process for freelancers. The hiring process for staff involved an advert pursuant to which people were encouraged to apply and there were formal interviews with set criteria for success based on a job description. In contrast, for freelancers, the process generally involved a talent search instigated by the editorial lead at the BBC. A number of possible freelancers might be approached and often a conversation around editorial direction might replace a formal interview;

(b) staff were required to comply with robust conflict of interest guidelines and were precluded from working for other broadcasters or media companies whereas freelancers were subject to less stringent conflict of interest terms and were allowed to work for a variety of other broadcasters and media outlets;

(c) staff received a salary and increases to that salary were negotiated globally between the BBC and the relevant unions whereas freelancers received a fee for each programme and were free to re-negotiate their fees at each contract renewal and sometimes even in mid-contract;

(d) staff were not engaged for a specific programme and could be moved from task to task - for example to cover for a colleague - whereas freelancers were engaged for an identified specific programme; and

(e) where a programme was presented by a member of staff, the relevant individual was expected to do more of the research and administration tasks underpinning the programme than a freelancer, who generally attended only for a short preparation period, the recording and then a short debriefing;

(12) she distinguished between freelancers and part-time staff. An individual tended to be a part-time member of staff when he or she had external commitments such as childcare or was winding down his or her career. It tended not to be because he or she had employments elsewhere. However, the BBC had a lot of part-time staff members and she could not rule out the possibility that a part-time staff member might have other employments or might have slightly more flexible working hours;

(13) she accepted that, at the time when the written agreements were executed, there were categories of contract in addition to contracts for freelancers and contracts for staff. Around 2013, OATS contracts, and the related "On-Air Talent - Benefits" contracts ("OATB contracts" and, together with OATS contracts, "OAT contracts") had been devised for news and current affairs presenters. That was because the BBC wished to impose significantly greater restrictions on the external activities of news reporters and journalists. The main difference between OATS contracts and OATB contracts lay in the level of benefits which they offered to the relevant individual. OATS contracts provided for only statutory employment benefits, were terminable on minimum statutory notice and were not subject to collective bargaining with the unions. She could not recall whether OATB contracts were also terminable on minimum statutory notice. Both categories of OAT contract:

(a) were drafted as fixed term contracts but, because of employment law, were treated as continuous contracts once two years had elapsed;

(b) could be non-exclusive but imposed strict limits on the other work that the relevant worker could do. The relevant worker was heavily constrained by the editorial guidelines as to what work he or she could accept; and

(c) were treated as giving rise to an employment relationship and payments to the relevant individuals were subject to income tax and national insurance;

(14) there was not a significant difference between the benefits available under an OATB contract and the benefits available to staff and many of the individuals who had originally had OATB contracts subsequently became members of staff. However, OATS contracts carried significantly lower benefits than OATB contracts and staff contracts;

(15) the restrictions on work for other organisations which were placed on individuals who were staff were greater than the restrictions on such work placed on individuals who were on OAT contracts;

(16) she did not consider individuals who were on OAT contracts to be "staff" but she accepted that she also did not think of those individuals as "freelancers";

(17) at the time when the BBC introduced OAT contracts, there had been a general review of all of the BBC's presenters who might be considered to be news or current affairs presenters. Of particular interest in the course of that review were journalists like Ms Adams, whose programme followed the news programme in the morning. She recalled discussing Ms Adams's status with Mr Zycinski in the course of that review and that they had agreed that:

(a) Ms Adams's programme was more lifestyle than news;

(b) although she might discuss topics drawn from the news, her programme was lighter in tone, and the content of her programme was less serious, than a core news programme;

(c) she was being engaged precisely because the BBC wanted to broadcast her opinion and the BBC did not want her to be impartial;

(d) she wouldn't be presenting news; and

(e) therefore, she did not need to be subject to the more stringent editorial guidelines which were applicable to news and current affairs presenters;

(18) at the time of the relevant contracts between the BBC and the Appellant, the BBC were aware of Ms Adams's other engagements on Loose Women with ITV, as a paper reviewer for Sky TV and for various charities and she understood that Mr Paterson had confirmed in writing to Ms Adams that those engagements were not in conflict with her engagement by the BBC and would require no further discussion. In addition, without knowing the specific details, she was also vaguely aware at that time that Ms Adams worked as a journalist for various newspapers and was looking for other work. The market for engaging presenters for key slots was competitive and the BBC had to be flexible in accommodating the other engagements of the relevant presenter - for example, by amending its production schedule. The BBC considered Ms Adams's other engagements to be beneficial to the BBC because they enhanced her brand and would attract an audience and so it encouraged Ms Adams to accept those other engagements. There would have been an ongoing conversation between Ms Adams and Mr Paterson and/or Mr Zycinski during the terms of Ms Adams's engagement as to the other work which Ms Adams was doing;

(19) in fact, on at least one occasion, the BBC had arranged for Ms Adams to record her programme elsewhere in the UK to accommodate her other engagements. In addition, the BBC would occasionally flex the topic to be covered on the Kaye Adams Programme so as not to create an overlap with Ms Adams's other work. For example, if, on a particular weekend, Ms Adams had covered a particular topic in the course of her other work, then the BBC might well avoid that topic in considering the subject matter of the Kaye Adams Programme the following week. It was always a case of balancing the

desire to have Ms Adams on air as much as possible and facilitating the other commitments which would be beneficial to the BBC;

(20) there was a photograph of Ms Adams, along with other high-profile presenters and actors who worked on BBC Scotland, in the foyer of the BBC Scotland building, with the aim of showcasing the wealth of programming which BBC Scotland was making;

(21) she accepted that she had no knowledge of the terms of Ms Adams's other engagements but she assumed from her knowledge of the way that the media industry operated in general that those other engagements were on a self-employed basis; and

(22) she confirmed that:

(a) although she had not considered offering Ms Adams a staff contract at the relevant time, she was sure that, if the BBC had insisted on Ms Adams's having a staff contract at that time, Ms Adams would have rejected it as she had had multiple engagers for her services as a journalist or presenter since the start of her career, considered herself to be self-employed and would have regarded staff terms and conditions as too restrictive;

(b) the BBC would not have been prepared to contract directly with Ms Adams on the basis that she was self-employed because that would have been contrary to the policy described above and in the NAO Report but, in any event, Ms Adams already had a personal service company in place and it was at her request that the engagement was made through the Appellant; and

(c) if she and Mr Zycinski had formed the view that Ms Adams's programme fell within the ambit of news or current affairs, then the BBC would have needed to contract with Ms Adams on OATS contract terms. In other words, any engagement of Ms Adams would have needed to be on terms which allowed her to work for other organisations on a limited basis, carried only the statutory benefits and was for a fixed term of 12 months.

OUR FINDINGS OF FACT

Introduction

68. There are three distinct categories of factual findings which are relevant to this decision.

69. The first category relates to the conduct in practice of the parties following the execution of each written agreement. These are relevant to Stage 2 of the process - the construction of the hypothetical contract out of the actual contract reflecting the relevant written agreement - see *Atholl House UT* at paragraphs [52] to [70].

70. The second category relates to the circumstances which were known or reasonably available to the parties at the time when the relevant written agreement was executed. These are relevant to Stage 3C of the process - determining whether the hypothetical contract which arose as a result of the actual contract to which that written agreement related was intended to give rise to a relationship of employment - *Atholl House CA* at paragraphs [58], [86], [122] to [137], [163] and [167] to [171].

71. Just pausing there, it can be seen that the facts falling within the first category relate to events occurring after the relevant written agreement was executed and without regard to whether or not those events could have been foreseen by both parties at the time when the relevant written agreement was executed. In contrast, facts falling within the second category are necessarily confined to circumstances which were known or reasonably available to both parties at the time when the relevant written agreement was executed. Circumstances which were determinable only in hindsight or which were known or reasonably available only to one

party but not the other at the time when the relevant written agreement was executed do not fall within this category.

72. However, in this particular case, because the written agreements in question were executed after Ms Adams had already been engaged by the BBC for some five years, there is, in practice, no distinction between the two categories. The conduct in practice of the parties following the execution of each written agreement was no different from the conduct in practice of the parties over the preceding five years and, as such, it was known or reasonably available to both parties before each written agreement was executed. For that reason, we have elided the first two categories of factual conclusions in the paragraphs which follow.

73. In contrast to the first two categories, the third category of factual findings relates to matters which, although they were not known or reasonably available to both parties at the time when the written agreements were executed and are therefore not to be taken into account in determining the terms of the hypothetical contracts or whether the relevant hypothetical contracts were intended to give rise to a relationship of employment are nevertheless relevant context in relation to the hypothetical contracts and therefore to the manner in which we will in due course consider those questions and reach our conclusions in relation to the appeal.

74. Having explained the background in which our findings of fact are to be made, we would set them out as follows.

Findings of fact in the first two categories

75. As regards the first two categories set out above, we find the following to be facts, taking into account both the evidence which was presented to us at the original hearing and the new evidence which was presented to us at the remitted hearing. We find that, at the time when each written agreement was executed:

(1) the terms of the relevant written agreement, as summarised in paragraph 53 above, were known or reasonably available to each of Ms Adams, Mr Zycinski and Ms Denvir, who were the individuals representing the parties to the relevant written agreement (together referred to in the rest of this decision as the "relevant individuals");

(2) the terms of the relevant Radio Guidelines, as summarised in paragraphs 62 to 64 above, were known or reasonably available to each of the relevant individuals;

(3) it was known or reasonably available to each of the relevant individuals that:

(a) the BBC's policy to require presenters whose programmes did not involve news or current affairs and whose contracts were for six months or more or had a value of £10,000 or more to contract through personal service companies so as to pass any risk of employment status to the personal service company;

(b) Ms Adams had been a journalist for a considerable period of time and that, over that period, she had had a number of engagements with various media organisations in addition to the BBC, some of which engagements had been concurrent with her engagement by the BBC over that period;

(c) Ms Adams had a considerable reputation and brand. She had her own social media presence and a high public profile. The need for her to maintain her own reputation and brand led her to make a complaint to the Press Commission in relation to the criticism made of her in connection with the Ched Evans debate, even though the BBC were not concerned about her handling of the debate;

(d) the manner in which Ms Adams carried out her work in general meant that she was dependent on finding work from various sources;

(e) it was for her role on Loose Women, as opposed to her work for BBC Scotland, that Ms Adams was primarily recognised by the public;

(f) Ms Adams would generally wish to prioritise her role on Loose Women over her role for BBC Scotland because of the higher value which her exposure on Loose Women offered to her in the pursuit of her career;

(g) it was Ms Adams's practice to enter into engagements through her existing personal service company regardless of the BBC policy mentioned in paragraph 75(3)(a) above;

(h) Ms Adams had already been engaged by the BBC for some five years pursuant to a series of rolling contracts with the Appellant and the extent of her work for the BBC over that period had fluctuated considerably from time to time over that period. For example:

(i) she had at one stage been engaged to present her programme for five days each week and not four; and

(ii) under the agreement which was in place immediately prior to the written agreement commencing in March 2015 - which was expressed to run from September 2014 to August 2015 and was therefore replaced when that written agreement came into effect - Ms Adams had been engaged to do 46 programmes of an hour each called "Morning Call" for a fixed fee of £27,600.00 and with an additional fee of £600 per programme if she exceeded that commitment. This was a considerably lower commitment in terms of working time than her commitment under the written agreement in question. Under each written agreement, Ms Adams was engaged to do 160 programmes of three hours each called the "Kaye Adams Programme" for a fixed fee of £155,000 and with an additional fee of £968.75 per programme if she exceeded that commitment;

(i) in practice, the BBC did not exercise the rights which it had under its agreements with the Appellant to limit Ms Adams's other engagements. Instead, matters were dealt with on a consensual and collaborative basis between Ms Adams and the relevant representatives of the BBC. Ms Adams and the BBC had what the Upper Tribunal described in *Atholl House UT* at paragraph [56(1)] as "a harmonious and reasonable working relationship". Thus, in practice:

(i) the BBC did not require Ms Adams to obtain its prior written consent before taking on other engagements; and

(ii) the BBC sought to accommodate Ms Adams's work for other organisations and to work around it - for example:

(A) by allowing her to present the programme from other locations when that was necessary in order for her to fulfil her other commitments;

(B) by allowing her occasionally to prioritise her other commitments over her commitments to the BBC; and

(C) by choosing topics for the BBC programme which did not overlap with topics which were the subject of Ms Adams's other work at the relevant time;

(j) in practice, Ms Adams did not provide substitutes for programmes which she could not do. Instead, if Ms Adams was unable to present a programme, then the BBC found a replacement and that replacement was paid separately, outside the terms of the relevant agreement between the BBC and the Appellant;

(k) in practice, the BBC exercised a light touch in relation to the content and format of the programmes which Ms Adams presented and afforded Ms Adams a high degree of autonomy on those matters;

(l) in practice, the BBC did not exercise the rights which it had under its agreements with the Appellant to require Ms Adams to attend editorial training and to undergo a full medical;

(m) in practice, the BBC did not require Ms Adams to do any work for the BBC other than the programmes for which it had contracted with the Appellant;

(n) Ms Adams had no entitlement to use BBC equipment except when she was in the studio or presenting programmes outside the studio and therefore had to use her own iPad and mobile phone to perform the services. In addition, Ms Adams sometimes used her own devices when she was in the studio or presenting the programme from outside the studio and had no access to the BBC system when she was at home; and

(o) there was a photograph of Ms Adams, along with other high-profile presenters and actors who worked on BBC Scotland, in the foyer of the BBC Scotland building;

(4) the amount of income received by the Appellant from the BBC in each tax year ending prior to the date when the relevant written agreement was executed was known or reasonably available to each of the relevant individuals;

(5) the turnover of the Appellant in each of its financial years for which accounts had been produced and lodged at Companies House prior to the time when the relevant written agreement was executed was known or reasonably available to each of the relevant individuals;

(6) the fact that, in the two years preceding the execution of the first written agreement, the percentage of Ms Adams's overall working time which was devoted to the BBC was lower than it was expected to be under the relevant written agreement was known or reasonably available to each of the relevant individuals;

(7) the fact that custom and practice within the industry as a whole was for presenters of programmes such as Ms Adams, who satisfied most or all of the conditions for self-employment which were set out in the Radio Guidelines, to be regarded as self-employed was known or reasonably available to each of the relevant individuals;

(8) each of the relevant individuals believed that:

(a) in the market in general, presenters in the position of Ms Adams were self-employed; and

(b) the terms of Ms Adams's engagement by the BBC satisfied most or all of the conditions for self-employment which were set out in the Radio Guidelines.

As regards this point, we find that, although the fact that Ms Adams was engaged through the Appellant meant that any risk that she might fall to be treated as an employee of the BBC did not fall on the BBC, neither Mr Zycinski nor Ms Denvir was relying on that fact. They genuinely believed that Ms Adams satisfied most or all of the conditions for

self-employment which were set out in the Radio Guidelines and was not an employee of the BBC; and

(9) it was known or reasonably available to each of the relevant individuals that Ms Adams's work for the BBC pursuant to the relevant written agreement was going to involve a considerable commitment in terms of time and take up a considerable part of Ms Adams's overall working time over the period in which the relevant written agreement was on foot.

There are two aspects to this question - the level of commitment in terms of time which Ms Adams's engagement was expected to involve as at the date when the relevant written agreement was executed and the percentage of Ms Adams's overall working time which that commitment was expected to take up as at that date.

As regards the first of those, the precise extent of Ms Adams's commitment resulting from the Kaye Adams Programme would certainly have been known or reasonably available to the relevant individuals by the time that the second written agreement was executed but, even at the time when the first written agreement was executed, all three of the relevant individuals would have known that, on each day on which she presented a programme, a significant part of Ms Adams's working day was going to be taken up with the programme. Exactly how many hours in the working day would have been expected to be involved in the making of each show is slightly unclear and no doubt it varied according to the content of a particular show and how much preparation time and debriefing time were required. However, it seems to us that an estimate of six to seven hours in the working day for each show - which is the one suggested by the Respondents based on the evidence summarised above - is entirely realistic.

As regards the second of the two questions - the percentage of Ms Adams's overall working time which her engagement by the BBC was expected to take up - there was considerable dispute at the remitted hearing as to what would have been known or reasonably available to the relevant individuals in relation to that subject at the time when each written agreement was executed.

Mr Gordon pointed out that Ms Adams's uncontested evidence at the original hearing was that:

> (a) on average over the two tax years in question, between 50% and 70% of her gross income came from the BBC and the rest came from other sources; and
>
> (b) she estimated that her work for the BBC over the two tax years in question amounted on average to approximately 40% to 50% of her overall working time.

Mr Tolley KC said that, given the significant time commitment required for the making of each show described above and the fact that it was known that Ms Adams wanted to spend time looking after her parents, Ms Adams's estimate described in paragraph 75(9)(b) above looked like an under-estimate. However, he did not seek to recall Ms Adams to cross-examine her on that evidence.

Given that this exercise is one which must necessarily be conducted by reference to what was known or reasonably available to each of the relevant individuals at the time when each written agreement was executed, we do not see that there is much to be gained from debating the accuracy of Ms Adams's percentages with the benefit of hindsight. However, in the light of the fact that:

> > (i) on the basis of the expected time commitment in relation to the programme described above, Ms Adams's engagement for the BBC under

each written agreement would have been expected to involve between 960 and 1,120 hours over the course of a year;

(ii) the number of working hours in a year assuming an eight-hour working day, five days a week for 48 weeks is 1,920; and

(iii) Ms Adams's estimate described in paragraph 75(9)(b) above was not challenged on cross-examination,

we are inclined to accept that, despite the expected impact on Ms Adams's overall working time of her caring responsibilities, it would have been known or reasonably available to each of the relevant individuals at the time when each written agreement was executed that, over the course of the relevant written agreement, roughly half of Ms Adams's working time was going to be spent on her engagement for the BBC.

76. Although, at the time when each written agreement was executed, it was known or reasonably available to each of the relevant individuals that Ms Adams had engagements with organisations other than the BBC, we make no finding of fact in relation to what was known or reasonably available to each relevant individual, at that time, as to the basis on which Ms Adams carried out those other engagements and, hence, carried out her career in general. This is because we have not been provided with sufficient evidence as to the terms on which she did so. However, we do find that, at the time when each written agreement was executed, each of the relevant individuals believed that:

(1) Ms Adams had, over her professional career, tended to carry on her profession as an independent contractor rather than as an employee; and

(2) Ms Adams's activities as an independent contractor included activities which were similar to those which she was to perform for the BBC pursuant to the relevant written agreement.

We need to say a little more about this finding given the importance which was attached to the matters set out in paragraphs 76(1) and 76(2) above by the parties at the two hearings.

At the original hearing, we found the two matters set out in paragraphs 76(1) and 76(2) above to be facts. Although those findings were challenged by the Respondents at the hearing before the Upper Tribunal, the Upper Tribunal held that we were entitled to make them - see *Atholl House UT* at paragraphs [110] and [111].

In its decision in *Atholl House CA*, the Court of Appeal did not expressly reject our findings to that effect in plain terms. However, although Sir David Richards said that it would be myopic, at Stage 3C, to ignore the fact that "the person providing the services is known to carry on a business, profession or vocation on their own account as a self-employed person" and that "the weight to be attached to it is a matter for the decision-making court or tribunal" - see paragraph [124] of the decision - he also criticised the weight which was placed on that fact by the Upper Tribunal in *Atholl House UT* and added that whether or not the terms and circumstances of the worker's other engagements amounted to self-employment could not be determined definitively, even if evidence had been adduced on that subject. At paragraphs [128] and [129], he said that:

"The terms and circumstances of [Ms Adams's] other engagements may well themselves have been varied and it cannot be assumed that, if analysed, all or indeed any of them would be found to be engagements as an independent contractor. They cannot be held up as a gold standard against which the contracts with the BBC were to be judged".

Arnold LJ adopted a similar approach at paragraph [170]. He said that the fact that the worker has an established career as a freelancer is part of the "admissible factual matrix" if known to both parties at the date of the hypothetical contract but that, where the precise terms on which

the worker is doing work for other people is not known to the client, they cannot be taken into account.

In the light of the approach adopted by the Court of Appeal, we consider that it is not now open to us to find the matters set out in paragraphs 76(1) and 76(2) above to be facts in and of themselves. We have had insufficient evidence to reach that conclusion. However, what we do find is that each of the parties who were involved in the formation of each written agreement - in other words each relevant individual - believed that to be the case.

Findings of fact in the third category

77. As regards the third category set out above, we find that, taking into account both the evidence which was presented to us at the original hearing and the new evidence which was presented to us at the remitted hearing, at the time when each written agreement was executed, the BBC had in place at least five different categories of contract, as follows:

> (1) staff contracts - these were for individuals who were regarded as being BBC staff. They carried the highest level of benefits but imposed the greatest level of restrictions on work for organisations other than the BBC;
>
> (2) OATB contracts - these were for news and current affairs presenters. In comparison to staff contracts, they imposed a lower level of restrictions on work for organisations other than the BBC but carried a slightly lower level of benefits;
>
> (3) OATS contracts - these were also for news and current affairs presenters. They imposed the same level of restrictions on work for organisations other than the BBC as OATB contracts but carried a lower level of benefits than those contracts;
>
> (4) freelance contracts without an intermediary - these were for individuals who were perceived by the BBC to be self-employed freelancers and whose terms of engagement fell beneath thresholds referred to in paragraph 75(3)(a) above; and
>
> (5) freelance contracts with an intermediary - these were for individuals who were perceived by the BBC to be self-employed freelancers but whose terms of engagement fell at or above the thresholds referred to in paragraph 75(3)(a) above and were therefore considered by the BBC to be at risk of being treated as employees,

and that:

> (a) individuals falling within the first three categories set out above were treated as being employees for income tax and national insurance purposes and paid net of tax; and
>
> (b) individuals falling with the fourth and fifth categories set out above were treated as being self-employed for income tax and national insurance purposes and were paid gross.

DISCUSSION

Introduction

78. In the light of the facts set out in paragraphs 68 to 77 above, we now address, in turn, each of the stages set out in paragraphs 17 to 27 above.

79. The starting point is necessarily to determine, first, the terms of the actual contracts which arose between the BBC and the Appellant (Stage 1) and then the terms of the hypothetical contracts which would have arisen between the BBC and Ms Adams if they had contracted directly (Stage 2).

Stage 1 and Stage 2

Stage 1 and Stage 2 - the conclusions of the Upper Tribunal and the Court of Appeal

80. Before setting out our conclusions in relation to Stage 1 and Stage 2, it is necessary to reiterate that, if Mr Tolley KC is correct in his submissions as to the scope of our remit at this stage, then there is nothing for us to say at this point as regards the terms of the actual contracts or the hypothetical contracts. Instead, we are bound by the conclusions reached by the Upper Tribunal and the Court of Appeal in that regard.

81. We therefore think that it would be helpful to summarise those conclusions at this stage.

The Upper Tribunal's and the Court of Appeal's conclusions in relation to Stage 1 - the terms of the actual contracts

82. As regards Stage 1, the Upper Tribunal concluded that the terms of the actual contracts were to be determined by reference to the terms of the written agreements which had been executed by the BBC and the Appellant. That was because:

(1) the parties stipulated expressly in the written agreements that the written agreements were a complete record of the terms of their agreement; and

(2) the evidence did not suggest that any modification was required to be made to those terms by reference to the principles set out in *Autoclenz*.

83. The Court of Appeal agreed with the Upper Tribunal that the decision in *Autoclenz* had no application in determining the terms of the actual contracts. It did so both because it agreed with the Upper Tribunal's reasons for rejecting our application of *Autoclenz* in our original decision and because it considered that, following the Supreme Court decision in *Uber* which was published after the Upper Tribunal's decision in *Atholl House UT*, it was now plain that *Autoclenz* had no relevance in the context of a common law test of employment where no special statutory meaning applied (see *Atholl House CA* at paragraphs [140] to [161]).

84. It follows that both the Upper Tribunal and the Court of Appeal determined that the terms of the actual contracts in this case should be determined by reference to the terms of the written agreements between the BBC and the Appellant.

The Upper Tribunal's and the Court of Appeal's conclusions in relation to Stage 2 - the terms of the hypothetical contracts

85. Turning then to the Upper Tribunal's conclusions in relation to the terms of the hypothetical contracts, the Upper Tribunal said that the starting point was necessarily the terms of the actual contracts between the BBC and the Appellant. However, as it went on to note in *Atholl House UT* at paragraphs [8], [9], [43], [53] and [54], those terms were merely the starting point in the determination of the terms of the hypothetical contracts. It said that, in addition, it was necessary to take into account the circumstances in which the services were provided. Those circumstances might, in appropriate cases, include:

(1) one party's subjective views as to the terms of the actual contracts; and

(2) the conduct of the parties in the performance of the actual contracts,

(see *Atholl House UT* at paragraph [8(4)], [43(3)] and [54]).

86. In *Atholl House UT* at paragraphs [56] to [70], the Upper Tribunal described the approach to be taken in determining the terms of the hypothetical contracts from the circumstances surrounding the execution of the actual contracts. It described this as a "counterfactual exercise" in which certain hypothetical "flashpoint" scenarios needed to be considered.

87. After considering the evidence from the original hearing in relation to these "flashpoint" scenarios, the Upper Tribunal concluded that:

(1) the evidence did not support the conclusion that the BBC would have declined altogether from exercising its rights under the actual contracts to restrict Ms Adams's other engagements or that, had the BBC done so, Ms Adams would have resisted and forced the BBC to litigate and that therefore those rights should form part of the hypothetical contracts - see *Atholl House UT* at paragraphs [57] to [62] and [70(1)];

(2) the evidence supported the conclusion that the BBC's rights of "first call" over Ms Adams's services under the hypothetical contracts were slightly more restricted than as set out in the actual contracts. It said that, under the hypothetical contracts:

(a) Ms Adams would not have been required to notify the BBC of all her competing engagements before signature of the relevant actual contract;

(b) the BBC would have had to have good reason for insisting on exercising its rights of "first call" at the expense of Ms Adams's other engagements (for example, because the competing engagement was unsuitable from the BBC's perspective because it would have reflected badly on the BBC or because it would involve Ms Adams's not being available for an episode of the Kaye Adams Programme); and

(c) before enforcing its rights of "first call", the BBC would have been obliged to engage in reasonable discussions with Ms Adams to see if adjustments could be made to the schedule in order to accommodate her reasonable other commitments - for example by allowing her to present the programme from a different location - and that the obligation of flexibility that this imposed on the BBC would be higher in relation to any episode of the programme after the 160th episode.

In short, the Upper Tribunal held that the hypothetical contracts would have allowed Ms Adams some latitude to fulfil other engagements but that that latitude would not have been unlimited and the BBC would have taken action under the hypothetical contracts to exercise its rights of "first call" in certain circumstances - see *Atholl House UT* at paragraphs [63] to [67] and [70(2)]; and

(3) the evidence supported the conclusion that the BBC would have enforced its rights to require Ms Adams to attend at such times and places as it deemed reasonably necessary, with the question of what attendance was "reasonable" to be determined so as to give Ms Adams a reasonable opportunity to undertake other appropriate non-BBC engagements - see *Atholl House UT* at paragraphs [68] and [70(4)].

88. The Upper Tribunal also held that the terms of the actual contracts and the other evidence provided at the original hearing meant that:

(1) each of the hypothetical contracts would have provided for Ms Adams to present a minimum of 160 shows over a period of one year - see *Atholl House UT* at paragraphs [69(1)] and [70(3)];

(2) the hypothetical contracts would have required Ms Adams to adhere to the BBC's editorial policies from time to time and to Ofcom guidelines - see *Atholl House UT* at paragraphs [69(2)] and [70(5)];

(3) the hypothetical contracts would have contained the terms described in paragraph [102] of our original decision (to the extent not inconsistent with the conclusions set out in paragraphs 87(1) to 87(3) above). Those were that:

(a) the BBC had ultimate editorial control over the content of the programmes;

(b) the BBC would be obliged to pay the Minimum Fee in circumstances where Ms Adams failed to achieve the Minimum Commitment because the BBC did not call on her to present a programme which she was willing and able to present;

(c) the Minimum Fee would be reduced pro rata in circumstances where Ms Adams failed to achieve the Minimum Commitment because she was unwilling or unable to present a programme;

(d) all intellectual property in relation to the programme content belonged to the BBC and Ms Adams waived all of her moral rights to such content;

(e) Ms Adams was required to attend editorial training and to undergo a full medical, in each case should the BBC so request;

(f) Ms Adams was responsible for providing her own clothing;

(g) Ms Adams was not entitled to holiday or sick pay, maternity leave or any pension entitlement; and

(h) Ms Adams was not entitled or obliged to receive a review, was not subject to the formal procedures applicable to BBC employees when a change was made to the nature of their work obligations and was not entitled to apply as an insider for internal vacancies

- see *Atholl House UT* at paragraph [70].

89. In laying down the terms of the hypothetical contracts, the Upper Tribunal did not refer expressly to certain of the rights and obligations which were set out in the written agreements between the BBC and the Appellant and were therefore terms of the actual contracts found at Stage 1 of the process.

90. The most significant of these omissions was the right of substitution which was set out in clause 16.4 of the written agreements.

91. In our original decision, we had concluded, based on our erroneous application of *Autoclenz*, that that right did not exist in the actual contracts which we found at Stage 1 and therefore that that right did not exist in the hypothetical contracts which we found at Stage 2.

92. In its analysis of the terms of the actual contracts at Stage 1, the Upper Tribunal noted that:

(1) the right of substitution was "quite realistic: it operated in limited "exceptional circumstances" and could only be invoked on prior notice to the BBC and in circumstances where the BBC was happy with the substitute being proposed"; and

(2) Ms Adams's testimony to the effect that she was not entitled to send a substitute simply demonstrated that she did not know all of the terms of the actual contracts (see *Atholl House UT* at paragraph [49(4)]).

Since those observations appeared in the course of setting out the errors which we had made in our application of *Autoclenz*, the clear implication was that the Upper Tribunal had concluded that the right of substitution was a term of the actual contracts at Stage 1 of the process.

93. When it turned to discuss the terms of the hypothetical contracts at Stage 2, the Upper Tribunal did not refer expressly to the right of substitution although it did warn more generally against constructing the terms of the hypothetical contracts "by reference to Ms Adams's and Mr Paterson's imperfect and sometimes incorrect, understanding of the terms of the [actual contracts]". It said that that would be to place too much weight on matters which were not necessarily relevant to the construction of the hypothetical contracts (see *Atholl House UT* at paragraph [55]).

94. Finally, when it dealt with the question of mutuality of obligations at Stage 3A, the Upper Tribunal said that it agreed with the conclusion which we had reached in our original decision, which neither party had challenged in the proceedings before it, to the effect that the mutuality of obligations test at Stage 3A was satisfied (see *Atholl House UT* at paragraph [98]).

95. The above summary means that it is not very clear from the terms of *Atholl House UT* whether the Upper Tribunal considered that the right of substitution was a feature of the hypothetical contracts at Stage 2. However, since our reading of *Atholl House UT* is that:

(1) the Upper Tribunal held that the right of substitution was included in the terms of the actual contracts; and

(2) the Upper Tribunal considered the right to be realistic,

we have concluded that the better view is that the Upper Tribunal considered that the hypothetical contracts did include that right and that it was merely an oversight on its part that the relevant right was not included in the summary of the terms of the hypothetical contracts at paragraph [70] of its decision. That view would certainly be consistent with the Upper Tribunal's general approach to the process of determining which rights were contained in the actual contracts at Stage 1 and which of those rights should be regarded as surviving in the hypothetical contracts at Stage 2.

96. Thus, taking into account that general approach and the references to the right of substitution and Stage 3A set out in paragraphs 92 to 94 above, we are inclined to the view that the reason why the Upper Tribunal did not refer expressly to the right of substitution when it set out the terms of the hypothetical contracts was that neither party in those proceedings had challenged our conclusion in the original decision that the hypothetical contracts satisfied the mutuality of obligations test at Stage 3A. We do not think that the mere fact that the Upper Tribunal expressed its agreement with that conclusion at paragraph [98] of its decision can be taken as an indication that the Upper Tribunal agreed with our conclusion in the original decision to the effect that the hypothetical contracts did not contain the right of substitution. It is equally, if not more, likely that the Upper Tribunal said that simply because it considered that, despite the existence of the right of substitution in the hypothetical contracts, the mutuality of obligations test at Stage 3A was still satisfied. We therefore propose to proceed on the basis that the Upper Tribunal considered that the hypothetical contracts did include the right of substitution which was set out in the written agreements.

97. The Upper Tribunal in *Atholl House UT* also did not comment expressly on whether the term of each written agreement to the effect that each of the BBC and the Appellant did not intend the relationship between the BBC and Ms Adams to be one of employer and employee was incorporated into the hypothetical contracts at Stage 2 but we can see no reason why it would have considered that that term should be excluded. In *Dragonfly Consulting Limited v. The Commissioners for Her Majesty's Revenue and Customs* [2008] EWHC 2113 (Ch); [2008] STC 3030 ("*Dragonfly*") at paragraphs [54] and [55], Henderson J, having made the point that any such statement of intention was, by definition, to be set out in the actual contract found at Stage 1 and not in the hypothetical contract which was required to be constructed at Stage 2 (because the latter did not actually exist), went on to observe that "in a suitable case there may be material which would justify the inclusion of such a statement in the hypothetical contract". Henderson J did not elaborate on what cases would be suitable in that context but we can see no reason in principle why the Upper Tribunal would have wished to exclude that statement in the written agreements from the terms of the hypothetical contracts in this case. Accordingly, we again propose to proceed on the basis that, in the view of the Upper Tribunal, that term of the written agreements was also a term of the hypothetical contracts.

98. The Court of Appeal in *Atholl House CA* did not comment expressly on the Upper Tribunal's conclusions in relation to Stage 2. However, that is not surprising given that, as we have noted in paragraphs 42 and 43 above:

(1) the focus of the hearing before it was Stage 3C, which was the basis for the Respondents' appeal; and

(2) whilst it did address the Stage 1 question of whether *Autoclenz* played any role in the construction of the actual contracts - because that was the basis for the "Respondent's notice" - having upheld the Upper Tribunal's conclusion to the effect that *Autoclenz* had no relevance to that stage, it did not comment on how the Upper Tribunal had reached its conclusions in relation to Stage 2 on the basis of its conclusions in relation to Stage 1.

99. We have therefore concluded that the Court of Appeal adopted the Upper Tribunal's conclusions in relation to Stage 2 in its decision.

Stage 1 and Stage 2 - our conclusions

100. Now that we have set out the Upper Tribunal's and the Court of Appeal's conclusions in relation to Stage 1 and Stage 2 - which, as we have already noted, Mr Tolley KC said was binding on us - we will proceed to consider the alternative scenario - the one favoured by Mr Gordon - in which we are entitled to reach different conclusions in relation to those stages based on the evidence which has been presented to us as a whole. Before doing so, we should reiterate that our own view on this question lies between the two parties in that we consider that:

(1) we do have freedom to reach different conclusions in relation to each of Stage 1 and Stage 2 but only insofar as those conclusions are relevant to Stage 3C, which is the only stage that we are required to address in these proceedings; and

(2) we do not have the freedom to reach different conclusions in relation to each of Stage 1 and Stage 2 insofar as those conclusions are relevant to either of Stage 3A or Stage 3B

– see paragraphs 37 to 47 above.

101. However, for reasons which will shortly become apparent, we do not think that the distinction which we have drawn above ultimately matters on the facts in this case and so we will proceed to address this question on the assumption that Mr Gordon is right and that we are not limited in reaching our conclusions in relation to Stage 1 and Stage 2 by the fact that each of Stage 3A and Stage 3B has already been decided.

Our conclusions in relation to Stage 1 – the terms of the actual contracts

102. Turning then to Stage 1, there is nothing for us to add about this stage in the light of the evidence as a whole because, on the basis that we are bound by:

(1) the Court of Appeal decision to the effect that *Autoclenz* cannot apply; and

(2) the principles set out by the Supreme Court in *Wood* at paragraphs [10] and [11],

we can see no reason to reach a different conclusion from the one reached by both the Upper Tribunal and the Court of Appeal to the effect that the terms of the actual contracts between the BBC and the Appellant should reflect the terms of the written agreements between the BBC and the Appellant.

103. In short, there is nothing either in the evidence which was presented to us at the original hearing or in the new evidence which was presented to us at the remitted hearing that might alter the conclusions which were drawn by the Upper Tribunal and the Court of Appeal in relation to this stage.

Our conclusions in relation to Stage 2 – the terms of the hypothetical contracts

104. As for Stage 2, it is clear from paragraphs 85 to 99 above that the terms of the hypothetical contracts in this case are not to be determined solely by reference to the terms of the actual contracts between the BBC and the Appellant. Instead, the circumstances in which those actual contracts came into existence - such as the parties' subjective beliefs and their subsequent performance of the actual contracts - are relevant factors to be taken into account - see *Atholl House UT* at paragraphs [43(3)] and [51] to [70].

105. There was some disagreement at the hearing as to how we should approach the process of determining the terms of the hypothetical contracts if we were doing so on the basis that the conclusions reached by the Upper Tribunal in relation to Stage 2 were not binding on us.

106. Mr Gordon submitted that, if the correct interpretation of the Court of Appeal's injunction in *Atholl House CA* and the CA Order was that we were not bound by the conclusions of the Upper Tribunal in relation to Stage 2 in *Atholl House UT*, then it was open to us to start with a blank page and reach our own conclusions, ab initio, in relation to the terms of the hypothetical contracts in the light of all the evidence which had been presented to us, whether in the course of the original hearing or in the course of the remitted hearing.

107. In contrast, Mr Tolley KC said that the correct approach to adopt was to start with the conclusions which were drawn by the Upper Tribunal in relation to Stage 2 in *Atholl House UT* (with the benefit of our findings of fact at the original hearing) and then to consider whether there was anything in the new evidence which was presented to us at the remitted hearing which might lead us to the view that any of those conclusions should be modified.

108. We consider that Mr Tolley KC's approach on this question is to be preferred over Mr Gordon's because our conclusions as to the terms of the hypothetical contracts are not simply conclusions of fact but involve mixed questions of fact and law. Stage 2 is not simply a matter of determining primary facts. Instead, it involves drawing inferences of fact from the primary facts by reference to legal principles which are potentially open to challenge before a superior court. That can be seen in the successful challenge which was made by the Respondents to our conclusions in relation to Stage 2 in *Atholl House UT* - see paragraphs [51] to [70]. Once it is necessary to take into account other circumstances in addition to the terms of the actual contracts in determining the terms of the hypothetical contracts, then the relative weight which is to be attached to each of those other circumstances and the terms of the actual contracts involve issues of law.

109. Thus, in our view, in determining the terms of the hypothetical contracts, we cannot simply address the evidence as a whole unencumbered by the approach taken by the Upper Tribunal in *Atholl House UT*. Instead, we need to bear that approach in mind in considering the evidence. For example, at the remitted hearing, Mr Gordon suggested that, based on the evidence as a whole, it was open to us to revisit the conclusions which were drawn by the Upper Tribunal in relation to the BBC's rights of first call and control, which conclusions were reached on the basis of the evidence that was presented to us at the original hearing. We do not see how, as a matter of law, it would be permissible for us to do that at this stage in the absence of something in the new evidence which was presented to us at the remitted hearing which might lead us to the view that any of those conclusions should be modified.

110. However, as it happens, we do not think that anything turns on this distinction in the present case because, regardless of whether, in relation to determining the terms of the hypothetical contracts following the remitted hearing, we adopt the approach urged on us by Mr Tolley KC or the approach urged on us by Mr Gordon, we can see no basis for reaching any conclusion in relation to the terms of the hypothetical contracts which differs from the conclusions in that regard which were reached by the Upper Tribunal in *Atholl House UT*.

111. In other words, adopting the approach urged on us by Mr Tolley KC, we cannot see that any of the new evidence which was presented to us at the remitted hearing would cause us to reach different conclusions in relation to any part of Stage 2 from the ones reached by the Upper Tribunal in *Atholl House UT*. In our view, none of that new evidence impinged upon, or was relevant to, the terms of the hypothetical contracts. Instead, all of it was directed at other facts which, whilst they might well be pertinent to the determination of the appeal because they relate to the circumstances in which the hypothetical contracts would have arisen, and are thus relevant at Stage 3C, had no relevance to the terms of the hypothetical contracts at Stage 2.

112. Similarly, adopting the approach urged on us by Mr Gordon, even if we were to take into account, ab initio, all of the evidence which was presented to us at the original hearing and all of the new evidence which was presented to us at the remitted hearing, we can see no reason for reaching conclusions in relation to the terms of the hypothetical contracts which differ from those drawn by the Upper Tribunal in *Atholl House UT*. That is again because, in our view, none of the new evidence impinged upon, or was relevant to, the terms of the hypothetical contracts. Instead, it pertained solely to the circumstances in which the hypothetical contracts were made, for the purposes of Stage 3C.

113. In particular, because Mr Gordon mentioned this specifically in his submissions, we should say that we do not conclude from Mr Zycinski's testimony to the effect that he did not expect Ms Adams to make herself available to fulfil the Minimum Commitment in each case that that should change the conclusion which we drew in our original decision - which was adopted by the Upper Tribunal in *Atholl House UT* at paragraph [70(3)] - to the effect that, under each hypothetical contract, the BBC was obliged to provide, and Ms Adams was obliged to present, programmes equal to the Minimum Commitment and the BBC was required to pay the Minimum Fee. In our view, if, as Mr Zycinski expected, it had become apparent during the term of a hypothetical contract that Ms Adams was not going to be available to fulfil the Minimum Commitment, then the parties would have sat down and agreed to amend the relevant written agreement in order to reduce the Minimum Commitment and the Minimum Fee, as had occurred during the term of one of the earlier agreements between the BBC and the Appellant. Mr Zycinski's expectation that Ms Adams would not be available to fulfil the Minimum Commitment does not mean - either alone or when taken together with the evidence presented to us at the original hearing - that that Minimum Commitment was not a term of the relevant hypothetical contract.

114. Similarly, we do not conclude from Mr Zycinski's and Ms Denvir's testimony to the effect that they welcomed Ms Adams's other engagements because of the positive impact which those other commitments would be likely to have on the size of the BBC Scotland audiences that the BBC's rights of first call and control were anything other than those set out in *Atholl House UT*. The mere fact that the BBC had reasons of its own for not enforcing its rights says nothing about whether such rights existed. That is a fact which is pertinent to Stage 3C but we do not see how it changes the rights under the hypothetical contracts at Stage 2.

115. It follows from the above that, despite the extensive debate which took place at the hearing as to whether, in the light of the new evidence at the remitted hearing, we are entitled to reach different conclusions in relation to Stage 2 from the ones reached by the Upper Tribunal in relation to that stage, it transpires that that debate was entirely theoretical. After considering the new evidence, together with the original evidence, we find that the terms of the hypothetical contracts at Stage 2 were exactly the same as those found by the Upper Tribunal.

Stage 3

Introduction

116. We now address, in turn, the three parts of Stage 3 which we are required to address in the light of the decision of MacKenna J in *RMC*. As we have been doing throughout this decision, we will refer to those three stages as follows:

(1) Stage 3A - mutuality of obligations;

(2) Stage 3B - control; and

(3) Stage 3C - the other terms of the hypothetical contracts and the circumstances in which the hypothetical contracts arose.

Stage 3A

Introduction

117. We have already set out, in discussing the scope of the remitted hearing, our view that Stage 3A is not within the scope of this decision on the basis that it has already been determined in favour of the Respondents by the Upper Tribunal and the Court of Appeal.

118. However, we said to the parties at the remitted hearing that, in case that conclusion was wrong, we would set out our views in relation to Stage 3A, based on our findings as to the terms of the hypothetical contracts in the light of the new evidence which was presented to us at the remitted hearing. The paragraphs of this section which follow therefore set out our conclusions in relation to the question of whether the hypothetical contracts in this case satisfied the mutuality of obligations test in case we are wrong in concluding that that question has already been determined by the superior courts.

The law

119. The case law establishes the following principles in relation to this test:

(1) there are two aspects to Stage 3A. The first relates to the nature of the putative employer's obligations - the putative employer limb of Stage 3A - and the second relates to the nature of the putative employee's obligations - the putative employee limb of Stage 3A;

(2) as regards the putative employer limb of Stage 3A, the case law establishes that, in order for this limb to be satisfied, the putative employer must either be obliged under the hypothetical contract to provide work to the putative employee or obliged under the hypothetical contract to pay a retainer to the putative employee - see *Clark v. Oxfordshire Health Authority* [1998] IRLR 125 ("*Clark*") at paragraph [41], *Usetech Limited v. Young* [2004] TC 811 at paragraph [64] and *Atholl House CA* at paragraph [73]. In this regard, it is important to note the distinction between:

(a) a contract under which the putative employer agrees to pay a retainer to the putative employee in return for which the putative employee agrees to do the work which the putative employer may provide (but the putative employer is not obliged to provide work for the putative employee); and

(b) a contract under which the putative employer agrees to make a payment to the putative employee if work is provided in return for which the putative employee agrees to do the work which the putative employer may provide (but the putative employer is not obliged to provide work for the putative employee) - for example, a piecework contract.

In the former case, the obligation on the part of the putative employer to pay the retainer is sufficient to satisfy the putative employer limb of Stage 3A - see *Turner v. Sawdon &*

Co [1901] 2 KB 653 (CA) - whereas, in the latter case, the absence of the obligation to provide work prevents that from being the case - see *Devonauld v. Rosser & Sons* [1906] 2 KB 729 and *Professional Game Match Officials Limited v. The Commissioners for Her Majesty's Revenue and Customs* [2021] STC 1956 ("*PGMOL*"). Sir David Richards highlighted this distinction in *Atholl House CA* at paragraphs [73] and [74];

(3) as regards the putative employee limb of Stage 3A, MacKenna J in *RMC* said that, in order to satisfy this limb, the putative employee "must be obliged to provide his own work and skill. Freedom to do a job by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may be".

However, subsequent case law has more fully explored the question of when the putative employee's right to substitute the services of another person for the putative employee's own services can be seen as preventing this limb of Stage 3A from being satisfied.

In *Pimlico Plumbers Limited v. Smith* [2018] ICR 1511 ("*Pimlico Plumbers*"), the Supreme Court addressed the question of whether, assuming that the putative employee (a plumber) had a contractual right as against the putative employer to arrange for a particular job to be done by another plumber who also did work for the putative employer, that contractual right was incompatible with an obligation of personal performance on the part of the putative employee and hence negated the existence of a contract of service between the putative employer and the putative employee. The Supreme Court concluded that the appropriate way to approach this issue was to consider whether the "dominant feature" of the contract in question remained one of personal performance on the part of the putative employee.

In *Pimlico Plumbers* itself, the Supreme Court focused on two particular aspects of the facts in that case, namely:

> (a) the language used in the terms of the contract, and particularly the use of the vocative, which revealed that the right of substitution was an insignificant part of the contract; and
>
> (b) the fact that the substitute needed to come from the ranks of plumbers who were acceptable to the putative employer - in other words, those who could be assumed to be under similar obligations as regards carrying out the services as the putative employee in question,

and concluded that the "dominant feature" of the contract in that case was one of personal performance. The contract was to be contrasted with "a situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done" (see *Pimlico Plumbers* at paragraph [34]).

The "dominant feature" test set out in *Pimlico Plumbers* was applied by the Upper Tribunal in *Northern Light Solutions Limited v. The Commissioners for Her Majesty's Revenue and Customs* [2021] UKUT 134 (TCC), a case relating to the IR35 legislation. In that case, it had been held at first instance that the hypothetical contract included a right on the part of the putative employee to offer a substitute which the putative employer could refuse as long as it acted reasonably in so doing. The Upper Tribunal held that, assuming that the First-tier Tribunal had been right to conclude that the hypothetical contract included a term to that effect, it was unlikely, in practice, that the putative employee would be able to offer a substitute who met the requirements for the right experience and qualifications whom the putative employer, acting reasonably, would accept. That was because it was clear from the facts in that case that the putative employer particularly valued the putative employee for his specialist expertise and

familiarity with the way in which the putative employer operated. That was sufficient to show that the "dominant feature" of the hypothetical contract was personal performance by the putative employee.

The "dominant feature" test set out in *Pimlico Plumbers* was also considered by the Court of Appeal in *Stuart Delivery Limited v. Warren Augustine* [2021] EWCA Civ 1514 ("*Stuart*"). In that case, the putative employee (a courier) did not have a right of substitution as such. The courier could give up slots that he or she had previously accepted provided that another courier who worked for the same putative employer was able and willing to take the slot. In the Court of Appeal in *Pimlico Plumbers*, Sir Terence Etherton MR had set out what he saw as five basic principles which could be derived from the prior case law as to when a right of substitution would or would not negate the obligation of personal performance and the lower courts in *Stuart* had considered whether the facts in *Stuart* fell within the fifth of those principles.

However, the Court of Appeal in *Stuart* rejected that approach. It held that it was unhelpful to try to impose rigid rules based on the facts of prior cases as to when a right of substitution would or would not negate the existence of an obligation of personal performance. Instead, each case needed to be considered on the basis of its own facts and in the light of the injunction by the Supreme Court in *Pimlico Plumbers* to consider whether the "dominant feature" of the contract in question was one of personal performance (see *Stuart* at paragraphs [47] to [58]). In so doing, it was necessary to consider "whether the nature and degree of any fetter on the right or ability to appoint a substitute ...was inconsistent with any obligation of personal performance" (see *Stuart* at paragraph [55]). It concluded that, on the facts in that case, the limited right or ability of the courier to give up a slot was not sufficient to remove from the courier the personal obligation to perform his work personally for the putative employer and the facts were analogous to those in *Pimlico Plumbers*.

Our analysis

120. In this case, it is common ground that the putative employer limb of Stage 3A is satisfied. That is because, under each hypothetical contract, the BBC would have been obliged to pay the Minimum Fee in circumstances where Ms Adams failed to achieve the Minimum Commitment because the BBC did not call on her to present a programme which she was willing and able to present.

121. The question of whether the putative employee limb of Stage 3A is satisfied was addressed by us in our original decision on the erroneous basis that the right of substitution set out in Clause 16.4 of each written agreement:

(1) did not form part of the actual contract to which that written agreement gave rise; and

(2) therefore also did not form part of the relevant hypothetical contract.

On that basis, we concluded that there was an obligation of personal service on the part of Ms Adams and therefore that the putative employee limb of Stage 3A was satisfied.

122. The Upper Tribunal held that the conclusion set out in paragraph 121(1) above was unsound and, for the reasons which we have given in paragraphs 91 to 96 above, we infer from the rest of its decision that the relevant clause was therefore a feature of each hypothetical contract as well. Nevertheless, the Upper Tribunal noted at paragraph [98] of its decision that neither party had sought to challenge our original conclusion to the effect that Stage 3A was satisfied and that it agreed with that conclusion.

123. The Court of Appeal also noted that it had been common ground before the Upper Tribunal that Stage 3A was satisfied - see *Atholl House CA* at paragraph [30]. Since that conclusion had not been challenged before the Court of Appeal, it went on to say that it too considered that Stage 3A was satisfied - see *Atholl House CA* at paragraph [163].

124. However, at the remitted hearing, Mr Gordon submitted that the right of Ms Adams to provide a substitute for her services meant that the putative employee limb of Stage 3A was not satisfied. He said that, although the right of substitution in the hypothetical contracts was heavily circumscribed, it would have been open to Ms Adams to nominate an alternative of an appropriate calibre to present the programme instead and the BBC would have been obliged to accept that nominee. As a result, he said, the personal service of Ms Adams was not the "dominant feature" of the hypothetical contracts.

125. We do not agree.

126. We think that the "dominant feature" of the hypothetical contracts in this case was one of personal performance on the part of Ms Adams. The decision in *Stuart* at paragraphs [47] to [58] demonstrates that that question is to be answered in each case on the basis of its own facts and the facts in this case show that this was not a situation where the BBC was "uninterested in the identity of the substitute, provided only that the work gets done" (see *Pimlico Plumbers* at paragraph [34]). We say that for the following reasons:

(1) under the terms of the hypothetical contracts, the right of Ms Adams to provide a substitute to provide the services was heavily circumscribed. It was a right to provide an alternative only "in exceptional circumstances" where Ms Adams was not available for reasons beyond her control (other than because she was suspended) and it was subject to her giving the BBC reasonable prior notice and to the specified alternative's being deemed suitable and approved by the BBC. The very limited nature of the right to propose a substitute serves to emphasise the importance of the obligation to provide the services personally. The First-tier Tribunal made a similar observation in *Paya Limited and others v. The Commissioners for Her Majesty's Revenue and Customs* [2019] UKFTT 583 (TC) at paragraph [616] and in *Alan Parry Productions Limited v. The Commissioners for Her Majesty's Revenue and Customs* [2022] UKFTT 194 (TC) (*Parry*") at paragraph [115(1)];

(2) in addition, the hypothetical contracts provided that it would be a material or irremediable breach and justify termination of the hypothetical contracts if Ms Adams were to be "unable personally to provide the [services] hereunder due to ongoing ill-health, injury, mental or physical disability or other substantive cause or reason" (see clause 13.1 of Part B of each written agreement). This again served to show how important Ms Adams's personal service was to the BBC;

(3) the evidence of both Mr Zycinski and Ms Denvir was that the BBC entered into the written agreements with the Appellant with the aim of using Ms Adams's brand to grow the BBC Scotland audience. The essence of each written agreement was that it was Ms Adams who was presenting the programme. That was why, at the start of the earlier of the two written agreements, in March 2015:

(a) the programme name was changed so that it bore her name;

(b) the number of programmes was increased substantially to 160 programmes in each year; and

(c) the length of the programme was increased from one hour to three hours.

Each of these features demonstrated how it was Ms Adams's reputation in the market which the BBC was hoping to utilise in entering into the written agreements and that the provision of the services by her was an essential feature of the contracts;

(4) neither Mr Hollywood nor Ms Adams considered that Ms Adams had the right to provide a substitute. Whilst their beliefs do not mean that the right of substitution should be regarded as not being a term of the hypothetical contracts - see paragraph 93 above and *Atholl House UT* at paragraph [55] - they do speak to the intentions and understanding of the parties and are therefore relevant to the question of whether Ms Adams's personal service was the dominant feature of the hypothetical contracts; and

(5) in practice, no substitute was ever suggested or provided by Ms Adams. Instead, if Ms Adams was unable to present a programme, then the BBC found a replacement, that replacement was paid separately, outside the terms of the contract between the BBC and the Appellant, and the programme presented by the replacement did not count toward the Minimum Commitment. Whilst we agree that the failure to exercise a right of substitution does not mean that that right does not exist - see Lord Clarke in *Autoclenz* at paragraph [19] - a failure to exercise a right of substitution is, we consider, a relevant factor in considering whether the right of substitution is the "dominant feature" of the relevant contract. So we think that the fact that, on the days when Ms Adams was unable to present the programme, the BBC sourced a replacement separately and outside the terms of the actual contracts with the Appellant is a relevant factor to consider in assessing whether the "dominant feature" of the hypothetical contracts was one of personal service by Ms Adams.

127. For the reasons set out above, even if we were entitled to consider Stage 3A afresh and were not bound by the decisions of the Upper Tribunal and Court of Appeal in that regard, we would conclude that the putative employee limb of Stage 3A was satisfied and therefore that both limbs of Stage 3A were satisfied.

Stage 3B

Introduction

128. As was the case in relation to Stage 3A, we have already set out, in discussing the scope of the remitted hearing, our view that Stage 3B is not within the scope of this decision on the basis that it has already been determined in favour of the Respondents by the Upper Tribunal and the Court of Appeal.

129. However, we said to the parties at the remitted hearing that, in case that conclusion was wrong, we would set out our views in relation to Stage 3B, based on our findings as to the terms of the hypothetical contracts in the light of the new evidence which was presented to us at the remitted hearing. The paragraphs of this section which follow therefore set out our conclusions in relation to the question of whether the hypothetical contracts in this case satisfied the control test in case we are wrong in concluding that that question has already been determined by the superior courts.

The law

130. The case law establishes the following principles in relation to this test:

(1) shortly stated, this test refers to the ability of the putative employer to have the power of deciding the thing to be done, the way in which it should be done, the means to be employed in doing it and the time when, and the place where, it should be done, or, as it has often been put, the "what, how, when and where";

(2) the case law reveals the following:

(a) the extent and degree of control exercised by the putative employer over the putative employee is not, by itself, decisive - see *RMC* itself, *Market Investigations Limited v. Minister for Social Security* [1969] 2 QB 173 ("*Market Investigations*") at 183 and *Atholl House CA* at paragraph [82];

(b) in a case such as this one, where the putative employee has a level of skill which is not susceptible to direction by anyone else in the organisation by whom he or she is engaged, control over the "what" is the most significant aspect of the test - see *Atholl House UT* at paragraph [93];

(c) in relation to the "what", the absence of a general right of redeployment in relation to the putative employee is a relevant factor although not determinative in and of itself - see *O'Kelly v. Trusthouse Forte plc* [1984] 1 QB 90 (*O'Kelly*") at 126 and *Atholl House UT* at paragraphs [97], [102] and [103];

(d) the fact that control over the "what" is the most significant aspect of this test does not mean that control over the "when" and the "where" are of no importance - see *Atholl House UT* at paragraph [93];

(e) it has long been acknowledged that the test for control over the "how" - which is to say the way in which the work will be carried out and the means to be employed when doing it - is less important than control over the "what, when and where" and that the "how" test should be focused more on ultimate authority than on close direction by actual supervision. That is because there are many examples, of which this is one, where the degree of skill which the work requires is such that direct control is necessarily absent - see *The Catholic Child Welfare Society and others v. Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56 at paragraph [36].

In this regard:

> (i) in *Montgomery*, at paragraph [19], Buckley J gave the examples of a master of a vessel, a surgeon or a science or technology expert and said that control over the "how" existed as long as there was "some sufficient framework of control" even though the level of knowledge and skill required to carry out the work meant that control exercised by actual supervision was impossible;
>
> (ii) in *Christa Ackroyd Media Limited v. The Commissioners for Her Majesty's Revenue and Customs* [2019] UKUT 326 (TCC) ("*Ackroyd*") at paragraphs [51] to [54], the Upper Tribunal considered the meaning of the above phrase and held that "what mattered in determining control was not the practical exercise of day-to-day control and whether 'actual supervision' was possible, but 'whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions'." In *Ackroyd*, the Upper Tribunal gave as an example the facts in *White v. Troutbeck* [2013] IRLR 286 ("*Troutbeck*"), where the owner of an estate who left a servant in charge of the day-to-day running of the estate but "retained the right to step in and give instructions concerning what was, after all, their property" was held to have retained control over the servant - see the decision of the Employment Appeal Tribunal in *Troutbeck* at paragraphs [40] to [42]; and
>
> (iii) in *PGMOL*, at paragraphs [115], [130] and [132], the Court of Appeal approved the statement which had been made by the Upper Tribunal at paragraph [138] of its decision in that case to the effect that "[a] right to give directions cannot be ignored just because 'there is no ability to step in and give

directions during the performance of the obligations (where the nature of the obligations precludes it)".

Our analysis

131. On the basis that the terms of the hypothetical contracts were as set out in paragraphs 85 to 99 above, we consider that they satisfied the control test, essentially for the reasons set out by the Upper Tribunal in *Atholl House UT* at paragraphs [99] to [107]. In particular:

(1) under the hypothetical contracts, the BBC controlled the "what" in that, although it did not have a general right of redeployment over Ms Adams, it was entitled to determine the form and content of the programme presented by Ms Adams. Although in practice it gave Ms Adams a high degree of autonomy in that regard, it had the right under the hypothetical contracts to insist on that form and content;

(2) the BBC also controlled the "where" and the "when" under the hypothetical contracts. It had a qualified right of first call and it had the right to schedule the programmes which Ms Adams was to present when it chose. Although it was obliged to behave reasonably in accommodating Ms Adams's other engagements, it could ultimately withhold its consent to those other engagements and require Ms Adams to present the programme at the time and place it desired; and

(3) although the BBC had relatively modest control over the "how", that is of little moment in a case such as this given the case law described in paragraph 130(2)(e) above. Ms Adams provided services of a highly-skilled and specialist nature and therefore it is not surprising that, in carrying out her work, she was not under the close supervision of the BBC. Ms Adams was required to adhere to the Guidelines and Standards and to Ofcom's guidelines. Although there was little that the BBC could do in real time if Ms Adams breached those requirements, it did retain the right to impose sanctions for any breach retrospectively. In addition, the case law shows that such real time control is not necessary for this part of the control test to be passed. In the words of Buckley J in *Montgomery* at paragraph [19], the BBC had the ultimate authority or "framework of control" even though the level of knowledge and skill required to carry out the work meant that control exercised by actual supervision was impossible. The position on the "how" in this case is similar to that in *Parry* at paragraph [119(3)].

132. For the above reasons, even if we were entitled to consider Stage 3B afresh and were not bound by the decisions of the Upper Tribunal and Court of Appeal in that regard, we would still conclude that Stage 3B was satisfied.

Stage 3C

Introduction

133. We now turn to the critical part of this decision, which is whether, taking into account the terms of the hypothetical contracts which we have found at Stage 2 and the wider circumstances in which the hypothetical contracts arose, the hypothetical contracts should be seen as contracts of service or contracts for services. Putting it another way, should Ms Adams be seen as having entered into the hypothetical contracts as an employee of the BBC or as a person acting in the course of a business on her own account.

The law

134. It is clear from paragraphs [58], [86], [122] to [137], [163] and [167] to [171] in *Atholl House CA* that, in relation to Stage 3C, the question for the relevant 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 terms of the relevant contract and the circumstances in which it was made. In other words, the court or tribunal is

required to take into account not only the express or implied terms of the relevant contract, but also a broader range of factors - see *Market Investigations*, *Hall v. Lorimer* [1994] WLR 209 ("*Hall*"), *McGregor v. Edinburgh Leisure* [2007] UKEAT 0027/07/2908 (29 August 2007) and *Matthews v. The Commissioners for Her Majesty's Revenue and Customs* [2014] STC 297.

135. The authorities, including the Court of Appeal in *Atholl House CA*, have set out various principles for determining Stage 3C in any particular case and those are as follows:

(1) there has historically been some debate as to whether, once each of Stage 3A and Stage 3B has been satisfied, there has to be a clear inconsistency in the other terms of the contract to displace the conclusion of employment or whether Stage 3C should be approached on the basis that the other terms of the contract need to be consistent with employment in order to reach the conclusion of employment. However, in *Atholl House CA* at paragraph [75], Sir David Richards said as follows:

"Whether the third condition is one of consistency or inconsistency with a conclusion of employment strikes me as a largely arid debate. The court or tribunal will in any event have to analyse the terms of the contract and reach a conclusion whether they are consistent or inconsistent with a relationship of employment. Given that mutuality of obligation and control are necessary elements of employment, there will inevitably have to be factors pointing in the opposite direction, but it is, in my view, no more than that."

It follows that, when it comes to Stage 3C, there is no presumption either in favour of the conclusion of employment or against the conclusion of employment;

(2) nevertheless, the absence of any presumption either way does not mean that the court must address Stage 3C in a vacuum. The express or implied terms of the relevant contract are central to the enquiry and necessarily the starting point in that enquiry but the factors to which the court or tribunal is to have regard "are not confined only to the terms of the [relevant] contract and the effects of those terms" (see *Atholl House CA* at paragraph [61]). What is needed is a consideration of "the relationship between the parties recorded in the agreement in the setting of the surrounding circumstances" - see *Troutbeck* at paragraph [41] and also *Atholl House CA* at paragraphs [122] and [130];

(3) in that regard:

(a) all aspects of the relationship between the putative employer and the putative employee need to be considered and no single factor is decisive - see *O'Kelly* at 104G and 124E;

(b) this is not a mechanical exercise of running through items on a checklist. It is about painting a picture from an accumulation of detail and then standing back to make an informed qualitative assessment from a distance. Thus, no exhaustive list can be compiled of the factors which should be taken into account and it is not possible to lay down strict rules as to the relative weight which such factors should carry in particular cases because each case turns on its own particular facts and all of the relevant factors need to be taken into account - see *Market Investigations* at 184 and *Hall* at 216; and

(c) for a circumstance to be relevant in that context, it must be one which was known, or could reasonably be supposed to have been known, to both parties. As noted by Arnold LJ in *Atholl House CA*, the contract "should not be construed in a vacuum, but in the light of the admissible factual matrix" and, in that regard, the admissible factual matrix includes factual circumstances which were known by, or reasonably available to, both parties at the time when the contract was executed but

not factual circumstances which were known by, or reasonably available to, only one of the parties at that time - see Arnold LJ in *Atholl House CA* at paragraphs [170] and [171] and *Arnold* at paragraph [21] and see also Sir David Richards in *Atholl House CA* at paragraphs [123], [131] and [164]. However, in each case, the critical period to be addressed is the period covered by the engagement which is being considered. Whilst the court or tribunal should not shut its eyes to periods which precede that period, that is merely part of the surrounding circumstances and should not be the focus of attention - see *Atholl House CA* at paragraph [131];

(4) turning then to the factors that have been addressed specifically in the case law, those are as follows:

(a) financial risk - the degree of financial risk which is undertaken by the putative employee is a relevant factor. The taking of financial risk is an indication of self-employment. However, this does not include the risk of not being able to find alternative employment as that is a risk shared by all casual employees. To be a factor pointing towards independent contractor status, the risk needs to be an ability to make a loss or a profit from how the work is performed - see *Global Plant Limited v. Secretary of State for Social Security* [1972] 1 QB 139 at 152 ("*Global Plant*") and *Lee Ting Sang v. Chung Chi-Keung* [1990] 2 AC 374 ("*Lee Ting Sang*") at 384;

(b) dependence on multiple clients - the extent to which the putative employee is dependent upon, or independent of, a particular paymaster for the financial exploitation of his or her talents is a relevant factor. The putative employee's ability to exploit his or her talents in the wider market and economic independence from any one paymaster is an indication of self-employment - see *Hall* at 218C, *Atholl House UT* at paragraph [113] to [115] and *Red, White and Green v. The Commissioners for His Majesty's Revenue and Customs* [2023] UKUT 83 (TCC) ("*RWG*") at paragraph [112];

(c) time commitment - the time commitment which the engagement involves is a relevant factor. An engagement which does not require the putative employee to spend a significant part of his or her working time on the engagement is more likely to be one entered into in the course of self-employment - see *Atholl House UT* at paragraph [113] to [115] and *Atholl House CA* at paragraph [130];

(d) other engagements - the manner in which the putative employee generally carries out his or her working life is an important contextual circumstance to be taken into account, along with all of the other relevant factors, in determining whether he or she should be regarded as an employee in relation to the particular engagement in question. The fact that the putative employee's working life generally involves entering into a series of engagements in the course of self-employment is a factor which points toward self-employment. However:

(i) it is not determinative - see *Synaptek Limited v. Young* [2003] ICR 1149 at paragraph [20]. In *Atholl House CA* at paragraph [124], Sir David Richards LJ noted that:

"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";

(ii) it therefore does not preclude the putative employee from being regarded as an employee in relation to one of those engagements if the terms of that one engagement are more consistent with the putative employee's being an employee; and

(iii) the focus should always be on the contractual terms and circumstances of the particular engagement which is being considered. It should not be on either:

(A) the activities involved in the putative employee's other engagements; or

(B) the contractual terms and circumstances of those other engagements;

(e) nature of activities - whether or not the putative employee performs similar services for others as an independent contractor "is a relevant fact, if known or reasonably available to the putative employer". The fact that the putative employee performs similar services for others as an independent contractor is a factor which points toward self-employment. However, "it goes no further than that". It is wrong to assume that, because the services performed by the putative employee as an independent contractor are similar to those performed by the putative employee under the engagement being considered, the putative employee must have been performing the services under the engagement being considered as an independent contractor

- see *Davies v. Braithwaite* [1931] 2 KB 628 at 635, *Fall* at 295H and 298F, *Sidey v. Phillips* [1987] STC 87 at 90-91 and *Atholl House CA* at paragraphs [128], [129] and [171];

(f) ownership of equipment - whether or not the putative employee used his or her own equipment to perform the services is a relevant factor. The use of the putative employee's own equipment is a factor which points towards self-employment - see *Market Investigations* at 184 -185 and *Fall* at 293;

(g) length of relationship - the degree of continuity in the relationship between the putative employer and the putative employee is a relevant factor but is not of itself determinative.

There are two aspects to this factor. First, an engagement which is short-term and where there is no obligation on the part of the putative employer to find something else for the putative employee to do after the putative employee has completed the allotted task is more likely to involve self-employment. Secondly, where there is a fixed-term contract which is part of a series of contracts, a track record of continuing engagement might well give rise to a reasonable anticipation of future renewal at the point when the relevant fixed term contract comes to an end - see *Kickabout UT* at paragraph [87], *Kickabout Productions Limited v. The Commissioners for Her Majesty's Revenue and Customs* [2022] EWCA Civ 502 ("*Kickabout CA*") at paragraph [94] and *Hall* at 218D.

However, that does not mean that a putative employee who has a fixed term contract for a single project with no obligation on the part of the putative employer to offer the putative employee further work at the end of the project cannot be said to be an employee during the term of that project - see *Lee Ting Sang* at 384 and *The Commissioners for Her Majesty's Revenue and Customs v. Larkstar Data Limited* [2009] STC 1161 at paragraphs [28] to [32]. In *Windle v. Secretary of*

State for Justice [2016] EWCA Civ 459 at paragraph [23], Underhill LJ noted that, whilst "the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status …it will not always do so. Its relevance will depend on the particular facts of the case";

(h) the "part and parcel" test - the question of whether the putative employee can accurately be described as being "part and parcel" of the putative employer's organisation is a relevant factor in some cases but not in others. It all depends on the context - see *RMC* at 524B, *Lee Ting Sang* at 388, *Hall* (at first instance) at 612g and *Kickabout CA* at paragraphs [98] to [101].

In *Kickabout UT*, which concerned the services of a presenter on Talksport, the Upper Tribunal had held that it did not think that "in the circumstances of this case, an impressionistic analysis of whether [the presenter] was "part and parcel" of Talksport's organisation would weigh heavily in the balance" and that such an analysis would "[add] little in this case" - see *Kickabout UT* at paragraph [95] - and the Court of Appeal in *Kickabout CA* concluded that "[there] is no criticism that can properly be made of this analysis" - see paragraph [101].

At the remitted hearing, Mr Tolley KC submitted that this test was not about organisational integration and line management but rather about whether the activities of the putative employee were integral to the activities of the putative employer or merely accessory to those activities. For that proposition, he referred us to the decision in *Lee Ting Sang* at 386 and 387. Whilst we agree that that was one of the bases on which the "part and parcel" test was addressed in *Lee Ting Sang*, that is not the only basis on which this test was addressed. In fact, the Privy Council in that case referred to two distinct strands in relation to the test.

It is true that the first of them related to whether specified activities of the putative employee could be said to be integral to the activities of the putative employer or merely accessory to those activities. However, the second related to the quite different question of whether the putative employee could be said to be "part and parcel" of the putative employer in an organisational sense - see *Lee Ting Sang* at 387 and 388 - and it was the second of them, based on the dictum of Denning LJ in *Bank voor Handel en Scheepvaart N.V. v. Slatford* [1953] 1 Q.B. 248 at 295, which was mentioned by MacKenna J in *RMC* at 524.

In *Lee Ting Sang*, the Privy Council in fact determined that neither of the two strands had any relevance on the facts of that case and that reliance on them had led the lower courts into error – see *Lee Ting Sang* at 388. However, that is not to say that either or both of those strands may not be relevant on the facts of another case;

(i) custom and practice - the custom and practice generally adopted across the relevant industry as a whole is a relevant factor to take into account although "not a particularly important factor" - see *O'Kelly* at 117;

(j) contractual statements - whilst the understanding and intentions of the parties are relevant factors, "statements by the parties disavowing any intention to create a relationship of employment cannot prevail over the true legal effect of the agreement between them". In a borderline case, such statements "may be taken into account and may help to tip the balance one way or the other" but, in the majority of cases, they "will be of little, if any assistance in characterising the relationship between them" - see

Dragonfly at paragraphs [53] to [55], *Kickabout CA* at paragraph [95] and *RWG* at paragraphs [122] to [124];

(k) employee benefits - in the context of the hypothetical contract which is required to be constructed for the purposes of applying the IR35 legislation, the fact that the actual contractual arrangements involve two companies rather than a company and an individual and therefore make no provision for holiday or sick pay, maternity leave or a pension entitlement should not be regarded as a significant factor in determining whether the hypothetical contract would be an employment contract but it is not entirely irrelevant - see *Atholl House UT* at paragraph [74], *Kickabout CA* at paragraph [97] and *RWG* at paragraphs [125] and [126];

(l) worker status - the question of whether the putative employee is a "worker" for the purposes of employment law is not a relevant factor. All that matters is whether the hypothetical contract would be a contract of service or a contract for services - see *Dragonfly* at paragraphs [58] and [59]; and

(m) mutuality of obligations and control - finally, as both Sir David Richards and Arnold LJ noted in *Atholl House CA* at paragraphs [76], [113] and [169], in addressing Stage 3C in each case, the relevant court or tribunal must not entirely divorce its evaluation of the relevant factors from the conclusions which it reaches in relation to Stage 3A and Stage 3B. In particular, the extent of the putative employer's control needs to be borne in mind when the evaluation for the purposes of Stage 3C is made - see, for example, *Augustine v. Econnect Cars Ltd* [2019] UKEAT 0231/18 (20 December 2019) at paragraph [66]. Thus, even though it is axiomatic that, in reaching this stage, each of Stage 3A and Stage 3B will already have been satisfied, the extent of the mutuality of obligations and the extent of the control are relevant factors to be considered at Stage 3C.

There are a number of points to be made in relation to this particular subject, which we set out in the paragraphs which follow.

136. In relation to the extent of the mutuality of obligations and the extent of the control for the purposes of Stage 3C, Mr Gordon sought to persuade us at the hearing that, at that stage, when both the terms of the hypothetical contract and the circumstances in which the hypothetical contract would have arisen are required to be considered, it is not simply the rights under the hypothetical contract pertaining to mutuality of obligations and control which need to be taken into account but also the manner in which those rights were exercised in practice.

137. With respect to Mr Gordon, we do not agree. We think that his submission to that effect is exactly the same submission as the one which he advanced - in relation to control - before the Upper Tribunal in *RWG* and which the Upper Tribunal expressly rejected in its decision at paragraphs [132] to [134]. The Upper Tribunal in that case held that, in each case, whilst what happened in practice might be relevant in determining the terms of the hypothetical contract at Stage 2, once those terms were determined, it was those terms which needed to be taken into account in determining the extent of control for the purposes of Stage 3C and not the manner in which the rights of control were exercised in practice. Putting it another way, it is the rights of control which are determined at Stage 2 and which are taken into account in reaching the conclusion that Stage 3B has been satisfied - and not the practical application of those rights - which are to be taken into account in assessing the extent of control for the purposes of determining Stage 3C.

138. We would add that that conclusion is consistent with the fact that, in referring to this point in *Atholl House CA*, Sir David Richards referred at paragraph [76] to "rights of control"

(as distinct from the actual exercise of control) and Arnold LJ at paragraph [169] used the word "exercisable" (as distinct from the word "exercised").

139. Mr Gordon said that the Upper Tribunal in *RWG* did not decide that evidence of what was expected to happen in practice in relation to control was irrelevant at Stage 3C. He submitted that, instead, the Upper Tribunal was simply saying that there was no evidence of such expected practice on the facts in that case. We do not accept that. It is clear from paragraph [133] that the Upper Tribunal was addressing in the following paragraph the submission that the way that control was exercised in practice was relevant at Stage 3C. It went on to answer that question in the negative in the manner, and for the reasons, we have outlined above.

140. Mr Gordon also said that the decision in *Carmichael* supported his position on this point because it was a case where what happened in practice was taken into account in deciding that there was no contract of employment. In our view, it does no such thing. We should start by observing that *Carmichael* was not an IR35 case but that is nothing to the point - the principles which it set out are equally applicable in the present situation. Looking at those principles, and applying parity of reasoning and the shorthand which we have been using throughout this decision, the House of Lords in *Carmichael* concluded that the contract in that case failed Stage 3A because there was an absence of mutuality of obligations. In so doing, the House of Lords was required first to determine the terms of the contract in question - the equivalent of Stage 2 in an IR35 case - and it determined the terms of that contract by reference to, inter alia, the manner in which the terms of the written documents in that case had been operated in practice (in the same way that, in an IR35 case, the manner in which the terms of the actual contract have been operated in practice form part of the circumstances which are to be taken into account at Stage 2 in determining the terms of the hypothetical contract). However, *Carmichael* says nothing whatsoever about Stage 3C. This is for the simple reason that, by failing at Stage 3A, the putative employees in that case never reached the point where Stage 3C became a relevant consideration.

141. The approach of the House of Lords in *Carmichael* is therefore entirely consistent with our interpretation of the conclusion reached by the Upper Tribunal in *RWG*. In other words, it is permissible to take into account what happens in practice in identifying the terms of the hypothetical contract at Stage 2 but then, in determining the extent of the mutuality of obligations and the extent of control for the purposes of Stage 3C, it is not permissible then to look at what happened in practice. Instead, the focus should be on the rights which gave rise to the conclusion that each of Stage 3A and Stage 3B was satisfied.

142. Mr Gordon said that the decision in *Montgomery* at paragraph [16] also supported his submission but, again, we see no basis for that conclusion. In that paragraph, the Court of Appeal was simply saying that subsequent words and conduct were a legitimate source for reaching conclusions as to the terms of the contract - which, in an IR35 case, is a Stage 2 matter. The case is not saying that, having determined the terms of the hypothetical contract at Stage 2, it is then permissible, at Stage 3C, to disregard the rights in the hypothetical contract which pertain to the issues of mutuality of obligations or control by reference to subsequent words or conduct.

143. Finally in this context, we should note that, except to the extent that it involves a right of "first call" (and therefore goes to the "where" and the "when" of the putative employee's activities under the engagement in question), the issue of control over the extent of the putative employee's other engagements is not a matter which is relevant to Stage 3B. That is because it does not relate to any of the "what, how, when and where" of the putative employee's engagement. Consequently, except to the extent noted above in relation to a right of "first call",

in considering the extent of the putative employer's control over the putative employee's other engagements for the purposes of Stage 3C, the principle described in paragraphs 136 to 142 above does not apply and we are permitted to consider at Stage 3C the manner in which such rights were exercised in practice.

144. Now that we have set out:

(1) the principles which are required to be adopted at Stage 3C;

(2) the factors which the case law shows to be potentially relevant at that stage; and

(3) the weight to be attached to those factors,

we should briefly set out the criticisms made of the Upper Tribunal by the Court of Appeal in this case in relation to the application of Stage 3C.

145. In *Atholl House CA*, the Court of Appeal observed that the Upper Tribunal had approached Stage 3C by saying that, since Ms Adams had tended over her career to carry on her activities as an independent contractor and those activities were similar to those which she carried on for the BBC, the relationship between the BBC and Ms Adams under the hypothetical contracts would be employment relationships only if there was some relevant difference between the activities which she carried on as an independent contractor and the activities which she carried on for the BBC. The Court of Appeal held that this approach involved the following errors of law:

(1) first, it meant that the Upper Tribunal wrongly focused on the activities of Ms Adams instead of the capacity in which, and the conditions under which, those activities were performed. The Court of Appeal said that it is a relevant fact, if known or reasonably available to the client, that the worker performs similar services as an independent contractor but it goes no further than that - see *Atholl House CA* at paragraph [128];

(2) secondly, insofar as this approach was concerned with the terms and circumstances under which Ms Adams performed her services, it involved taking into account the terms and circumstances of Ms Adams's other engagements, which were not in issue in the relevant proceedings, which might well have been varied themselves and which could not be assumed to be those carried on as an independent contractor, if analysed. "They cannot be held up as a gold standard against which the contracts with the BBC were to be judged. Even if the FTT had received evidence of these other engagements and the circumstances in which they were made, the approach of the UT is misguided" - see *Atholl House CA* at paragraph [129];

(3) thirdly, apart from taking into account the amount of time that Ms Adams's contractual commitment took up, the Upper Tribunal had not considered the terms of the hypothetical contracts, including those which pointed in the direction of employment, and those were "central to the enquiry". The Upper Tribunal had "largely failed to take account of the many features of the contractual terms and their effects, some of which may be seen as pointing to an employment relationship while others may be seen as consistent with Ms Adams being an independent contractor" - see *Atholl House CA* at paragraphs [130] and [164];

(4) fourthly, the Upper Tribunal had said that Ms Adams's time commitment for the BBC over the years in question needed to be judged by reference to an appropriately broad sample of her professional career rather than simply by reference to a snapshot in the two tax years in dispute. Whilst it was correct to take into account the fact that Ms Adams had been performing as an independent contractor for the period before the tax

years in dispute, if known or reasonably available to the BBC at the time when the contractual arrangements took effect:

(a) that was merely one factor to be taken into account and went no further than that because the critical period was the tax years in dispute; and

(b) insofar as the reference to the surrounding tax years was intended to include tax years after the tax years in question, that was incorrect

- see *Atholl House CA* at paragraph [131]; and

(5) fifthly, in looking at the period before the tax years in dispute, the Upper Tribunal had wrongly assumed that the Respondents' concession as regards the Appellant's appeal in relation to the two tax years preceding the tax years which remained in dispute meant that the Respondents had accepted that Ms Adams was acting as an independent contractor in those earlier tax years whereas the Respondents had in fact made that concession simply for pragmatic reasons - see *Atholl House CA* at paragraphs [132] to [136].

Our analysis

Introduction

146. Taking all of the above into account, our approach in relation to Stage 3C is as follows:

(1) it is apparent from the criticism made of the decision in *Atholl House UT* by the Court of Appeal that it is important for us to afford a degree of pre-eminence in the process to the terms of the hypothetical contracts, over and above other factors. Whilst it is not the case that only those terms need to be considered, they remain "central to the enquiry". In this regard, account must be taken of both terms which point in favour of employment and terms which point in favour of self-employment. There should not be an imbalance in favour of one category of terms over the other - see *Atholl House CA* at paragraph [130];

(2) however, the circumstances in which the relevant hypothetical contracts would have arisen must also be taken into account in addition to the terms. We deduce from the fact that the Court of Appeal considered that it was unable to re-make the decision and remitted the case on the basis that additional evidence as to those circumstances could be provided that the circumstances in which the hypothetical contracts would have arisen are of some importance to the outcome and that it is not simply a question of looking at the terms of the hypothetical contracts;

(3) in weighing up the relevant factors:

(a) only matters which were known or reasonably available to both parties at the point when the relevant hypothetical contracts arose should be taken into account; and

(b) no account should be taken of matters which occurred following the point at which the hypothetical contracts arose (except to the extent that those events were foreseeable or could reasonably have been foreseeable by both parties at that point because then they could be said to be known or reasonably available to both parties at that point)

- see *Atholl House CA* at paragraphs [66], [113], [170] and [171];

(4) in a case where the evidence shows that the worker tends generally to be engaged on a self-employed basis, it is wrong to approach the question by asking whether the particular engagement which is being considered is an exception to that general trend.

Instead, the starting point should be the terms of the hypothetical contract relating to the particular engagement in question and the knowledge that the worker's other engagements are generally on a self-employed basis should be no more than one of the factors which is to be weighed in the balance - see *Atholl House CA* at paragraphs [126] to [137];

(5) similarly, the mere fact that Stage 3A and Stage 3B have been satisfied at the point when Stage 3C is being addressed does not mean that there should be a presumption of employment at the point when the various factors are being considered. The position should be approached without any presumption either way - see *Atholl House CA* at paragraph [75]; and

(6) our task is to determine whether, taking into account the terms and effects of the hypothetical contracts and the circumstances in which those contracts would have arisen insofar as they would have been known or were reasonably available to both parties, there would have existed an employment relationship between the BBC and Ms Adams under the hypothetical contracts.

The parties' submissions

147. The Respondents' case in this regard can, in essence, be distilled into two critical submissions.

148. The first is that we have been directed by the Court of Appeal to focus on the terms of the hypothetical contracts in priority to the circumstances in which the hypothetical contracts arose. Those circumstances form part of the background in which the relevant terms need to be considered but they should not assume disproportionate importance. The terms of the hypothetical contracts remain "central to the enquiry".

149. The second submission, which follows on from the first, is that, when one examines the terms of the hypothetical contracts in this case, they are minimally different from the terms of the OATS contracts, which both parties accept gave rise to a relationship of employment. The Respondents point out that news and current affairs presenters who have OATS contracts have minimal employment benefits, are also permitted to take on other engagements outside the BBC and are also subject to control by the BBC in the manner in which they carry out their work for the BBC. The Respondents say that all of those are also features of the relationship between the BBC and Ms Adams under the hypothetical contracts and they add that further significant pointers towards employment status in this case are:

(1) the proportion of Ms Adams's working time which the parties must necessarily have known at the point when the written agreements were executed that Ms Adams was going to have to spend on her engagement for the BBC pursuant to those contracts; and

(2) the fact that, at the time when the written agreements were executed, Ms Adams had already been engaged by the BBC for some five years and that therefore there must have been an expectation that, after each written agreement expired, a further agreement was going to be offered.

150. For its part, the Appellant submits that the Respondents are placing too much weight on the terms of the hypothetical contracts at the expense of the circumstances in which the hypothetical contracts arose. It accepts that the terms of the hypothetical contracts are "central to the enquiry", but it points out that the Court of Appeal have made it plain that those terms are not the end-point of that enquiry. Instead, the Court of Appeal have said that it is necessary to consider the terms of the hypothetical contracts within the context of the circumstances in which those hypothetical contracts would have arisen and its refusal to re-make the decision but instead to remit the case demonstrated how significant to the decision those circumstances

must be. The Appellant submits that, once one takes into account those circumstances, it is clear that the hypothetical contracts would not have given rise to a relationship of employment. It says that, when the hypothetical contracts are viewed in the context of Ms Adams's career as a whole in the period prior to the execution of each written agreement, it is clear that the relationship between the BBC and Ms Adams under the hypothetical contracts was one of client and independent contractor. The Appellant points to the fact that, over that period, Ms Adams worked for many different organisations, both consecutively and concurrently, and that, in the period preceding the execution of the first written agreement in this case, the commitment of Ms Adams under her engagements by the BBC were considerably smaller than that under each hypothetical contract. The Appellant says that simply because Ms Adams's commitment under the hypothetical contracts was greater than it had been historically did not convert what had always been a relationship of client and independent contractor into a relationship of employer and employee.

151. Furthermore, the Appellant says that the analogy which the Respondents seek to make between the terms of the hypothetical contracts and the terms of the OATS contracts is misconceived. It says that there is a fundamental distinction between the terms on which Ms Adams was engaged and the terms to which the news and current affairs presenters who were employed under the OATS contracts were subject, both in terms of the ability of Ms Adams to take on other engagements outside the BBC and in terms of the degree of control which the BBC was entitled to exercise over Ms Adams in the performance of her engagement.

The terms of the hypothetical contracts

152. Turning then to the practical application of the principles set out in paragraph 146 above in the present case in the light of the parties' submissions, it is clear that, in line with those principles, the starting point must necessarily be the terms of the hypothetical contracts.

Terms indicative of employment

153. In our view, a number of those terms are indicative of employment. Those are as follows:

(1) time commitment - the time commitment required by each hypothetical contract was substantial. We have found as facts that, at the time when each written agreement was executed - and therefore at the time when each hypothetical contract would have arisen - it was known or reasonably available to each of the relevant individuals that Ms Adams's work for the BBC pursuant to the relevant written agreement:

(a) was going to involve a considerable commitment in terms of time; and

(b) was going to take up roughly half of Ms Adams's overall working time over the period in which the relevant written agreement was on foot.

In this case, the Upper Tribunal considered that the level of time commitment involved was a significant factor although not determinative - see *Atholl House UT* at paragraphs [81], [114] and [115] - and the Court of Appeal did not include this in its list of errors of law which had been made by the Upper Tribunal. On the contrary, it implied that the Upper Tribunal had been right to take that approach - see *Atholl House CA* at paragraphs [128] to [136] and particularly paragraph [130];

(2) extent of mutuality of obligations - the fact that the BBC was required by each hypothetical contract to pay the Minimum Fee in return for the Minimum Commitment and the fact that the dominant feature of each hypothetical contract was personal service by Ms Adams together mean that the extent of the mutuality of obligations was considerable. The only mitigating factor in this context is that there was a right of substitution which Ms Adams could have invoked in very limited circumstances but, in

overall terms, we think that the extent of the mutuality of obligations in this case points in the direction of employment;

(3) extent of control - similarly, the rights of control which were exercisable by the BBC under each hypothetical contract were significant.

We should start by reiterating that, in relation to this question, it is the extent of the rights of control, as opposed to the manner in which the rights of control were or were not exercised in practice, which counts. It is therefore of no moment in this context that, in practice, the BBC chose for the most part not to exercise its rights of control under each hypothetical contract.

Turning then to those rights of control, the BBC's rights to control the "what", the "when" and the "where" of Ms Adams's engagement were considerable.

The BBC had significant control in determining the "what" in that it had the right to decide on the form and content of the programme. In *Atholl House UT*, the Upper Tribunal accepted Mr Gordon's submissions that:

> (a) control over the "what" was the most significant aspect of control in a case such as this one; and
>
> (b) the absence of a general right of redeployment was a factor to be taken into account in assessing the extent of the rights of control at Stage 3C,

but went on to say that, on the facts of this case, it did not accept Mr Gordon's argument that the BBC's rights of control over the "what" were narrow. On the contrary, it concluded that, despite the absence of a general right of redeployment, the BBC's right to control the "what" went much further than mere "editorial control". It was instead "significant and related to the very tasks that Ms Adams could be required to perform"– see *Atholl House UT* at paragraphs [93] to [97] and [102] to [105].

As for the rights to control the "when" and the "where", those rights were slightly more limited under each hypothetical contract than they were under the related actual contract - the Upper Tribunal held that the BBC had to have a good reason for insisting on exercising its right of "first call" to Ms Adams's services and had to engage in reasonable discussions with Ms Adams to accommodate her other reasonable commitments in exercising that right so that its rights to control the "when" and "where" were subject to some limitations - see *Atholl House UT* at paragraph [70(2)] - but they were nevertheless still wide-ranging. In *Atholl House UT*, the Upper Tribunal expressly stated that the BBC's rights of control over the "when" and the "where" were "significant".

The BBC's right under each hypothetical contract to control the "how" was more limited than its rights to control the "what", "when" and "where" but we have already explained in paragraph 130(2)(e) above why the right to control the "how" is of limited significance in the case of a highly-skilled worker such as Ms Adams.

As such, in overall terms, we think that the rights of control in this case were considerable and point in favour of employment. This not a case where, to follow the language of Sir David Richards in *Atholl House CA* at paragraph [76], "the decision on whether the right of control is sufficient may be borderline";

(4) control over other engagements - the BBC's rights under each hypothetical contract to limit Ms Adams's other engagements during the term of the relevant hypothetical contract were far-reaching. Pursuant to the terms of each hypothetical contract:

(a) Ms Adams could not appear in any third party audio or visual content primarily intended for an audience in the United Kingdom and the Republic of Ireland without the BBC's prior written consent, such consent not to be unreasonably withheld; and

(b) it would be reasonable for the BBC to withhold consent where such third party could reasonably be considered to be in direct competition with the services provided to the BBC by Ms Adams.

As we have already observed, except to the extent that these rights to control Ms Adams's other engagements related to the BBC's right of "first call" (and therefore related to the "when" and the "where"), they did not involve any ability to control the manner in which Ms Adams performed her engagement for the BBC and, as such:

(i) they were not relevant in determining Stage 3B above; and

(ii) our consideration of these restrictions is not confined to the contractual rights of control but extends to the manner in which, at the start of each hypothetical contract, the parties knew, based on previous practice, these restrictions would in practice be applied.

We discuss the latter in paragraph 159(1) below. It suffices to say at this stage that, given the terms of that discussion, this particular aspect of the terms of each hypothetical contract as a feature pointing in favour of employment is effectively negated; and

(5) editorial training and medicals - each hypothetical contract required Ms Adams to attend editorial training and to undergo a full medical, in each case should the BBC require it. Since we have found as a fact that, at the time when each written agreement was executed, each of the relevant individuals knew that, in practice, the BBC did not exercise these rights, this particular aspect of the terms of each hypothetical contract as a feature pointing in favour of employment is effectively negated. We discuss this in paragraph 159(2) below.

Terms indicative of self-employment

154. In contrast, a number of the terms of the hypothetical contracts are indicative of self-employment. These are as follows:

(1) absence of customary employment rights - each hypothetical contract did not entitle or oblige Ms Adams to receive a review or to be subject to the formal procedures applicable to BBC employees when a change was made to the nature of their work obligations and each hypothetical contract did not entitle Ms Adams to apply as an insider for internal vacancies. In addition, although limited weight can be attached to this for the reason set out in paragraph 135(4)(k), neither hypothetical contract made provision for Ms Adams to receive holiday or sick pay, maternity leave or a pension entitlement;

(2) clothing - each hypothetical contract required Ms Adams to be responsible for providing her own clothing; and

(3) contractual statement - each hypothetical contract stated that the parties did not intend the relationship between the BBC and Ms Adams to be one of employment (see paragraph 97 above). This is clear evidence of an intention on the part of the parties to the effect that they intended the relationship to be one of self-employment. We recognise that the decision in *Dragonfly* suggests that such statements should be given minimal, if any, weight and may be useful only in a borderline case but, in our view, this is precisely such a case, as the terms of this analysis demonstrate.

Terms which are neutral or of marginal weight

155. There are also terms of the hypothetical contracts which we would regard as being neutral or of marginal weight. For example:

(1) intellectual property rights - we do not think that the fact that all of the intellectual property rights associated with the programme were assigned to the BBC or that Ms Adams waived her moral rights in relation to the programme content sheds any meaningful light on the question which we are addressing. We regard this as a neutral factor in determining this question. As the programme was being broadcast on the BBC, it was inevitable that the BBC would wish to own the intellectual property rights associated with the programme and not to be exposed to any claim by Ms Adams in relation to its use of the material and that would have been the case regardless of whether Ms Adams's engagement was as an employee or as an independent contractor; and

(2) changes in the length and name of the programme - similarly, we think that the fact that each hypothetical contract specified that the programme presented by Ms Adams would be three hours in length and would bear her name - neither of which was the case under the agreement which was on foot when the first of the written agreements was executed - is neutral in its impact. It might be said that those changes tend to indicate that Ms Adams was being presented as one of the BBC's "own" and therefore support a conclusion of employment. On the other hand, the changes are entirely consistent with the evidence of Mr Zycinski and Ms Denvir to the effect that, in engaging Ms Adams, the BBC was seeking to access her "brand" as an independent journalist of some standing with a reputation founded on her other engagements and, in particular, her role on Loose Women and this would tend to support a conclusion of self-employment.

Conclusion in relation to the terms

156. Just pausing at that stage, we would observe that, in our view, although there are terms in the hypothetical contracts which point in the opposite direction, the terms of the hypothetical contracts as a whole tend to indicate that the relationship between the BBC and Ms Adams under the hypothetical contracts would have been one of employment. This is largely because the terms which point in that direction are, in our view, more significant than the terms which point in the opposite way. In particular, the fact that it was known or reasonably available to the relevant individuals that the hypothetical contracts would require a considerable time commitment on the part of Ms Adams and would confer on the BBC a considerable degree of control were indicative of employment. As the Upper Tribunal noted in *Atholl House UT* at paragraph [84], the former is not determinative but it is nevertheless highly relevant to the conclusion. There is also the fact that Ms Adams's personal service was a "dominant feature" of the relationship created by the hypothetical contracts.

The circumstances in which the hypothetical contracts would have arisen

157. However, it is clear from *Atholl House CA* that the terms of the hypothetical contracts alone, although "central to the enquiry", are not determinative and that we need to consider those terms in the light of the circumstances in which each hypothetical contract would have arisen. We now turn to consider those attendant circumstances.

Circumstance indicative of employment

158. The length of the relationship between the BBC and Ms Adams is a feature of the attendant circumstances which points in the direction of employment. At the time when each written agreement was executed, it was known or reasonably available to each of the relevant individuals that the relevant written agreement was part of a series of contracts which had existed between the BBC and the Appellant for some five or six years prior to the date of execution of the written agreement in question. There was thus a longevity to the relationship

between the BBC and Ms Adams and case law establishes that a track record of continuing engagement can be indicative of a relationship of employment.

Circumstances indicative of self-employment

159. However, there are many more features of the attendant circumstances which are indicative of self-employment. These are as follows:

(1) absence of control over other engagements - as we have indicated in paragraph 153(4) above, although the terms of each hypothetical contract gave the BBC the right to require Ms Adams to obtain its written consent before taking on other engagements, we have found as a fact that, at the time when each written agreement was executed, the fact that, in practice, the BBC did not exercise those rights was known or reasonably available to each of the relevant individuals. In fact, not only did Ms Adams not have to seek the BBC's written consent to her other engagements but those other engagements were positively encouraged by the BBC because of the favourable impact which the BBC perceived that they would have on its audiences. Each of Mr Zycinski and Ms Denvir was acutely aware that Ms Adams had her own brand which they were seeking to harness by engaging Ms Adams and took steps to facilitate Ms Adams's performance of her other engagements.

Since, except to the extent that it relates to the right of "first call" and therefore feeds into the "where" or the "when", the ability or inability of Ms Adams to work for others does not go to the question of the BBC's control over any aspect of the provision of her services to the BBC, we are not constrained, in considering this factor, by the terms of each hypothetical contract pursuant to the decision in *RWG* at paragraph [134] but are instead permitted to take into account both the terms of the relevant hypothetical contract and the manner in which the relevant hypothetical contract was expected at its inception to operate in practice. Thus, the fact that, at the time when each hypothetical contract would have arisen, Ms Adams would, in practice, be free to seek alternative engagements during the term of the relevant hypothetical contract without obtaining the prior written consent of the BBC (and would in fact be encouraged to do so) was known or reasonably available to each of the relevant individuals is a factor which points toward self-employment;

(2) absence of compelling editorial training and medicals - as we have indicated in paragraph 153(5) above, although the terms of each hypothetical contract required Ms Adams to attend editorial training and to undergo a full medical, in each case should the BBC require it, we have found as a fact that, at the time when each written agreement was executed, the fact that, in practice, the BBC did not exercise those rights was known or reasonably available to each of the relevant individuals. Thus, this is also a factor which points toward self-employment;

(3) time commitment in previous tax years - it is important that any consideration of Ms Adams's commitment to the BBC under the hypothetical contracts is viewed against the background of her commitment to the BBC in the period which preceded the execution of each written agreement. The extent to which a worker is dependent upon, or independent of, a particular paymaster for the financial exploitation of his or her talents is a relevant factor. Thus, Ms Adams's ability to exploit her talents in the wider market and economic independence from the BBC in that earlier period is an indication of self-employment. Although Ms Adams was highly dependent on the BBC in the tax years to which each written agreement relates, we have found as facts that:

(a) the amount of income received by the Appellant from the BBC in each tax year ending prior to the date when the relevant written agreement was executed was known or reasonably available to each of the relevant individuals;

(b) the turnover of the Appellant in each of its financial years for which accounts had been produced and lodged at Companies House prior to the time when the relevant written agreement was executed was known or reasonably available to each of the relevant individuals; and

(c) the fact that, in the two years preceding the execution of the first written agreement, the percentage of Ms Adams's overall working time which was devoted to the BBC was lower than it was expected to be under each written agreement was known or reasonably available to each of the relevant individuals.

That information would have indicated to the relevant individuals that, at least in the two years prior to the execution of the first written agreement, Ms Adams would have had considerably more time for other engagements outside the BBC than was expected to be the case under each written agreement and that is indicative of a relationship between the parties of client and independent contractor. It is of course possible for a relationship of self-employment to become a relationship of employment but that would generally require some sort of change in the terms on which the worker is engaged and not merely a reduction in the time in which the independent contractor is able to pursue his or her other engagements;

(4) custom and practice - we have found as a fact that, at the time when each written agreement was executed:

(a) the fact that custom and practice within the industry as a whole was for presenters of programmes such as Ms Adams who satisfied most or all of the conditions for self-employment which were set out in the Radio Guidelines to be regarded as self-employed was known or reasonably available to each of the relevant individuals; and

(b) each of the relevant individuals believed that:

(i) in the market in general, presenters in the position of Ms Adams were self-employed; and

(ii) the terms of Ms Adams's engagement by the BBC satisfied most or all of the conditions for self-employment which were set out in the Radio Guidelines.

We consider each of these to be factors which point toward self-employment. Having said that:

(A) as regards the first of them, we recognise that custom and practice across the industry as a whole was said in *O'Kelly* to be "not a particularly important factor"; and

(B) as regards the second of them, we understand that our task is to judge objectively whether the parties intended when reaching their agreement to create a relationship of employment and that therefore the subjective intentions of the parties in entering into the agreement are of little weight in that regard - see *Atholl House CA* at paragraph [123]. However, it seems to us that there is a difference between, on the one hand, the subjective intentions of the parties and, on the other hand, their commonly-held underlying subjective beliefs. We cannot see

why the latter should not be a relevant circumstance which informs the objective determination of the parties' intentions in entering into the agreement. Thus, we think that the fact that both of the parties to a contract hold the same subjective belief at the time when the contract was executed can reasonably be included as part of the factual matrix to be taken into account in objectively determining the intentions of the parties in entering into the contract;

(5) course of business dealings - a similar point to the one made in paragraph 159(4)(b) above arises in relation to our finding of fact that, at the time when each written agreement was executed, each of the relevant individuals believed that:

(a) Ms Adams had, over her professional career, tended to carry on her profession as an independent contractor rather than as an employee; and

(b) Ms Adams's activities as an independent contractor included activities which were similar to those which she was to perform for the BBC pursuant to the written agreements.

There are two points which we would make in relation to this factor.

The first is that, even if we were to have found as facts that the statements in paragraphs 159(5)(a) and 159(5)(b) above were true, that would not, in and of itself, be determinative of self-employment status. The Court of Appeal made it clear in *Atholl House CA* at paragraph [128] that the fact that the worker is generally in business on his or her own account and that the activities performed under the hypothetical contract in question are similar to the activities performed under the worker's self-employed engagements are merely relevant facts and go no further than that.

The second is that, in any event, as we have already said in setting out our findings of fact - see paragraph 76 above - we have had insufficient evidence in this case to conclude that the matters set out in paragraphs 159(5)(a) and 159(5)(b) above were facts in and of themselves. The mere fact that the relevant individuals believed them to be true does not mean that their beliefs were well-founded. However, whilst we have had insufficient evidence to establish the truth of those propositions as facts, we have had a lot of evidence to support the conclusion that the relevant individuals believed the propositions to be true and, for similar reasons to those which we have just noted in paragraph 159(4)(B) above, it seems to us that, in the context of identifying objectively whether the parties intended their agreement to give rise to a relationship of employment, the subjective beliefs of the parties as to the situation in which they were entering into the contract at the time when the contract was executed are relevant circumstances.

Thus, the fact that, at the time when each written agreement was executed, each of the relevant individuals believed that Ms Adams was generally acting on a self-employed basis when she entered into her various engagements, and that her activities under those engagements were similar to those which she was to perform for the BBC pursuant to the relevant written agreement is a relevant factor to be taken into account in suggesting that none of them intended Ms Adams to be an employee of the BBC by virtue of her engagement with the BBC; and

(6) equipment - we have found as a fact that, at the time when each written agreement was executed, the fact that:

(a) Ms Adams had no entitlement to use BBC equipment except when she was in the studio or presenting programmes outside the studio and therefore had to use her own iPad and mobile phone to perform the services; and

(b) Ms Adams sometimes used her own devices when she was in the studio or presenting the programme from outside the studio and had no access to the BBC system when she was at home,

was known or reasonably available to each of the relevant individuals. We think that these features are indicative of self-employment - essentially for the reasons set out in paragraph [125(a)] of our original decision.

Circumstances which are neutral or of marginal weight

160. There are other features of the attendant circumstances which we would regard as being neutral or of marginal weight in relation to this question. For instance:

(1) the "part and parcel" test - we do not consider the "part and parcel" test to be of much assistance in the present case because it seems to us to point in both directions.

For instance, we think that Ms Adams was "part and parcel" of the BBC in the first of the two ways in which that phrase was considered in *Lee Ting Sang*. In other words, the work that she carried out under her engagement - that of presenting 160 three-hour programmes over the course of a year - was clearly integral to the activities of the BBC and not merely accessory to it. Her programme took up three hours of air-time for 160 days in the course of the year.

On the other hand, Ms Adams was not "part and parcel" of the BBC in the second of the two ways in which that phrase was considered in *Lee Ting Sang*. In other words, at the time when each written agreement was executed, the fact that the BBC did not consider Ms Adams to be "part and parcel" of the BBC in an organisational sense was known or reasonably available to each of the relevant individuals. The latter approach could be seen in, for example:

(a) the light touch which the BBC showed in exercising its rights of control over Ms Adams's other engagements;

(b) the absence of any reviews;

(c) the fact that the BBC did not ask Ms Adams to attend editorial training or to undergo a medical; and

(d) the fact that Ms Adams did not have the right to apply for vacancies within the BBC.

Moreover, although we recognise that the relevance of, and weight to be attached to, a particular factor in any case is highly dependent on the facts in that case and that we are therefore free to depart from the approach which was adopted by another tribunal in relation to this factor on the facts of another case, we consider it to be significant that, in *Kickabout CA*, the Court of Appeal did not disapprove of the Upper Tribunal's refusal to place significant weight on this aspect in considering the circumstances of that case. We think that it might fairly be said, as Mr Tolley KC in fact did say at the remitted hearing, that the situation of Ms Adams in the present case is not very different from that of the Talksport presenter who was the appellant in that case.

For the above reasons, we are not inclined to place much weight on the "part and parcel" test in reaching our conclusion in this case;

(2) the photograph of Ms Adams - for similar reasons, we do not think that the fact that, at the time when each written agreement was executed, it was known or reasonably available to each of the relevant individuals that there was a photograph of Ms Adams, along with other high-profile presenters and actors who worked for BBC Scotland, in the

foyer of the BBC Scotland building sheds any light on this question. That could either be taken to evidence the fact that Ms Adams was being presented to the world at large as an integral part of the BBC - and therefore amount to an indication of employment - or to evidence the fact that the BBC was trying to benefit from Ms Adams's brand as an independent journalist and presenter - and therefore amount to an indication of self-employment; and

(3) financial risk - we do not think that financial risk is a factor which carries any weight in the present case, in the light of the decisions in *Global Plant* and *Lee Ting Sang*. The financial risk which distinguishes a worker who is in self-employment from an employee is the ability to make a profit or loss from the engagements into which the relevant worker enters - for example, by way of sub-contracting. The mere fact that Ms Adams stood to make a smaller profit if she were to be unable to obtain sufficient engagements or if one of her clients defaulted did not put her in any different a position from that of a casual employee. We would add that, in saying that the risk of client default carries no weight in this context, we are not relying on the fact that a credit exposure to the BBC is insignificant in comparison to a credit risk on a client in the private sector. Instead, we are saying that, as is the case with the risk of not being able to find further work, the risk of non-payment by the client, no matter how creditworthy the client may be, is not what this test is ultimately about.

Conclusion

161. We have found this to be a very difficult case notwithstanding each party's confident assertion that its position is the one which is very obviously correct. We see it differently. In our view, the position is finely-balanced and we have reached our conclusion with some diffidence. Indeed, the very fact that each party considers that its position is very obviously correct tends to support our view that this is a difficult case.

162. As we have outlined in the paragraphs above, there are undoubtedly features of the terms of the hypothetical contracts and the circumstances in which the hypothetical contracts would have arisen which point toward the conclusion that the hypothetical contracts were contracts of employment. Those features are essentially:

(1) the degree of commitment which each hypothetical contract was likely to entail;

(2) the length of the relationship between the BBC and Ms Adams; and

(3) the extent of the mutuality of obligations and the rights of control to which the hypothetical contracts gave rise.

163. As regards the first of those, we recognise the importance of the fact that, at the time when each written agreement was executed, it was known or reasonably available to each of the relevant individuals that the number of programmes required under each written agreement, coupled with the time commitment involved in making each programme, was likely to require Ms Adams to spend a considerable part of her available working time on her engagement for the BBC, particularly when Ms Adams's caring responsibilities were taken into account. However, against that must be set the fact that it would also have been known or reasonably available to the relevant individuals that those written agreements still left a meaningful amount of working time available to Ms Adams for her other engagements.

164. Moreover, the extent of Ms Adams's commitment to the BBC as a result of the execution of the written agreements needs to be seen in the context of Ms Adams's career as a whole prior to that point and, in particular, her career as a whole over the period of her prior engagements by the BBC. At the time when each written agreement was executed, the fact that Ms Adams had, for many years, including the whole period of her prior engagements by

the BBC, provided her services to a number of different organisations and derived income from her engagements with organisations other than the BBC was known or reasonably available to each of the relevant individuals. Whilst the precise extent of Ms Adams's income from those other organisations and the precise percentage of Ms Adams's working time that was spent on those other engagements may well not have been known to Mr Zycinski and Ms Denvir at the time when each written agreement was executed, the fact that that income and percentage of working time were meaningful would have been known or reasonably available to them, both:

(1) by reference to the amounts which the BBC had paid to the Appellant historically and the Appellant's filed accounts; and

(2) anecdotally, from the fact that they knew the extent of Ms Adams's responsibilities to the BBC and were kept informed by Ms Adams of her other engagements as part of the ongoing management of the relationship.

The income from Ms Adams's other engagements was considerable. In the two tax years preceding the tax years in question, her income from those other engagements accounted for a significant proportion of her gross income - see paragraphs 60(5) and 60(6) above. That in turn suggests that a meaningful percentage of Ms Adams's working time would have been spent on her engagements for organisations other than the BBC.

165. We have therefore concluded that the extent of Ms Adams's commitment to the BBC pursuant to the written agreements over the two tax years in question, whilst it carries some weight, is to be tempered by taking into account the context in which Ms Adams had for many years been engaged by many organisations other than the BBC and had spent a meaningful percentage of her working time on those other engagements.

166. Turning then to the length of the relationship between the BBC and Ms Adams, whilst a long relationship can in certain cases be indicative of employment, it is perfectly possible for a worker to retain the status of self-employment over many years if the other features of the relationship point in that direction. Given the observations which we have made in paragraphs 163 to 165 above to the effect that, over the period of her prior engagements by the BBC, Ms Adams had been engaged by many organisations other than the BBC and spent a meaningful percentage of her working time on those other engagements, the length of Ms Adams's engagement by the BBC is, in our view, not a particularly strong indicator of employment in this case.

167. Finally, as regards the extent of the rights of mutuality of obligations and the rights of control, whilst the Court of Appeal has made it plain that they are matters which need to be taken into account in the overall mix of factors at Stage 3C, they are primarily of significance in the context of Stage 3A and Stage 3B. Their place in Stage 3C is simply in the context of the overall consideration of the whole. In our view, to afford them great significance at Stage 3C would be to give them disproportionate importance at that stage and thereby subvert the process which is required to take place at Stage 3C.

168. Going back to the original formulation of the three-stage test set out by MacKenna J in *RMC*, there is a clear implication that, at Stage 3C, when, by definition, it has already been established that the relevant hypothetical contract satisfied the conditions of mutuality of obligations and control, the primary focus should be on:

(1) the provisions of the relevant hypothetical contract which do not relate to mutuality of obligations or control; and

(2) the overall circumstances in which the relevant hypothetical contract arose.

We say that because, in his formulation of Stage 3C, MacKenna J referred explicitly to "[the] other provisions of the contract" (by which he meant the provisions of the contract other than those relating to mutuality of obligations and control) and then described Stage 3C as "[the] third and negative condition". In our view, this language tends to emphasise that the primary focus at Stage 3C should be on the provisions of the relevant contract which do not relate to mutuality of obligations or control and on the circumstances in which the relevant contract came to exist.

169. We think that when the factors set out in paragraph 162 above are considered in the light of the points which we have made in relation to them in paragraphs 163 to 168 above, they are outweighed by the factors which point in the direction of a relationship of self-employment in this case. In particular, leaving aside for the moment the underlying subjective beliefs of the parties to which we have referred in paragraphs 159(4)(b) and 159(5) above:

(1) although we have had insufficient evidence as to the precise terms on which Ms Adams's other engagements occurred to be able to reach a conclusion as to whether those other engagements were pursuant to contracts of service or contracts for services, at the time when each written agreement was executed, the fact that those other engagements occurred in an industry where established custom and practice, as reflected in the terms of the Radio Guidelines, was to treat presenters like Ms Adams as self-employed independent contractors was known or reasonably available to each of the relevant individuals;

(2) at the time when each written agreement was executed, the fact that Ms Adams had her own "brand" as a presenter from which the BBC wished to benefit by engaging her services was known or reasonably available to each of the relevant individuals. This was not a case where the BBC wished to curtail the other engagements of Ms Adams over the period that she was engaged by the BBC, as it did in the case of its staff or its news or current affairs presenters who were on OAT contracts. On the contrary, the BBC positively sought to facilitate those other engagements in order to make the most of Ms Adams's profile and to increase its audience;

(3) at the time when each written agreement was executed, the fact that the BBC did not treat Ms Adams as an employee in any way was known or reasonably available to each of the relevant individuals. For example, it was known or reasonably available to each of the relevant individuals that Ms Adams:

(a) had no entitlement to holiday or sick pay, maternity leave or any pension entitlement;

(b) was not entitled or obliged to receive a review;

(c) was not subject to the formal procedures applicable to BBC employees when a change was made to the nature of their work obligations;

(d) was not entitled to apply as an insider for internal vacancies;

(e) had to provide her own equipment except when she was in the studio or presenting programmes outside the studio and therefore had to use her own iPad and mobile phone to perform the services;

(f) sometimes used her own devices when she was in the studio or presenting the programme from outside the studio and had no access to the BBC system when she was at home; and

(g) had to use her own clothing when providing the services; and

(4) finally, there was an unequivocal statement in each written agreement to the effect that the parties did not intend to create a relationship of employment.

170. Whilst the last of the above points is by no means determinative, it is capable of carrying weight in a case which is finely-balanced, which we consider this case to be. As for the other points, whilst some of them may not carry much weight when considered in isolation, their cumulative effect means that, when one stands back and considers the various factors as a whole, as we are required to do - see Nolan LJ in *Hall* at 216 - the hypothetical contracts appear to us to be contracts for services and not contracts of service.

171. To the list set out in paragraph 169 above, we would add the points which we have made as regards the underlying subjective beliefs of the relevant individuals to which we have referred in paragraphs 159(4)(b) and 159(5) above. For the reasons set out in those paragraphs, we consider that those underlying subjective beliefs are relevant factors to be taken into account in the objective determination of the intentions of the parties in entering into the hypothetical contracts. However, we recognise the oddity in taking into account, in the process of objectively determining the intentions of the parties in entering into a contract, the underlying subjective beliefs of the relevant individuals given that their subjective intentions in entering into the relevant contract have no role to play in the process. For that reason, we wish to make it clear that, in our view, even if those beliefs were to be wholly disregarded in this context, the factors set out in paragraph 169 above are sufficient in and of themselves to tip the balance in favour of a conclusion of self-employment.

172. We have therefore concluded that, on balance, the terms of the hypothetical contracts and the circumstances in which the hypothetical contracts arose point toward a conclusion of self-employment.

173. Whilst we agree with the Respondents that the contrast between the terms on which Ms Adams was engaged and the terms on which workers who were regarded as BBC "staff" were engaged (which was the focus of the Appellant and its witnesses at the original hearing) was not a fair representation of the position because it did not take into account the intermediate position of the BBC news or current affairs presenters who had OAT contracts, we are not persuaded by the Respondents' attempt to portray the terms of the hypothetical contracts in this case as being on all fours with the terms of the OATS contracts. It seems to us that there were meaningful differences between the terms of the hypothetical contracts - on which Ms Adams is to be treated as having been engaged - and the terms of the OATS contracts, both as regards the degree of editorial control which the BBC was entitled to exercise over the relevant presenter and as regards the BBC's control over the relevant presenter's engagements for organisations other than the BBC. Although it is true that, had Mr Zycinski and Ms Denvir concluded in the course of their general review that Ms Adams should be categorised as a news or current affairs presenter, BBC policy would have required any engagement of Ms Adams to take place on the terms of an OATS contract, there is no evidence that Ms Adams would have agreed to be engaged on that basis.

DISPOSITION

174. For the reasons set out above, we uphold the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

175. 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.

TONY BEARE
TRIBUNAL JUDGE

Release date: 29 NOVEMBER 2023